"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 VISION

Statelessness and displacement

In quest of peace and prosperity

JUSTICE MD. MOZIBUR RAHMAN MIAH

HUMAN beings do not want to live as refugees which is completely a form of leading very inhumane life. In today's global order, refugee crisis is one of the very complex challenges for the politically less-influenced countries. There are various reasons for the people to become refugees. But the main contributory factor to this crisis prevalent in the world is, armed conflict and ethnic cleansing perpetrated on the marginalised and minority group of people by their own State machinery.

Armed conflict and/or violence break out in a certain country when a section of people or political group revolts against their own State and the State functionary then uses force to silence the dissident. Aside from that, a State sometimes brands its own people or a particular political party as rebels when they denounce the political view of the party in power or merely because they belong to a specific political, religious or ethnic group. State itself unleashes atrocities and oppression on them which leaves a vast populace homeless and they resultantly take refuge to other countries. Take for example, the ongoing Rohingya crisis which is now one of the most pressing and much talked about issues in the global order.

At present, more than a million Rohingyas have taken shelter in a tiny district town of Bangladesh, Cox's Bazar which is the tourist hub having longest sea-beach of the world but has now become a threat of ecological imbalance. So, what are the root causes for the Rohingyas to become refugees? Simple answer is, they are the Muslim minorities in Myanmar which is their only fault and for that, they have been subjected to inhumane torture, killing, rape, arson, displacement by the Myanmar army. This is a classic case of 'ethnic cleansing' allegedly perpetrated by the Myanmar government. Rohingya Muslims have been living in Rakhine for generations, but now the state is denying their citizenship.

Bangladesh is an over-populated country of 170 million people. But only for the sake of humanity to those huge distressed people and to keep regional harmony, Bangladesh has sheltered those vast number of helpless people as was done by India during our war of liberation in 1971 sheltering 10 million people showing rare example of generosity. The Hon'ble Prime Minister Sheikh Hasina has left no stone unturned to raise this most burning issue in different global forums whenever she gets the scope urging the world community to compel Myanmar to take back their people. She has even very robustly placed the issue in the recently concluded UN General Assembly meeting. But Myanmar still remains unmoved.

Now, the question remains, where does the solution of such refugee crisis lie? Can the world body compel the defiant countries to take back these displaced people to their own land? Or can it be any lasting solution to depend on the international agencies of their aid for the survival of the refugees for years together? I myself am not so optimistic over its early solutions in the given system of the world body. Because, big powers who are considered to take leading part in resolving this burning crisis, are mostly driven by their own national interest over humanity. As when any resolution leading to resolving such crisis is placed before the UN Security Council, those big powers (five permanent members of the Security Council) then exercise their most powerful weapon, i.e. veto.

On the flipside, International Criminal Court (ICC) and International Court of Justice (ICJ) cannot do anything substantial unless the impugned country ratifies the charter of these two international Courts. But cruel reality is that, crime of genocide, crimes against humanity, extermination, deportation and other inhuman acts are being committed unabatedly under the very nose of the United Nations. Positive news is that recently the ICC Chief Prosecutor has been authorised to start an investigation into the alleged crime against humanity of forcible deportation of the Rohingyas.

We can no more remain as silent spectators

Justice Md. Mozibur Rahman Miah

to this most pathetic event and criminal acts diabolic in nature. Here, Article 51 of the Indian Constitution deserves attention. Article 51 refers that the State shall endeavour to: (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law; and (d) encourage settlement of international disputes by arbitration. In order to establish a strong regional association like, SAARC, ASEAN, the above mentioned four significant points may guide us to hold the countries accountable. While dealing with refugee crisis, the affected country may take the dispute to the designated court determined by the association of the countries for redress, making the verdict binding upon the countries in dispute. And if it is materialised, the interference of big powers and dependency on the UN Security Council in tackling many global issues will be lessened up and peace and security will be restored to a great extent in the whole world.

So, let us take a holistic approach and urge the world leaders to be united in bringing about the global issues through mutual understanding, arbitration and settlement in order to uphold humanity, peace, prosperity and make this planet safe and secured for all human beings - by shunning petty interests and stopping brutal use of weapons against innocent people. Because civilisation is now at stake which we are all pledged bound to preserve.

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NOTE: THIS IS AN ABRIDGED VERSION OF THE PAPER PRESENTED IN THE 20TH INTERNATIONAL CONFERENCE OF CHIEF JUSTICES OF THE WORLD, ORGANISED BY CITY MONTESSORIE SCHOOL LUCKNOW, INDIA, ON 6-12 NOVEMBER 2019.

