LAW *vision*

Domesticating international human rights

MUHAMMD HABIBUR RAHMAN

The old aphorism of Sir William Blackstone that the law of nations is part of the law of the land is not honoured in his home country. Unlike a few countries like the Netherlands, international human rights are not automatically received as domestic laws. The history of the International Bill of Human Rights, and provisions for ratification with reservation, and non-ratification of an international covenant like ICCPR by big powers like the UK indicate that the international convention for human rights needs to be ratified for application in national jurisprudence.

In 1978, on the question of whether a bill of rights should be formulated for the United Kingdom, it was observed in the Report of the Select Committee of the House of Lords (1978):

"In any country, whatever its constitution, the existence or absence of legislation in the nature of a Bill of Rights can, in practice, play only a relatively minor part in the protection of human rights. What is important, above all, is a country's political climate and traditions. There is, the committee thinks, common ground both among those who favour and those who oppose a Bill of Rights, and they received no evidence that human rights are, in practice, better protected in countries which have a code of fundamental human rights embodied in their law than they are in the United Kingdom."

Since 1990 many countries have introduced international human rights treaties or standards into their constitutional law. The constitution might stipulate that international human rights treaties must be recognised and respected. Or the constitution might mandate that interpretation and application of the constitutional human rights provisions accord with international human rights treaties and standards. Or the constitution might stipulate that the agencies of the state must guarantee implementation of basic human rights and international human rights.

Another direction would be to establish a law that would give international human rights conventions the status of domestic law, what is known as "domestication" of international human rights standards. We find examples of this method among both, countries that have a formal written constitution and those whose constitutions are unwritten.

As for countries without written constitutions, the more typical model is that of passing special legislation to introduce the International Bill of Rights into domestic law. New Zealand's "Bill of Rights Act" of 1990, and Hong Kong's 1991 "Bill of Rights Ordinance" put the standards in the ICCPR into effect. They have higher legal status than ordinary domestic laws.

In 1990 Latvia issued its "Declaration on the Accession of the Republic of Latvia to International Instruments Relating to Human Rights." The declaration announced Latvia's intention to put into effect some 53 of the United Nations international human rights instruments, including the UDHR, the ICESCR and the ICCPR. In 1997 Latvia acted to bring the ECHR into domestic law, as well as to recognise the jurisdiction of the European Commission of Human Rights and the European Court of Human Rights.

The UK's 1998 Human Rights Act demands that the judiciary must take into account the opinions of the various institutions created under the ECHR to interpret the Convention, including the European Court of Human Rights, the European Commission of Human Rights, and the Committee of Ministers, no matter whether the act demands that new legislation and legal interpretations must be in accord with the ECHR. Before the second reading of any bill the government minister in charge of the bill must issue a "statement of compatibility" in which it is declared that the law accords with European human rights standards. The Act renders illegal any behaviour by any public authority which violates European human rights standards.

Ireland drafted its 2001 "European Convention on the Human Rights Bill" to render the ECHR into domestic law. Its principal provisions were: (1) judicial interpretation and application of the law must be in accord with Ireland's national obligations under the ECHR, regardless of when the domestic law was enacted, in other words all of Ireland's domestic law must come into accord with the standards set by the ECHR; (2) when the high court or supreme court of Ireland is weighing a case on appeal it may, at its own initiative or on request of one of the parties when there is no other legal relief available, declare that any law of Ireland is not in accordance with the obligations under the ECHR, and when the high court or supreme court so declares it must forward the declaration to Ireland's parliament; (3) all of Ireland's government agencies must carry out the exercise of their authority in accordance with Ireland's national obligations to the ECHR, so that all of Ireland's state behaviour will be in accordance with its regulatory mandate; (4) should people believe that their rights are being violated by the behaviour of any state institution, and when there is no other path of legal remedy, they may bring suit before the high court demanding compensation for injury.

