Law and Our Rights

"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

Law Reforms in the Light of International Human Rights Norms

By Justice Naimuddin Ahmed

This is not an isolated occurrence in Bangladesh. In the Indian sub-continent alone half the population do not have any toilet to ease. Millions do not have even one meal a day. Many more do not have any roof over their heads. 80% in the sub-continent live on less than two US dollars a day. The beautifully coined international human rights instruments have no meaning or significance to these deprived millions, to the eight-year old boy who escorts the beggar in the street corner of Dhaka or New Delhi or Islamabad from 6 in the morning till 10 in the evening, to the eight-year old girl standing on the highway with her two-year old brother in her lap, her face representing the starving millions around the globe.

IN February last year I had an opportunity to meet Lord Irvine of Lairg, the Lord Chancellor of England, at his office at the House of Lords. He asked me a pertinent question as to whether, in enacting law, Bangladesh adheres to the principles enshrined in various international human right instruments. I did not give a straight reply because I was never associated with the process of law-making, except by way of interpretation, as a judge is often required to do. I replied in a circuitous way that the courts in Bangladesh always prefer such interpretation, particularly in grey areas, conforming to human rights norms. I also apprised him that while suggesting reforms (either by way of enactment of new law or amendment or repeal of any existing law), the Law Commission certainly takes care to see that its recommendations conform, to, and do not conflict with, the international human rights instruments.

There are, to my knowledge, (up to 18 December 1992) ninety-five international human rights instruments, which include Declarations, Covenants, Conventions, Protocols, etc. Bangladesh is a state-party to only nine of them which are as follows:

1) International Convention on the Elimination of All Forms of Racial Discrimination

2) International Convention on the Suppression and Punishment of the Crime of Apartheid 3) Convention on the Rights of the Child

4) Convention on the Elimination of All Forms of Discrimination Against Women

5) Slavery Convention

6) 1953 Protocol amending the 1926 Convention

7) Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institution and Practices Similar to Slavery:

8) Convention for the Suppression of Traffic in Persons and of the Exploitation of Prostitution of Others.

The British Experience

The constitutional and legal positions in respect of international instruments, treaties etc. (including the human rights instruments adopted by the world community) are by no means uniform, but diverse and different in different countries, although they are generally adopted by consensus of nations. The internationalisation of basic human rights and their consequent enforcement by the world community against nation-states still remains a far cry from the ultimate aims, even 399 years after Grotius propounded his thesis that when the Sovereign of a state persistently trampled upon the basic human rights of his subjects, it became an international issue. So, enforcement of the basic human rights norms largely remains the responsibility of the violators of those rights, acting merely on subjective satisfaction as in the case of Liversidge. In the words of the lone voice of the only dissenting Law Lord, in matters of the basic human rights of a subject, the right to liberty and freedom, even the judges were more executive than the Executive itself. International human rights norms have, however, entered into English courts through judgements of the European Court of Human Rights which are enforced by the Government as a member of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The English judges also follow the decisions of the European Court of Human Rights unless they are inconsistent with any law made by Parliament. So, statutory law passed by the British Parliament prevails over rights recognised by the international human rights instruments. In quite a number of decisions the courts in England have laid down the constitutional and legal position as follows:

Firstly, in the United Kingdom, international Conventions and Covenants are not part of the law of the land even though the United Kingdom, has ratified them. A change in the existing law to make it conform to the principles of international Conventions or Convents can be made only by Parliament.

Secondly, when a statute is challenged as being in violation of the terms of an international covenant to which the United Kingdom is a party, the courts shall act on the presumption that Parliament intended to conform to the international obligations as far as possible, but this presumption is rebuttable and the municipal law must prevail if the international obligation is clearly contrary to it.

Thirdly, though the United Kingdom has ratified an international covenant (such as the International Covenant on Civil and Political Rights), the British courts cannot directly enforce the rights guaranteed by the covenant so long as they are not adopted by legislation by Parliament.

