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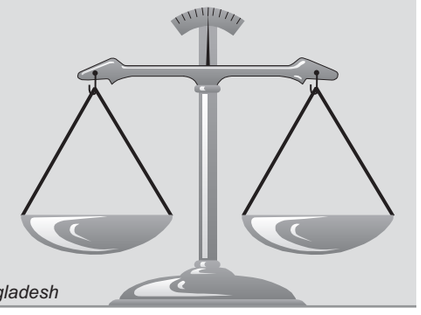
"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-*Article 27 of the Constitution of the People's Republic of Bangladesh*



Star LAW review

The bouncing cheque-a narrow interpretation

KHALED H. CHOWDHURY

IN Bangladesh the Negotiable Instrument Act, 1881 (NIA 1881) has been amended twice, in 1994 and 2000, mainly to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques with adequate safeguards to prevent harassment of honest drawers. Despite the radical progression of electronic banking, a cheque is still the most common method of payment. However, it is a common saga in our society that cheques get dishonoured for say, insufficiency of funds, or under the drawer's instructions to stop payment, or even that the account has since been closed. Obviously this is a serious matter for the payee and unless it is an honest error on the part of the drawer it often causes severe hardship for the payee. Filing a money suit to obtain payment is an obvious method to make the drawer pay, but this is often futile as civil remedy is not as effective as a criminal sanction. Section 406/420 of the Penal Code does provide a solution, but it is often difficult to prove the ingredients of the same.

Amendments: From 1994 to 2000

To deal with this very issue, the Parliament in 1994 brought amendments to Chapter XVII of NIA 1881 by inserting sections 138 141 making such an act criminal while providing for certain safeguards for the drawer. Thus if proper procedure is followed, a defendant upon conviction could face a sentence of imprisonment of upto one year or a fine of up to twice the amount of the cheque or both. To make it a greater deterrent, in 2000, another amendment followed whereby the amount was increased to three times. Most importantly, the payee could get the cheque amount from the fine so obtained. The intention of the legislature, therefore is to make it a strict penal law which otherwise was a matter of civil remedy, at the same time keeping the other options open.

The purpose of this article is to deal with a procedural aspect of s.138 NIA in the light of a recent judgment pronounced by the Hon'ble High Court Division in *Abdus Salam v Munshi Rashed Kamal,* reported at *54 DLR 234,* which may have a serious impact on the way these provisions operate. The case was decided on the basis of the law as stood before the amendment in 2000. But this does not really alter the nature of the problem which is the purport of this article.

Plain reading of the law

A plain reading of the law clearly stipulates that for the offence to bite, the cheque must have been presented to the bank within a period of six months from which it is drawn or within the period of its validity whichever is earlier (s.138(1)(a)). Thereafter, a demand for payment has to be made in writing by the payee within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid (s. 138(1)(b). Finally, for the cause of action to arise, the drawer of the cheque must have failed to make the payment as called for within 15 days of the receipt of the said notice (s. 138(1)(c).

The case has to be filed in the Court of the CMM or in a Court of First Class Magistrate or above by a complaint made in writing by the payee or holder in due course within one month of the date upon which such cause of action would arise (s. 141).

S. 138(1)(a) does not impose any restriction whatsoever upon the number of times a cheque can be presented to bank for payment. It is a common practice in the commercial world that the drawer arranges for payment and asks the payee to present the cheque again. It also allows the parties to maintain their commercial relationship. If people are forced to file a complaint after the first bounce, since no second chance is there, that would be, it is submitted, going against the plain intention of the legislature. The judgment in *54 DLR* , however, does put such a restriction on the law.

The fact of the case

In this case, a cheque was dishonoured 4 times and on each occasion the drawer promised payment. The complainant made a demand within 11 days of the date of last dishonour. The High Court Division after due hearing ultimately came down in favour of the accused. Accordingly, by failing to act after the first dishonour, the complainant had lost his chance forever to have recourse to NIA. The Court also found support from the decision of the Hon'ble Appellate Division reported at *1999 BLD (AD) 166* while reaching this conclusion.

