"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 INTERVIEW

Any organised crime can only be countered through an effective and multi-stakeholder response

A Russian career diplomat, Mr. Sergey Kapinos is currently the Regional Representative at the UNODC Regional Office for South Asia. In this post, he serves as the Chief Official of UNODC in six South Asian countries, namely Bangladesh, Bhutan, India, Maldives, Nepal and Sri Lanka. Mr. Kapinos brings over 39 years of distinguished experience in the areas of diplomacy, crime prevention, security, justice and management.

Mohammad Golam Sarwar, *from Law Desk, talks to him on the following issues.*

Law Desk (LD): How does the UNODC assess the prevalence of human trafficking in South Asia and particularly in Bangladesh?
Sergey Kapinos (SK):Every year, thousands of men, women and children fall into the hands of human traffickers and almost every region is affected by this crime, including South Asia. According to data reported by countries, victims from South Asia have been detected in over 40 countries around the world. Bangladesh also faces a heightened risk of this crime. The global demand for low-skilled workers, deceptive offers of employment, fake marriage or promises of a better life, and little to no awareness of trafficking risks, result in many Bangladeshis making perilous journeys abroad, facilitated by traffickers, predominantly to the Gulf region. Many become victims of trafficking, most commonly for the purpose of forced labour, sexual exploitation, debt bondage etc. The economic adversities related to Covid-19 has further exacerbated the inequalities and vulnerabilities of people to this crime.

LD: Bangladesh has recently acceded to the UN Protocol to Prevent, Suppress and PunishTrafficking in Persons, Specially Women and Children, supplementing the UN Convention against Transnational Organized Crime. According to the UNODC, what is the significance of such accession? How can the UNODC support the Government of Bangladesh to implement the Protocol?
SK:The accession of Bangladesh to the Protocol is reflective not only of the Government's commitment to tackle this crime, but also of its strong intent to promote and protect the freedom and dignity of its citizens. The Government's efforts have been acknowledged internationally, as indicated in the US 2020 Global Trafficking in Persons report which reflects the improved ranking of Bangladesh from Tier 2 Watch List to Tier 2. The UNODC is supporting the Government's efforts through the implementation of a flagship project titled "The Global Action against Trafficking in Persons and the Smuggling of Migrants - Bangladesh (GLO.ACT-Bangladesh)": a joint initiative by the European Union and the UNODC, implemented in partnership with International Organization for Migration (IOM). The GLO.ACT-Bangladesh focuseson developing evidence-based information on trafficking and smuggling patterns and trends, legislative review and harmonisation, capacity-building of criminal justice actors, and promoting international cooperation. The project also provides direct assistance to victims of human trafficking and migrants in vulnerable situations.

LD: How is the Covid-19 pandemic impacting the human trafficking prevention efforts?
SK: The root causes and drivers that cause people to fall victim to human trafficking have been exacerbated because of the pandemic. For instance, given the confinement measures and economic hardships, some trafficking forms – like those involving the commercial sexual exploitation of children and the exploitation of those in domestic servitude are reportedly increasing. The economic crisis is also hitting low-skilled workers, undocumented migrant workers and workers in the informal sector very hard, particularly those with little to no labour and social protections, making them even more vulnerable to human trafficking. In some cases, survivors may find their repatriation process interrupted by the lockdown measures. Traffickers are also exploiting children's vulnerabilities online taking advantage of their increased digital presence during the lockdown. The surge in domestic violence has escalated women and girls' vulnerabilities. In some countries, children and women living in overcrowded camps for refugees and migrants are not only facing huge health risks but are also being very vulnerable to sexual exploitation.

In trafficking rings, criminals are likely to quickly adjust their modus operandi and routes. With law enforcement agencies taking on new responsibilities for the enforcement of lockdowns, traffickers are taking advantage and preying on the vulnerabilities of people. Justice systems have been similarly affected and international cooperation becomes difficult on account of various imposed restrictions.

LD: We understand that human trafficking and migrant smuggling can occur along the same routes and smuggling can sometimes lead to trafficking. Against this background, what is important to distinguish between the two crimes and how does the UNODC consider the crime of Smuggling of Migrants in the efforts to prevent and address trafficking in South Asia?

SK: Human trafficking and migrant smuggling are complex phenomena that affect people in different ways. While sometimes linked, these are separate crimes. Human trafficking involves the recruitment, movement or harbouring of people for the purpose of exploitation - such as sexual exploitation, forced labour, slavery or organ removal. Victims are trafficked by the use of improper means such as the threat or use of force, fraudulent schemes, deception, or abuse of power. It can occur within a country or across borders.

In contrast to human trafficking which can take place both domestically and internationally, migrant smuggling is a crime that takes place only across borders. It consists in assisting migrants to enter or stay in a country illegally, for a financial or material gain. Since migrants give their consent to the smuggling venture, mostly due to the lack of regular ways to migrate, they are not considered victims in absolute terms. However, smuggled migrants are often put in dangerous situations by smugglers (such as a hazardous sea crossing) and therefore become susceptible to other crimes during the smuggling process, including severe human rights violations.