I did not draw the attention of his Lordship the Lord Chancellor to the fact that, despite the Report of Parliamentary Committee more than twenty years back, nothing has been done to codify human rights in a Bill of Rights, and Lord Wade's Bill introduced in 1977 for the purpose still remains inactive.

The USA Perspective

The position in the United States is settled by Article VI of the US Constitution, the second paragraph of which reads:

"This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the constitution or Laws of any State to the Contrary notwithstanding:

The result of the above provision is that a treaty has the same status in the United States as a federal law. By a series of decisions this provision of the US Constitution has been interpreted to mean that (a) where a treaty is self-executing, it becomes operative without requiring any legislation to implement it and it would prevail over any federal law enacted prior to it, but federal legislation enacted subsequent to it would be deemed to have repealed the conflicting treaty, (however, the courts start with a presumption against such repeal); (b) if a treaty is not self-executing, courts cannot enforce it until it is implemented by a valid law. In another case, it was held that although the UN Charter has no binding legal effect and is non-self-executing, as it embodied the pledge of the United States "to promote universal respect for, and observance of fundamental rights," the court might invalidate a state law which conflicted with this international pledge.

Constitutional Position of India

The Indian Constitution reads in Article 51 (c) as follows: "The State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised people with one another."

The above provision is, however, hedged in by Article 37, which makes this provision unenforceable by the courts. There is also no provision in the Indian constitution like Article VI para 2 of the US Constitution.

So, the constitutional position in India, despite Article 51 (c), is that rules of international law or treaties to which India is a party do not automatically become part of the municipal law, and therefore the international human rights norms do not automatically become enforceable after ratification so long as law is not enacted in that behalf by the Indian legislature. Secondly, even if a rule of international law is adopted in an Indian statute, it is the statue that will prevail if it is inconsistent with the rule of international law. The Directive Principles in the Indian Constitution, Article 51 (c) included, exhort the government and the legislature to implement the obligations under international law and treaties, but by no means permit the municipal courts to compel them to do so. So, the constitutional position in India is that an international human rights instrument to which India is a party does not ipso facto become part of the municipal law of India, and therefore the courts in India are bound to apply the municipal law where the is a conflict with international law. The Indian Supreme Court has qualified this constitutional position by declaring that the municipal courts should so interpret rules of the municipal law that they should, if possible, not be inconsistent with those of international law. This qualification is obviously subject to "buts" and "ifs."

It would, however, be unfair not to point out that quite a sizeable number of human rights norms enunciated in the International Bill of Rights have been included in the constitutions of almost all countries which framed their constitutions after the Second World War as judicially enforceable fundamental rights. India and Bangladesh are no exceptions.

The Bangladesh Context

The constitutional position in Bangladesh in relation to the international instruments is similar to that of India. Article 25 of the Bangladesh Constitution which, like India, is a fundamental principle of state policy unenforceable judicially, provides: "The State shall base its international relations on the principles of respect for national sovereignty and equality, non-interference in the internal affairs of other countries, peaceful settlement of international disputes, and respect for international law and the principles enunciated in the United Nations Charter...."

In Bangladesh also, mere ratification of an international instrument does not make its provisions judicially enforceable, and does not make it a part of the municipal law. Consequently, in case of conflict, the municipal law will prevail.

In fact, the greatest obstacle to implementation of the international human rights norms by the world community is the concept of 'national sovereignty" as well as principle underlying "non-interference in the 'internal' affairs of other countries." Most of the nation-states still consider that violation of the rights of their subjects, internationally recognised human rights norms included, are their "internal affairs" and almost a birth-right. The thesis propounded by Grotius (when the sovereign of a state tramples upon the basic human rights of his subject, it does not remain an internal affair of the sovereign but becomes an international question and such an arbitrary ruler forfeits his rights as a sovereign under international law and in such cases, other nations will be justified to intervene) remains an illusion.

It would, however, be unfair not to point out that quite a sizeable number of human rights norms enunciated in the International Bill of Rights have been included in the constitutions of almost all countries which framed their constitutions after the Second World War as judicially enforceable fundamental rights. India and Bangladesh are no exceptions.

