REVIEWING *the views*

Article 106: A Constitutional curiosity

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IN the backdrop of increasing role of the judiciary in state mechanism the constitutional significance of the Supreme Court's reference jurisdiction (Article 106) needs to be revisited and rejuvenated. Some pertinent questions relating to advisory jurisdiction of the Appellate Division may be raised in this connection; a. How advisory opinion of the Supreme Court can contribute to the development of rule of law and constitutionalism in Bangladesh? b. Is rendering advisory opinion more a function of the President than a jurisdiction of the Supreme Court? And c. Has the provision of advisory jurisdiction been best explored and exploited by the Presidents of Bangladesh? Keeping these questions in mind, the present write up would focus on the rationality of advisory jurisdiction of the apex court and discuss how that can be of great use in Bangladesh's present experience in nurturing its constitution, democracy, human rights and rule of law.

The American Practice

One obvious objection against consultative role of the apex court is that it is not in vogue in major democracies like the USA. But there is a scope to view the matter from a different angle. President George Washington's famous request to Chief Justice John Jay and other Supreme Court Justices for advice concerning international law and American neutrality vis-à-vis the war between Britain and France in the early 1790s is a staple of constitutional history. The outcome is well known: the Court simply refused to give an advisory opinion, thereby creating the constitutional principle that the Supreme Court does not give advisory opinions in abstract cases; it only adjudicates "concrete" cases. However, a recent in-depth thesis by Stewart Jay investigates the history behind the Court's refusal to advise President Washington. The crux outcome of the thesis is that "an advisory relationship [between the Court and President] was not inconsistent with the text of the Constitution or the views of the Philadelphia Convention. To understand why the Justices seemingly turned away from this aspect of the British legal heritage, a thorough investigation of the events leading to the refusal must be undertaken" (Stewart Jay, New Haven: Yale University Press, 1997 p. 112). Thus, taking no definitive cues from the constitutional convention that advisory opinions were clearly prohibited, Jay fingered to the political dynamics of the first government under the 1787 Constitution. Apart from Jay's new finding, it can be argued that the rigid separation of powers doctrine is not applicable for a brand of constitutionalism as that of Bangladesh.

The Indian experience

The Indian Supreme Court is blessed with advisory jurisdiction under Article 143. The terms are analogous to Article 106 of Bangladesh constitution with the difference that Indian President may also ask about factual matters. It is not necessary that the question on which the opinion of the court is sought must have arisen actually. The President is competent to make a reference at an anterior stage, namely when he is satisfied that such question 'is likely to arise'. In terms of authority, the opinion of the Supreme Court is only advisory in nature and is therefore not binding upon the President. In actual practice, however, its opinion on serious controversies had a great binding force and constituted, insofar as the legal aspect concerned, the last authoritative word. Even if a political or other considerations bar its acceptance by the government, the opinion of the Supreme Court has been held in high esteem. The references made by the Indian President to the apex court so far (at least 10 times) were on the constitutionality of the Delhi Laws Act, 1912, the Kerala Education Bill, 1959, Implementation of the Indo-Pakistan Agreement on Berubari, the Sea Customs Act, 1878, the Presidential Election, 1974, the Special Courts Bill, 1979, the Cauvery Water Disputes Tribunal, the Babri-mosque/Ram-mondir matter , the Jammu & Kashmir Resettlement Bill, the Judges Transfer case and the Constitutionality of the Election Commission's Orders on the Gujarat Elections.

To my understanding, Article 106 of our constitution is a constitutional curiosity. This curiosity is demonstrated by our learned judges (with ATM Afzal J. as the Presiding Judge) in the maiden case in our constitutional history in re No. 1 of 1995, 47 DLR (AD) 11, popularly known as en masse resignation of MPs case. The language of Article 106 is couched in wide terms which provide that any question of law may be referred by the President for consideration of the Appellate Division. However, many people argue that the President is not free to invoke such jurisdiction of the apex court on his own for the presence of Article 48 (3). The argument seems to be misleading as ATM Afzal, J. rightly observed: "The discretion is entirely his (President's) which can not be doubted or questioned. The expediency, or the motive, political or otherwise, or bonafides of making reference can not be gone into by the Court. The President's satisfaction that a question of law has arisen, or is likely to arise, and that it is of public importance and that it is expedient to obtain the opinion of the Supreme Court justifies a Reference at all times under the Article." [Special Reference No 1 of 1995, 47 DLR at Para 23]. The President's prerogative can further be elaborated to be within the constitutional ambit by referring to interpretation of legend N S Bindra. Bindra in his Interpretation of Statutes at p. 871 observes, "[A] Democratic constitution cannot be interpreted in a narrow and pedantic (in the sense of strictly literal) sense. It is the basic and cardinal principle of interpretation of a democratic constitution that it is interpreted to foster, develop and enrich democratic institutions (read here the office of the President). To interpret a democratic constitution so as to squeeze the democratic institutions of their life giving essence is to deny, to the people or a section thereof the full benefit of the institutions which they have established for their benefit". So, there is no reason why the President's power should come within the vicious circle of Article 48(3).

