"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 ● dslawdesk@yahoo.co.uk

LAW OPINION

SOME BASIC Q&As ON THE GAMBIA'S CASE AGAINST MYANMAR

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Of late, the social media and news media in Bangladesh have been brimming with questions and concerns about The Gambia's case against Myanmar at the International Court of Justice (ICJ). This essay will briefly address a few of such questions which are of legal nature.

The most recurring question is why Bangladesh has refrained from filing a case against Myanmar for violation of the Genocide Convention. Arguably, there are both strategic and legal reasons why Bangladesh did not volunteer to file any case against Myanmar at the ICJ. Myanmar is one of the two countries with whom Bangladesh shares its borders. Hence, it is not unusual that Bangladesh will evade any head to head situation with Myanmar over the treatment of its own inhabitants. There are many strategic disadvantages in pursuing cases against an immediate neighbour, not to mention the high litigation cost and political repercussions. From legal viewpoint, there appears to exist no legal dispute between Bangladesh and Myanmar over Myanmar's observance of the Genocide Convention. Bangladesh has not formally taken issue with Myanmar over the alleged Rohingya Genocide in any bilateral or multilateral forums. Without the existence of a well crystallised legal dispute, any ICJ proceedings may not get through the preliminary objection phase.

Many people have expressed concern if Bangladesh will be able to intervene in The Gambia's case against Myanmar. Articles 62 and 63 of the Statute of the ICJ allow a state to intervene in a case pending before the ICJ. Should Bangladesh consider that it has 'an interest of a legal nature' to protect, which may be affected by the ICJ's decision in The Gambia's case, it may decide to intervene under article 62 of the aforesaid Statute. Alternatively, Bangladesh may intervene under article 63 of the same Statute for the reason that interpretation of the Genocide Convention to which Bangladesh is also a signatory state is a matter in issue in this case (para 23 of The Gambia's Application Instituting Proceedings). In the latter case, the judgment of the ICJ will be equally binding on Bangladesh like The Gambia and Myanmar.

A favourable ICJ advisory opinion, despite having no binding force, will nevertheless help the issue of Rohingya nationality transform into a matter worth greater international attention.

Another frequently asked question is whether the ICJ could declare the Rohingyas as Myanmar citizens and order their repatriation. In its Application Instituting Proceedings, The Gambia has asked for safe and dignified return of the forcibly displaced Rohingyas as well as respect for their full citizenship and human rights. However, the ICJ is unlikely to uphold such request since it does not have any nexus with the contents of the Genocide Convention. For example, in the recently concluded *Jadhav Case* (*India* v *Pakistan*), the remedies requested by India included either annulment of the decision of the Pakistani military court, or in the alternative restraining Pakistan from giving effect to the said sentence, and so forth. The ICJ declined to grant this request on the grounds that its jurisdiction derived from article I of the Optional Protocol, which is limited to interpretation or application of the Vienna Convention on Consular Relations and does not extend to India's claims based on other rules of international law like the ICCPR [paras 125-126, 135-137 of Judgment dated 17 July 2019 (Merits)].

Can Bangladesh bring a case against Myanmar before the ICJ asking for repatriation of the Rohingyas? To begin with, the jurisdiction of the ICJ in contentious proceedings comes from the consent of the states. According to article 36 of the ICJ Statute, states may signify their consent to jurisdiction of the Court in the following manner: (1) by means of special agreement or *compromis* between the disputing states (2) in virtue of a *compromissory clause* in a treaty, and (3) optional clause declaration. Bangladesh and Myanmar have concluded a treaty titled, 'Arrangement on Return of Displaced Persons from Rakhine State' dated 23 November 2017 in order to facilitate repatriation of the Rohingyas to their homeland. However, it is to be noted that this Agreement does not contain a *compromissory* clause accepting the jurisdiction of the ICJ. Moreover, neither Bangladesh nor Myanmar deposited any optional clause declaration accepting the jurisdiction of the Court. Therefore, for the time being Bangladesh will not be able to espouse the cause of Rohingya repatriation or their citizenship before the ICJ.