In 2001 the UNDP, in its Human Development Report, recommended

five things for the advancement of human rights. Four out of the five recommendations were to ensure that governments make references to human rights in their constitutions, and remove contrary laws.

Incorporation of international human rights law in national jurisprudence may be done (i) by ratification of an international covenant or treaty, or (ii) by necessary amendments in the Constitution, where there is a written Constitution, or (iii) by making new laws, or (iv) by the courts in their law-making power. Of these four methods, incorporation of human rights by ratification of an international covenant is the most convenient. Incorporation of a particular human right by amending the Constitution may be the most difficult, often requiring votes of two-thirds of the members of parliament. Opportunities may be rare for the courts to intervene suo- motu. Implementing human rights by legislation will depend on the willingness of the legislature and its time-constraint in law making. In many a country, because of lack of legislative time, recommendations of bodies like law commissions cannot be expeditiously given effect to. In this country, and I believe in many other countries, laws existing from before 1950 may be adjusted by a general repealing and amending bill. After the Constitution came into effect, a repealing and amending bill was passed in our country.

Despite the presence of well-structured legal institutions like the Court and the Bar, sophisticated investigating and prosecuting agencies, and prevailing general awareness of citizens' rights, violations of human rights are taking place in developed countries like the USA and the UK. The law and order problem, or over-zealousness of the executive for the maintenance of law and order, or sheer abuse of power, or unexplained negligence/violation of human rights appear to be a human condition common in every human society. We do not think there will be any end to such violations soon. We are to take continuous measures, both remedial and preventive, against this human disease.

Democracy and human rights were our war-cries in the War of Liberation. We invoked them in the preamble to our constitution, and made it one of the fundamental principles of state policy that the republic would be a democracy in which fundamental rights, and freedom and respect for the dignity and worth of the human person, shall be guaranteed. Most of the human rights mentioned in the United Nations declaration for Human Rights, 1984, are enumerated as fundamental rights in our Constitution. Further, the right to move the High Court Division for the enforcement of such rights is recognised as a fundamental right and is guaranteed.

Our lawyers and judges are more familiar with the human rights mentioned in the constitution and statutes of the country. Our existing laws are, by and large, not in contravention of the international human rights bill. The constitutional matters involving human rights are only raised in the Supreme Court. In the lower courts lawyers are ordinarily busy with crimes and land-rights. Our familiarity with human rights conventions calls for more awareness and recognition of the problems and challenges of applying them in our national jurisprudence.

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COURT *corridor*

Proclamation of emergency never suspends rule of law

BARRISTER MOKSADUL ISLAM

Can the High Court Division (HCD) exercise its Writ Jurisdiction Under Article 102 of the Constitution of the People's Republic of Bangladesh (the Constitution), when a Proclamation of Emergency is in force, was the main question everyone in the Supreme Court (SC) wanted to know after the President declared state of emergency on the 11th of January 2007 under Article 141A of the Constitution. Similar question was also discussed in the Appellate Division (AD). Apparently on the 11th November, 2007 vide Order No 1 the President has suspended the right to move any court to enforce the fundamental rights mentioned in Part III (Articles 26 to 47A) of the Constitution. And on the 13th of November, 2007 vide Order No. 2 the President further suspended all the proceedings pending in any court regarding the enforcement of fundamental rights. Let us examine the situation very carefully.

Proclamation

During a Proclamation of Emergency the State can make law without considering the provisions of the Articles 36 to 40 and 42. However, a plain reading of the Article 141B would clarify that unless there is a specific law made, during a Proclamation of Emergency, sidestepping the provisions of the Articles 36 to 40 and 42 it cannot be said that the provisions of these Articles would remain suspended automatically.

Furthermore under Article 141C (1) apparently the President may suspend the right to move any court for the enforcement of the rights conferred by Part III of the Constitution and also suspend proceedings pending in any court regarding the enforcement of fundamental rights mentioned therein and this order may be enforceable all over Bangladesh or any part thereof [Article 141C (2)].