The unexplored horizons of 106 of Bangladesh Constitution

In Bangladeshi democratic polity possible reasons of reluctance in invoking the aid of Article 106 may be traced from different standpoints; I. Perceived constitutional limitation of the President; II. Contradictory to the theory of Separation of Powers; III. Uncertainty about its compatibility with the Rule of law; IV. Too much allegiance of the President to partisan governments; V. Lack of available previous instances, especially the precarious possible effect in politics; VI. Non-binding nature of advisory opinion; VII. Manning of the Supreme Court by Judges essentially of a scrupulous ideology than the government of the day. Needless to mention all these grounds do not hold weighty reasoning, though some of them are not devoid of substance. But when the makers of a democratic constitution envisaged such a culture, perhaps as a last resort to adhere to constitutionalism, we need to extract the best benefit from it. The cases in which the President could have sought Advisory Opinion in the present interregnum can be illustrated as under:

The Chief Advisor options: After the dissolution of the 8th parliament on October 27, 2006, President Professor Dr Iajuddin, by virtue of the constitutional provisions, could have used Article 106 to seek advisory opinion of the Supreme Court to settle the opposing approaches to the interpretation of the concerned constitutional provisions, Article 58C (3) and (4) and 58C (7) (b) in particular. Instead, after assuming the office of the Chief Adviser, he in a live broadcast said to the nation that he had taken advice from the Attorney General on the constitutional interpretations of those Articles. Why the President bypassed Article 106, when it was of utmost necessity not only for him but also for the nation, still remains an unanswered question. Such bypass has in effect kept the interpretation on the point finally unresolved which in future may be a big problem for the next President while deciding the constitutional choice for the office of the Caretaker Government (Ahmed Ziauddin:2006).

Holding Elections within 90 days, Mandatory or Directory: The constitutional justification of deference of national election even after the judicial pronouncement to the effect that the Election Commission has failed to comply with its constitutional obligation by not holding election within 90 days could have been referred to the apex court.

The local government election drama: Whether holding local government election prior to national election is constitutional or not could very much come within the list of asking under Article 106. At least a constitutional curiosity would remain unresolved for future (Speaker Jamiruddin Sircar opined in a Seminar, 2 August Prothom Alo 2008).

The manning of CTG: Whether there can be more than 10 members in the Advisory Council and whether creation of Special Advisor/Assistant Advisor was constitutional or not is a giant constitutional question. It is well settled in jurisprudence that what cannot be done directly cannot be done indirectly. Chairman of Bangladesh Law Commission Mustafa Kamal J. suggested this point to the government. But thwarting the constitutional spirit, a hoax on constitution has been played by the government creating Assistant Advisors' posts. Thus a big constitutional question is remaining unresolved.

Constitutionality of a Bill for the purpose of a reformation in law or institution or body: We are now swimming in the wave of Ordinances. In abnormal absence of Parliament the extent of President's Ordinance making power should have been demarcated by the Apex Court. An analogy may be deduced from Irish experience. The Supreme Court of Ireland does not have any consultative or advisory functions. However, where primary legislation has been adopted by the Houses of the Oireachtas (parliament) the President may, before promulgating the measure as law, refer such measure or specified provisions of it to the Supreme Court in order to determine whether the relevant provisions are compatible with the Constitution. The opinion of the Court is binding. Should the measure or any provisions of it be found to be unconstitutional, the measure does not become law. Otherwise, the President promulgates the legislation as law.

The language question of the Supreme Court: Constitutionally, the state language of Bangladesh is Bangla (Article 3). The official language of the Supreme Court is English. Question is whether the 'Supreme Court' doesn't fall within the definition of 'state'? Is the Higher Court itself not going against the constitution's mandate? Isn't there a diarchy in higher judiciary and lower judiciary on language question? It is argued that the decision in favour of using English in the Supreme Court established in Hasmotullah v. Ajmiri Bibee (44 DLR 1991, P. 332), is vague and misleading (Salimullah Khan: 2006). It is suggested that in quest for our distinctiveness and retention as a nation the matter needs to be authoritatively settled by the Appellate Division.

