LAW ANALYSIS

Brexit: Legal perplexities

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ON the 24th of June this year the whole world woke up to the startling results of a referendum where a majority of British citizens had voted in favour of leaving the European Union (EU). The referendum turnout was a staggering 71.8% where more than 30 million citizens had voted, , precisely 51.9 % were in favour of leaving the EU while a 48.1% voted to stay.

While the Brexit brings in its wake a plethora of concerns from a nationalistic dimension, one of the main issues that has now become of primary concern is the legal mechanism through which UK's exit from the EU can actually be implemented. The Brexit, (i.e Britain's referendum going in favour of an exit from the EU), serves as the first of its kind since mechanisms for formally leaving the EU had been put in place since 2009, but such mechanisms have never been triggered till date as no member state had, till now, initiated an exit from the EU.

In the simplest of terms, a 'referendum' refers to a general vote by the electorate on a single political question that has been referred to them for a direct decision. In relation to the legal status of the outcome of this referendum, it is a misconception, and also a common error in terminology, that because majority votes are in favour of leaving the EU, that Britain has 'decided' to leave the EU. The memorandum is simply advisory in that it expresses the will of the citizens, but it is not legally binding. This can be said with conviction based on two matters. Firstly, it is unambiguous that in the UK, Parliament is sovereign and the ultimate decision, therefore, lies with the Parliament. Secondly, a referendum shall only become binding if the relevant legislation obliges the Government to change the law to be in line with the results of the referendum, and no such clause had been included in the EU referendum legislation.

It has, nevertheless, been widely understood that while the referendum is not legally binding, it might still be politically so since it shall now be considerably difficult, if not impossible, for the UK Government to disregard the referendum.

As of now, the UK is still a member of the EU. The formal procedure for an actual exit would only begin if Article 50, which was inserted into the Maastricht Treaty (i.e the Treaty on EU) when it was amended by the Lisbon Treaty, is invoked by the UK and a notice of intention to leave the EU is communicated to the European Council. Article 50 had only been in force since 2009, and owing to never having been invoked by any member state, its application and the procedure for Britain's contemplated exit under this Article remains ambiguous. Article 50 provides the following:

1.Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2.A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.

3.The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

As such, in line with Article 50, once a notice of intention to leave the EU has been given to the European Council, time for the 2-year period mentioned under Article 50(3) starts running within which the mechanism and the terms of departure of UK from the EU shall be negotiated and the EU treaties shall cease to be applicable to UK. Even if an exit agreement could not be reached in the 2 years time, UK shall cease to be a part of the EU at the end of the 2 year period, unless the same is extended. On a practical note, no notice of intention under Article 50 has yet been forthcoming from the UK, and is also unlikely to emerge until a new Prime Minister takes office in replacement of Mr. David Cameron.

Having summarised the procedure for an official Brexit, we may now consider the legal position of the British Parliament if UK leaves EU. Although UK is a nation where parliamentary sovereignty prevails, by virtue of the European Communities Act-1972, EC Law has been given priority over national UK law in the situation where a conflict arises between the two. Owing to such allegiance to the supremacy of the EU law, the law of UK has, ever since, been largely shaped by prevailing EU laws. Needless to say, such prevalence has affected both primary legislation (i.e statutes) and secondary legislation (i.e case laws). In such circumstances, it remains a challenge for the UK Parliament to separate the EU laws from the national law by repealing the European Communities Act-1972, and also to ascertain areas where there is a vaccum in the existing national law owing to those areas being widely regulated by the EU laws.

Considering all of the aforesaid, while the referendum and the current Prime Minister's announcement of his resignation has left the country in a state of precariousness, the worst is yet to come since no notice has yet been provided under Article 50. Once notice is served, the biggest uncertainty that now looms over the country remains the procedural separation of EU legislation from national legislation, and negotiation the terms of the exit agreement within the 2 year period. This one referendum may leave the country in economic, political and procedural uncertainties for years to come. With Article 50 being invoked once by a country, this might very well be the beginning of an end.

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LAW VISION

ARBITRATION IN BANGLADESH
Looking ahead

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THE world we are in today is greatly dependent on the free flow of trade and investment. Arbitration is one of the most common ways of settling a dispute between parties without having to recourse to the time consuming, costly and complicated procedure of litigation. It is an excellent tool to facilitate international trade and investment as it allows a speedy and cost-friendly way to settle cross-border disputes.

In the early days after independence, arbitrations in Bangladesh were governed by Arbitration Act 1940. In order to rectify its shortcomings, Bangladesh enacted the Arbitration Act 2001. The Act is based on the UNCITRAL Model Law. The Arbitration Act 1940 had its own problems and provided for many hindrances to the arbitral process. For example, the national courts had an extensive supervisory role over the arbitral process and, most importantly, there were problems being faced by arbitration users in relation to the enforcement of foreign arbitral awards. The Arbitration Act 1940 did not expressly deal with foreign arbitral awards and thus enforcement of such awards was highly problematic. Although the Act of 2001 attempted to rectify these problems, it has failed to provide a complete solution. Fifteen years have passed since the enactment of the Arbitration Act of 2001, however, it seems that arbitrations in Bangladesh are still struggling with certain important issues such as interim measures and smooth enforcement of foreign arbitral awards.

Under the Act of 2001, the place of arbitration is a decisive factor as to whether interim remedies ordered by national courts are available to a party or not. According to the Act, the place of arbitration has to be in Bangladesh for the national courts to grant any interim remedy. The position was the same in India as well. However, in line with recent times and regular use of arbitrations, India has moved forward in this regard by amending its Arbitration Act 1996 in 2015. India has now changed its legal position and arbitration users may seek the help of nationals courts in India for interim remedies regardless of whether the arbitration is taking place in India or not. This is a marked improvement since an arbitration user may be contesting arbitration outside of Bangladesh and after winning the same, the user may come to Bangladesh only to find out that the Bangladeshi party has dissipated its assets here in Bangladesh.

Regarding enforcement of foreign arbitral awards, despite the Arbitration Act of 2001's attempt to make such enforcement of awards easier, in practice, enforcement in Bangladesh is highly time-consuming. A party must apply to the District Court in Dhaka to enforce such an award,

and there is a list of circumstances under which the Court will not enforce an award. For example, an award may not be enforced if it is contrary to the public policy of Bangladesh. It is to be noted that no definition of 'public policy' has been provided by the Act of 2001, leaving it open to the national courts to interpret the same. This procedural requirement requires the arbitration user to go to the very national court, which it wished to avoid in the very first place. Given that national courts are marred with delays, arbitration itself then becomes a victim of this delay. Adopting the procedures of civil administration of justice (in cases of enforcement of awards) delays the overall completion of the arbitral process. Dealing with the topic of delay, a notable improvement which the amended Arbitration Act of 1996 did was to introduce a time limit for the arbitral process. The amendment provides that an arbitration process shall be concluded within a period of twelve months, which the parties may, by consent, extend for a further period not exceeding six months. It also provides a fast-track arbitration process, optional for the parties, where the process shall be concluded within a period of six months or extended for another six months by consent.

Given the passage of time, the amendment of the Arbitration Act of 2001 is now required in order to resolve the many problems being faced by arbitration users in Bangladesh. The archaic provisions of the Act of 2001, which was initially based on the UNCITRAL Model Law, need revision in order to address these problems. It is noteworthy that, even the UNCITRAL Model Law has been revised since the enactment of the Arbitration Act of 2001.

UP CLOSE WITH

A long way gone

"MY academic journey of law was eventful. I got fixated with the idea of studying law in the Great Britain right before my exams of MA in Islamic Studies. My parents were disgruntled and perhaps even annoyed with me for such an impulsive decision, after all exams are a crucial period and it was definitely not the time to shift routes. After a period of impasse, however, they were supportive. I left for United Kingdom through an international student recruitment program", said the 18th Chief Justice of Bangladesh musing his past as we began our interview.

Former Chief Justice of Bangladesh **Mr. Mohammad Fazlul Karim** *was born on 30th September, 1943 in Chittagong. Justice Karim, having obtained LLB from the University of Dhaka, was called to the Bar of England & Wales in 1969 by the Honourable Society of Lincoln's Inn. He practiced as a lawyer for about 28 years from 1965 to 1992 in the Supreme Court of Bangladesh. As a High Court judge, he adjudicated upon many legal issues. Most prominently, he acted as one of the author judges in the Bangabandhu Murder case. He was elevated as a judge of the Appellate Division on 15th June, 2001. During his office in the Appellate Division, he co-authored the judgment in the landmark case of Masdar Hossain concerning the separation/independence of judiciary. He served as the 18th Chief Justice of Bangladesh from 8th February, 2010 till 30 September, 2010.*

How was your life as a law student? What would be your advice to fellow law students?

Student life was routine owing to the fact the huge amount of manual reading we had to do back then. But I did find recluse every now and then, I loved playing football and there were days which I spent playing carom. I did not find much interest in chess. I was already doing several chess matches worth brainwork every day; chess couldn't be my game after all that.

I read books of all sorts. Read out-books, try to relate with people's afflictions and realize that not everything is covered by textbook definition. We are after all problem solvers, being able to relate helps.

Knowledge should be sought from real life too; during my student life garnering work experience was unimaginable. I had to enter the unforgiving professional world right after completing my studies!

Since this is going to be your life long work, try to get acquainted with it.

Not all memoirs are filled with success, tell us of the way you motivated yourself during hard times.

Ah, yes. When you practice, there will be hardships and even failures. Amidst those times, I looked up to the legal profession as my calling, I reminded myself of my duties.

Clients relied on us, we had to be professionals. We had to concentrate so much on the result of cases that it inherently became a lifestyle and tough times rarely affected our work. Even amidst hard times you will find relief knowing that you did your best to get someone justice.

You have been both a judge and a lawyer, what are the differences? Also, how different is practicing law from studying law?

The roles are co-related but very different, as a lawyer I used to plead to the satisfaction of the judge. As a judge I always had a responsibility of upholding justice in a balance of reasons.

There is indeed a "gulf of difference" between practicing and studying law. What we read in textbooks is for exam purpose whereas in case of practice we have to apply acquired knowledge and experience in a real life scenario. The purpose of the claims needs to be evaluated and the detriments needs to be foreseen.

In the past, lawyers had to go to the library and flip through plethora of books to get the crux of a matter, but now everything one can imagine in a large library is within the reach of their fingertips and a few clicks away.

Do you think media plays a big role in distorting the role of law in the society?

Although it is quite easy to shift the blame on media but one should not resort media to fathom the true interpretation of law. Yes, it is an acceptable that media can be a powerful tool which might induce a distorted picture of the legal framework but active efforts must be made to eradicate the discontent towards law. Judicial comments and cases should be the first point of reference.

After spending almost your whole adolescents in this profession and observing it through different optics what do you think should be the motto of legal professionals?

Well, the motto goes for every profession: Do justice to your fellow human. It must be made sure that the very utterance is in line with nothing less than justice. Leave things better than as they were.

Lastly, after accomplishing what could be stated as a journey or success and triumph do you feel you have achieved all the goals you set for yourself?

Listen", he said with a sunset smile, "there should not be a definite end to goals, self-actualization should have a speed limit entailed to it. To answer your question, no, I don't think I have accomplished all my aspirations. He then added with a nostalgic sigh, "I still miss my work, it was my life, it was the cornerstone of my being. But, time being the greatest of referees shows where one must stop. I feel I could do a lot more than what I have done. But then we must all surrender to the mosaic of fate."

INTERVIEWED BY ADIB SHAMSUDDIN AND SHEIKH AMENA JAHAN.