In Bangladesh those few norms, are, therefore, part of the supreme law of the land and any law or any action contrary to or inconsistent with, those norms is void to the extent of the inconsistency. Moreover, machinery and procedure have been provided in the constitution for enforcement of those norms.

Some Options and Considerations

In a state where international treaties do not automatically become part of the domestic law as soon as they are ratified, a number of position in relation to international human rights instruments can be adopted, and these positions may be summarised as follows:

(a) It may decline to accede to and ratify the instrument in question:

(b) It may ratify the instrument but pass no legislation expressly incorporating it into the domestic law:

(c) It may ratify the instrument and pass no legislation to incorporate the instrument into the domestic law, but it may proceed to pass specific legislation amending particular aspects of the domestic law which are in conflict with the provisions in the instruments;

(d) It may ratify the instrument and pass no incorporating legislation but instead simply issue directives instructing its public officers to abide by the instrument and in this way, render the instrument domestically operative and effective;

(e) It may ratify the instrument and pass legislation to incorporate it into the domestic law.

Some countries face peculiar difficulties in implementing certain provisions of a number of international human rights instruments. Particularly those relating to the equality clauses, for socio-political reasons. In these countries various communities are governed by their respective personal laws in matters of marriage, divorce, guardianship, inheritance, etc. The gender discrimination on the ground of sex is patent in these communities and is sanctioned by their personal law, based in some cases on strong religious sources. The task of law reform in such areas as these in pursuance of the equality clauses based on international human rights norms is extremely difficult.

There are other areas where socio-economic conditions are insurmountable barriers against implementation of various provisions of the human rights instrument. Earnestness of the international community may probably remove these socio-economic barriers.

Last but not the Least

Some time ago in a southern district of Bangladesh, a daily labourer could not provide food to his wife and two sons for two days. On the third morning, the two sons started crying for food. There was no food in his shanty house but there was a bottle of liquid insecticide before him. He poured the liquid into two glasses and offered the glasses to his children. The children drank the liquid and died. The mother followed, having been unable to bear the grief. She did too. The labourer is in police custody on charge of manslaughter.

This is not an isolated occurrence in Bangladesh. In the Indian sub-continent alone half the population do not have any toilet to ease and was themselves. Millions do not have even one meal a day. Many more do not have any roof over their heads. 80% in the sub-continent live on less than two US dollars a day. The beautifully coined international human rights instruments have no meaning or significance to these deprived millions, to the eight-year old boy who escorts the beggar in the street corner of Dhaka or New Delhi or Islamabad from 6 in the morning till 10 in the evening, to the eight-year old girl standing on the highway with her two-year old brother in her lap, her face representing the starving millions around the globe.

Can those great people who are the architects of nearly one hundred human rights instruments postpone space exploration, nuclear testing, and the manufacture of nukes, and divert their resources from these ventures until those instruments really become meaningful?

The writer is a Member of Bangladesh Law Commission.

This is a slightly edited version of the keynote paper presented in the British-Bangla Law week 1998.

law watch

Y2K Legal Issues

By Tanjib-ul Alam

THE people in Bangladesh now generally understand the "Year 2000 Problem". To describe it in simple language, many computerised systems are programmed to use two digits rather than four-digit number to represent the year. The "19" that precedes dates in this century was assumed. Systems programmed in this fashion will treat the Year 2000, stored in their system as "00", as the year 1900. As a result, systems or programs that use dates to perform calculations, comparisons, or sorting may generate incorrect results when working with years after 1999. For example, a firm with a system that is not compliant may be unable to receive or process payment information in January 2000 for a transaction that took place in December 1999.