Reflecting thoughts

Constitutional jurisprudence shows that democracy exists in the larger context of constitutional values. Democratic institutions of a state should necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each catalyst to make constitutional journey smooth. Advisory opinions could in this journey become more than rhetoric. My conclusions in the light of above discussions may succinctly be put as thus: i. The utility of Article 106 of Bangladesh constitution has not been extracted to the best extent possible. ii. The provision for advisory jurisdiction is superficially contradictory yet complementary to the theory of separation of powers. iii. In order to make advisory jurisdiction more fruitful, the President is required to be more vigilant about upholding the rights of the citizenry. The institutional orientation of the post of the President can make the seat more people-empathetic. Growth of confidence in each other may diminish the snootiest feeling between the executive and the judiciary. The public interest-centric mentality may lead to develop a new dimension of native constitutional jurisprudence. Hence, best extract of Article 106 may germinate a broadened horizon of public interest litigation which I propose to be termed as President's PIL. iv. The wording of Article 106 is such that seeking advisory opinion from the apex court is the sui generic power of the President. It is more a question of function than a question of jurisdiction. But once the court's opinion is invoked it should be a court's jurisdiction with all of its significance. That means it should be a law declared by the Appellate Division and hence binding upon all inferior courts (not necessarily upon itself).

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LAWS FOR *everyday life*

Guardianship of children

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GUARDIANSHIP refers to the right to control the movement and actions of a minor. Guardianship is also needed for other people unable to take care of themselves e.g. an idiot or a lunatic. For the purpose of this article our discussion would be confined to guardianship of minors.

Categories of guardianship

Guardianship may be of:

a) the person (body),
b) the property, and
c) in marriage.

But as our statutory law criminalized the incident of child marriage, guardianship in marriage is no more relevant for our purpose.

Natural guardian

In Muslim law father is the natural and legal guardian of the person and property of his minor child. So to act as a guardian the father does not require an order of the Court. Even if he takes away his minor child from the custody of its mother, that will not constitute the offence of kidnapping.

Guardians appointed by the court

Though mother or other relatives are not natural guardians of minor children, they are not debarred from applying to the appropriate court for such guardianship. All applications for the appointment of a guardian of the person or property or both of minor are to be made under the Guardians and Wards Act, 1890. The court, upon such application, can appoint any person as the legitimate guardian other than the father. In doing so the court shall put paramount importance on the welfare of the concerned minor. It shall also see what decision will be consistent with the personal law of that minor.

In determining the welfare, the court shall have regard to the age, sex and religion or the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes of a deceased parent and any existing or previous relations of the proposed guardian with the minor or his property.

If the court thinks that the minor is old enough to form an intelligent preference, such preference would also be taken into account.

Guardianship of property

We already have seen that the father is the natural guardian of his minor child. Failing the father the following persons are entitled to the guardianship of the minor in question in order of priority:

- The father's executor;
- The father's father
- The paternal grandfather's executor

It must be borne in mind that the substantive law of Islam does not recognize any other relatives, like mother or uncle or brother as legal guardians. However, these relatives can be appointed by the court as the guardians of minor children.

Who is an executor?

Since executors of father and grandfather get their place in the list of legal guardians for minor's property, we must understand who they really are. Executor is an individual appointed through a will to administrate the estate of a deceased person. The executor's main duty is to carry out the instructions and wishes of the deceased. The executor is appointed by the person making the will.

If legal guardians fail

Failing the abovementioned legal guardians, the court is entitled to appoint a guardian for the protection and preservation of the minor's property. In the exercise of its duty to appoint a guardian, the court may appoint the mother or some other person as such guardian, since a woman is under no disqualification to be so appointed.

De facto guardian

A person, who is neither a legal guardian nor appointed by the court, may place himself in the position of a guardian and can be termed a de facto guardian. Such de facto guardians are merely custodians of the person or the property of a minor. They have no rights but they have to incur obligations.

Limitation of guardians

Guardians, be they are legal or appointed by the court, are under some serious limitations in exercising their rights especially when it comes to transfer of minor's immovable property. Usually they have to obtain a prior approval of a competent court before they can sell, gift or exchange immovable property of a minor.

Rules are quite flexible in relation to movable properties. Even a de facto guardian can sell the movable property of the minor for the minor's necessities, such as: food, clothing and nursing. But a guardian has to deal with the property of the minor as carefully as a person of ordinary prudence would deal with it if it were his own.