Part III Articles

Laws inconsistent with fundamental rights to be void (26); Equality before law (27); Discrimination on the grounds of religion, etc (28); Equality of opportunity in public employment (29); Prohibition of foreign titles, etc (30); Right to protection of law (31); Protection of right to life and personal liberty (32); Safeguards as to arrest and detention (33); Prohibition of forced labour (34); Protection in respect of trial and punishment (35); Freedom of movement (36), assembly (37), association (38), thought and conscience, and of speech (39), profession or occupation (40); Freedom of religion (41); Right to property (42); Protection of home and correspondence (43); Enforcement of fundamental rights (44); Modification of rights in respect of disciplinary law (45); Power to provide indemnity (46); Saving for certain laws (47); and Inapplicability of certain articles (47A).

Writ

Under Article 102 of the Constitution the High Court Division (HCD) of the Supreme Court (SC) of Bangladesh exercises its power of judicial review by issuing writs in the nature of prohibition, mandamus (do it), certiorari (lack or excess of jurisdiction) and quo warranto, against the concerned public functionaries and a writ of habeas corpus [have the corps (body) before us (court)] against anyone, including a private individual, if there is a violation of any relevant provision of this Article.

Being a Constitutional enforcement it cannot be taken away or curtailed by ordinary legislation [22 DLR (SC) 203] or even by amendment of the Constitution [1989 BPD (Spl) 1]. The jurisdiction of the Court under this Article is known as Special Original Jurisdiction or writ jurisdiction. The Rule Nisi, which may be issued under this Article, requires the respondent to explain that his action was not unlawful and an interim order in the form of 'stay' or a direction also may be granted under this Article. This interim order would usually be for a certain period or until the adjudication of the matter.

The Court, usually, will not entertain any writ application on a premature grievance, however, an application can be brought when there is an apprehension of immediate danger to legal right [22 DLR (SC) 437].

Article 102

Under clause 1 of Article 102 the HCD may issue directive or order against 'any person or authority including any person performing any function in connection with the affairs of the Republic' for the enforcement of the fundamental rights guaranteed in Part III of the Constitution. Right to move HCD under Article 102(1) is itself a fundamental right [Article 44(1)]. Although writ jurisdiction is an equitable jurisdiction; however, power of the HCD under clause 1 is not a discretionary power rather it is obligatory for the Court to grant necessary relief to the aggrieved person.

Clause 2 deals with the rights, which are not fundamental in nature as mentioned in Part III of the Constitution. If the High Court Division is 'satisfied that no other equally efficacious remedy is provided by law' on an application by the 'person aggrieved', under clause 2(a)(i) of the Article the Court may prohibit 'a person performing any function in connection with the affairs of the Republic or of a local authority' from taking any illegal steps (writ of prohibition) or coerce to do something which is 'required by law to do' (writ of mandamus). Writ of prohibition stops the executives from taking any steps beyond the mandate they were given (negative sense) whereas writ of mandamus orders the executives to do something what they were required to carry out (positive sense).

Likewise, regarding clause 2(a)(i) (stated above), if there is 'no other equally efficacious remedy' and, once again, only on an application by the aggrieved person, under clause 2(a)(ii) of the Article the High Court Division may declare that the 'act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect' by issuing a writ in the nature of certiorari.

A writ of certiorari restrains the public functionaries within their jurisdiction. Proceedings are ultra vires (illegal) which was conducted without complying with the statutory procedure, when the principles of natural justices (i.e. a man cannot be condemned unheard (audi alterram partem) and a man cannot be the judge of his own cause (nemo debet esse judex in propria causa) [R v. BSMS Magistrate ex p Pinochet (No 2), 1 All E.R. 577]) or the principle of legitimate expectation [6 BLC 681; 51 DLR (AD) 56] was breached.

