LAW OPINION

& BANGLADESH *The Gambia v Myanmar*

There is no reason as to why Bangladesh should not at least attempt to apply under Article 62 when its stakes are extremely high. Bangladesh cannot expect The Gambia or any other country to plead its case before the Court.

KHAN KHALID ADNAN

The Gambia initiated a contentious proceeding in the International Court of Justice (ICJ) on 11 November 2019 bringing allegations of violations of the Genocide Convention 1948 against Myanmar. The Court has already held that it has jurisdiction to try the case under Article IX of the Genocide Convention (Judgment on Preliminary Objections, 22 July 2022, para 89). Undoubtedly, Bangladesh has an interest in the outcome of *The Gambia* v *Myanmar* case. Nonetheless, it is unfortunate that Bangladesh has not yet attempted to effectively engage with this proceeding. As Bangladesh is not a disputing party, the only way for Bangladesh to get involved is by way of intervention either under Articles 62 or 63 of the Statute of the Court.

Article 63 is basically an interpretative intervention tool providing an opportunity to third states to protect their common collective interests within the bilateral framework of dispute resolution. This was one of the least used provisions of the Court's Statute until *Ukraine* v *Russia* (2022) where 33 states being parties to the Genocide Convention submitted their declarations of intervention. In the latest order dated 5 June 2023, the Court decided on the admissibility of these declarations finding all of them to be admissible so far as they concern the interpretation of Article IX and other provisions of the Genocide Convention except for the declaration by the US. The declaration by the US was held to be inadmissible due to its reservation to Article IX (paras 93-99). The massive intervention in *Ukraine* v *Russia* is encouraging for *The Gambia* v *Myanmar* case due to the involvement of the same Genocide Convention in the latter. However, following the Court's order, Bangladesh will not be able to intervene under Article 63 because of its reservation to Article IX of the Genocide Convention which resembles the US reservation.

The Gambia v *Myanmar* case having initiated in November 2019 witnessed no intervention requests whereas the *Ukraine* v *Russia* case with the initiation date of February 2022 has already witnessed 33 interventions. Despite repeated assurances by Canada and the Netherlands to submit their joint declaration of intervention in *The Gambia* v *Myanmar* case, their commitments remain unfulfilled to date. This in a way represents the diplomatic failure on part of The Gambia, Bangladesh, and other interested states to collaborate. As the case has entered the merits phase, it is high time that Bangladesh utilised its diplomatic relations with other countries.

The purpose of intervention under Article 62 is protective, covering only an "interest of a legal nature." The principal challenge for Bangladesh will be to demonstrate the interest of a legal nature capable of being affected by the Court's decision. Moreover, the Court's jurisprudence on Article 62 indicates an extremely restrictive approach. However, the following observations might be beneficial from the perspective of Bangladesh. Firstly, in *The Gambia* v *Myanmar*, the Court already acknowledged the large influx of members of the Rohingya group faced by Bangladesh (Judgment on Preliminary Objections, 22 July 2022, para 113). Secondly, The Gambia, amongst others, sought relief directing Myanmar to perform the obligations of reparation by allowing safe and dignified return of the forcibly displaced Rohingyas. The granting or not granting of this request by the Court will carry significant consequences for Bangladesh as directly affected by the huge influx. Thirdly, the growing trend of compensation culture developed by the Court in recent years will certainly add new dimension to this case if Myanmar persistently breaches the provisional measures earlier issued by the Court. Finally, with provisional measures against Myanmar already in place, the Court's judgment in rejecting Myanmar's preliminary objections might give a hint as to what might be coming. The parallel progression of the *Ukraine* v *Russia* case with similar theme also distinctly points towards an outcome favourable to The Gambia.

Although, it is already late to apply under Article 62 of the Statute considering the time frame of Article 81 of the Rules, Bangladesh may be able to satisfy the "exceptional circumstances" requirement. The Court is likely to accept this as Bangladesh lacks substantive experience with international proceedings (of such stature and nature). If Bangladesh does not get involved in the proceeding, even a judgment favourable to The Gambia may not practically benefit Bangladesh. There is no reason as to why Bangladesh should not at least attempt to apply under Article 62 when its stakes are extremely high. Bangladesh cannot expect The Gambia or any other country to plead its case before the Court.

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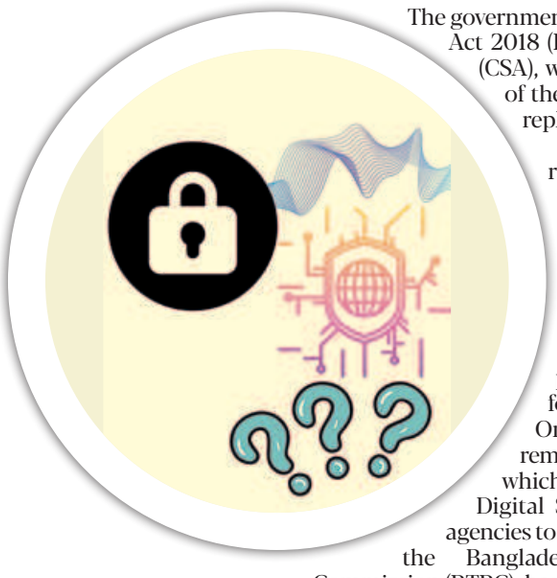
FOR YOUR INFORMATION

What does the proposed Cyber Security Act offer?