LD: What are some of the key recommendations to address trafficking in persons from a regional perspective in South Asia, and from a national perspective in Bangladesh?
SK: I believe that any organised crime can only be countered through an effective, organised and multi-stakeholder response. There is a need to build capacities of public officials and law enforcement agencies, including better information and intelligence sharing and cross-border cooperation and coordination between countries of the region.

This year, the Government of Bangladesh has pledged to establish divisional-level Special Tribunals dedicated to trafficking in persons cases. The full activation of these tribunals needs to be prioritised to ensure protection of and access to justice for trafficking victims, and to increase prosecutions and convictions for trafficking offences, particularly of labour traffickers and complicit public officials, while strictly respecting due process. Guidelines on provision of adequate victim care and standard operating procedures for victim referrals should be developed and disseminated. There is an urgent need to establish the National Anti-Human Trafficking Authority under the Prevention and Suppression of Human Trafficking Act, 2012 in order to effectively oversee and coordinate the implementation of the Act and the corresponding National Plan of Action.

LD: What is the key message that you would like to convey on behalf of the UNODC ahead of the World Day against Trafficking in Persons scheduled to be observed on the 30th July.
SK: The 2020 theme is "Committed to the Cause -Working on the Frontline to End Human Trafficking",under which the UNODC acknowledges and supports the first responders to human trafficking. The first responders come from different sectors –law enforcement, health, criminal justice, NGOs, and social welfare who identify, support, counsel and seek justice for human trafficking victims, and challenge the impunity of the traffickers. During the current crisis, the critical role of first responders is even more important but their essential contribution is often overlooked and unrecognised. This, in particular, needs to change.

RIGHTS ADVOCACY

10 Minute School and the freedom of expression

Ragib Mahtab

ONE might wonder whether the series of death threats and abuses hurledat 10 Minute School, an online education platform, allegedly over a comment made by one of its former educators appreciating a post on pro-LGBTQ and videos relating to menstruation and sexual consent posted on its website, can invoke the constitutional debate of balancing freedom of expression against other interests.

Constitutional rights are principally considered to regulate the relationship between the individuals and the State (classical vertical approach). Had the State itself adopted measures to take down those videos from the website citing the debatable claim of hurting religious sentiments, the action could have been constitutionally challenged, like it had been done in the case of *Bangladesh Anjumane Ahmadia* v *Bangladesh* (1985) where the State itself confiscated copies of a book that were considered by the State as outrageous and offensive towards the feeling of the majority of the Muslims in the country. However, in the case at hand, the education platform was forced to take down those videos following the threats made by private individuals who believed those videos ran counter to their religious ethos. More often than not, in seemingly pseudo-legal sense, such incidents are labeled as 'clamp down on free speech and expression' which raises the most pertinent question –can the constitutional right of free speech and expression guaranteed in article 39 of the Constitution be justiciable in actions between private individuals?

This question brings to the forefront the issue of the horizontal concept of constitutional rights as opposed to that of the vertical one. The horizontality of constitutional rights implies that the Constitution, besides the State, binds private individuals as well. The inclusion of 'any person' or 'any authority' in article 102(1) of the Constitution of Bangladesh (that lays down in particular against whom remedy can be sought for infringement of fundamental rights), to a certain extent, indicates the radiating approach of the Constitution in both public and private sphere. Despite the presence of such wordings, the vertical concept pervaded the judicial decisions of Bangladesh. Nonetheless, the horizontal approach has unfolded itself steadily and incrementally over the years. It finally bloomed through the decision of *Liberty Fashion Wears Ltd* v *Bangladesh Accord Foundation and others*(2016) where the High Court Division held that a plain reading of article 102(1) of the Constitution empowers the court to give directions or orders to any person irrespective of whether he is in the service of the Republic or acting merely in private capacity for the enforcement of any aggrieved person's fundamental rights. The court's validation for enforcing a claim by a private person against another, solely based on constitutional right,was a manifestation of'direct horizontal effect.'

It appears that there has not yet been a case in Bangladesh where a claim of right of freedom of speech has been made and successfully debated by one private party against another. However, recourse can be had to the case laws from other jurisdictions. For instance, in the United States of America, in the case of *New York Times* v *Sullivan* (1964), libel suit was filed against *Times*.The Alabama jury deciding against *Times* awarded damages to Sullivan. On appeal, the US Supreme Court found the libel award violative of constitutional protection of freedom of expression. Thus, although it was a libel suit between two private parties, constitutional protection of freedom of expression successfully came to play.

In the famous *Luth case* (1958) of Germany, Eric Luth, in an open letter criticised the film director Viet Harlam for his involvement in Nazi regime and called for a boycott of the latter's new film. The producer and distributing company obtained injunction against Luth. In turn, Luth made constitutional complaint of free speech. The constitutional court, despite the matter's being between two private parties, applied 'the indirect effect of constitutional right' to hold that the injunction objectively limited Luth's right to free speech.