Clause 2(b)(i) of the Article invests the High Court Division, 'on an application by any person', to issue a writ of habeas corpus, to bring someone (detained unlawfully) before the court. A writ of habeas corpus can be issued against anyone including a private individual. Clause 2(b)(ii) of Article 102 sanctions the High Court Division a jurisdiction to issue a writ, in the nature of quo warranto, to inquire under what authority a person is 'holding or purporting to hold a public office'.

In short, under clause 1 of the Article 102 the High Court Division may issue a writ of prohibition or mandamus for the enforcement of the fundamental rights guaranteed under the Constitution. Under clause 2(a)(i) again the High Court Division may issue a writ of prohibition or mandamus if the executives overstep their mandate or neglect their duty respectively. Under clause 2(a)(ii) the High Court Division may issue a writ of certiorari to detain the public functionaries within their jurisdiction. Clause 2(b)(i) empowers the High Court Division to issue a writ of habeas corpus against anyone to prevent unlawful detention and under clause 2(b)(ii) of this Article the HCD may issue a writ of quo warranto to find out under what authority someone is holding or purporting to hold an office of the republic.

Observation

A Proclamation of Emergency may hit only Article 102(1), however, force of all the provisions of the Article 102(2) would remain intact always. Unless it is enacted otherwise nothing, including the fundamental rights even, is suspended automatically during a Proclamation of Emergency. And force of Article 102 is always there although may be restricted by some kind of law regarding one or more of the fundamental rights. Use of words 'as may be specified' and 'the rights so specified' in Article 141C(1) further suggest that whatever the restriction the President may impose during a Proclamation of Emergency must be specifically specified in the Order. Article 141C(2) allows the President to make law for the entire country or part of the country means nothing is automatic it must be specifically stated. Had it been automatic and for the entire Part III there was no need for the Article 141C(2). A general order suspending the entire Part III of the Constitution would also suspend force of Article 31 (right to protection of law).

Suspension of Article 31 would mean suspension of Rule of Law. How can that be possible? Without the Rule of Law there cannot be a Constitution and without the Constitution there cannot be a Proclamation of Emergency. Actually a close examination of Article 141B and both Clauses (1) and (2) of the Article 141C would support this observation that nothing is suspended automatically unless actually it is done by enacting law to that effect "specifically". A close examination of the 23 Articles mentioned in Part III would further confirm that it is highly unlikely that any sovereign country could possibly come into such a situation when suspension of all the Articles of Part III would ever be required.

As Shakespeare wrote no one would be able to remove a bowl of meat from your body without spilling some of your blood. Similarly it is simply not possible to separate some of the fundamental rights, mentioned in Part III, from many other legal rights.

This is a fortnightly column and the columnist is an advocate of the Supreme Court, Bangladesh, who can be reached at mail@legalsteps.net

LAW *week*

Vandalism at SC

A Dhaka court accepted the charge sheet of the case filed against eminent lawyers Dr Kamal, barristers Amir Ul Islam, Rokanuddin Mahmud and 10 others for vandalising on the Supreme Court (SC) premises on November 30 last year. The court also granted the petition filed for exempting Dr Kamal and 11 others from appearing in person before the court on different dates of the case. Dr Kamal and 11 others were present in the court during the passing of the order regarding exemption from appearing in person. After scrutinising the case docket (CD) and other relevant documents, Metropolitan Magistrate Towfiqul Islam accepted the charge sheet and issued an arrest warrant against another accused Habibur Rahman, an outsider, as he has been absconding since the incident. Earlier on December 22 last year, Detective Branch (DB) Inspector Naimur Rahman, who is also the investigation officer (IO), pressed charges against 13 including Dr Kamal, Amir and Rokan, showing 28 people as prosecution witnesses. *The Daily Star, January 15.*