LAW EVENT

Barrister Syed Ishtiaq Ahmed Memorial Lecture 2019

THE Asiatic Society of Bangladesh organised the 15th edition of Barrister Syed Ishtiaq Ahmed Memorial Lecture on 26 December 2019 in its premises. The memorial lecture titled as "Expanding Horizon of the Writ Jurisdiction: An Indian Perspective" was delivered by Justice Arijit Banerjee from Calcutta High Court, West Bengal, India. At the very onset, Justice Banerjee outlined the constitutional framework concerning writ jurisdiction of the higher courts in India. In doing so, he briefly reflected upon the historical origin and legacy of writ jurisdiction relevant to Indian subcontinent. He said that articles 32 (writ jurisdiction of the Supreme Court) and 226 (writ jurisdiction of High Courts of States) are two provisions which the framers of the Constitution consciously included to provide avenues for redressing any grievance that a citizen might have owing to infringement of his constitutional rights.

In this background, Justice Banerjee presented the discussion relating to broadening the scope of the application of writ jurisdiction. He said that in a welfare State, many of the functions are now not only performed through traditional arms of the State, but also by new statutory authorities, bodies or corporations. He posed the question as to whether such bodies or corporations should be amenable to writ jurisdiction. He analysed different judicial decisions, specially *Jayanti Mondal* v *State of West Bengal* (2015) (where he had delivered the judgment) and came to the conclusion that it is not how an entity is constituted that will determine whether or not it is amenable to writ court – because the source of existence of the entity is not decisive. In clearer words, he said, if the duties discharged by a private corporation are public in nature in the sense that it touches the lives of the public at large, or in any event, an appreciable section of the public, then in spite of the apparent private nature of the corporation, it would be accountable to the writ court.

He then viewed that 'an efficacious alternative remedy' available to the petitioner does not always serve as a self-imposed limitation to the judiciary as to the question of writ-maintainability. In other words, the mandate of alternative remedy is a rule of discretion and not a rule of compulsion. Referring to his own decision in *Debasis Chatterjee* v *Reserve Bank of India* (2013), Justice Banerjee said that he did not refuse to deny relief to the petitioner merely because there was an alternative relief. The petitioner in this case was an elderly person who had been running from pillar to post to get justice. Denying him relief on the ground of existence of alternative remedy, in his opinion, would have resulted in legal injustice.

Justice Syed Refaat Ahmed, Judge at the Supreme Court of Bangladesh, commented that the law of writ jurisdiction is also evolving in Bangladesh. He referred to *Moulana Md. Abdul Hakim* v *Bangladesh* (2014), where he being the author judge broadened the limit of writ jurisdiction on the ground of the breach of the principle of legality by applying the *Datafin* test of whether an impugned body has been "woven into the fabric of public regulation".

A book comprising all the previous fourteen lectures of this lecture series was also unveiled on this occasion.

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LAW ANALYSIS

TELENOR'S LEGAL NOTICE THROUGH THE EYES OF INT'L INVESTMENT LAW

SANJANA HOQUE MIFTA

RECENTLY, Telenor, the principal investor of Bangladesh's leading mobile phone operator Grameen Phone, has served a legal notice to the President of Bangladesh seeking arbitration regarding the dues of Tk 125.79 billion of Bangladesh Telecommunication Regulatory Commission (BTRC) to Grameenphone. The service of notice by a foreign company to the head of a sovereign state stimulates a debate regarding the legality of the notice.

The legal basis of the notice served by Telenor to Bangladesh is Bangladesh-Singapore Bilateral Investment Treaty (BIT) signed between the countries in 2004 for the promotion and protection of investments. BITs are treaties between two countries that protect the foreign investment made by the investors of both the countries.

Bangladesh and Norway do not have any BIT. Telenor is a Norwegian Company which has a subsidiary company in Singapore, named Telenor Asia which is the primary investor of Grameen Phone. Thus Telenor brings the claim under Bangladesh-Singapore BIT. Both Bangladesh and Singapore are members of the ICSID (International Centre for Settlement of Investment Disputes), which is an international arbitration institution established in 1966 for legal dispute resolution and conciliation between international investors.

The statement of Telenor is that the process of the realisation of the claimed amount by the Bangladesh government without following due process amounts to unlawful expropriation, which is a breach of the said BIT under Article 5. Now under Article 7.1 of the BIT, any dispute between the investor and the State shall be settled through negotiation initiated by one party after giving written notice to the other party. The legal action against any State is to be initiated against the Head of the State, i.e. the President. Thus serving the legal notice to the President is a part of the legal proceeding.