There has been considerable speculation in the legal sector around the world that the year 2000 computer problem will generate substantial amounts of litigation. Capers Jones, Chairman of Software Productivity Research, has speculated that for every dollar not spent on repairing the year 2000 problem, the anticipated cost of litigation and potential damages will probably amount to in excess of ten dollars. One legal commentator has estimated that the ultimate litigation may cost $1 trillion. It is anticipated that year 2000 litigation would exceed even the estimated total annual direct and indirect costs of all civil litigation in the United States.

Reasons for Y2K litigation

The reason why some litigation is inevitable due to the year 2000 problem stems from the fact that about 505 of the companies with a Y2K will not become fully Y2K compliant by January 1, 2000. The reason why so many companies will fail in their Y2K corrective effort is that (a) they are starting too late, (b) they are not devoting sufficient personal and funds to the effort, (c) there are not enough trained programmers available to fix all of the software code requiring correction, (d) not enough time and will be devoted to the testing phase, which could be the most expensive and time-consuming phase for many companies, (e) even if a particular company becomes fully compliant, its system may become contaminated by data or software supplied by outside third parties who have not become compliant, and (f) the city or geographic area in which the company has its offices may not have Y2K compliant telecommunication and electric utility systems, resulting in infrastructure failures which negatively impact on the company.

When will the litigation begin?

Suits may arise in the near future involving, for example, (a) claims that software and/or hardware purchased or licensed was not "Y2K compliant" as warranted, (b) claims that long-term maintenance providers or data procession outsourcing providers should absorb part or all of the plaintiffs' Y2K corrective costs, or (c) claims for damages due to the malfunction of non-compliant software applications which conduct forward-looking calculations. The first Y2K suit in USA was filed by Produce Palace against TEC America, Inc., claiming that cash registers were failing to dandle credit cards with expiration dates in the year 2000 due to TEC computer system which only recognised two digit date fields. The second major US Y2K litigation filed was Atlaz International, Ltd. V. Software Business Technologies, Inc. and SBT Accounting Systems, Inc. In UK the Court of Appeal dealt with Y2K issues in St Albans City and District Council v. ICL, where the Court of Appeal upheld the decision of the High Court giving a restrictive interpretation of the exclusion clause inserted by the software supplier.

Who will be the parties to the litigation?

The possible plaintiffs commencing Y2K litigation run the gamut of potential plaintiffs: private sectors companies, governmental entities, shareholders of companies, third party intellectual property owners. Customers, individually or as a class, tenants or governmental entities, among others. Potential defendants include product vendors, contract parties, banks, stock brokerage firms, service providers, boards of directors and top management, building owners of "smart" buildings providing telecommunications service and governmental entities.

What are some potential causes of actions?

Causes of action for Y2K problem would depend on the nature and relationship of the parties.

1. In a suit against hardware and software vendors and service providers:

The following are some potential causes of action:

(a) breach of an express warranty that a product is Y2K compliant

(b) breach of an express warranty by the vendor that the software contains no "viruses", arguing that the Y2K "Millennium Bug" constituted a "logic bomb" (a debilitating software code akin to a burus, that activates itself at a specified date or time),

(c) negligent misrepresentation of fraud, on the theory that the vendor knew that the plaintiff intended to utilise the product into the next century and fraudulently failed to alert plaintiff to the fact that the product would not operate properly past its first "event horizon" which mighty even preceded January 1, 2000;

(d) tort claims for personal injury or property damages, based on negligent misrepresentation, fraud or strict product liability;

(e) claim for injunctive relief against vendors which refuse to grant access to the source code of a licensed program so that the licensee may modify the software to make it Y2K compliant;

(f) failure or refusal to correct the Y2K defect as part of an existing long-term maintenance agreement or long-term outsourcing agreement.

2. In a suit against hardware and/or software consultants the following are some of the causes of action:

(a) claims of negligence in failure to design Year 2000 co pliant computer systems or negligent misrepresentation inn failure to warn plaintiff the Year 2000 compliancy problem.

(b) Claim of failure to exercise "good faith and fair dealing" in failing to disclose to the plaintiff the Year 2--- compliancy problem as part of consultation with respect to the purchase of a computer product;

(c) Computer malpractice in designing a computer system which became obsolete due to the Year 2000 problem.

