

LAW AND POLITICS

The politics of recognition and Bangladesh's statehood

Following the surrender of the Pakistani army to Bangladesh on 16 December 1971, after the bloody war of nine months, the ultimate victory was attained. After quite a hiatus, the USA recognised Bangladesh on 4 April 1972. Many countries had recognised Bangladesh as an independent state by then. The main cause underlying USA's delay in recognising Bangladesh may be traced back to unscrupulous international politics existing at that time.

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Following the surrender of Pakistani army to Bangladesh on 16 December 1971, after the bloody war of nine months, the ultimate victory was attained. After quite a hiatus, the USA recognised Bangladesh on 4 April 1972. Many countries had recognised Bangladesh as an independent state by then. The main cause underlying USA's delay in recognising Bangladesh may be traced back to unscrupulous international politics existing at that time. More specifically, the politics of the Cold War between the USA and the USSR had a significant impact on the overall climate surrounding the emergence of Bangladesh as an independent state. Despite meeting all requirements of statehood under international law, Cold War politics unnecessarily prolonged Bangladesh's wait for state recognition from several states.

The criteria of statehood under international law have been stated in Article 1 of the Montevideo Convention on the Rights and Duties of States of 1933. It entails that a state ought to have a permanent population, defined territory, government, and capacity to enter into relations with other states. However, meeting the legal requirements outlined above does not ensure that an entity will be recognised as a state; rather, state recognition is contingent upon political considerations. In this regard, Opinion No. 10 of the Conference on Yugoslav Arbitration Commission in July 1992 stated that recognition is a discretionary act that other states may perform when they choose and in the manner of their choosing, subject only to compliance with the imperatives of general international law. For instance, the USA declined to recognise North Korea and the People's Republic of China due to political



considerations rather than their failure to meet statehood requirements under international law.

In fact, the USA applied the same policy with regard to recognising Bangladesh. Due to its Cold War

conflicts with the Soviet Union over Bangladesh's independence, the USA not only delayed in recognising Bangladesh until 4 April 1972, but also persuaded other states to that end. The countries so persuaded including

Turkey, Saudi Arabia, and China, recognised Bangladesh after 4 April 1972. Among these countries, Pakistan and Turkey recognised Bangladesh on 22 February 1974. The recognition of Saudi Arabia and China to Bangladesh

came on 16 and 31 August 1975, respectively.

On the other hand, in this regard, the USSR's influence can be seen in the fact that most Warsaw Pact countries recognised Bangladesh following the war. In fact, East Germany, Poland, Ukraine, Yugoslavia, and the USSR were among those states that recognised Bangladesh's independence before other states did. Indeed, most of the 44 states that recognised Bangladesh until the USA did so on 4 April 1972, were members of the Soviet bloc and its allied nations.

The differences of opinion among the states over whether or not to recognise Bangladesh could raise serious concerns about whether or not Bangladesh satisfies the requirements set forth by international law to be recognised as a state. However, the fact that recognition is predicated more on political considerations than legal ones, helps clarify Bangladesh's status of statehood even prior to recognition from states such as the USA, since Bangladesh met all the legal criteria as enshrined in Article 1 of the Montevideo Convention. Bangladesh had a permanent population of about 70 million, a defined territory of 147,000 square kilometres, a government headed by Tajuddin Ahmad in absence of the Father of the Nation, Bangabandhu Sheikh Mujibur Rahman, and the ability to engage in relations with other states (as evidenced from the joint forces agreement signed by the government-in-exile of Bangladesh with India on 4 December 1971. Despite meeting all the legal criteria of statehood, the non-recognition of Bangladesh by the USA and its allies can be explained as manifestation of their political calculations.

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LAW OPINION

The principle of comity of courts and child welfare in custody disputes

The principle of comity of courts must be implemented universally to ensure that the judicial decisions are enforced and respected. The effective application of the comity of courts principle plays a significant role and contributes to the development of the shared respect for judicial decisions and the rule of law.

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The principle of comity of courts is closely connected with the effective and efficient administration of justice throughout the world. This principle has been playing a vital role in solving disputes between parents of mixed nationalities regarding custody of minor children. The principle is essentially a principle of self-restraint applicable when a foreign court has already given a definite ruling regarding a dispute, before institution of suit in a domestic court. At that juncture, it is imperative for the domestic court to restrain itself from trying the suit afresh, rather render sufficient assistance to the pre-existing order of the foreign court.

