

Law and Our Rights

The Politics of Supersession and Our Judiciary

By Sarwat Siraj

THE recent elevation of two justices to the Appellate Division of the Supreme Court has given rise to a situation, unprecedented in the history of the judiciary. The two Justices in question have been appointed by the President on 9th January, in supersession of the seniority list.

While supersession is no stranger to our judiciary, it is not a common phenomenon either. Until the Ershad regime such practice was unheard of in our higher judiciary. Four Justices have so far been superseded under the present Awami League government. One of the said four has resigned from office in protest of his supersession. There however is no instance of supersession during the BNP led government elected in 1991. There has never been such an outburst against any of the previous supersessions. A section of the lawyers of the Supreme Court staged a sit-in demonstration in front of the Chamber of the Chief Justice in protest of the elevation. They chanted slogans against one of the elevated justices and virtually held the justices under seize for some three hours. As a result despite having been sworn in, the newly elevated justices could not take their respective seats in the Appellate Division and the felicitation ceremony had to be stalled. Although a huge number of Supreme Court lawyers would agree with the essential substance of their anger, the mode and manner in which the lawyers expressed themselves was unprecedented and unacceptable. The concerned members of the Bar could have ventilated their anger and disappointment in a manner befitting to the sanctity of our courts and dignity of their calling. One must not forget the lingering effect of such precedents on both the Bar and the Bench.

The fact nevertheless remains that the agitating members of the bar have apprehended that such supersession shall coerce our judges and further consolidate the executive interference and in effect curtail the independence of judiciary. The judicial sovereignty is being interfered with by the executive throughout the world in promoting political agenda and serving partisan interest.

In United States for example, judicial appointments, retirements and elevation are frequently interfered with, often in not so subtle ways. The most famous American attempt of executive interference with the judiciary is that proposed



by Franklin Roosevelt. Roosevelt's Presidency had witnessed the casualties of stock market crash as well as the 'Great Depression of the thirties. A series of court decisions handed down in 1935 and 1936 invalidated many of the legislative Acts Roosevelt designed to speed-up economic recovery. President Roosevelt grumbled about "the nine old men" (of the Federal Supreme Court) and sent a Bill to the Congress that would allow a President to add another Justice to the Federal Court when a Justice with ten years of service on that Court reached the age of seventy. If passed, that measure would have allowed Roosevelt to make fifty appointments to the lower courts and six to the Supreme Court. However, Roosevelt's attempt to "pack the courts" with judges who would endorse his agenda was never realised. The Senate Judiciary Committee chided the President and let the Bill languish. More recently, during the presidency of Ronald Reagan, Mr. Justice Robert Brock was denied elevation to the Federal Supreme Court by the Republican Administration and subsequently

resigned in protest of the unwarranted Executive Prerogative. The recent American Presidential election has been a showcase of the extent to which the American Judiciary has been politicised.

United States aside, at home there is no legal bar on appointing junior Judges to the Appellate Division. It however is a time-honoured convention to follow the seniority list while elevating the judges. Article 95 of our 1972 Constitution allowed the provision for appointment of all Judges of the Supreme Court after consultation with the Chief Justice. The Constitutional provisions of consultation was abolished by the post-liberation Awami League regime and was never reinstated by the subsequent Governments. Article 95 as it stands today allows no provision for consultation with the Chief Justice. It is imperative to restore Article 95 to its former glory so as to ensure the participation of judiciary in deciding its own fate and keeping controversies at bay.

Unfortunately, the office of the Chief Justice seems to have been tainted during this whole fiasco. In

an extraordinary display of evasion of responsibility, the Law Minister has conveniently pointed a finger at the Chief Justice for providing the Government with the names of four justices. The government, according to the Law Minister, has simply chosen two Justices out of the list of four, recommended by the Chief Justice himself. Forwarding four names for the vacancy of two positions can hardly be termed as 'recommendation'--- this may be perceived as a choice given to the Government to prejudice any of the four Justices the Government wishes. Although the Government is not obliged to consult the Chief Justice and the recommendation made by the Chief Justice has no binding effect on the Executive decision, the office of the Chief Justice has been thrown into the mud-sliding match of partisan politics.