PHOTO: COLLECTED

A good many people have asked if the ICJ can still be availed of to facilitate Rohingya repatriation. The fact is that no Rohingya has hitherto returned to Myanmar despite conclusion of the aforesaid repatriation treaty. The reason is they believe that their plight will not end without citizenship rights. The prevailing Citizenship Law of Myanmar does not recognise the Rohingyas as the nationals of Myanmar. In Myanmar, they are considered to be Bangladeshi expatriates. Hence, it is clear that Rohingya repatriation now hinges on the recognition of their demand for Myanmar nationality. In this context, an advisory opinion from the ICJ on the question of nationality of the Rohingyas could be a useful tool to address this matter. A favourable ICJ advisory opinion, despite having no binding force, will nevertheless help the issue of Rohingya nationality transform into a matter worth greater international attention. It will uphold the morale of the Rohingyas, might also encourage their return to Myanmar. Therefore, it is advisable that Bangladesh should take steps to move the UN General Assembly for this purpose. *The Chagos Archipelago advisory opinion* (25 February 2019) makes a comparable example of this kind of move.

And lastly, if there are any weak spots in The Gambia's case against Myanmar. It appears from the Application Instituting Proceedings that the mainstay of The Gambia's theory of dispute is based on an unreciprocated *note verbale* dated 11 October 2019 urging Myanmar to comply with the Genocide Convention. The Gambia thereafter instituted the current proceedings on 11 November 2019 without further ado. Generally speaking, an international legal dispute is said to exist when there is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons (*Mavrommatis Palestine Concessions case*). According to ICJ jurisprudence, mere assertion is not sufficient to prove the existence of a dispute. It must be shown that the claim of one party is positively opposed by the other (*South West Africa case*). Hence, it is very much probable that Myanmar will try to capitalise on the aforesaid fact at the preliminary objection phase by contending that The Gambia's application is inadmissible for non-existence/lack of crystallisation of dispute. The procedure of the ICJ recognises any objection as to jurisdiction or admissibility as preliminary objections (articles 79, 79bis and 79ter of the Rules of the Court).

Finally, it will be interesting to see how the ICJ deals with Myanmar's reservation to articles VI and VIII of the Genocide Convention in the light of its own advisory opinion on reservations to the Genocide Convention (28 May 1951) if The Gambia's case against Myanmar succeeds in getting through to the merits phase. Let's wait and see.

THE WRITER IS AN ADVOCATE, SUPREME COURT OF BANGLADESH.

GLOBAL LAW UPDATES

ICC to probe into alleged war crimes in Palestine

On 20 December 2019, Ms Fatou Bensouda, the chief prosecutor of the International Criminal Court (ICC), announced that the preliminary examination found the situation in Palestine to have met all the statutory criteria under the Rome Statute for the opening of an investigation. The preliminary examination was conducted upon the referral of Palestine itself; therefore, the prosecutor did not seek the authorisation for proceeding with the investigation.

However, owing to the "unique and highly contested legal and factual issues" attached to the situation, namely, "the territory within which the investigation may be conducted", the Prosecutor requested the Pre-Trial Chamber to issue a ruling on the Court's jurisdiction. The UN General Assembly granted Palestine a non-member observer status in 2012. Later in 2015, the ICC welcomed Palestine as a state party to the Rome Statute, as a result of which Palestine was able to make a State referral for investigation into the situation. Israel, on the other hand, is not a party to the Rome Statute.

Therefore, the matter of Palestine's statehood is contentious and likely to be questioned. The Israeli Prime Minister has already responded to the decision stating that it is an attempt to delegitimise the Tel Aviv regime. The US Secretary of State, Mike Pompeo has also issued a statement expressing the US's discontent with the decision of the Prosecutor, stating that Palestine is not a 'sovereign State' and is therefore, not qualified to participate as a state in international organisations.

In the context of such complicacies, the Prosecutor has sought the counsel of the court, and requested that the court issue a rule expeditiously, while also permitting victims, relevant States, and others to participate in these proceedings, as appropriate". She also opined that the court's ruling in the matter would render upon the prosecutor's decision "greater clarity and reinforced legitimacy".

COMPILED BY LAW DESK (SOURCES: UN.ORG, PRESSTV.COM).

YOUR ADVOCATE

ON INTERFAITH MARRIAGE

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. Our civil and criminal law experts from reputed law chambers will provide the legal summary advice.

Query

One of my Muslim friends is in love with a Hindu girl for quite a long time. Now they have decided to marry each other. Their family members do not want them to be married. They are adults and have already left their parents' houses. Can they marry as they belong to two separate religions?

Suparna, Dhaka

Response

Dear Suparna,

Thanks for your query. In Bangladesh, family laws including laws concerning marriage are predominantly regulated by the religious laws of the concerned individual. As your friend is Muslim, Muslim law will regulate his marriage-related issues and Hindu law will apply for the girl belonging to Hinduism. In accordance with Islamic Law, a Muslim male is permitted to marry any girl who is a follower of any *Kitaab* (scripturalist), e.g. Muslim, Christian, or Jew, but marriage to polytheists and idol or fire worshippers (e.g. Hindus) are not allowed under the Islamic law. As such, if they keep their respective religious beliefs, unfortunately, such marriage is not permitted within the existing legal framework of the country.

