PARLIAMENTscan

Speaker acting as president: No constitutional controversy

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A fierce debate is now in progress with regard to the constitutional post of the president of Bangladesh which can very gently be clarified from the constitutional point of view as the Constitution of the People's Republic of Bangladesh contains clear provision regarding this issue. If Article 54 of the constitution is read with article 74 and article 152, of the constitution, then it would be evident that the discharge of the functions of the president by the Speaker until the president resumes his office cannot give rise to any Constitutional controversy, even when the president is present in the country, but unable to discharge his functions due to illness.

Article 54 of the Bangladesh constitution categorically states that if a vacancy occurs in the office of the president or if the president is unable to discharge the functions of his office on account of absence, illness, or any other cause, the speaker shall discharge those functions until a president is elected or until the president resumes the functions of his office, as the case may be. So, no debate should arise regarding the discharge of functions of the president by the speaker when the former is unable to discharge his functions due to illness. Now, question arises, will the speaker discharge the functions as President or as speaker? If article 54 is read with article 74, then the answer becomes transparent. Article 74, while describing the reasons for the vacancy in the speaker's office, clearly states that while the office of the speaker is vacant or the speaker is acting as president or if it is determined by the parliament that the speaker is unable to perform his functions of his office, those functions shall be performed by the deputy speaker. So, there is no doubt that while discharging the functions of the president, speaker will act as president, not as speaker. And article 152 of the constitution clearly states that "the president" means the president of Bangladesh elected under this constitution or any person for the time being acting in that office. So, it is crystal clear that speaker is going to act as president, not as speaker and he will receive all the protocol as president, not as speaker.

Now, whether the speaker, while acting as president, should be called the acting president or president-in-charge, that may create a controversy. To explain that, we have to go back to the history of our constitution. Before the fourth amendment of the constitution, the provision of article 74(3) was a bit different. Then the language of that article was -- "while…the speaker is 'exercising the functions of the' president…"- but by the fourth amendment act, 1975 (Act II of 1975), the words 'acting as' president was substituted for the words 'exercising the functions of the' president. Not only that, by the fourth amendment, in fact the whole Chapter I regarding the president was substituted for a new 'Chapter I --the president and vice president'. Then the provision of article 55 under the heading 'acting president' stated that in case of a vacancy in the Office of the president or if the president is unable to discharge his functions on account of absence, illness or any other cause, the vice president shall act as president, and when both the president and the vice president are unable to discharge their functions on account of absence, illness or any other cause, the speaker shall act as president. So, according to the article 55 (due to its heading) and amended article 74, speaker could be called acting president in such an inevitable situation. But by the constitution (Twelfth Amendment) Act, 1991, when this Chapter 1 was again substituted by a new chapter namely 'Chapter 1 The president', previous Article 55 under that chapter was abolished and article 54 was incorporated under the heading 'Speaker to act as president during absence etc'. And the language in this article 54 does not directly grant the speaker the status of acting president, rather it says: '…the speaker shall discharge those functions…' only.

But, even after the enactment of the (Twelfth Amendment) Act, 1991, article 74 remained unchanged and still it contains the words 'while…the speaker is acting as president…'However, article 54 being the enabling article for the speaker to discharge the functions of the president, it is better to address the speaker not as acting president, but as president-in-charge, who is acting as president. But according to the provisions of article 54 (with its heading), read with article 74 and article 152, the speaker while acting as president, shall be entitled to the full protocol as the regular president. At the same time, when the president is ill, as per the certificate of the doctors, who is unable to discharge his functions, may very well rest in his home while the speaker is discharging the function of the president in his office--no constitutional controversy may arise due to this reason. But whether the president is unable to discharge his functions due to his present illness or not, that can only be a question of fact, which is to be decided by the doctors, and to be clarified by the government, but it cannot be a question of law to be decided by the law specialists.

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LAW campaign

Ratify the OPCAT

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THE Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), which will establish the first international system of detention monitoring of its kind in the world, has already entered into force on June 22, 2006. Following the simultaneous ratification by Bolivia and Honduras on 23 May 2006, the instrument now has the necessary twenty ratifications to come into effect. Nice to see that this came as a great news specially to the victims of torture in the eve of International Day in Support of Torture victims and Survivors (June 26) after a long negotiation of almost four years.

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) entered into force on 26 June 1987 and Bangladesh has ratified it in 1998 without much delay putting a question mark on its willingness to eliminate torture by declaring that it " will apply article 14 paragraph 1 in consonance with the existing laws and legislation in the country". Article 14 paragraph 1 states " each state party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation." However there are no laws in Bangladesh that implement the provisions of article 14 paragraph 1.