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Star LAW *analysis*

Implementing international human rights law in national jurisdiction: The Bangladesh case

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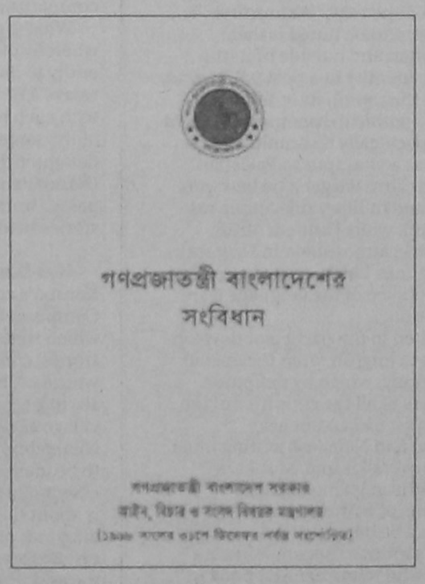
INTERNATIONAL concern with human rights is a phenomenon of comparatively recent origin. Although it is possible to point to a number of treaties or international agreements affecting humanitarian issues before the second world war, it is only with the entry into force of the United Nations Charter in 1945, that it is possible to speak of the advent of systematic human rights protection within the international system. None the less, it is clear that the international protection of human rights has its antecedents in domestic efforts to secure protection for individuals against the arbitrary excesses of state power.

Even today, the protection of human rights at both the national and international level is intimately connected, if not symbolic. All international instruments require states domestic constitutional systems to provide adequate redress for those whose rights have been violated. It is only when those states' own internal protective systems falter or where, in extreme cases, they are non-existent, that international mechanism for securing human rights come into play. In a sense, therefore, international mechanisms operate to reinforce domestic protection of human rights and to provide redress when the domestic system fails or is found wanting.

Most of the instruments on human rights have created mechanisms for the enforcement of human right at international level. The reporting system, inter state communications, individual communication to be made before the human rights committee, set up by the United Nations International Covenant on Civil and Political Rights (ICCPR), additional protocol to the ICCPR, International Committee on Economic Social and Cultural Rights (ICESCR) are such mechanisms. In addition, there are some regional human rights treaties, such as the European Convention for the protection of human rights and fundamental freedoms and the American convention on human rights and the American declaration on the right and duties of man, the African charter of human rights and people's rights which have created mechanisms for the protection of human rights at regional level.

In a country like Bangladesh, which is among the poorest in the world, the concern for human rights assumes much greater importance. The constitution of Bangladesh has guaranteed to all its citizens some basic rights of individuals. There are no problems relating to those human rights, which have not



been mentioned in the constitution. Being a follower of dualistic theory Bangladesh cannot enforce human rights norms of international instruments in national jurisdiction directly.

Bangladesh constitution has recognised the rights, which have been embodied in the International Bill of Human Rights, the bill comprises of four important documents namely the Universal Declaration of Human Rights, 1948 (UDHR), the International Covenant on Civil and Political Rights, 1966 (ICCPR) the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), and the optional protocol to the ICCPR, 1966. These international instruments on human rights have been ratified by Bangladesh. But no enabling legislation has been passed for the implementation of these instruments. Part III of the constitution contains civil and political rights, under the title "fundamental rights" most of which echo the provisions of the ICCPR. The economic, social and cultural rights are dealt with in part II as "fundamental principles of state policy". This part contains the rights, which are almost similar to the provisions of the ICESCR.

The judiciary of Bangladesh in some recent cases has delivered judgments in favour of the implementation of socio-economic rights, relying on the judgment of the Indian Supreme Court. In the case of Ain O Salish Kendra (ASK) and other v. Government of Bangladesh and others the judges adopted a strategic approach in enforcing socio-economic rights contained in the fundamental principles of state policy by way of incorporating these rights within the domain of the fundamental rights.

Recommendations

The primary responsibility for implementing human rights law rests upon the judiciary of a state. But the judiciary having many other functions is not sufficient to deal with all kinds of violations of human rights, thus it is required to be supported by other useful mechanisms. A national institution like human rights commission may be established as an alternative mechanism for the domestic implementation of the internal human rights obligations of the states, which will assist in strengthening human rights protection. A national human rights commission is a body, which is established by a government under the constitution or by legislation for the specific purposes of promoting and protecting human rights.

Bangladesh does not have any human rights commission still now. Once it is established this commission would be able to implement human rights norms, which the constitution fails to recognize. Where the judicial system is weak, politicised, and slow or otherwise incapacitated, national human rights commission may play a central role. As the judiciary may be overburdened and full of numerous problems, Bangladesh is in need to have a human rights commission.

In Bangladesh where judicial system is full of problems and most of the people are poor the establishment of a human rights commission will be beneficial. A project entitled "Action research study in the Institutional Development of Human Rights in Bangladesh" (IDHRB) commenced in April 1995 in order to make recommendation on the establishment of a human rights commission. Following the project a fifteen-member committee was established which started functioning in November 1996. Finally a bill for setting up of the National Human Rights Commission was prepared which was supposed to be presented before the parliament in 1998, but this bill has not yet been placed in the parliament.

The obligation to implement human rights norms should not be imposed upon a human rights commission alone. The state organs ought to play a vital role in this regard.

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