LAW *opinion*

Citizens' concern over appointment of judge in Supreme Court

ANISUR RAHMAN

WHETHER Mr. Justice Syed Shahidur Rahman will be proved guilty or not before the Supreme Judicial Council is not our concern. Our question is how he got appointment having an allegation of misappropriation of funds of the Supreme Court Bar Association while he was office bearer of the association. Mr. Rahman was appointed as the judge of the highest court of the country on April 24 despite protest from various quarters including the senior lawyers of the Bar. It is not new here that the opposition protests every decision of the government including the appointment of judges in the Supreme Court. But for the first time corruption charge was raised not only by the opposition lawyers but also by the senior lawyers of the court against a person going to appointed as the judge of the Supreme Court, the last resort to justice. But the government did not pay any head to the allegation and appointed him at the cost of dignity of the court.

Loopholes in appointment procedure

Actually our constitutional provisions for the appointment of justice are not sufficient to spare from the government to appoint a person loyal to it. A person who has been practising law in the Supreme Court for ten years or who has been performing judicial functions in the territory of Bangladesh for ten years may be appointed as judge of the Supreme Court by the president. Here lies some loopholes for the government to manipulate the appointment procedure.

Firstly, it is not mentioned here that such person must have regular practice in the court. One may get enrollment in the Supreme Court by passing an enrollment examination. And after ten years he may get appointment as the judge of the court without having good record of practicing law if he is in the good book of the government.

Secondly, the Constitution does not define the term 'judicial officer'. According to the decision of the Masdar Hossain case (Secretary, Ministry of Finance Vs Md. Masdar Hossain, 20 (2002) BLD, AD) only the person who performs the judicial functions will be treated as the judicial officer. One who is the secretary of the Ministry of Law, Justice and Parliamentary Affairs shall not be treated as the judicial officer. But last time an officer of the law ministry was appointed as the judge of the Supreme Court which is clear violation of the directions of the abovementioned case.

Thirdly, the president is entrusted with the sole power to appoint judges in the Supreme Court. There is no check and balance on it. In our original Constitution of 1972 there was a provision for consultation with Chief Justice in the matter of appointment of judges in the Supreme Court which is out dated by the constitutional fourth amendment. And now the president has the unfettered power to appoint judges in the highest court which may be influenced by the decision of the government. Because, in our country decision of the president merely derails from the decision of the party in power. Although it is said that there is a convention that president should consult Chief Justice before exercising his power in appointment of judges, but it has no binding force.

Legacy of the Masder Hossain case

The decision of the Masdar Hossain case (Secretary, Ministry of Finance Vs Md. Masdar Hossain, 20 (2002) BLD, AD) emphasised on the independence of the lower judiciary as the appointment and other issues of the judicial officers of the lower judiciary are dealt by the executive. The judgement advocated for a Judicial Service Commission instead of the executive authority to deal with matters including appointment. Ok. It is alright that the appointments and other matters of the lower judiciary will be dealt by the Judicial Service Commission. What will be of higher judiciary?

It is already assumed that our higher judiciary i.e. the Supreme Court is independent in exercising its duty. " Judicial independence involves both individual and institutional relationships: the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative relationships to executive and legislative branches of government" (Walter Valente Vs Her Majesty the Queen, 2 R.C.S. 1984, Masdar Hossain Case). It seems that our Supreme Court has the individual independence as the tenure of its judges is secured by the Constitution. But does it has the institutional independence? Can we say that the Supreme Court is institutionally independent when its judges who are the part and parcel of the court are appointed only by the executive decision i.e. the president and the court or the Chief Justice has no role to play?

May be Mr. Rahman was appointed as the allegation against him was subject to adjudication and Constitution does not prohibit such appointment. But such type of practice must be stopped to keep the highest judiciary beyond question. So the appointment procedure of judges of the Supreme Court should be changed and the sole power of the president should be shared. An Appointment Council represented by members of the opposition, civil society and obviously by the government may be introduced to make appointment in the Supreme Court more transparent. Because it seems that the judge of the Appellate Division who is in the good book of the government is appointed as the Chief Justice. Therefore consultation with Chief Justice is no more acceptable as there is a possibility of government interference in his decision making. Opposition's voice is always ignored in every appointment of the important posts of the country. This habit should give up. Supreme Court had the chance to give direction to the government in this regard in Masdar Hossain case, but ignored.

The Supreme Court had another option at least to direct the legislatures to revive the provision of "consultation with chief justice" in the matter of appointment of judges of the highest court, which was in the original Constitution. Independence of judiciary is the basic structure of the Constitution which is not attainable without participation of the Chief Justice in the appointment procedure. Therefore, re-introduction of the provision of the original Constitution will ensure the participation of the court in appointment procedure of its judges. And the highest court left it in a limbo.