BNP clique trying to change president

A section of BNP leaders are making moves to change the president, who holds the defence portfolio during the tenure of the caretaker government with the authority of transferring and promoting the armed forces personnel. Losing confidence in President Iajuddin Ahmed, BNP is lobbying for a new face in the presidency believing that a change might help it in the upcoming election. Iajuddin's last speech frustrated the BNP leaders and now they want someone 'more loyal' to them in the presidency, sources said. The leaders who want to change the president believe that the speaker of the last parliament might act more favourably to BNP if made the acting president following resignation of Iajuddin. The BNP leaders already sent a massage to the president expressing their desire. A senior official of Bangabhaban met Speaker Jamiruddin Sircar, who is supposed to act as the president in absence of Iajuddin, sources said. A BNP delegation led by Salahuddin Quader Chowdhury, parliamentary affairs adviser to the immediate past prime minister, held a three-hour long meeting with the Speaker in his office in the parliament complex. *The Daily Star, January 16.*

Oriental Bank ACC leaves out key man

The Anti-corruption Commission (ACC) filed 29 cases against 14 'culprits', who had swindled Oriental Bank, but mysteriously left Obaedul Karim's name out of the list, who had been categorically named as the key swindler in the Bangladesh Bank (BB) investigation report. The ACC however claimed to The Daily Star that more cases will be filed and the 'main culprit' will be charged based on the BB investigation. The BB investigation implicated Oriental Bank's majority shareholder and chief of Orion Group, Obaedul Karim, in misappropriation of Tk 596.60 crore in collusion with his bank's high officials and some managers. An ACC official noted that the commission filed the cases against the 14 in connection with siphoning of Tk 33.30 crore from Oriental based on its own findings. When it filed the cases on December 28 and 29, it did not have the BB investigation report in hand. "We repeatedly asked the central bank to give us the investigation report that had been filed in September. But the central bank delayed its response and gave us a copy on December 30, coinciding with the Eid holidays. That's why Obaedul Karim's name was not incorporated in the first 29 cases," said an ACC official. *The Daily Star, January 16.*

Judicial probe of defamation case against Hasina stalled

A Dhaka court adjourned the judicial inquiry of a defamation case filed against Awami League (AL) Chief Sheikh Hasina until March 15 as BNP Senior Joint Secretary General Tarique Rahman could not appear before it. Metropolitan Magistrate ABM Abdul Fattah passed the order following a time petition by the defence lawyers on behalf of the complainant. On December 19 last year, Tarique filed the case with the Chief Metropolitan Magistrate's Court against Hasina accusing her of conducting 'malicious campaign' against him. After hearing the petitioner, the court ordered judicial inquiry into the case without taking the matter into direct cognisance. In the complaint, Tarique said Hasina on November 3 told a public meeting at Paltan Maidan that he (Tarique) drove a Tk 2 crore car, wore suit worth lakh taka and squandered thousands of crore taka in gambling abroad. The petitioner said the news, which contained Hasina's remark and got wide coverage in the media, was false and baseless and aimed to dent his political image. The Daily Star, January 16.

Separation of judiciary in sight, at last

The newly appointed caretaker government in a landmark move published the gazette notifications of four rules relevant to separating the judiciary from the executive. The much-expected separation of the judiciary now requires only an amendment to the Code of Criminal Procedure (CrPC) as per the 12-point directive of the Supreme Court (SC) given in 1999. Earlier, President Iajuddin Ahmed, and the newly appointed chief adviser signed the documents of the four rules. The whole process was done in a hasty move as the Supreme Court (SC) deadline for publishing the gazette notifications of the four rules. The rules are, Judicial Service Commission Rule 2002, Bangladesh Judicial Service Pay Commission Rule 2002, Bangladesh Judicial Service (Service Constitution, Composition, Recruitment, Suspension, Dismissal and Removal) Rules 2002, and Bangladesh Judicial Service (Posting, Promotion, Leave, Control, Discipline and other Service Condition) Rules 2001. If the rules are implemented, the magistrates who work under the executive branch of the government now will come under the authority of the Supreme Court, and the lower court will also be free of government control. "We are preparing to amend the CrPC also as per the Supreme Court's direction," he said, adding that the task for preparing its draft has already been started. It now depends on the government when it will pass the amendment in parliament, he said. January 17, *The Daily Star.*

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