Although two adults belonging to two different religions can get married under the Special Marriage Act 1872, they have to declare themselves as non-believer (atheists) before the marriage is solemnised.

When a marriage is solemnised under this Special Marriage Act, the bride and the bridegroom have to sign a Declaration which reads: "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." It is noteworthy that if the female partner declares that she is a Hindu, it will not be possible for her to marry a Muslim male, as the religion Islam is not mentioned in the second part of the Declaration.

Alternatively, your friend and her partner may get married if the Hindu female partner converts herself to Islam. After conversion, both will have the same religion and can get married under the Muslim law.

I hope you will have answers to your query from the aforesaid opinion.

LAW VISION

Absence of adequate legal framework for e-cheques

FAHAD BIN SIDDIQUE

The electronic form of cheques (e-cheques) and the system of cheque truncation are prevalent in most of the countries in the world. E-cheques and the system of cheque truncation have been introduced to reduce the physical movement of cheques and ensure safe and secure payments. These processes are harbinger of replacing paper-based cheques. In early 1980, Denmark and Sweden introduced the complete system of cheque truncation. Besides, to enhance efficiency and to avoid delay, banks in the United States (US) and the United Kingdom (UK) introduced electronic processing of cheques, making it unnecessary for cheques to be physically transported to and presented for payment to the drawee bank.

In the UK, section 74B of the Bills of Exchange Act 1882, which has been inserted in the statute in 1996, permits a bank to present cheque to the drawee bank for payment by notifying it of the essential features of the cheque electronically or otherwise instead of presenting it physically. It needs to be mentioned that the Bill of Exchange Act of the UK does not use the term 'truncated'. On the other hand, the United States Congress enacted the Check 21 Act in 2003 to allow truncated cheques by the conversion of an original paper-cheque into an electronic image for presentation through the clearing process.

The security of the banking transaction system has acquired prime importance with the advent of technology and the digital era. No doubt, the banking sectors are providing services faster than ever before. To provide more customer-friendly service in the competitive market, some local banks are planning to introduce e-cheques and truncated cheques.

In Bangladesh, the only statutory law regarding cheques is the Negotiable Instrument Act 1881 (NI Act). Section 6 of NI Act defines that a cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand. Unfortunately, there is no provision in the NI Act which can define e-cheques or truncated cheques. Most of the banks have automated digital systems with updated equipment and are ready to originate the e-cheque system, but our legal system is not ready to adopt the new version of cheques. In case any bank uses e-cheques or truncated cheques, it will create a question of legal regulation of such cheques.

Our neighbouring country India has already included two modern definitions of cheques in their Negotiable Instrument Act. Clause (a) of Explanation 1 to section 6 of the Negotiable Instrument Act of India defines 'cheque in electronic form' (e-cheque), and clause (b) defines 'truncated cheque'. India has amended the necessary provisions of the Negotiable Instrument Act to accommodate new requirements and policies regarding the modern version of cheques. The amendments done by India in their NI Act in respect of the definition of 'cheque' have opened up avenues for commencing new methods of processing paper-based payment instruments. Contemporaneous amendment to the Information Technology Act 2000 of India, making it applicable to NI Act, has conferred legal status to the practice of electronic payment systems in the banking sector of India.

The objective of imaging, image exchange, and the transmission of electronic information between and among banking sectors is to improve the effectiveness of cheque clearing in Bangladesh. There is no doubt that the requirement for e-cheques and truncated cheques have increased after the establishment of agent banking in our country. In the context of Bangladesh, NI Act, Information and Communication Technology Act 2006 and Bankers' Book Evidence Act 1891 are interrelated in the sector of banking. It is unfortunate that the only definition of cheque provided in the NI Act includes only paper-based cheques.

The security of the banking transaction system has acquired prime importance with the advent of technology and the digital era.

Now, if our government shows their intention to include the modern definition of cheques in the existing Acts of the banking sector, then all the laws related to banking should need to be amended accordingly. To encourage digital and modern banking systems, Bangladesh Government should amend the existing acts, rules, procedures, guidelines, and operating directives so that they can adequately govern paper-based payment items and other instruments that are eligible for truncation and electronic cheque image presentment.

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