The theory of 'indirect horizontal effect'regards constitutional rights as 'objective system of values' capable of advancing their effects in private affairs. The preamble pledge of the Bangladesh Constitution for securing fundamental human rights and freedom for all citizens, the incorporation of the supremacy clause (article 7) and the requirement of all laws to be consistent with the fundamental rights (article 26) can be understood to inhere a similar notion of 'objective system of values' and to equip the constitutional rights with an indirect horizontal effect. This notion is considered to impose positive obligations on the State to make sure that the fundamental rights are realised in practice. In case of freedom of speech,it requires the State to create an atmosphere where the right can be exercised effectively without any fear.

The anguished question as to the State's obligation had been raised by the Indian Supreme Court in *S Rangrajan* v *P Jagjivan Ram*(1989)- "what good is the protection of freedom of expression if the State does not take care to protect it? "Itwas further stated by the court that freedom of expression cannot be suppressed on account of threat of demonstration or threats of violence and the State cannot plead its inability to handle the hostile audience problem. Till date, no substantial step is reported to have been taken against those who posted death threats on social media againstthe 10 minute school.

As discussed, the constitutional jurisprudence of Bangladesh as it stands today makes room for both 'direct' and 'indirect horizontal effect' ofconstitutional rights. The latest stance of thecourt in *Liberty Fashion* case also points towards the shift inrecognising the constitutional rights' horizontal aspect. Now it is to be seen whether the recent clamp down on the online education platform's right of free speech andexpression gets the constitutional scrutiny that it deserves under the constitutional mandate of horizontality or it gets subdued by the impulses of the majority.

THE WRITER IS ASSISTANT JUDGE, BANGLADESH JUDICIAL SERVICE.

BOOK REVIEW

MFN-Clauses in Investment Agreements and Developing Countries

SINCE the emergence of International Investment Agreements (IIAs) in 1960s, IIA regime has gone through a myriad of changes in terms of impetus and implication. With regard to number the IIA regime has grown, continuing to do so *albeit* to a lesser degree. Whereas, the impact has evolved unanticipatedly with Investor-State Dispute Settlement (ISDS) claims and their capacious, at times contradictory decisions. The inclusion of Most Favoured Nation (MFN) treatment in IIAs followed its inferences in the backdrop of international trade; however in the context of IIAs, it has evolved differently. As early treaties didnot grant National Treatment (NT) systematically, the inclusion of MFN clause was generalised in order to ensure that the host States while not granting NT would accord the beneficiary foreign investor a treatment that is no less favourable than what it accords to a third State and its foreign investors. With the jurisdictional award in *Maffezini*v *Spain*(2000) witnessing an unexpected application of MFN treatment in IIAs, a controversy espoused that has so far not found an end coupled with inconsistent decisions by arbitral tribunals.

Dr. Tanjina Sharmin, Lecturer at Faculty of Law, Monash University, in her book titled *"Application of Most-Favoured-Nation-Clauses by Investor-State Arbitral Tribunals: Implications for the Developing Countries"* examines the causes of such debates, traveling back to the root of the problem and recommending solutions based on the skeleton of clear and expressed intention of IIA parties.

The first chapter of the book introduces the readers with MFN and its implications added with the background and context of issues relating to MFN. The second chapter delves into history of MFN and discusses its origin, history and development with a focus on the drafting trends of MFN clause in first generation IIAs. The third chapter of the book allows readers to have an insight in the interpretation of MFN spinning on the existence of a set of uniform principles applicable to MFN clause in light of the 1969 Vienna Convention on the Law of Treaties(VCLT) and the 1978 ILC Draft Articles on MFN. A combined reading of the first three chapters will enable the readers to understand the intricacy of application and interpretation of MFN clause by arbitral tribunals. In terms of evolution, the author argued that initially the state parties intended to procure specific advantage through MFN clause in IIAs not importing any more favourable treatment standard from other IIAs. As such, the interpretation of MFN cannot be preconceived and cannot bypass any IIA provision.

Chapter four to six which are central to the book embrace a more doctrinal approach evaluating sixty-onearbitral decisions pertaining to substantive, procedural and jurisdictional issues of MFN. Appraising contrasting views of the tribunals, the author in chapter four rebuts the conventional view on MFN's unhindered power to 'multilateralise'substantive benefits. In chapter five, she portrays how arbitral decisions applying MFN to bypass procedural rudiments indicates a pro-investor bias against host-states. In chapter seven, the author highlights the repercussions of applying MFN to bypass consent of IIA party states conferring jurisdiction. A combined reading of these three chapters enables the readers to contextualise the mandatory language in which IIAs are drafted to consider procedural prerequisite and jurisdictional matters ousting the ambit of MFN to override them.

The book's focus on developing countries' experience in the backdrop of a pro-investor application of MFN till date will significantly guide investment hubs like Bangladesh to draft MFN clause while concluding investment agreements in a way that caters the national interest of the state as well as an ascertained interpretation of MFN in ISDS mechanism.

THE REVIEWER IS A STUDENT OF LLM, UNIVERSITY OF DHAKA.