"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

RIGHTS ADVOCACY

The use of foreign judgment in the legal system of Bangladesh

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The judicial use of international laws, judgments in formal adjudicative courts is being seen and recognised around the world to an increasing extent. This practice is not something contradictory with state sovereignty or the national legal system but must be treated liberally. In spite of being an unequivocal follower of dualism, Bangladesh is constitutionally committed to awe international laws.

The ingrained gist of Article 25 of the Constitution of Bangladesh is that Bangladesh respects both customary and conventional rules of international laws and the principles described in Article 1 of the UN Charter. In a nutshell, the constitutional provision on international law is the portraiture of *jus cogens* norms and exemplary in nature. Furthermore, section 13 of the Code of Civil Procedure (CPC), 1908 sets the foundation of conclusiveness of foreign judgments considering some exceptions mentioned thereby. Section 14 of the CPC also stipulates that the production of any documents on foreign judgments shall be presumed as it was given by a court of competent jurisdiction unless any contrary appears.

The outcome of applying foreign judgments in the national legal system is too many. This practice will make the judicial system smoother and more dynamic than as usual. Analysis of foreign judgments and principles can adhere to contemplation of national legal principles.

From a global perspective, the enforcement of the foreign judgment is basically a complex topic, governed by a variety of methods in different jurisdictions involving a mixture of bilateral and multilateral conventions and jurisdiction-specific procedural laws, rules and regulations. But in general, although often having statutes, common law systems rely more on judicial precedents, decisions that have already been given by the judges. Common law systems are not investigatory, rather adversarial in nature, with the respective judge moderating between the contested parties. As the legal system of the sub-continent inherited common law traditions and as the courts of the sub-continent never confronted the issue before decolonisation, the common law followers in the sub-continent follow the common law approach to the application of international law into national courts.

In many cases, legal representatives submit foreign judgments to support their claim and the judiciary accepts it. This acceptance is not only for ensuring utmost justice but also for stirring the legal field in the era of globalisation.

Since independence, the Supreme Court of Bangladesh has applied foreign judgments in several cases. In *Hussein Mohammad Ershad* v *Bangladesh and Others*(2001) 21BLD (AD) 69, the Appellate Division held that national courts should not overlook the international laws if there is no suitable national law in disputed issues then the court can take into consideration the principles of international instruments. In broader scenes, the international instruments can be international conventions, treaties and foreign judgments.

In the case of *Mrs. Aruna Sen* v *Government of Bangladesh* (1975) 27 DLR (HCD) 122, to prevent the detention by executive authority, the court considered the decision of *Liversidge* v *Anderson* (1942) AC 206, where Lord Atkins said that "every imprisonment without trial and conviction is prima facie unlawful". Even in the *Hussain Mohammad Ershad* and other cases, on the question of application of international obligations of sovereign states on international conventions and treaties, the court accepted the conventions and treaties.

Reaching a decision by ensuring utmost justice may not always seem unstrained to the court. In this case, international principles, foreign judgments can play a handy role. Learned judges are more likely to analyse and overlook the judicial precedents.

In Bangladeshi legal parlance, use of foreign judgments and international law principles can add a new dimension in attaining utmost justice. With the expansion and development of the economy, intellectual property rights and refugee rights, many foreign arbitral awards and precedent of foreign judgment are being considered.

Already in some of the cases, our judiciary was gracious enough in taking some noteworthy foreign judgments as strong reference. This is how the historical material source of law enriches the domain of legal jurisprudence in our country and the world at large.

It will not be wrong to say that with this development of different sectors and the disputes arising in different matters, the use of foreign judgment has been increased. Even in the near future while deciding on any issue the use foreign precedents will be increased and will be followed in the judiciary of Bangladesh.

The foreign judgments and precedents are required in different appellate trials and settlements such as cross-border business dealings, family disputes and the parties in different jurisdictions deliberate the importance of foreign statutes and judgments. Even national courts look into the foreign precedents when there is an imbalance in the laws, which makes the judiciary of a country more functional.

In the perspective of other countries, India from the beginning of independence has frequently depended on the case law from other common law jurisdictions. The judicial precedents of the United Kingdom, United States of America, Canada and Australia have been relied upon frequently.

Even in landmark constitutional cases of India, the case laws and precedents have been followed in deciding the matters, e.g. right to privacy, freedom of press and the constitutionality of the death penalty.

In *Subhash Kumar* v *State of Bihar* AIR (1991) SC 420, international instruments have been taken into consideration. Furthermore, the Court has enunciated 'right to a healthy environment' as an extension of right to life and personal liberty.

In South Africa, the Constitution has a clear provision that directs the consideration of international laws as well as foreign judgments in interpreting its Bill of Rights.

The outcome of applying foreign judgments in the national legal system is too many. This practice will make the judicial system smoother and more dynamic than as usual. Analysis of foreign judgments and principles can adhere to contemplation of national legal principles. The ideas and principles can be an effective way forward to improve judicial practice. So, the more the judges apply foreign judgments and judicial precedents, the more efficient our justice system will become.