Another unfortunate outcome of this crisis is the lodging of a case under PSA against sixteen prominent pro-opposition lawyers and a BNP law-maker in connection with the January 11 incident at the Supreme Court. While the nature of protest against the supersession had shocked the public at large, the PSA case against lawyers had completely turned the table around.

Especially, the naming of Morshed Khan MP in connection with the Supreme Court incident has appalled the nation and dealt a fatal blow to the credibility of this case. Instead of resolving the crisis in the Supreme Court it has in fact intensified it. The High Court on January 17 issued a Rule on the Government asking it not to arrest or harass any of the accused in the case, which in effect is a moral defeat for the Government. The Government has been ill advised in instigating a case that epitomizes the evils of Public Safety Act and realises all the public-apprehension regarding this statute.

When two learned, dedicated and honest Justices with outstanding reputation are superseded for no apparent reason, by their respective junior albeit, competent colleagues, the public have reasons to believe that the Government while not acting in excess of their authority have acted arbitrarily. Any executive decision that is not just, fair and reasonable on the face of it, is a fair game for public criticism. The Government must deal with this issue with statesmanship, foresight and democratic temperament. In the recent past, the issue of public accountability of judiciary has been agitated by the Government. Now it is time for the

Government to account for this arbitrary and unwarranted intervention into the judiciary. The fact that the previous supersessions have gone unchallenged, does not justify silence in the instant case.

The agitating Lawyers on the other hand must face the reality that the two elevated Justices have taken oath and are bound by the same to discharge their Constitutional duties as the judges of the Appellate Division. Only the Supreme Judicial Council can remove them from office, that again in extraordinary circumstances described in the Constitution. One must not demean the apex forum of our judicial system even for the sake of what seems to him to be a just cause. The legal community must stand together to save the dignity of our courts and to uphold the majesty of this institution.

As an immediate solution to the crisis, a reconstituted Appellate Division Bench of seven Justices has been suggested by different quarters from across the political spectrum. There is no legal or Constitutional Bar on such reconstitution. It appears from the news reports that the Chief Justice and the President have also agreed to the proposal on principle. A team of five senior lawyers representing the legal community is soon to meet the Prime Minister, who has the ultimate say in this regard.

A section of public has been trying to hinder the realisation of this proposal. Bureaucratic and procedural complications, as well as the political antecedents of one of the superseded justices have been raised to defeat the compromise proposal. It is however interesting to note that, no section of public has so far succeeded in casting a shred of doubt on the competence, integrity and wisdom of the Justices concerned and thereby putting a big question mark on the moral validity of their supersession.

The issues that had been raised to hinder the compromised proposal are peripheral and can be overcome by mere political goodwill.

Then again it all boils down to the lack of goodwill on the part of our politicians to fulfill their pledge of separation of power. Separation of power has become one of those perpetual pledges of convenience-pledge the politicians made while in opposition and break when they are in power. The truth is that, until and unless the separation of power is achieved such crisis shall continue to arise. Whether one likes it or not.

ANATOMY OF PARLIAMENT-1

Parliamentary Committee System

Parliamentary Committees: 'Parliamentary Committees' means Committees appointed by the Parliament or nominated by the Speaker. Each Committee may have Sub Committees.

The Parliamentary Committees are rooted in the Constitution and could therefore be described as constitutional bodies.

Formation of Committees: Article 76 of the Constitution provides the essential constitutional parameter within which Committees are formed. The process of founding Parliamentary Committees is further elaborated in the Rules of Procedure of the Parliament (Rules 187-266).

The Constitutional provision regarding the formation of Committees may be unique. The existence of such a scope is rarely perceptible in the Constitutions of other countries.

The Need for Committees: The Committees enable the Parliament to organise its work efficiently and to discharge its functions effectively. The informal and business-like atmosphere in Committees engenders an environment that allows deliberations free of party politics.