Concluding remarks

The allegation of corruption against Mr. Rahman is to be investigated by the Supreme Judicial Council for the first time in the history of Bangladesh. And for the very reason all of us turn to the matter. But we must not avert from the main weakness of the Constitution, the appointment procedure of the judges of the highest court. It will be a blunder to expect independent and transparent judiciary if the sole power to appoint judges of the Supreme Court lies with the executive.

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LAW *in-depth*

Plea of natural justice

An ultimate defence

M. HUMAUN KABIR

Natural justice is the administration of justice in a common sense based substantially on natural ideas and human values. 'No one to be condemned unheard' is the principle of natural justice, which is also commonly known as 'audi alteram partem' in a Latin term. It also may be termed as the 'First Principle of Law,' Principle of Universal Justice,' 'Fundamental Justice' which are found in the 'Canadian Bill of rights-1960 (section 2.e).

Requirement of hearing of both sides in any disputes before reaching a conclusion was enshrined in the very ancient world. It was also thought then that reaching a decision without a full hearing of both parties is injustice. Articles 10 and 11 of the Universal Declaration of Human Rights (UDHR) reveal the concept of the principle of natural justice. These Articles state that everyone is entitled full equality to a fair and public hearing by an independent and impartial tribunal in the 'determination of rights and obligations of any criminal charge against him. And everyone charged with penal offence has the right to be presumed innocent until proved guilty.

The first and foremost pillars of this principle is serving notice to the accused showing the allegations against him/ her with adequate time to defence. In the absence of notice of this kind and such reasonable opportunity of defence, any order passed against him in absentia becomes wholly vitiated. Even no materials or evidence should be relied on against any person without being given him an opportunity of explaining them. Thus, it is essential that a party should be put on notice of the case before any adverse order is passed against him. But who has the right to be heard? Answer is anyone whose right has been or would be affected or violated without legal sanctions.

There are sets of judgement of the Supreme Court, which established that non-observance of the principle of natural justice absolutely vitiates any proceedings taken. In case of violation of this principle a wide range of remedies is available to the individual claimed to prejudiced. It is now well recognised that the court has power to expand procedure laid down by statute if that is necessary to prevent infringement of natural justice.

The precise purpose of invoking this principle is to supplement the statute and not to supplant it. So, this principle is of universal application where the statute itself prescribes no specific procedures. It is decided by the Supreme Court of India in MRF Ltd Vs Inspector, verdala, Govt & Ors AIR (1999) Sc 188 that principle of natural justice, including right of hearing, can not be invoked in the making of law either by the parliament or by the state legislature.

Now it may be concluded that principles of natural justice are not codified cannons, rather they are ingrained into the conscience of human beings the breach of which will prevent some one from justice.

So, this principle is the last resort against the arbitrary decision of judicial, quasi-judicial or of administrative orders. The govt can not by framing a rule take away the right to show cause, which a person has on account of a principle of natural justice. Plea of natural justice is an ultimate self-defence when anyone is deprived of proper hearing. But independence of judiciary and rule of law are the condition precedents.

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CONSUMER *corner*

Consumers' voice to be raised more

QUAZI FARUQUE

A big event on consumers' rights ended just two weeks back (in the middle of September 2003) in Lisbon, Portugal. Consumers' advocates and activists from all over the world gathered in their 17th world congress. Over 600 consumer leaders from 110 countries attended the congress. They participated in the series of workshops, discussion meetings etc. and took decision to make the consumer voice more strong. In the inaugural speech of the congress president Jorge Sampaio of Portugal called for responsible sustainable consumption. He said, 'who better than the organised consumers' can act against the threat that harm human rights and health'? He specially focused to a more sustainable future and stressed on the need to be responsible to find ways for protecting public assets and to integrate economic, social and environmental concerns.

However, this years congress theme was- 'The future of Consumer Protection.' It is an exaggeration to say that 'Consumers are kings.' Of course in our country it is not maintained. Rather the sellers are the kings. And most of the time consumers face mis behaviour of the sellers at the time of buying, at the time of bargaining. This has almost become a part of culture of the sellers community specially in our country. This practice can be only stopped by uniting the voice of the consumers. In this regard, consumers organisation can ply a vital role. But consumers from all levels are to be made aware of their rights and responsibilities properly. As our consumers most of the cases are far from awareness, their voices are still weak in comparison to vested interest groups. And they are being deprived of their rights by the unscrupulous business community in everyday life.

We all know that this is an age of globalisation, open market economy and trade liberalisation where consumers are the deciding force to accept or reject the commodities or services whatever that may be. In that case with the consumer organisations the Govt. related trade bodies like chambers have also the responsibilities. So far I know the apex body of the Federation of Chamber of Commerce and Industries (FBCCI) has a separate cell on consumer protection. But I never found them working. We should remember the time goes fast as the science and technology is getting advanced rapidly. Since this is an age of globalisation we should look everything in the global context, present perspective. At the Consumers Internation (C.I) World Congress in Lisbon, what Director General Julian Edward said that is very much true. He told that consumers allover the world face different problems. One of the themes that came from congress was that globalisation affects everywhere, including the developing world. So it is essential that an organisation like C.I. should be just global in its leadership and strategies. In this context I want to depict the picture of C.I in brief for the clear conception of the respectable readers.