Interpreting a law

This case ought to have raised issues of statutory interpretation. When courts interpret statutes, certain rules are followed. One such rule is the literal rule, i.e. clear words of the statute should be given their plain, natural meaning. Another approach is the mischief rule. The courts ought to look for the mischief for which the statute was enacted. Thus, since the legislature has not put any embargo on the number of times a cheque can be presented for payment as long as it is done during the period of validity and that since the intent of the legislature is clearly to deal with the mischief of defrauding people by unscrupulous issuance of cheques, no restrictions should have been read into clear wording of NIA by interpretation. Moreover, filing of a criminal case is not mandatory but rather a matter of choice under NIA. The payee can waive the benefit of the law by not prosecuting the drawer. Adequate built-in safeguards for the drawer are there. It is the demand for payment made within 15 days of the notification of dishonour which ought to set the provisions in motion. If the payee makes a demand and the drawer does not pay within 15 days thereafter, then he must file a complaint within one month. This omission ought to be fatal for him but not a failure earlier. The decision of the Court also goes against a fundamental principle that a statute cannot be used as an instrument of fraud. The courts ought to avoid any such result without twisting the plain meaning of the law.

Given the immense repercussion of this decision of the High Court Division particularly in the light of the fact the a number of important issues were not drawn to the attention of the Court, it is only hoped that in a not too distant future, our highest Court will have the opportunity to give a final clarification thereby settling the law in the right direction.

One may argue to the contrary that when a penal provision is capable of having two reasonable constructions, then one should give effect to the meaning which is more lenient to the accused. But this has never been the case where a lenient construction would otherwise defeat the intent or purpose of the legislature. The strict rule of interpretation ". . . yields to the paramount rule that every statute is to be expounded according to its expressed or manifest intention and that all cases within the mischief aimed at are, if the language permits, to be held to fall within its remedial influence." (*Maxwell's Interpretation of Statutes 11th ed. P. 254*) Also where there is no ambiguity, there is no room for construction.

What it inexplicable is that no relevant Indian decisions were cited before the Court though our law has been copied almost word for word from the NIA 1881 applicable in India where NIA was amended in 1989 to similar effect. Our legislature has gone one step further by making stringent provisions against an accused by the amendments in 2000.

The Indian Context

After some dissent in India the position is now unanimous that a cheque can be tendered or presented for payment during the period of its validity as many times as possible. There is no need for filing a complaint after the first dishonour. The payee can retender and make a demand within 15 days of the dishonour and get the statutory 15 day period to seek payment from the drawer. This gives rise to the cause of action. So he must now file a complaint under section 142 (corresponding to our s. 141). If he fails to do so, then he loses his right to prosecute under NIA 1881.

The Andhra Pradesh High Court in a decision reported at *1992 Cri LJ 4048* observed, "Section 138 does not lay down as to the number of times a cheque can be presented to the bank. When the statute has not laid down any limitation . . . it will not be desirable to read into the said clause any such restriction . . ." The Court also observed that such an interpretation will not mean that an accused may be prosecuted on more than occasion on one dishonour. There can only be one prosecution though each time a cheque is dishonoured, the drawer is in danger of being so liable. It is a constitutional bar to have the same person prosecuted for the same offence twice (Article 20(2) of the Indian Constitution and Article 35(2) of our Constitution). It is the fact of the final dishonour which a complainant can always avail himself of. After six months, fear of prosecution would disappear anyway. The Calcutta High Court in *(1992) 73 Com Cas 590,* the Bombay High Court in *1993 Cri LJ 680* took the same view. So have the Madras High Court in *1994(1)KLT (SN) 22.* In a decision reported at *(1995) 84 Com. Cas. 447,* Kerala High Court approved *1992 Cri LJ 4048.* The Court in an illuminating judgment observed, "Deferment of prosecution or even omission to prosecute the offender at the earliest opportunity and availing a cause of action which arises to him subsequently may not in any way be considered as an act prejudicial to the interest of the drawer or an act intended to harass or embarrass the drawer of the cheque. If at all, such an act can only be considered as an act advantageous to the drawer who is in a position not to pay. Repeated presentation and creation of fresh cause of action cannot also be considered as an action intended to embarrass or harass the drawer as he can at any time pay and avoid the threat of prosecution effectively if he chooses to do so. So long as the cheque remains unpaid, attempts made to claim payment and to keep alive the criminal remedy to the maximum period by creating a fresh cause of action if possible cannot be considered as tantalising the drawer or keeping the Damocles sword over him indefinitely to his harassment and misery unjustifiably." The judgment continued, "Such a conclusion will be clearly against the plain meaning of the provisions of the . . . Act and the object for which the Sections are incorporated in the Act. It will have the effect of excluding an act which will amount to an offence as contemplated by the provisions out of its purview and defeating the object for which the provisions were specifically enacted by way of amendment. It will only help to perpetrate the mischief sought to be prevented by the provisions." In *1999 Cri LJ 518* Allahabad High Court followed the Kerala decision by observing that limiting the law to the first presentation would "not only be unjust but would prove to be a lacuna in the scheme of this Act, which could never be the intention of the legislature." In *1998 Cri LJ 345*, Punjab & Haryana High Court and in *(1999) 95 Comp. Cas. 318,* Delhi High Court also followed the Kerala decision.