Bangladesh is also lagging far behind in terms of the reporting obligation under the convention. The initial report has been pending for 7 years since November 1999 and the second periodic report is pending since November 2003.

Moreover, various domestic laws are contrary to the rights of victims and perpetuates impunity for perpetrators of torture. Impunity, for example, is enshrined in Sections 132 and 197 of the Criminal Procedure Code, which legislate that prior sanction by the government is required in order for courts to take cognizance of any offence committed by any public servant, including members of the police or other forces, while on official duty. Furthermore, the government can decide whether an offence will be prosecuted and if yes, in which court will be tried. In addition, the Indemnity Act 2003, which was brought into force following the notorious Operation Clean Heart in which more than 11,000 people were allegedly arrested and 58 were tortured to death in 2002, enables blanket impunity to all actions performed by the army and other security forces during the period between October 2002 and January 2003. As regards the indemnity given to the special force, the government also ignored the urgent appeal made by the special rapporteur on extra judicial killing jointly with the special rapporteur on torture on 30 October 2002. On 21 Januray 2003 they sent another urgent appeal concerning the indemnity ordinance for the army personnel deployed in the special operation. In the urgent appeal the special rapporteurs expressed concern that if the ordinance were approved by the Parliament no soldier would be investigated or brought to justice for the alleged deaths or torture which were reported to have taken place during the crack down.

This culture of endorsing immunity has subsequently contributed to make torture rampant in Bangladesh. After the withdrawal of Operation Clean Heart in June 2004, the special force called Rapid Action Battalion (RAB) was brought to the field by the Armed Police Battalions (Amendment) Act, 2003. This amendment has been done on the "The Armed police Battalions ordinance, 1979". And according to the Section 6(b) of the Act the RAB has been entrusted with any kind of investigation under direct instruction of the Government.

RAB from the very beginning of its operation has been engaged in extra judicial killings, which are typically excused as 'death in crossfire'. According to the statistics compiled by the Documentation Unit of Ain o Salish Kendra (ASK), between June 2004 to the end of the year 59 people have been killed in "crossfire". While as per the statistics of the same source in 2005 as many as 112 persons have been killed by RAB and other law-enforcing agencies following the showed path of 'crossfire' in maximum cases.

The pervasive fear atmosphere created by the ruthless of the RAB operation is to the extent that many of the victim's family remains scared to talk to outsiders, not to think of lodging the complaint for grievances and to seek justice. This could imply that the actual number of persons killed extra judicially by the RAB could be even more.

The most outrageous is instead of persecuting or criticizing the government of Bangladesh has taken the way of appreciation of the killings of RAB and the elite force has even awarded the Independence Award in 2005.

Thus the killings and torture are in a rising trend. In the first four months of 2006, the law enforcing agencies has killed 101 people. The following table prepared by ASK Documentation Unit on the basis of newspapers will show the range and method of torture of the law enforcing agencies.

Death by law enforcing agencies: January 2004- April 2006

Force/AgencyNature of Death	RAB	RAB & Police	Police	Kobra & Chita	BDR/ Army	Joint Force	Total
"Crossfire" (without arrest)	37	5	114	8		2	166
"Crossfire" (in custody)	166	7	225	9			407
Physical Torture (Without arrest)			5				5
Physical Torture (in Custody)	3		31		1	5	42
Shooting/Shot (Without arrest)	3	1	41		9	2	56
Shooting/shot(in Custody)	9		2			1	12
Total	**218**	**13**	**418**	**17**	**10**	**10**	**688**

Note: The ward `Crossfire' has been used in the newspapers.

At present Bangladesh is serving as one of the members of the newly formed UN Human Rights Council, which is convening its first session in Geneva right now. Will Bangladesh take this historic opportunity to show her real willingness against the culture of torture? Giving a declaration to ratify the OPCAT could be an appropriate mean to express that commitment.

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Star LAW analysis

The Artha Rin Adalat Ain/2003: A review

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IN our legal system, money lent by financial institutions/banks to individuals, private limited companies, public limited companies, corporations, partnership firms, societies, co-operatives, proprietorship firms etc. when due for default, is realised through money suits, suits for foreclosure, mortgage by instituting the same to competent civil courts. The civil courts were burdened with other businesses and such suits of banks consumed time for disposing of. The delay caused made the bank sector suffer for non-realisation of dues in time and the bankers gathered bitter experience in realising the same. To remove this difficulty, the government enacted a special piece of legislation named "The Artha Rin Adalat Ain, 1990" which had gone under some changes by way of amendments since its inception. The law brought changes to a great extent in the administration of justice delivery system for regulating those suits but it failed to fulfil the expectation of the legislators/bankers to recover the dues expeditiously from the defaulters. The thinkers on the subject gave second thoughts to frame a new law and ultimately the legislature passed "The Artha Rin Adalat Ain, 2003" (hereinafter Adalat) by repealing the earlier one.