TASNIM BINTE MAKSUD



The government is all set to replace the Digital Security Act 2018 (DSA) with the Cyber Security Act 2023 (CSA), which offer some changes in some parts of the current law. The cabinet approved this replacement in principle on 7 August.

The DSA underscores quite a wide range of offences as cognisable and non-bailable, which is one of the most widely criticised features of the Act. In the CSA, the main differences are that some non-bailable offences under the DSA have been made bailable— punishments for some offences have been reduced—fines have been increased—and the provision for additional punishment for repeated offences has been omitted. On the contrary, sections 8 and 43 have remain unchanged. Section 8 of the DSA, which empowered the director-general of Digital Security Agency and law enforcement agencies to remove or block digital content through the Bangladesh Telecommunication Regulatory Commission (BTRC), has been retained in the CSA. Similarly, the police's authority to search and arrest without a warrant under section 43 of the DSA has been kept intact under section 42 of the CSA, which is deeply worrying.

The most significant changes under the CSA are shown in the chart for a clearer picture-

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OFFENCES	PENALTY IN THE DSA	PENALTY IN THE CSA
Section 21: Propaganda against the spirit of the Liberation War, the father of the nation, the national anthem, or the national flag	Ten-year imprisonment	Seven-year imprisonment
Section 28: Offence of hurting religious sentiments	Five-year imprisonment (non-bailable offence)	two-year imprisonment (bailable offence)
Section 29: Defamation in the context of news coverage	Three-year imprisonment	No imprisonment, a maximum fine of Tk 25 lakh will be imposed, three to six-months jail in default of payment
Section 31: Destroying communal harmony	Seven-year imprisonment	Five-year imprisonment
Section 32: Disclosing official secrets	Fourteen-year imprisonment	Seven-year imprisonment

LAW LETTER

Minimum age of criminal responsibility: A Quandary

SADIKA NOUSHEEN

Against multiple sensational crimes involving the juveniles, recommendations at times are put forward to amend the Children Act, 2013, among others, to lower the age limit that qualifies an individual as juvenile. In this piece, I argue that lowering the minimum age of criminal responsibility would potentially undermine the main purpose of the 2013 Act that makes specific reference to the United Nations Convention on the Rights of the Child (UNCRC) and is expected to uphold the Convention's spirit.

Article 1 of the UNCRC considers any individual below the age of 18 years as a child. Section 4 of the Children Act aligns with international standards by categorising individuals under 18 as juveniles.

However, in Bangladesh, the minimum age of criminal responsibility remains 9 years, as per section 82 of the Penal Code, 1860. This is below the minimum age of criminal responsibility (12 years or higher) as recommended by the United Nations Committee on the Rights of Child (UNCRC).

The determination of age is an important starting point that decides jurisdiction and other procedures to be followed in a court of law trying juveniles. According to section 20 of the Children Act, the offender's age at the time of the offense will determine whether that person shall be dealt with under this Act or not. Whenever any juvenile commits a heinous crime punishable with death or imprisonment for life, the Children's Court may mandate detention of the juvenile in a Child Development Centre (CDC) for up to 10 years. If a juvenile offender is still on trial when she/he becomes 18, the CDC authorities can send her/him to jail with the Court's approval. However, such offenders are to remain separated from the convicted and the undertrial offenders.

Lowering the threshold of minimum age of criminal responsibility by amending the law would result in retributive justice. This would defeat the very purpose of saving the juveniles from getting tangled up in the maze of criminal justice system.

The separation of the general criminal justice system from the juvenile justice system itself marks an essential feature of the Act. The former follows a deterrent approach which is inappropriate for juveniles with insufficient physical and mental maturity to take responsibility for their crimes. Deterrent approach tries to instill fear of consequences to prevent crimes. The socio-economic backdrop of a juvenile committing a crime gets ignored in the process. Such strategy may stigmatise the juveniles, whereas restorative approaches can allow the delinquent juvenile to own up to their circumstances and behavior, take responsibility for the actions, and learn from their lived experiences.

Presently, the Children Act ensures punishment while separating judicial procedures and facilities, which improves the possibility of rehabilitation, while preventing them from becoming threat to the society. The Beijing Rules provide that states should appraise the facts of emotional, mental, and intellectual maturity and abstain from setting age limit too low. The UNCRC places an obligation on the states to ensure the survival and development of the children to the maximum extent possible. Lowering the threshold of age by amending this Act would result in retributive justice rather than restorative and reformative justice. This would defeat the very purpose of saving the juveniles from getting tangled up in the maze of criminal justice system.

Exceptional instances and public pressure shouldn't lead to counterproductive criminal justice tactics. The Beijing Rules allows states margin of appreciation to make special provisions for grave offenses. Countries like the UK, Australia, and the US have done so without compromising the minimum age threshold. Such an approach might be appropriate instead of lowering the threshold of age which may affect a larger section of juveniles negatively as well as disproportionately. A balance between accountability and rehabilitation is essential, considering broader societal welfare.

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