Classification of Committees: The Classification of Committees is set out in the Constitution and the Rules of Procedure. Accordingly, Committees can be broadly classified into three categories:

- Standing Committee
 - Select Committee on Bills
 - Special Committee
- The Standing Committee comprises the following types, namely:
- Standing Committee on Public Accounts
 - Standing Committee of Privileges
 - Standing Committee on Rules of Procedures and
 - Standing Committee on Ministries.
 - Business Advisory Committee
 - Standing Committee on Petitions
 - Committee on Estimates
 - Committee on Public Undertakings
 - Committee on Private Members Bills and Resolutions
 - Committee on Government Assurances
 - House Committee
 - Library Committee

The current number of Committees, including the Standing Committee on various Ministries, stands at 46.

Appointment of Committee: The House of Parliament appoints the Select and Special Committees. The House also appoints all the Standing Committee except the Business Advisory Committee, Petition Committee, House Committee and Library Committee. The Speaker nominates these four Committees.

Appointment of Committee Members: The Committee members are appointed by the Parliament upon a motion made by it. Members having any personal, pecuniary or direct interest in matters, which may come for consideration by a Committee, are not appointed to that Committee due to possible conflict of interests. Casual vacancies are filled up by members appointed by the Parliament upon a motion made by it. Such members are appointed to hold office for the unexpired part of the term of the former member.

Composition of Committees: The number of members in each Committee varies according to the Rules of Procedure. The number ranges from a minimum of eight to a maximum of fifteen members. The Rules of Procedure do not however specify the number of members for the Select and Special Committees.

Formation of Sub Committees: A Committee may appoint one or more Sub-committees each having the power of the appointing Committee. As such, the Sub-committee may examine matters referred to them. If any report submitted by a Sub-committee is approved at a sitting of the appointing Committee, then that report is construed as the report of the appointing Committee.

Tenure of Committee: The term of office of a Committee of the House, other than a Select Committee on a Bill or a Special Committee constituted by the House for a specific purpose, remains valid for the duration of the Parliament. However, the House may, if considered necessary, reorganise a Committee. Determination of the tenure of the Select or Special Committees is subject to the provisions of the Constitution.

When the Speaker nominates a Committee, it holds office (unless otherwise specified in the Rules of Procedure) for the period specified by him, or until a new Committee is nominated.

Powers of Committees: The Parliamentary Committees are appointed by the Parliament and they can only act within the bounds specified by the Parliament. Nevertheless, Committees have the power to formulate their own rules of procedure.

Article 76(2)(a) of the Constitution, read with Rule 246 of the Rules of Procedure, empowers Committees to examine Draft Bills and other legislative proposals. Therefore, a Standing Committee of a Ministry can examine the legislative proposal or draft bill of that Ministry.

The Committees cannot exercise any executive powers, since such powers are assigned, by the Constitution, to be exercised by the Prime Minister or under his/her authority. However, Committees have the power to make recommendations on matters within the purview of the Executive.

Functions of Committees appointed by the Parliament: The functions and duties of the Committees appointed by the Parliament are as follows:

Standing Committee on Public Accounts: It examines the accounts laid before the House such as government expenditure and the annual financial accounts of the government. In doing so, the Committee is duty-bound to ensure that a) the amounts shown have been used for the stated purposes; b) the expenditure conforms to the original governing authority; and c) that re-appropriation has been made in accordance with the rules framed by the competent authority.

The Committee also examines the statement of accounts showing the income and expenditure of state corporations, trading and manufacturing schemes, expenditure of autonomous and semi-autonomous bodies and others with similar status.

Standing Committee of Privileges: This Committee determines whether a breach of privilege, as alleged, exists. If so, it examines the nature of the breach and the circumstances leading to it.

Standing Committee on Rules of Procedure: This Committee considers matters of Rules of Procedure and recommends necessary amendments to Rules.

Standing Committees on Ministries: These Committees examine Bills or other matters referred to them by the Parliament, review works of Ministries, inquire into activities, irregularities or serious complaints and other matters within their jurisdiction and make necessary recommendations.

