LAW OPINION

Between blasphemy and sedition

Parity of justice for freedom of expression

KAWSAR MAHMOOD

Although in postmodern values, both ideas of religion and nationality are disregarded as subjective truth, which exist only in the psychological realm; historically, people of this subcontinent demonstrated affinity for the homeland and fostered devotion for their deity at the same time. They fought for political autonomy but managed to successfully subdue various forms of communal discord within the territory. The reflection of their history can also be seen in the Penal Code 1860, which sanctioned blasphemy and sedition in sections 124A and 295A, respectively. But imperceptibly, the country has been indoctrinated towards a new trend that the presentation of piety and celebration of patriotism cannot coexist in our democratic dynamics. Faithwears are often regarded by many as a threat to the body politic. In contrast, a revulsion against symbols of statehood, such as the flag and the national anthem, is on the rise.

This trend began with a deliberate attempt to confuse the cognitive orientation of the general mindset about the idea of "freedom of expression". It is the author's opinion that the ruling class recognised that if the offence of blasphemy and sedition could be adulterated, a controlled altercation among the citizens would ceaselessly continue. Thus, they will be able to manipulate public debate and subtly subjugate judicial oversight of the "inalienable constitutional right".

The ruling class recognised that if the offence of blasphemy and sedition could be adulterated, a controlled altercation among the citizens would ceaselessly continue. Thus, they will be able to manipulate public debate and subtly subjugate judicial oversight of the "inalienable constitutional right".

Originally, Article 39 of the Constitution guarantees the freedom of "thought and expression," which is, however, "subject to [certain] reasonable restrictions". Restriction is reasonable if it is imposed by law, *inter alia*, in the interests of public order, or to prevent criminal incitement. Because one's unfiltered opinion cannot completely ignore the social setup in which our audience is addressed, Article 39 justifiably attempted to reconcile the right and the responsibility to look after the effect of its exercise.

Later, the Information and Communication Technology Act 2006 (ICTA) and the Digital Security Act 2018 (DSA) came to the forefront. Section 57 of the ICT Act criminalises the publication of any material that prejudices the image of the State or person or creates any possibility to hurt religious belief. The question popped up— what is the test to determine 'level of the image' and the 'magnitude of the hurt' to call an expression an offence? Judicial review was expected to safeguard the sacredness of free speech, yet, by this stage, it was predisposed to unprecedented legal philosophies.

As a general rule, an act is considered an offence if it is committed with malicious intention and causes some detectable harm. But in the digital era, the subjective reaction of the person at the end of the communication became an all-important element. One High Court Division Bench felt "shocked and humiliated" by a documentary titled "All the Prime Minister's Men". It declared in the case *Md. Anamul Kabir Emon* v *Bangladesh and Ors.* [WP No. 1839 of 2021] that "when millions of people across the globe have viewed the documentary and made adverse comments on it obviously demeaning the dignity and honour of the highest authority of the republic." Again, one host Khadijatul Kubra was charged under the DSA for "anti-government propaganda and tarnishing the country's image" because her guest in an interview spoke against the government. The Appellate Division of the Supreme Court of Bangladesh was reported to have said that "being a university student Khadiza [no matter she is a minor] has to bear the liability of any comments her interviewee may makes." [voabangla.com, 10 July 2023]

With the advent of the DSA and ICTA, a way to curb the constitutional guarantees was laid out. The process commenced with the creation of a delusion as to the concept of freedom of expression. All of a sudden, everyone felt intimidated by the views of everyone else. That resulted in a muted hostility between theology and civics. An infatuation, in turn, for socio-political wrangling engulfed social media and the internet. Sometimes, the suppressed feelings of antipathy to one another erupted into volcanic resentment.

In such a course, pretext was found to curtail freedom of expression by making draconian laws. Under a pretentious justification for ensuring public order, a popular mandate for the legislation was managed. A textbook exemplification of the warning given in *Turner Broadcasting System* v *FCC* (1994) that "Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion" could be seen.

The salvation from such statutory clutches lies in the true notion of the freedom of expression and balancing between individual rights and the community interests. The whole enigma is explained in the works of philosopher Jean-Jacques Rousseau. We suspend the peripheral practices of the freedoms in order to save their core existence. Unless the urge for unfettered freedom is restrained by ourselves, nobody is actually free except the ones who sits under a powerful tree and has the reign in their hands.

The writer is Assistant Registrar (Assistant Judge), High Court Division, Supreme Court of Bangladesh.

CONSTITUTIONAL LAW

The enforcement of unenforceable constitutional rights

ABUZAR GIFARI

In 1937, Ireland, for the first time, incorporated the Economic, Social and Cultural (ESC) rights in its Constitution as unenforceable directive principles. Countries such as India and Bangladesh followed the same model in their respective Constitutions. However, there has been a ubiquitous practice by the Courts of these countries to interpret the Civil and Political (CP) rights (*e.g.,* the 'right to life') in such an extended manner by which several ESC rights, despite being textually unenforceable, have been enforced indirectly. In my view, such an interpretation is immensely problematic and rather, an amendment of Article 8(2) of the Constitution is required.

It is traditionally believed that the enforcement of ESC rights implies the imposition by the judiciary of positive obligations on the executive. In other words, giving a positive mandate to the Government often involving budgetary implications is considered to be the main way of 'enforcement' of such rights. For instance, a judicial order to rehabilitate victims of arbitrary eviction, or a mandate to manage necessary food supplicants for a petitioner, etc. are considered enforcement of ESC rights.

In this regard, the true scope of 'judicial review' should also be reconsidered. The doctrine of judicial review does not only encompass the power of the Court to strike down a law inconsistent with the Constitution but also includes the power of judicial scrutiny. Thus, the Court may find a right judicially enforceable, but it may not always direct the government to take positive actions. Rather, it has the power to determine, based on the

'reasonableness doctrine', whether the applicant is eligible to get the said order.