The law came into force on 1st May 2003 except sections 46/47 which came into operation on 1st May 2004. Within a short span of time, the law has gone under an amendment by the Artha Rin Adalat (Amendment) Ain, 2004 which reflects weak draft of the law. The law begins with a preamble which speaks of the purpose of the law. The purpose of the law as it is visualised from the preamble is that the existing laws relating to recovery of loans of financial institutions/banks are needed to be amended and consolidated. The contents of the laws have been divided into six chapters having 60 sections. Chapter-1 deals with preliminary (sections 1-3); Chapter-2 deals with establishment of Adalat (section-4); Chapter-3 deals with power and jurisdiction of Adalat (section-5); Chapter-4 deals with institution of suit, practice and procedure of Adalat (sections 6-20), Chapter-5 deals with alternative dispute resolution (sections 21-25); Chapter-6 deals with execution (sections 26-39); Chapter 7 deals with appeal & Revision (sections 40-44) Chapter 8 deals with miscellaneous (sections 45-60).

I have been working as a Judge of the Adalat for more than two years. I have taken no pain to apply the laws during my business hours but at the same time I have seen that some provisions of the laws are acting as barriers in discharging my responsibilities. I shall make an endeavour to focus on those and other allied subjects in this writing.

In Chapter-1, under section 1 (2), the law has extended to the whole Bangladesh. It does not exclude the hill districts viz. Rangamati, Bandorban and Khagrachhari where the justice systems of the land are not applicable. No Adalat has been established in pursuance of section 4 of the law vide gazette notification dated 15-4-04 in the hill districts. Therefore, the hill districts should be excluded from applicability of the law in clear terms like family Court Ordinance 1985. The law has defined 'loan' under section 2 (ga) wherein compensation as claimed by Islamic banks has not been included. The Islamic banks have been claiming compensation along with profit. Under the law of the land, compensation can be claimed as a remedial measure of breach of contract. The laws should incorporate an explanation to this aspect. Section 3 has an overriding effect over other laws. In spite of that a practical problem has arisen with the Bankruptcy Court when it calls for records under section 33 of the Bankruptcy Act 1997. This inconsistency should be removed by incorporating appropriate provision in the laws.

In Chapter 2, the law has created and established the Adalat and made provisions for appointment of Judges thereto from amongst the Joint District Judges but it unnecessarily enacted section 4 (4) of the law wherein it is made provision that the Adalat shall be declared after abolishing or suspending the jurisdiction of the Court of Joint District Judges which is not recognised by the Civil Courts Act 1887. Section 6 (2) of the Civil Courts Act has authorised the Joint District Judges to perform such additional duties as devolved upon such courts. Instance may be cited from Environment Court Act, 2000 wherein Judges from amongst Joint District Judges have been appointed to the Environmental Courts. There is no such legal provision in the Environment Court Act, 2000 like the present one. Therefore section 4 (4) and section 4 (10) should be omitted, and the provisions if so omitted, there would be no practical difficulty to appoint the Joint District Judges to the Adalat like the Environmental Courts.

In Chapter 3, the law has conferred an exclusive jurisdiction upon the Adalat to try the Artha Rin Suits as registered under section 5 (8) of the law. It cannot try any Civil and Criminal cases. This embargo may reduce the ability of the Judges in conducting others suits/ appeals/sessions cases in near future. The district Judges should be given authority to retransfer the judges of the Adalat with the Joint District Judges under his control from time to time. Section 5 (5) has curtailed the jurisdiction of the Adalat up to Tk. 5.00 lac for the claim advanced by the Bangladesh Agriculture Bank, Rajshahi Agriculture Development Bank and state owned Banks without any explanation. The Adalat cannot also entertain any claim against the government.

In Chapter-4, the law describes the practice and procedure of the Adalat. Section 6 (3) of the law has enacted a provision for payment of court fees with the written statement. Generally no court fee is payable with the written statement but when a written statement sets up a counter claim or sets off, one must pay court fees with such written statement under Article 1 of the first schedule of the Court Fees Act 1870. Section 18 of the law prohibits any counter claim and set-off in the written statement. Therefore, provision for payment of court fees with the written statement is a redundant one. It is stipulated under Section 6(5) that in executing a decree, it must at first be applied against the property of the borrower defendant (principal judgment debtor) and then against the property of the third party mortgegor or guarantor. The inherent meaning of such language is clear and one can easily understand that the principle can be applied when the decree contains the property of both the borrower and the third party mortgegor or guarantor. But in practice, the situation is different. The decree in which only the property of the third party mortgegor is liable for debt, the mortgegor creates obstructiontaking advantage of the provisionand when unsuccessful, the mortgegor intends to go to the High Court Division under writ jurisdiction. An explanation should be added to remove the doubt from the section.