Finally, the Supreme Court of India in Sadanandan Bhadran v Madhavan Sunil Kumar *(1998) 94 Comp. Cas 813* also favoured the Kerala decision: " . . .section 138 does not put any embargo upon the payee to successively present a dishonoured cheque during the period of its validity. This apart, in the course of business transactions, it is not uncommon for a cheque being returned due to insufficient funds or similar such reasons and being presented again by the payee after some time, on his own volition or at the request of the drawer, in expectation that it would be encashed. Needless to say, the primary interest of the payee is to get his money and not prosecution of the drawer, recourse to which, normally is taken out of compulsion and not choice. For the above reasons, it must be held that a cheque can be presented any number of times during the period of its validity. Indeed that is also the consistent view of all the High Courts .'

Towards a harmonious legal position

It is submitted that the decision of the Appellate Division reported at *1999 BLD (AD) 166* only concerned the issue of filing of a complaint within one month and had nothing to do with the date of first dishonour. Moreover, according to another Bench of the High Court, "Purpose and intention of Amending Act is to stop this practice of issuing cheque in favour of a party without fear of any legal consequences if the cheque is dishonoured."(*53 DLR 403).*

It is further submitted that amendment of 2000 merely confirms that the payee may also seek civil remedy, e.g. by filing a money suit. But that surely is not the same deterrent as that available in a criminal trial.

Given the immense repercussion of this decision of the High Court Division particularly in the light of the fact the a number of important issues were not drawn to the attention of the Court, it is only hoped that in a not too distant future, our highest Court will have the opportunity to give a final clarification thereby settling the law in the right direction.

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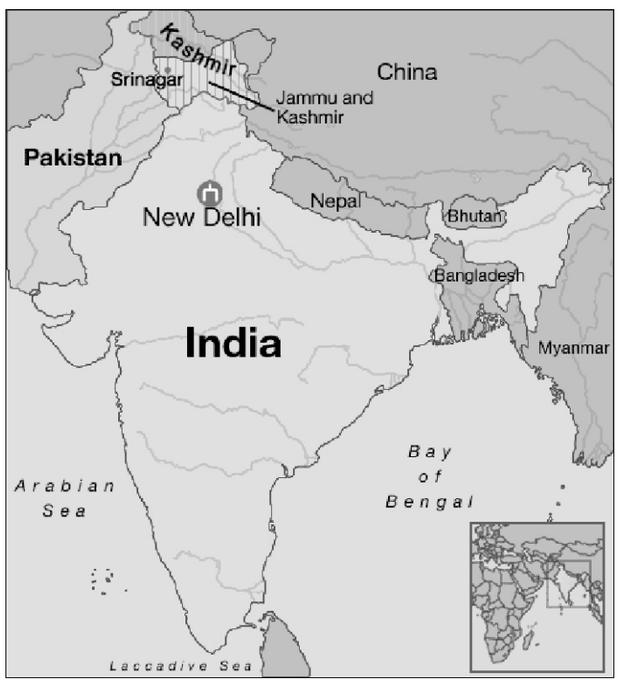
LAW news

An appeal for peace

South Asia Forum for Tomorrow's Leaders

In April 2002, a group of young activists drawn from Bangladesh, India, Pakistan, Nepal, Sri Lanka, and Maldives and from diverse professions, including journalists, politicians, lawyers, human rights defenders, teachers, development practitioners etc., were invited at their individual capacity to meet at Wilton Park in Sussex, England to discuss South Asian regional issues. We did so in a spirit of goodwill and friendship that we believe must be the model for furthering the goal of regional co-operation and harmony and we have organised ourselves into a standing committee dedicated to promoting that goal.

No reasonable person can maintain that attempts at peaceably resolving differences between India and Pakistan have been exhausted. In that context, armed conflict bears no justification and we condemn the belli-



cose language, gestures and war-mongering of our leaders, which has brought the region perilously close to destruction.