Committee on Estimates: This Committee examines all estimates referred to it. It prepares reports on organisational efficiency and possible improvements and economies, and administrative reforms underlying the estimates. It examines whether the money is

laid out within the limits of the policy implied in the estimates and to suggest the form of presentation of estimates before the House.

Committee on Public Undertakings: This Committee examines reports and accounts relating to 25 public undertakings as specified in Schedule 4 of the Rules of Procedure as well as reports of the Comptroller and Auditor General on public undertakings. It examines whether the public undertakings are managed in conformity with sound business principles and prudent commercial practices.

The Committee cannot, however, examine or investigate major government policies, which are distinct from business or commercial functions of the public undertakings, routine administrative matters and matters for the consideration of which there exist other statutory bodies.

Committee on Private Members' Bills and Resolutions: The Committee examines every Private Members' Bill after it is introduced into the House. It recommends the time that should be allotted for discussion of Bills, resolutions and other ancillary matters.

Select Committee on Bills: This Committee considers Bills referred to it and reports on them within the time fixed by the House. The Committee reports whether Bills have been published according to the Rules and states the dates of such publications. In the event of a Bill having been altered, the Committee may recommend to the member-in-charge that the Bill be circulated or, in case where it has already been circulated, for it to be re-circulated.

Special Committee: Functions of the Special Committee are specified in the motion through which the



Committee is appointed.

Functions of the Committees nominated by the Speaker: The functions and duties of the Standing Committees, which are nominated by the Speaker, are as follows:

Business Advisory Committee: This committee recommends the time that should be allocated for discussion on government Bills and such other business that may be referred to it by the Speaker, in consultation with the Leader of the House.

Committee on Petitions: This Committee examines petitions referred to it and arranges the circulation of such petitions. It reports to the House regarding specific complaints made in the petition and suggests concrete remedial measures.

House Committee: This Committee deals with matters of residential accommodation of Members of Parliament and supervises facilities relating to accommodation, food, medicine and other amenities accorded to members residing in Dhaka.

Library Committee: This Committee facilitates the use of the library by members and considers suggestions for the development of the library. Upon Speaker's reference (instruction), it considers and advises on matters concerning the library.

Quorum: In order to constitute a quorum for the sitting of a Committee, the attendance of one-third of the total number of members of the Committee is essential.

If there is no quorum, the Chairman of the Committee either suspends the sitting until there is a quorum or adjourns the sitting to some future day. Where there are adjournments for two successive dates, the Chairman reports the fact to the House.

Decision-making by Committees: Questions at a sitting of a Committee are determined by a majority of votes of the members present and sitting. However, it appears from various minutes of Committee meetings that decisions in Committees are to a great extent unanimous. In cases where unanimity cannot be reached, decisions and recommendations are generally taken on the basis of consensus.

It should, however, be pointed out that while disagreements in Committees over Bills referred to them are common, unanimity and consensus are limited to Committees engaged in oversight functions.

Submission of Report: Unless otherwise specified by the House, Reports of Committees are to be submitted within one month of the date on which reference to Committees was made. The period of submission may be extended by the House and fixed according to the date specified in a motion.

Implementation of Decisions and Recommendations of Committees: It is not mandatory for the government to implement decisions and recommendations of Committees. Information regarding the status of such decisions and recommendations when left unimplemented is not available. It is necessary to monitor the status of decisions and recommendations in order that they are effectively followed up for implementation. It may be suggested that a specific Rule of Procedure be adopted in this regard.

The Ensuring of Accountability by Committees: The Standing Committees on Ministries are able to monitor the administration of the government in so far as they are empowered to investigate or inquire into the activities of concerned Ministries. Accordingly, they are capable of reviewing the enforcement of laws and proposing measures for such enforcement. Committees can also take evidence or call for documents and reports if enforceable by law. The Parliamentary Committee system suggests that the entire executive organ is accountable to the respective Standing Committees for its activities.

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OPINION

Was Akhteruzzaman Elected from his Party or Kishoreganj-2 ?