Section 19 has provided provisions for setting aside the ex parte decree but it does not make any provision for notifying the plaintiff bank like Order 9 Rule 13 of the Code of Civil Procedure 1908. As a result, the plaintiff remains ignorant about restoration of the suit. This anomaly should be removed by inserting appropriate provision. Section 20 of the law has given finality to the order, judgment and decree of the Adalat. In spite of that the defaulter(s)/borrower(s) is/are challenging the same in the writ jurisdiction of the High Court Division under Article 102 of the Constitution of the People's Republic of Bangladesh and obtaining stay orders from the High Court Division.

In a recent discussion on "Money Loan Court Act 2003" organised by the Association of Bankers, Bangladesh (ABB), the Governor of Bangladesh Bank asked the banks to take special measures to recover bad loans as the defaulters filed 1,768 writ petitions in the High Court for such loans amounting to Tk 6445 crore. He told that the banks cannot recover the loans due to stay orders from the court, and asked the monitoring cells of banks to take up these issues seriously and hire efficient lawyers to move the cases of loan default (The Daily Star dated June 2, 2006). It is observed from regular business of court that the banks have been refraining from taking any step against the stay orders in writ petitions. It is seen that the banks let them (the defaulters) do the same with consent. This attitude of the bank should be changed and effective steps should be taken to face the legal battle with the defaulters.

Chapter 5 has enacted provisions for settling the dispute through Settlement Conference or Mediation (Sections 21/22). This system has been introduced with the aim to resolve the dispute at the early stage of the suit so that both the parties may win the suit irrespective of their claims. The financial institutions/banks are not tolerant to bring a positive result at this level. They rather prefer to obtain a decree to create pressure upon the judgment debtor(s) through execution of proceedings and on pending hearing of the proceeding they sometimes compromise the dispute by rescheduling the loan illegally [because reschedule of payment is permissible prior to suit(s) and in accordance with sections 38/46 of the law allowing more instalments and time not approved under Section 49 of the law]. Apart from sections 21/22, any compromise under section 38/46 should be subjected under Section 49 of the law. On the contrary, the borrower(s) taking the advantage of this stage hold the suit(s) for the time given for and take a transfer of the suit to another Adalat. As a result, they drag the hearing of the suit(s). To change both sides' attitude the plaintiff banks and the defendant borrower(s) should state their position in their pleadings for acceptability or non-acceptability of Settlement Conference or Mediation and if any one reluctant to accept the process, shall lead the suit to the next stage. Provisions like this should be introduced in the relevant sections of the law.

In Chapter 6 of the law the financial institution(s)/bank(s) have given authority to receive certificate on the mortgaged property under Section 33(5) and 33(7) when the property remains unsold in auction under sections 33(1) and 33(4) of the law. After obtaining certificate a question arises as to how bank(s) would deal with the property when they are out of possession of the same. No prescription is given in the law as it prescribed in Section 12 of the law. Thus relevant provisions should be incorporated in this regard.

Chapter 7 has enacted provisions for appeal and revision but it is silent about review under Section 114 and Order 47 of the Code of Civil Procedure 1908. The defaulter(s) taking the provision of Section 26 of the law has/have been applying for review of orders, judgements and decrees of the Adalat but the decision published in BLD 14(1994) page 195 prohibits a review in Artha Rin Suits. So a clear and specific provision should be framed banning review in the law.

In Chapter 8, under Section 46, the law has framed a time limit for institution of suit and provided consequence for non-filing the suit within the given time to take disciplinary action against the officer of the bank(s) responsible for such non-filing. It does not make any provision for dismissal of suit or rejection of plaint. In most of the cases, the defaulters agitate the ground and when unsuccessful, go to the writ jurisdiction. This is the lamentable state of the law for the borrower(s) in which the purpose of the law of limitation has not been reflected in true sense. The provision may be amended in the spirit of the law of limitation.

Apart from the aforementioned barriers, the law has been playing a very vital role in realising the loan from the defaulter(s). Its achievement in loan recovery has been so immense that the scenario of defaulting loan has improved significantly with number of pending Artha Rin Suits reducing with expectancy rate. The loan defaulting culture would further be reduced if the barriers can be removed as soon as possible.

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