Consumers Internation (C.I) was founded in 1960 by a small group of national organisations seeking to build upon their individual strengths by working across national borders. Rapidly recognised as the voice of the international consumers movement, Consumers International remains dedicated to the protection and promotion of consumers' rights and interests world wide through institution building, education, research and lobbying of international decision making bodies.

In 2002 C.I had a membership of 271 organisations in 113 countries. By this time it has increased. Three quarter of the C.I members are NGOs, the rest are Govt. agencies, standard setting bodies and other public interest groups. Some 60 percent of C.I members come from developing countries and 40 percent developed or transition economies. The Consumers Internation is governed by an 18 member council and eight member Executive Committee. The president and council are elected by C.I's General Assembly during its World Congress which is held every three years. It's a movement oriented organisation to protect the rights of the consumers raising their voice. But it is true that to protect the rights of the consumers, legal instrument of the Individual Country is very much needed that is consumer Rights Protection Act till today which is absent in our country. Of course the draft consumer rights protection Act is at the final stage. We guess it will go to the Cabinet after final approval in the Cabinet meeting and then to the parliament after necessary vetting.

It is also to be mentioned here that only consumer rights protection Act will not serve the purpose. Side by side competition policy and law for fair competition is very much essential at this stage of globalisation and trade liberalisation. Where markets operate freely and effectively, completion encourages firms to improve productivity, reduce prices and innovate thus rewarding consumers with wider choice, lower prices and higher quality. Competition policy and law are the tools that help bring about efficient working markets. They help alleviate market failures. Developing countries needed to adopt competition policy and law. Virtually two sets of factors account for this. The first one relates to the liberalisation of trade and it encourages foreign investment and privatisation of state owned enterprises that many developing countries have embarked on. Reliance on a more free market arrangement means that competition policy and law become necessary. A second set of factors relate to the external pressure being exerted on these countries. Amongst the conditionalities imposed by international financial institutes like International Monitory Fund (IMF) is one that required loan recipients to adopt competition law. Further competition comes though regional and bilateral agreements. Since the World Trade Organisation (WTO) come into existence there has been even greater pressure.

At the Singapore Ministerial of 1996, competition got formal mention. The Doha Ministerial of 2001 went further. The Doha Declaration recognised the case for multilateral framework to enhance the contribution of competition policy to international trade and agreed 'that negotiations will take place after the fifth session of the Ministerial Conference on the basis of a decision to be taken by explicit consensus at that session on modulations of negotiations.' Now the Cancun conference is over and it is the time to work on it.

However, it is estimated that out of 146 countries of the WTO, 90 member countries have already implemented or put in place competition policy and law that is more then one third of the member countries do not have any experience on formulating and implementing the competition law. They have yet to workout a policy and law best suited to their own needs. So far I believe today or tomorrow consumer rights protection Act which is almost at the final stage will get passed. But at the same time the need of competition policy and law is also urgently needed.

Quazi Faruque is General Secretary of Consumers Association of Bangladesh (CAB).

LAW *news*

UN finalises anti-graft treaty

United Nations member countries have finally agreed an international treaty to fight corruption after two years of negotiation. The Convention against Corruption is designed to stamp out graft by requiring states to criminalise bribery, embezzlement, money laundering and abuse of power. For the first time, it includes provisions that commit its signatories to returning assets stolen and lodged overseas to their country of origin. But some campaigners fear it does not go far enough, since rules on political party funding and on private sector corruption are only optional.

UN officials said the treaty represents a step forward in fighting corruption, which many judge to be one of the main forces holding back developing economies. "This treaty can make a real difference to the quality of life of millions of people around the world," said UN Secretary-General Kofi Annan in a message sent to the UN Office on Drugs and Crime (UNODC), which is responsible for the treaty.

The treaty will be formally adopted by the UN General Assembly next month, before a signing ceremony in Mexico. Before it comes into force, 30 countries must ratify it as well as signing it, a process that could take as long as two years.

The provision on stolen assets is the most important development for poorer countries, according to UNODC head Michael Costa. "(The convention) has teeth... I believe it's going to get a few fish," he said. "It is much more than just trying to stop this sort of activity, but trying to salvage economies which otherwise would go bankrupt" he added.

The asset return provisions could help countries like Nigeria, which has striven for years to reclaim billions of dollars stolen by late dictator Sani Abacha, much of which remains in UK and Swiss bank accounts.

Earlier this week Nigerian officials told the Financial Times newspaper that they were giving up on seeking help from the UK government in retrieving the billion dollars or more alleged to be held in London banks.

Source: BBC News.