Recognising that the peoples of South Asia share a cultural heritage, that the histories of our region overlap, combine and interconnect, we believe that the fortunes of each part of this region is inextricably linked to that of the others. We reject the legacy of animosity handed down by former generations. Our ties to each other transcend the narrow-minded prejudices which dog regional politics. The present generation of leaders are merely custodians of our inheritance and in the present circumstances they are jeopardising that inheritance.

Every minute our political leaders devote to agitating regional strife is a minute diverted from pressing problems urgently demanding attention; the crushing poverty under which many millions of our people live, the abuse of human rights so many suffer, the ravages of societies in which the rule of law has been replaced by the tyranny of crime.

We therefore implore our leaders and policy makers to step back from the precipice of war and to lay their faith as we - and all people of goodwill do - in the promise held out by talking, by meeting to discuss their grievances and find a way forward recognising that the problems and difficulties of the region, the difficulties concerning Kashmir, are common difficulties requiring a common and collective effort. The cost of not doing so is a price our nations can ill-afford.

Statement issued by the participants of the Wilton Park South Asia Farum 2002

LAW opinion

The debate on constitutional compatibility with the ICC

HELEN DUFFY AND BRIGITTE SUHR

IN the nearly two years since the adoption of the Rome Statute, the movement towards global ratification has gained considerable momentum. At the time of writing, ninetyseven states have signed the treaty, eleven have completed ratification and many more are in the process of doing so. In many countries, this ratification process has generated considerable debate on the compatibility of the ICC Statute with domestic constitutions. While different constitutions give rise to different questions, three issues have arisen with particular regularity. As explained in more detail below, these relate to the compatibility of the ICC Statute with prohibitions on the extradition of nationals, provisions on immunities, and prohibitions on life imprisonment. In many countries, after close analysis of the ICC Statute together with the relevant constitutional provisions, initial concerns have given way to the view that the statute and the constitution can in fact be read harmoniously. This approach, which might be termed the 'interpretative approach', and the ideas and arguments circulating in distinct parts of the world in support of it, are the focus of this paper.

Before considering this interpretative approach, it should be acknowledged that it is not the only approach that has been adopted to date. A small number of states have decided instead to amend their constitutions. France, for example, has completed its constitutional amendment procedure, such that Article 53.2 reads: "[t]he Republic may recognize the jurisdiction of the ICC within the agreed upon conditions contained in the treaty approved July 18, 1998." Brazil is currently debating an amendment which would have a similar effect. Importantly, Belgium has decided to take the amendment route, but to do so only after ratification, thus taking a critical step to ensuring that amendment will not affect the ability to ratify without delay.

Extradition

Some constitutions prohibit the extradition of nationals. Given that the ICC will not prosecute in absentia, the Court must gain physical control over the suspect for the trial to take place, and states are correspondingly obliged to cooperate with the Court in the arrest or surrender of persons, be they nationals or not. The apparent tension between the constitutional prohibition and the ICC obligation dissipates when one recognizes the difference between surrender to an international criminal court and extradition. The Statute distinguishes the two, defining "surrender" as "the delivering up of a person by a State to the Court" and extradition as "the delivering up of a person by one State to another." This is not merely a difference in terminology. The ICC is the negotiated product of states, and states will become part of the Assembly of States Parties upon ratification. Moreover, the ICC is an institution which must, as set out in its statute, meet the highest standards of fairness and due process. Surrender to the ICC is therefore quite different from extradition to another sovereign state, in whose creation the sending state has no investment, and over whose standards it has had no control. Thus, concerns which underlie the constitutional prohibition on the extradition of nationals do not apply to surrender of a national to the ICC. In some cases, the constitutional prohibition may be cast more broadly than prohibiting 'extradition,' such as in the Costa Rican constitution, which states that "no Costa Rican may be compelled to leave national territory." However, other provisions of the statute have been invoked to dispel any perception of potential conflict, including with constitutional prohibitions framed in this way. The principle of complementarity in Article 17, which provides that the ICC will be able to act only when the national justice system has not investigated or prosecuted, has been considered of central importance. A state can itself investigate a crime committed by one of its nationals, and therefore avoid being called upon to surrender him or her to the Court. In this respect it has also been noted that many states have already recognized the duty to prosecute or extradite for many of the crimes under the Rome Statute, namely torture, grave breaches of the Geneva Conventions and genocide, by virtue of their ratification of the relevant international treaties. Therefore, compatibility issues which arise with ICC ratification should not be new. If a national commits these crimes, the state would be obliged by virtue of other treaties to prosecute on the domestic level.