The case of South Africa is illustrative in this regard. The Constitution of South Africa (1998) made all rights (both ESC and CP) enforceable, and the Courts of South Africa played a pivotal role in enforcing them. For instance, in the *Soobramoney* v *Minister of Health* (1997) case, the Court denied access to emergency medical care from the state hospital considering resource constraints, although the right to health care was enshrined in Article 27 of the Constitution. On the other hand, in the *Minister of Health* v *Treatment Action C*ampaign (2002) case, the Court directed the government to make the Nevirapine vaccine available where they are required. Thus, the two cases show how the South African Courts have used judicial scrutiny to enforce ESC rights without breaching the doctrine of separation of power.

Clearly, the framers of the Constitution of Bangladesh in 1972 did not intend to enforce ESC rights as 'right to health care' through the umbrella term of 'right to life'. They had deliberately excluded the enforceability of the ESC rights contained in Part II of the Constitution under Article 8(2). Such a decision was inevitable due to the then persisting vulnerable economic situation of the country.

Besides, ESC rights were deemed unenforceable in the 1970s due to the absence of any enforcement mechanisms of the International Covenant on the Economic, Social and Cultural Rights at that time. But in 2013, such normative inconsistency was removed with the adoption of an Optional Protocol to the ICESCR. Many countries, such as South Africa, have made ESC rights enforceable subject to resource constraints and progressive realisation.

In fact, members of our constituent assembly did not intend to be keep ESC rights unenforceable forever. Tajuddin Ahmed, for instance, stated in the Constituent Assembly that the future parliament may take decisions on their enforceability. Since the situation has changed and the country's economy has become economically stronger than in 1971, the parliament may now amend Article 8(2) and make Part II of the Constitution enforceable subject to resource constraints progressively.

Therefore, in every consideration, ESC rights should be made enforceable through parliamentary amendment to align with the current global trend and 'judicial enforcement' must be understood as 'judicial scrutiny' for actual enforcement of those rights.

In every consideration, Economic, Social and Cultural rights should be made enforceable through parliamentary amendment to align with the current global trend and 'judicial enforcement' must be understood as 'judicial scrutiny' for actual enforcement of those rights.

Without expressly making ESC rights enforceable, it is submitted that their indirect enforcement through the 'right to life' can be regarded as one kind of deception on the constitution.

The writer teaches law at Presidency University, Bangladesh.

LAW ADVOCACY

A review of tobacco control laws in Bangladesh

FAIYAZ HASAN

The tobacco epidemic is one of the biggest public health threats the world has ever faced. According to the World Health Organisation (WHO), smoking kills nearly 8 million people yearly, while secondhand smoke causes another 1.3 million deaths annually. Despite this horrific number, it is shocking that our government is not taking this issue more seriously. It needs to be noted that Bangladesh ratified the WHO Framework Convention on Tobacco Control (FCTC) in 2004 in order to discourage smoking and using tobacco products. In line with the FCTC, the Government of Bangladesh enacted the Smoking and Use of Tobacco Products (Control) Act 2005, with several key amendments in 2013. However, despite these, widespread lack of awareness and enforcement of the laws has led to a significant gap between legal provisions and the actual reality.

Most people do not even know that smoking in public places is totally prohibited in Bangladesh due to such non-enforcement. Additionally, the sale of tobacco products to underaged individuals persists, despite being explicitly forbidden in the law. The failure to effectively implement these laws undermines public health objectives and the protection of vulnerable populations.

According to section 4 of the Smoking and Usinge of Tobacco Products (Control) Act, 2005, no person shall smoke in public places and in the public vehicles. Any individual found contravening this provision is liable to a penalty, with a fine not exceeding three hundred Taka for the first offence and for repeated offences, the fine will increase. Similarly, according to section 6A, the sale of tobacco or tobacco products to any person under the age of eighteen years has been prohibited, with a penalty up to five thousand Taka in case of contravention for the first time, and for repeated offences, the fine will increase.

To effectively protect public health, it is crucial for the government to not only enact laws but also ensure the proper implementation of such laws. A combined approach involving stricter enforcement, public education, and legislative reforms is necessary to close the gap between the law and its real-world application.

On the other hand, under section 9 of the Act, the authorised officer has the right to enter and inspect into any public place or vehicle for the purpose of carrying out the provisions of this Act. Also, according to section 14, no court can directly take cognizance of any offence under this Act unless the authorised officer files a written complaint. Thus, the exorbitant power given to the officers compared to that of the Court robs people off the access to justice and further aggravates the state of enforcement of the law.

Additionally, mobile courts are vested with the authority to enforce provisions related to the Act. However, the mobile courts have not been regular in taking actions against such violations until recent times. This absence of enforcement further contributes to render the Act ineffective and undermines its objectives. Furthermore, according to section 15A, a National Tobacco Control Cell has been established in 2007, but its overall effectiveness remains questionable.

Additionally, a major problem with the current law is that it does not impose any explicit restrictions on the use, advertising, promotion, sponsorship, or packaging, and labeling of 'e-cigarettes'. Although recently the Government has issued a ban on the import of e-cigarettes and electronic nicotine delivery systems, the efforts remain insufficient unless the existing Act is amended to include provisions that explicitly prohibit the use of e-cigarettes, along with comprehensive regulations governing their advertising, promotion, sponsorship, and labeling.

Hence, to effectively protect public health, it is crucial for the government to not only enact laws but also ensure the proper implementation of such laws. A combined approach involving stricter enforcement, public education, and legislative reforms is necessary to close the gap between the law and its real-world application.

The writer is law student at American International University-Bangladesh (AIUB).