If the dispute cannot be resolved through negotiation within six months from the date of the service of the notice, under Article 7.2, the investor can initiate arbitration proceeding in the forum of ICSID. Under Article 7.3 of the BIT, both parties give their consent to the jurisdiction of ICSID, and any arbitral award shall be final

and binding upon the parties to the dispute. Like the said BIT, the majority of ICSID clauses in modern BITs express consent on the part of the two Contracting States to submit to ICSID's jurisdiction, for the benefit of nationals of the other State party to the treaty. An investor may accept an offer of consent of the State contained in a BIT by instituting ICSID proceedings.

It is to be noted that some BITs have the clause of the exhaustion of local remedies or fork-in-the-road clause (i.e., electing one procedure is forfeiting the other procedure). But Bangladesh-Singapore BIT does not have any such requirement for the exhaustion of local remedy or fork-in-the-road clause. Thus the ongoing case between BTRC and GP is not in any way related to the mechanism of the settlement of investment dispute sought by Telenor. If the parties fail to resolve the dispute within six months, nothing prevents Telenor to drag Bangladesh to the ICSID forum as it has given its consent to the jurisdiction of ICSID and according to the ISDS (investor-state dispute settlement) mechanism, the consent becomes perfect the moment the investor files a written notice of arbitration.

According to Articles 53 and 54.1 of the ICSID Convention, ICSID awards have to be recognised as binding, and their monetary content (namely compensation and damages) has to be enforced in a manner equivalent to a last-instance decision of its own State courts by all (currently 163) parties to ICSID Convention.

Bangladesh has the precedent of the case *Saipem* v *Bangladesh* (2004), where ICSID holds the country responsible for expropriation based on the illegal interference by its judiciary in the arbitration proceeding. The amount of compensation was 6 million USD. On the other hand, in another arbitration dispute, *Chevron* v *Bangladesh*, ICSID turned down the US oil giant Chevron's age-old claim of around $240 million from Petrobangla.

In the given scenario, the settlement of this case is possible through negotiations between the parties or the ICSID tribunal. Now the wise move of Bangladesh would be to resolve the dispute through the negotiation between the parties as per the requirement of the said BIT.

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FOR YOUR INFORMATION

Looking into the Noise Pollution (Control) Rules

THE Noise Pollution (Control) Rules 2006 were adopted under Section 20 of the Bangladesh Environment Conservation Act 1995 with a view to laying down the specific guidelines regarding noise pollution and the degree of allowable noise in different areas.

The Rules lay down the permitted noise levels for both day and night-time in five types of areas- silent areas, residential areas, mixed areas, commercial areas and industrial areas. Silent areas include hospitals, educational institutions, offices and similar establishments, and their surrounding 100-meter area. Silent areas are areas where the noise level is to be kept at the lowest (50 decibels at day and 40 decibels at night); permitted noise level for residential areas is 55 decibels at day and 45 decibels at night. In industrial areas, where the highest noise levels are permitted, the limit is 75 decibels at day and 70 decibels at night. As per the Rules, the hours between 6 am and 9 pm are to be considered as daytime, and the remaining hours are considered as night-time. A separate range is prescribed for vehicular noise under Schedule-2 to the Rules, and the use of horns is completely prohibited in areas identified as silent areas.

However, in case of any social (weddings), cultural (sports, concerts, *melas, hats* and *bazars)* or political events in open or partially open spaces, the sound level can be exceeded if permission is obtained three days before the event. In case of urgent situations, permissions can be sought one day in advance as well. However, no such permission will allow for such exceedance beyond five hours and in any case, the time extension can be only up to 10 pm.

The Rules also state that no construction machines used to process and break down building materials (bricks, stones etc.) shall be used within 500 meters of any residential areas and such machineries cannot be used between 7 pm and 7 am except without the permission of the concerned authorities.

The Rules provide that any person can contact the concerned authorities with any complaints regarding excessive noise or contravention of the Rules either verbally or over phone or in writing, and it states that officials empowered under the 1995 Act can, in pursuance of the Rules, enter an establishment and confiscate any noise producing instrument.

The Rule allows the concerned officials to issue a written direction for the violation of the prescribed limits, the non-compliance with which is an offence punishable with imprisonment up to 1 month and/or fine up to 5,000 BDT. For repeated offence, one may be imprisoned up to 6 months and/or fined up to 10,000 BDT.

However, the Rules do not apply to religious events in mosques or temples and events on important national events such as Independence Day, Bengali New Year, International Mother Language Day, etc. They also do not apply to important announcements made by governmental organisations and during the official functions of the military or law enforcement agencies. Furthermore, an exception is made under the Rules for national and local election campaigns in all areas except the silent areas, subject to the permission of the Election Commission or other concerned authorities.

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