3. In suits against boards of directors and top management:

(a) Waste of corporate assets;

(b) Breach of fiduciary duty, duty of due care and/or duty of loyalty.

4. In suits against software licensees:

Infringement of intellectual property rights of a licensor, due to the object code only licensee reverse engineering software in order to modify the source code to make it Y2K compliant.

Almost every class in the business community will be vulnerable to Y2K suit. These include suit against product manufacturer on the ground of manufacturing of non-compliant products, against employers of software programmers on the ground of breach of confidence, against insurers on various grounds including business interruption damage etc.

It is true that we are going to affected by Y2K problem, but given the multifarious relationship with developed countries with various business institutions in Bangladesh, it would be prudent for us to be aware of technological vicissitude. Just in case anybody who is planning to become Y2K the following should be taken into account.

The writer, a Barrister-at-Law is an advocate.

One of the common features in Bangladesh is that most of the transactions take place without any documents. Computer market is no exception to that. Percentage of having properly drafted computer contract in Bangladesh is nearly zero. Need for a properly drafted computer contract can not be ignored. Most of uncertainties surrounding Y2K could have been resolved had there been a system of computer contract. Significant amount of money could have been saved if the consumers had cared for a written contract before entering into a computer contract.

Of Judges and Justice

By Raju Ramachandran

What strikes any lay visitor to the courts is the total uncertainty about when a case will reach for hearing, even if it figures in the list of business of a particular day. In fact a case may figure in a list for weeks and still not reach for hearing. On the other hand, a case at the bottom of the list may reach for hearing within the first hour because the previous cases have either been quickly disposed of or adjourned. Both lawyers and litigants are caught unprepared and unawares.

Continued from last week

UNLIKE in the US and Australian apex courts, our Supreme Court judges, like judges in England do not have 'law clerks' to provide them research assistance. Considering the complexity of issues dealt with by our Supreme Court, the desirability of a viewpoint different from the sharply competing ones presented by the rival parties and the pressure of work upon the judges and their ages (invariably over 55), our Supreme Court judges are badly in need of research assistance. But the US system of bright law graduates being attached to Supreme Court judges for a few years before embarking on lucrative careers in law firms is unlikely to be workable at present in India. Law clerks are privy to judicial decision-making processes. The nature of the job requires a high degree of confidentially, and contact with the Bar should be kept out. A possible solution would be to select lawyers in their late thirties, appoint them to judicial positions and then depute them to work as law clerks or judicial secretaries to Supreme Court judges for terms of 3-5 years, after which they can function as judges of High Courts.

What strikes any lay visitor to the courts is the total uncertainty about when a case will reach for hearing, even if it figures in the list of business of a particular day. In fact a case may figure in a list for weeks and still not reach for hearing. On the other hand, a case at the bottom of the list may reach for hearing within the first hour because the previous cases have either been quickly disposed of or adjourned. Both lawyers and litigants are caught unprepared and unawares.

Time management in courts requires that judges place a firm time limit on oral advocacy, and insist on written submissions. This would, of course, require that lawyers present fully researched written arguments in court well before the hearing, and that the judges read the submissions before the commencement of the hearing. Oral argument will be confined to highlighting important points and supplying clarifications. A switch over from oral to written advocacy will contribute towards better preparation by lawyers, better time-management and smoother, quicker dispensation of cases.

The process of removing a judge is a complicated one, involving signatures by a prescribed number of MPs, appointment of an Inquiry Committee by the Speaker of the Lok Sabha or the Chairman of the Rajya Sabha after forming a prima-facie opinion, and voting in Parliament if the Committee finds the judge guilty of misbehaviour. The experience of the attempt to remove Justice V. Ramaswami of the Supreme Court highlighted the inadequacy and undesirability of the Parliamentary mode of removing a judge. Inevitably this involves political lobbying which itself is inevitably preceded by a trial by the press. While this can subject an upright but politically inconvenient judge to vendetta, it can also enable an errant but resourceful judge to escape punishment. The process of disciplining judges is best left to a small but high-level body. The National Judicial Commission could perform this task, in addition to being responsible for making judicial appointments.