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LAW OPINION

Rectification of share register by shareholders

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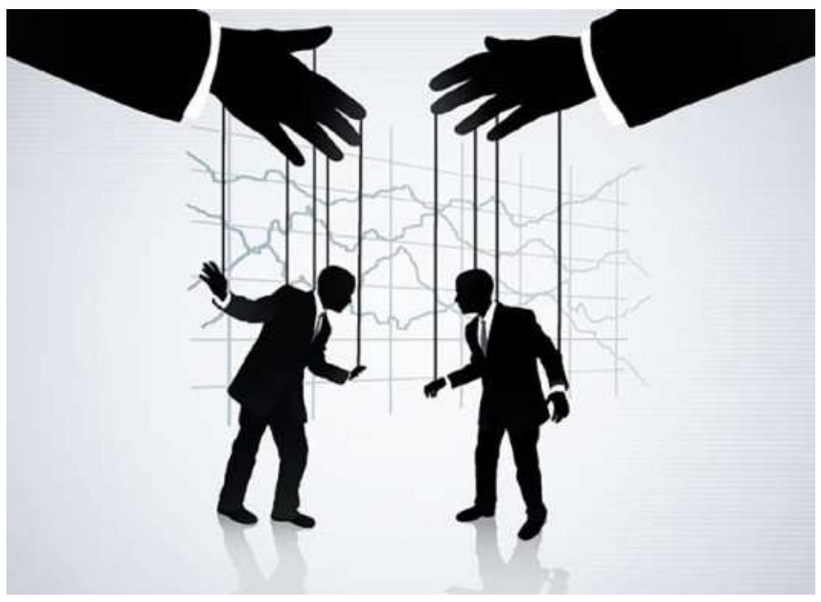
All the companies registered in Bangladesh are bound to keep a 'register of members' from the date of the registration. Such register shall be kept at the registered office of the company and allowed for inspection by the members free of cost during business hours. In case, a person's name is without any sufficient cause entered in or omitted from the register of members of a company, section 43 of the Companies Act, 1994 provides such person a remedy to resort to court for rectification. The provision, therefore, also covers scenarios arising from the company's refusal to register transfer of shares under section 38 of the Act. Court's power to rectify register under this provision is wide one, and it has the authority to decide any matter relating to the rectification of register of members of a company.

The Act accords a wide range of individual *locus standi* to apply for rectification. Accordingly, any person aggrieved or any member of the company or the company itself may apply to the court for rectification of the register. However, in applying for the rectification of the register, neither the directors of a company nor proper parties are necessary (*A. Ahad v S.M. Anwaruddin* (1966) 8 DLR 109). The same rule applies to the agents or servants of a company as well. It is only the corporation or the company that needs to be sued in its corporate name and is a necessary party.

The court may either refuse the application or may order for the rectification of the register under section 43(1)(a) of the Act. Moreover, the court has power to order the company to pay for any damages sustained by any party thereby and to make any order as to costs as it deems appropriate. While entertaining an application for rectification, the court keeps the authority to decide any question as to title of any person who is a party to the application to have his name entered in or omitted from the register. It also has the general power to decide any question necessary or expedient to be decided for rectification of the register and decide any issue involving the question of law.

In two situations the court has power to interfere to rectify the register. First, the power of court to order for rectification under the clause 'without sufficient cause' is very wide and even accords the court to allow an application for rectification if the name of a person is entered in or omitted from the register by a board not duly constituted or by a resolution of an invalid meeting of the board either for want of proper notice or otherwise (*Bangladesh Jute Mills Corporation* v *Shilpa Pratisthan Ltd. And others*10 BLC (AD) 83).



In the second situation, the court has the power to rectify when default is made or unnecessary delay takes place in entering on the register the fact of any person having become, or ceased to be, a member. What "unnecessary delay" is in entering on the register the fact of any person becoming or ceasing to become a memberis a question of fact and will mostly depend on the prescribed limitation for rectification of the of the register by the company as provided in its Articles of Association. Section 43(1)(b) of the Act mandates the court to rectify register when the company has not sent the notice of refusal to register within the time prescribed in its Articles of Association (*Matiur Rahman (Md)* v *Dhaka Stock Exchange Ltd. And another* MLR 1999 (HCD) 193).

Although, under the Act, the court has wide discretionary power to allow application for rectification share register, at times, such power may be curtailed by the Articles of Association of a company and other special laws. For example, in case of a company which also happens to be a trade organisation, court's power to rectify the register of members of such entity is subject to exhaustion of referring the matter to the Arbitration Council constituted for that purpose (Section 12 of the Trade Organisation Ordinance 1961). Similar provisions can be kept under the Articles of Association as well, and in that case court will not entertain the application unless the condition of the matter being referred to the Arbitration Council is exhausted (*Ibrahim Cotton Mills Ltd. And Others* v *The Chittagong Chamber of Commerce and Industry and Others* 1999 19 BLD 372). However, such curtailment under the Articles of Association must not be arbitrary and unreasonable. In general, directors may also have the power to refuse registration of transfer of share, but the Act contemplates such power to be predicated on judicial discretion and reasonableness (*Shoaib (Md)* v *Uttara Banl Ltd and another* 43 DLR (1991) 39). Another scenario wherein the courts are reluctant to allow application for the rectification of register is when two prayers – one being made for the winding up of the company, and the other, for the rectification of the register of the members – are made in the same application (*Ellal Textile Mills Ltd.* v *Md. Abdul Awal* 38 DLR (AD) 26).