An Observer

THE Election Commission (EC) has declared the parliamentary seat of Major Akhteruzzaman vacant because of his failure to boycott the parliament. One may wonder how this event of mockery will be recorded in the history of democracy. Before going any further into the topic the provision of the constitution that empowered EC to take such a decision can be briefly examined.

Article 70(1) of the constitution says, "A person elected as a member of Parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he resigns from that party or vote in the parliament against that party." Has Major Akhteruzzaman resigned from his party or did he vote against his party in the Parliament? Neither. The explanation given in the constitution also does not support EC's decision. One can be said to have voted in Parliament against the party by absenting himself from any sitting of Parliament ignoring the direction of the party, but mere presence in Parliament including participation in debates never tantamount to voting against the party direction inside the parliament unless one actually casts a vote. The constitutional provision is framed in a way to cover a party activity inside the parliament in the form of act or omission. This article of the constitution has three interlinked elements, i.e. parliament, party and voting. That means, the activity of the party should be inside the parliament for voting to be an issue. Moreover, article 70 falls within the Part five, Chapter-1 of the constitution that deals only with the Parliament. Therefore it talks only about the Parliament and when talks about the behaviors of the Member of Parliament elected from a particular party, it refers to the activity of the party inside the Parliament. The party giving direction to boycott is outside the Parliament and therefore their activities, decisions, etc. are not covered by the constitution. Their deeds, actions,

speeches, etc. are not covered by the privileges and immunities of the parliament members under article 78 of the constitution either. But Major Akhteruzzaman is entitled to such immunity and his deeds in the parliament cannot be questioned in court. How can this be questioned in a party forum outside the parliament? He entered the Parliament to perform his constitutional responsibility and upon entering the sitting Parliament his activities fall within the purview of the constitution. If all his elected party members were inside the Parliament, their activities would have fallen within the ambit of the constitution. Article 70 deals with conflicting act or omission of Member of Parliament from the same party inside the Parliament. For constitutional purposes Major Akhteruzzaman was the only Member of Parliament of his party and therefore, he was not in conflict with his party inside the parliament. For parliamentary purposes his party does not exist as all of them are absent. He disobeyed his party direction when he was outside the parliament by disagreeing with other members' decision to boycott the parliament. He has a right to disagree and has done so rightly. By vacating his seat in the parliament the EC has amended the explanation given in the constitution to mean that one can be considered to have voted against his party if he/she presents himself in the parliament ignoring the party direction. We would like to know who gave this authority of amendment to the EC.

One may well argue that he was expelled from the party. Well, if a party can expel one of its elected Members of Parliament, it obviously can expel more than one for not listening to a party decision. Then, can one consider a scenario where a political party expels all 90 or 144 of its Member of Parliament for not listening to its party decision to boycott the parliament. Would EC then vacate the seats of all 90 or 144 Member of the Parliament if they attend the Parliament disagreeing with party decision. I think not. As it will frustrate the

purpose of the Chapter 5 of the constitution which was framed to guide the activities and structure of the parliament, not to serve the purpose of a party. For constitutional purposes, a party exists only if it works within the framework of the parliament.

Another point needs to be settled in our state management. Freedom of thought, of conscience, of expression and of speech is guaranteed as a fundamental right in the constitution. Every citizen is entitled to this right. No one can be punished under any law for exercising this freedom. A Member of Parliament is not bereft of conscience, I believe, and if his/her conscience bothers him/her for being absent in the parliament for so long and he/she starts thinking and then expresses his/her thought and responds to his/her conscience by joining the parliament, should we have a provision in the constitution to punish him? Would not this be inconsistent with

the fundamental rights guaranteed in the constitution and because of this inconsistency should not this provision be void to the extent of its inconsistency?

A Member of Parliament is supposed to be the representative of the people, not representative of a party. But the way the EC vacated Major Akhteruzzaman's seat tends to indicate that he was a representative of the party. When people of Kishoreganj-2 voted in the last parliamentary election, did they only vote for his party? