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REVIEWING THE VIEWS

Stretching the scope of judicial review

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IN the 5th Distinguished Law Lecture Series, organised by the Department of Law and Human Rights of the University of Asia Pacific, Dr. Justice Syed Refaat Ahmed, the Honourable Judge at the Supreme Court of Bangladesh, delivered a lecture on the issue of judicial review in reference to a reported case of *Md. Abdul Hakim* v *Government of Bangladesh and others* 34 BLD (HCD) 129. In this case, as it was evident in Dr. Justice Ahmed's lecture, the court explored the extent of judicial reviewability of actions and decisions of private bodies operating in the public domain.

Generally judicial review means the power of the courts to review legislative and executive action and to determine their validity. Courts exercise such power on the basis that powers can be validly exercised only within their true limits and a public functionary is not allowed to transgress the limits of his authority conferred by the Constitution. In Bangladesh, the High Court Division under Article 102 of the Constitution can review the functions of State bodies' actions if they are contrary to the Constitution.

However, what makes the *Abdul Hakim* case complex and intriguing is the fact that the Madrasah where Mr. Abdul Hakim used to work happened to be a private body but run by the Managing Committee approved by a government authority, i.e. the Bangladesh Madrasah Education Board. The question that the court had to deal with, as Dr. Justice Ahmed being the presiding judge in the case informed, was whether an order issued by an ostensible private authority can be reviewed by a court in its writ jurisdiction. The court had to consider the judicial reviewability of actions and decisions of ostensible private bodies that nevertheless operate in the public domain.

In dealing with the issue the court considered the landmark case of *R* v *Panel on Takeovers and Mergers, exparte Datafin PLC and another* reported in (1987) QB 815. In this case, the Court of Appeal was concerned with the actions of the Panel on Take-overs and Mergers which it termed as a truly remarkable body as it is an unincorporated association without legal personality. The Court of Appeal further noticed that although the body was self-regulating, they were promulgating, amending and interpreting City Code on Take-Overs and Mergers. Lloyd LJ in his findings noted that "where there is a possibility, however remote, of the panel abusing its great powers, then it would be wrong for the courts to abdicate responsibility". Lloyd LJ further notes that "Of course the source of the power will often perhaps usually be decisive. If the source of the power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review…. If the body in question in exercising public law functions, or if the exercise of its functions have public law consequences, then that may be sufficient to bring the body within the reach of judicial review".

The court also considered the unreported case of *The London Metal Exchange ex p. Albatros Warehousing BV* (2000). In this case, Mr. Justice Richards considered the issue of what constitutes a public function. By referring to the *Datafin PLC* case, he pointed to the need to make broad assessment of all circumstances of a case and in particular on the "extent to which the powers can be said to be woven into a system of governmental control".

The court in applying the principles laid down in the above cases had to determine the fact and degree of the public element of any ostensible private authority's operation ambit in the case of *Abdul Hakim*. The court further had to examine the extent of the Madrasah Managing Committee Chairman's capacity to affect the rights and interests of the petitioner in the case and whether the authority's capacity is enmeshed in a complex regulatory regime that links it to a higher authority. In reaching its judgement the court was satisfied the Chairman of the Managing Committee of a non-governmental Madrasah in discharging his powers and duties engages effectively in regulating the services of the teachers. By doing so the Chairman remains a repository of power that otherwise is the preserve of the State under Articles 15(a) and 17 of the Constitution to ensure and provide education. In fact the Chairman is discharging functions for and on behalf of the State under a well- defined hierarchical order of compliance and oversight.

In today's globalized world, the courts need to be pragmatic in understanding the complexities of social or economic enterprise in the public realm as it creates opportunities for private bodies.

The decision in the *Abdul Hakim* case has set a precedent against the well-settled principle that any order or decision of a private body cannot be challenged under Article 102 of the Constitution. However, what the court carefully considered is whether the power of a Chairman of the Managing Committee of a non-governmental Madrasah is woven into a system of governmental control. The answer was in the affirmative and hence the court could invoke its jurisdiction under Article 102. By willing to delve into the forays made by courts in various jurisdictions due to a lack of case law in the country, the court in the Abdul Hakim case correctly justified its position in regard to the maintainability of the case.

However, the critics may point out that judicial reviews are for adjudication of disputes than for performing administrative functions. Hence, it is advisable that the court must exercise the power of judicial review with caution and self-control. While that may be true as courts are discouraged from providing their own preferred amendments in the guise of interpretation, it also has to be noted that the court in this case has rightly responded to fill an accountability vacuum created by the privatization of public enterprises, the contracting out of public services and the deregulation of industry and commerce.

In today's globalized world, the courts need to be pragmatic in understanding the complexities of social or economic enterprise in the public realm as it creates opportunities for private bodies to strike partnership with the public sector to keep the flow of trade, commerce and service delivery operational. Thus, one needs to understand whether various decisions by these private bodies are enmeshed within the broader regulatory authority of public bodies. As the *Abdul Hakim* case has shown, it is in fact something worth delving into by both the lawyers and the judges.

THE WRITER IS A BARRISTER-AT-LAW, SUPREME COURT OF BANGLADESH.

YOUR ADVOCATE

*This week Your Advocate is **Barrister Omar Khan Joy**, Advocate, Supreme Court of Bangladesh. He is the head of the chambers of a renowned law firm, namely, 'Legal Counsel', which has expertise mainly in commercial law, corporate law, family law, employment and labor law, land law, banking law, constitutional law, criminal law, IPR and in conducting litigations before courts of different hierarchies.*

Query

I am a student in Bangladesh. I am Muslim. I have a girlfriend in Thailand. She is a Buddhist. We are willing to marry in Bangladesh. She wants to come in Bangladesh for 10 days' stay and marry me at the same time. So, how can we marry in my country?

Please sir, give me suggestion.

Response

I would like to thank you for soliciting my legal opinion regarding the matter. I have understood from your particular query that you are a Bangladeshi Muslim male and your girlfriend is Thai Buddhist and both of you are desirous of getting married in Bangladesh. There are several avenues that are open for you to choose from,

which I shall discuss in turn.

The concept of family law in Bangladesh is personal, i.e. such matters are governed by the religious laws of the individual concerned. Since you are Muslim, Muslim law will govern your marriage related issues. Under such law a Muslim male can marry any girl, who is a follower of any Kitaab, e.g. a Muslim, Christian or a Jewish girl. However, as you have already mentioned that your girlfriend is Buddhist, your marriage cannot be solemnized under the Muslim laws of marriage.

However, if your girlfriend decides to convert to Islam and provided there is no age barrier and further provided that both of you are unmarried at the time of solemnizing the marriage, the process of getting married in Bangladesh becomes much simpler. On such an event you can go to a 'Kazi Office' in order to get married and through the Nikhah Registrar/Kazi you can register your marriage under Muslim law.

If on the other hand, if she would not want to convert to Islam and keep practicing Buddhism then you can get married under the Special Marriage Act of 1872. When a marriage is solemnized under the Special Marriage Act of 1872, both the bride and the bridegroom have to sign a Declaration which reads as: "I do not profess the Christian, Jewish, Hindu, Muslim, Parsi, Buddhist, Sikh or Jaina religion" or (as the case may be) "I profess the Hindu, or the Buddhist, or the Sikh or the Jaina religion".

Construing the words of the aforementioned Declaration, it appears that you may either declare yourself a non-believer i.e. professing none of the religions or you may declare to profess any one of the religions listed there in. Marriage is only allowed between persons declaring to profess any one of the religions specifically mentioned in the second part of the Declaration. Hence, if you declare yourself as Muslim, it is not possible for you to marry a Buddhist girl, as Islam is not mentioned among the options. Therefore, you have the option to marry under this Act if you declare yourself as non-believer. In consequence, your girlfriend can marry you by declaring herself as a non-believer or as a Buddhist.

Nevertheless, irrespective of the type of marriage based on religions, since your girlfriend is a foreigner and will merely be a visitor in Bangladesh at the time of your intended marriage, it will be advisable to swear a declaration in the form of affidavit before the Notary Public in Thailand by her parents regarding their knowledge of her getting married during her visit to Bangladesh. Furthermore, it would be particularly wise for you to request her to provide Unmarried Certificate/Marital Status Certificate from concerned authority in Thailand and attested by the Thai Foreign Ministry.

I hope the aforesaid opinion sufficiently answers your queries.

FOR DETAILED QUERY CONTACT: OMAR@LEGALCOUNSELBD.COM.

FOR YOUR INFORMATION

The loan recovery process

AL AMIN RAHMAN

THE Artha Rin Adalat Ain 2003 was enacted by the legislature of Bangladesh to address loan recovery process by financial institutions/banks. In our country, defaulter borrowers often challenge the Act of 2003 invoking writ jurisdiction through applying to the High Court Division (HCD) under Article 102 of the Constitution of Bangladesh. They stress on the issue that the Act of 2003 does not put financial institutions/banks and borrowers on equal footing.

Article 26 of the Constitution provides that any law inconsistent with the provision of Part III of the Constitution, which provides the list of fundamental rights, becomes void to the extent of inconsistency. Further it also imposes an obligation upon the state to not make any law inconsistent with any provision of Part III of the Constitution.

The defaulter borrowers often refer to two Articles, namely Article 27 and Article 31 to challenge the Act of 2003 in the HCD of Bangladesh under Article 102 of the Constitution. Article 44(1) of the Constitution, which itself is a fundamental right of a citizen, provides the right to a citizen to move the HCD in accordance with Article 102(1), for the enforcement of the rights conferred by Part III of the Constitution. Therefore, if the fundamental rights of a citizen guaranteed under Articles 27 and 31 of the Constitution are breached then a citizen has the right to go to the HCD for enforcing these fundamental rights.

Article 102 of the Constitution empowers the HCD to give directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate, for the enforcement of any of the fundamental rights conferred by Part III of this Constitution, if satisfied that no other equally efficacious remedy is provided by law.

Therefore, these constitutional provisions provide a floor to the defaulter borrowers to step forward in the process of challenging the Act of 2003.

However, the Act of 2003 ensures alternative efficacious remedy to the aggrieved borrowers as Section 19 of the Act of 2003 grants a right to a defaulter borrower to apply for setting aside an ex parte decree and Section 41 of the Act provides the special provisions relating to the filing of appeal and settlement by the defaulter borrower. Furthermore, the law recognizes that all persons are not alike and nothing can be a greater inequality than to treat an unequal as equal. This position has been upheld by the Appellate Division in the case of *SA Sabur* v *Returning Officer* (1989) 41 DLR (AD) 30.

Moreover, it has been observed by our judiciary that effective alternative remedy is a ground for refusing the exercise of this prerogative jurisdiction under Article 102 of the Constitution by the HCD. Hence the Act of 2003 cannot be challenged in this way.

Further a writ jurisdiction can only be invoked when an authority acts without jurisdiction or to correct any error of law. In such a case, the defaulter borrowers usually fail to show that the financial institutions/banks acted without jurisdiction or that it had made an error of law.

Defaulter borrowers resort to this remedy to restrain banks/financial institutions from proceeding with the execution case, to ultimately suffer loss and damage. This delaying tactic adopted by the defaulter borrowers misleads a court and has never been appreciated by our judiciary. Hence this kind of ill-motivated act is not expected from any citizen and should not be encouraged in any circumstance.

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GLOBAL LAW UPDATES

Forced displacement as of today

WARS and persecution have driven more people from their homes than at any time since UNHCR records began, according to a new report released on 20 June by the UN Refugee Agency. The report, entitled Global Trends, noted that on average 24 people were forced to flee each minute in 2015, four times more than a decade earlier, when six people fled every 60 seconds.

The report finds 65.3 million people, or one person in 113, were displaced from their homes by conflict and persecution in 2015.

The detailed study, which tracks forced displacement worldwide based on data from governments, partner agencies and UNHCR's own reporting, found a total 65.3 million people were displaced at the end of 2015, compared to 59.5 million just 12 months earlier.

It is the first time in the organization's history that the threshold of 60 million has been crossed.

"At sea, a frightening number of refugees and migrants are dying each year. On land, people fleeing war are finding their way blocked by closed borders", commented UN High Commissioner for Refugees Mr. Filippo Grandi.

The report found that, measured against the world's population of 7.4 billion people, one in every 113 people globally is now either an asylum-seeker, internally displaced or a refugee – putting them at a level of risk for which UNHCR knows no precedent.

Forced displacement has been on the rise since at least the mid-1990s in most regions,

but over the past five years the rate has increased.

The reasons are threefold:

- conflicts that cause large refugee outflows, like Somalia and Afghanistan – now in their third and fourth decade respectively – are lasting longer;
- dramatic new or reignited conflicts and situations of insecurity are occurring more frequently. While today's largest is Syria, wars have broken out in the past five years in South Sudan, Yemen, Burundi, Ukraine and Central African Republic, while thousands more people have fled raging gang and other violence in Central America;
- the rate at which solutions are being found for refugees and internally displaced people has been on a falling trend since the end of the Cold War, leaving a growing number in limbo.

COMPILED BY LAW DESK (SOURCE: UNHCR.ORG).