Immunities

Many national constitutions grant certain state actors a degree of immunity from prosecution. The scope and extent of such immunities vary greatly, with some constitutions strictly limiting immunity to certain acts, such as utterances in parliament, and others framing the immunity more broadly, granting immunity from any penal process.

Article 27 of the ICC Statute, on the other hand, establishes that the Statute "shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute." It goes on to state that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or internationa l law, shall not bar the Court from exercising its jurisdiction over such a person."

It has been suggested that such immunities only apply to domestic proceedings, and not to those before the ICC, an international court which was certainly not contemplated at the time the constitutional provisions were drafted. It has been suggested further that regard should be had to the underlying objective of any such immunities, which was not to guarantee impunity for genocide, crimes against humanity and war crimes. Rather, immunity provisions were often intended to protect the beneficiary of the immunity from undue interference in the exercise of his or her functions, even if the immunities were not expressly limited in this way. As the possibility of politically motivated interference is addressed by the multiple checks and balances provided in the ICC Statute, there is no need for immunity to address this concern.

The commission of the egregious crimes within the Court's purview would constitute a profound rupturing of the very constitutional framework which provides for the immunity. As such, it has been suggested that the immunity provisions should not be rigidly interpreted to provide impunity in respect of those crimes, as this could not have been the intention when the constitution was drafted. This is particularly so when such an interpretation would be inconsistent with the international obligations of the state. To build on this point, it is often highlighted that these compatibility issues should already have been resolved if the state has recognized the duty to prosecute or extradite, regardless of the official status of the accused, through ratification of other international treaties that establish this duty.

Finally, in certain contexts, constitutional immunities are subject to waiver by the parliament or other entity. Thus the immunity can be lifted, either in a particular case or, as some have suggested, on a permanent basis, through the parliamentary vote on ratification. It has been suggested that this removes any inherent tension between the obligations and the immunity.

Life imprisonment/"perpetual imprisonment"

The third issue relates to the constitutional prohibition on life imprisonment, which arises primarily in Latin America. Some constitutions prohibit life imprisonment outright, such as the Salvadoran Constitution, which provides in Article 27 that "[p]erpetual penalties are prohibited." Others provide that punishment involving restriction of liberty may not exceed a maximum number of years. The Statute on the other hand allows for the imposition of life imprisonment, "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person."

Life imprisonment by the ICC will therefore not be the norm, but the exception reserved for the most egregious of the serious cases that will come before the ICC. Moreover, it has been noted that a mechanism in the statute ensures that no one will be subject to imprisonment for 'life,' without the possibility of liberation. A mandatory review process under Article 110 obliges the Court to "review the sentence to determine whether it should be reduced" once a person has served 25 years. If the Court decides not to reduce the sentence, further hearings will take place, as established by the draft rules of procedure, at which the Court will consider evidence as to the behavior, rehabilitation and other circumstances of the convicted person.

It is critical to recall that the Statute makes clear in Article 80 that it does not in any way affect the penalties provided for, or prohibited, on the national level. Moreover, in no circumstances will a state be obliged to enforce a 'life sentence' handed down by the Court; a state party can attach conditions to any agreement to enforce sentences on its territory. Potential difficulties can only therefore arise when the state has custody of a suspect and receives a request from the Court to surrender that suspect. However, as set out above, if the state investigates or prosecutes the egregious crimes itself (irrespective of the fact that it will not impose a life sentence), the ICC will defer to the state's prosecution, in accordance with the complementarity regime in the statute. The issue is thus avoided.

Conclusion

The ICC will play a decisive role in the enforcement of human rights, the deterrence of future crimes and the strengthening of the very principles upon which many, if not all, constitutions of the world are based. It is therefore unsurprising that, as indicated by the debate in different corners of the world, which this article seeks merely to highlight, 'constitutional issues' have not proven to be 'constitutional obstacles.' Rather, there is reason to hope that the rich discussion on these issues around the world has deepened understanding of the complementary nature of this unique institution, and will translate into many more ratifications in the very near future.

This article was written for publication in the Coalition for an International Criminal Court's publication, The Monitor, by Helen Duffy and Brigitte Suhr. Both are serve as counsel to the International Justice Program, Human Rights Watch.