One vexed question thrown up by the Ramaswami affair is whether there should be major or minor penalties, depending on the kind of misbehaviour of which a judge is found guilty. But the idea of classifying a judge's misconduct into major and minor grades is abhorrent, at least in the context of the superior judiciary. A judge under a cloud of a minor penalty like a reprimand or a censure would lack legitimacy: his functioning would shake the confidence of the public in the administration of justice. A judge accused of misbehaviour either stays on after an honourable vindication, or goes on being found guilty.

No study of the role of judges in administering justice would be complete without a look at the district judiciary which starts from the level of the Munsiff and goes up to the level of the District Judge. The conditions in which the district judiciary functions are appalling. Poor service conditions, lack of adequate housing and transport facilities and the non-availability of books and secretarial assistance have made it virtually impossible for judicial officers to lead a life of dignity or perform their work with competence. The failure of the executive to take ameliorative steps in this regard ultimately left the Supreme Court with no option but to give its own directions in 1991 with a view to improving the service conditions of the district judiciary.

Added to the economic pressure, the district judiciary have to cope with the threat of bodily harm from disgruntled litigants and aggressive elements in the legal profession itself. It is not uncommon to hear of judges being verbally abused by lawyers when they fail to get favourable orders (these instances are not confined to the district courts, but have been reported from High Courts as well). Of late there have been instances of molestation and assault of judges by lawyers. (Again, there is an instance from a High Court). Judges functioning under such threats have to be of superior mettle to be able to administer justice 'without fear or favour, affection or ill-will', and those who manage to do so are worthy of notice and appreciation.

One long-needed reform is the creation of an All India Judicial Service on the lines of other All India Services for the district judiciary. This was recommended by the Law Commission of India as far back as in 1958 in its 14th Report, and thereafter in its 77th Report in 1978 and its 116th Report in 1986. The Chief Justices Conferences of 1961, 1963 and 1965 also favoured the proposal and the 42nd Amendment of the Constitution (1976) specifically enabled Parliament to create an All India Judicial Service. The Supreme Court in a judgment in 1991 again recommended the creation of such a service, but nothing has been done so far.

The creation of such a service would result in the imposition of higher standards, and the prestige it would command may attract better talent. It would ensure a measure of uniformity in the standards of all High Courts since a significant proportion of High Court judges are drawn from the district judiciary. It would also create a national outlook at the level of the district judiciary and would curb regional tendencies which have crept into all institutions. The same logic which has created a consensus that one third of the judges of every High Court should be drawn from outside the state requires the setting up of an All India Judicial Service for the district judiciary.

The concerns reflected here are not peculiar to the Indian judiciary alone. In his judges (1987), distinguished British Queen's Counsel David Pannick says 'English Judges have every reason to be proud of the quality of there performance and no reasons to fear more extensive public knowledge and assessment of their work. Nevertheless, there are aspects of judicial administration — appointment, training, discipline, criticism, mysticism and publicity — which hinder, or detract from their ability to serve society. We need judges who are not appointed by the unassisted efforts of the Lord Chancellor and solely from the ranks of middle-aged barristers. We need judges who are trained for the job, whose conduct can be freely criticized and is subject to investigation by a Judicial Performance Commission; judges who abandon wigs, gowns and unnecessary linguistic legalisms; judges who welcome rather than shun publicity for their activities.

It is unlikely that men and women will ever cease to wound, cheat and damage each other. There will always be a need for judges to resolve their disputes in an orderly manner. As people grow even less willing to accept unreservedly the demands of authority, the judiciary, like other public institutions, will be subjected to a growing amount of critical analysis. The way in which 'Judge and Co', is run is a matter of public interest and will increasingly become a matter of public debate'.

The writer is an advocate of the Supreme Court of India.