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FOR YOUR INFORMATION

Is there a Universal Definition of Corruption?

MAHBUBUR NAZMI

Various scholars, anti-corruption researchers and international organisations define corruption in many ways. Transparency International (TI), a non-governmental anti-corruption organisation, defines corruption as the abuse of entrusted power for private gain. In its *Global Corruption Report 2007: Corruption in Judicial Systems*, the TI described private gain as financial or material and non-material gain, such as political or professional ambitions. According to the World Bank, corruption is the abuse of public office for private gain. It covers a wide range of behaviour, from bribery to theft of public funds. The Global Organization of Parliamentarians Against Corruption (GOPAC) described corruption as the abuse of public position for personal benefit or the benefit of an individual or group to whom one owes allegiance.

The United States Agency for International Development (USAID) defines corruption as the abuse of entrusted authority for private gain. According to its *Anticorruption Strategy*, corruption involves not just the misuse of public office but also other offices. The Swedish International Development Cooperation Agency (SIDA) refers to corruption as the abuse of trust, power or position for inappropriate gain. Corruption includes, among other things, bribery, extortion, embezzlement, conflict of interest and nepotism etc. In its corporate policy paper, *Fighting Corruption to Improve Governance*, the United Nations Development Programme (UNDP) defined corruption as misusing public power, office or authority for personal benefit. While corruption is often considered immoral for public servants, it also predominates in the private sector. Moreover, the European Union (EU), the International Monetary Fund (IMF), the Organisation for Economic Co-operation and Development (OECD), the Asian Development Bank (ADB) and the U4 Anti-Corruption Research Institute offer definitions of corruption as the misuse of public or private office for private gain.

Although we have observed several institutionalised and operational definitions of corruption, the United Nations Office on Drugs and Crime (UNODC) states that there is no single, comprehensive and universally accepted definition. It is challenging to formulate such a universal definition due to legal, criminological and socio-political problems. Likewise, the Council of Europe's Group of States against Corruption (GRECO) and the Global Infrastructure Anti-Corruption Centre (GIACC) suggest that no precise definition exists that provides all forms, types, and degrees of corruption or would be accepted internationally.

Interestingly, the United Nations Convention Against Corruption (UNCAC), a legally binding multilateral treaty with 140 signatories and 188 States Parties, does not define corruption. Like UNCAC, several regional anti-corruption

instruments, e.g. the Council of Europe Criminal Law Convention on Corruption, the African Union Convention on Preventing and Combating Corruption, the Inter-American Convention Against Corruption, the Arab Anti-Corruption Convention, and the OECD Anti-Bribery Convention do not prescribe a single definition of corruption. Instead, these conventionslist and describe a series of corrupt acts, e.g. bribery, embezzlement, money laundering, extortion, illicit enrichment, concealment of property and obstruction of justice, that the states parties should criminalise within their jurisdictions.

Many academics and researchers, including Alina Mungiu-Pippidi and Mihály Fazekas, argued that measuring corruption is vital for policy-driven intellectual effort. Nevertheless, there can never be a single definition of corruption, so measuring it in different sectors mostly depends on the interest embedded in the measurement to satisfy the essential elements of a definition. They also claimed that each definition should suit its specific governance contexts, such as democracy or autocracy. Graham Brooks and David Walsh suggested that due to various forms and functions in diverse contexts, providing an unequivocal definition of corruption remains elusive and challenging for anti-corruption activists, policymakers and law enforcement agencies. According to Giulia Mugellini, the concept of corruption is broad, and there is no consensus on a standard and exhaustive definition. The complexity of corruption cannot be understood through a unidimensional definition but with a multidisciplinary approach. This is true when discussing corruption's conceptualisation and definition, specially when dealing with its measurement and policing.

While trying to understand the main features of the definitions described earlier, we found that most of them contain western notions, leading to arguments for their applicability and effectiveness in non-western societies and less-developed states. Some definitions are narrow, whereas some are broad, intricate to comprehend and apply equally in all societies. Besides, the nature and practice of corruption are also constantly shifting. Culture, tradition, societal structure, socio-legal environment, and political governance play a significant role in advancing and combating corruption in a country. Anti-corruption institutions and campaigners preferably choose a definition that fits their operational or policy purpose. However, definitions are essential, no matter the aim. Hence, we think it is fair to have a unique and conclusive definition of corruption; the question is, who will endorse the definition, and how will it be universally accepted?

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