There may be situations where the foreign court though seized of the issue, omits to pass any substantive order first, and rather the domestic court passes a substantive order in a suit instituted afterwards regarding the same issue in such case, the foreign court ought to exercise self-restraint. This principle is known as the First Strike principle. In *Surya Vadan v State of Tamil Nadu* (2015), the respondent had initiated divorce proceeding in India before the custody proceeding was initiated by the appellant in the United Kingdom (UK). The foreign court passed a substantive order on the custody dispute before the domestic court. In this case, the court held that if the jurisdiction of the foreign court is not in doubt, the First Strike principle would be applicable. That is to say that due respect and weight must be given to a substantive order prior in point of time to a substantive order passed by another court (foreign or domestic). But this principle has been whittled down by the *Nithya Anand Raghavan v State of NCT of Delhi* (2017), where the Indian Supreme Court took the opposite view. The



court argued that if the First Strike principle is given due weight, the principle of welfare of the child would be ignored.

This may well happen in a case where a person resident of C State gets married to a person resident of D State and together, they reside with their child in the E State. In such a situation, the family court having the most intimate contact with the child i.e., the court of the E State may find its orders not being given due respect by a family court of the first or the second states. This issue has been discussed in *Smt. Surindar Kaur Sandhu v Harbax Singh Sandhu* (1984), where the court held that jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child whose custody is in issue is brought or for the time being lodged. To allow

the assumption of jurisdiction by another state in such circumstances will only result in encouraging forum-shopping.

Though the court tends to prefer the comity of courts, the welfare of children may override the principle of comity of courts. If an interlocutory order passed by a foreign court has to be disregarded, there must be some special reason for doing so. The court emphasised the minor's welfare over the comity of courts in *McKee v McKee* (1950), where the Supreme Court of Canada held that the order of the foreign court may yield to the welfare of the child. Again, in *Surya Vadan* case, the Supreme Court of India opined that if an interlocutory order passed by a foreign court has to be disregarded, there must be some special reason for doing so.

At first sight, the principle of the comity of courts and the principle of

the welfare of the child may appear to be two contrasting principles. Of the two principles, the court usually places greater reliance upon the principle of comity of courts. In the cases of determining child custody, the court sometimes gives preference to the welfare of the child as the interest of the minor is always of paramount concern. But the court has to balance between these two principles keeping in mind the best interests of the child.

In *Shilpa Aggarwal v Aviral Mittal* (2010), the appellant and respondent were citizens of the UK and a child was born in their wedlock. Soon after the birth of the child the mother along with her minor child flew to India and refused to return to the UK. The respondent father thereupon initiated proceedings before the High Court of Justice, Family Division, UK and obtained an order directing the

appellant to return the minor child to the jurisdiction of the UK court. Then the father filed a writ petition of *habeas corpus* before the Delhi High Court and obtained an order directing the mother to take the child on her own to the UK and join the proceedings before the UK court. The appellant mother then filed an appeal to the Supreme Court of India challenging the order of the Delhi High Court, but in vain.

In the landmark case of *Elizabeth Dinshav v Arvand M. Dinshav and Ors.* (1987), the Supreme Court of India put emphasis on the welfare of the child and held that the first respondent returning the minor child to the USA would best serve the interest of the child. In such cases, the foreign court having the most intimate contact with the child would be a better place to appreciate the social and cultural milieu in which the child had been brought up. By resorting to this approach, the court usually seeks to strike a balance between the two principles.

In the *Surya Vadan* case, the Supreme Court of India refused to put reliance on the *McKee* case arguing that the Privy Council was not dealing with the interlocutory order but a final adjudication. From this view, it can be understood that section 13 of the Code of Civil Procedure 1908 is applicable in situations where a full-fledged judgment has been pronounced by a court of competent jurisdiction. After all, the principle of comity of courts must be implemented universally to ensure that the judicial decisions are enforced and respected. The effective application of the comity of courts principle plays a significant role and contributes to the development of the shared respect for judicial decisions and the rule of law.

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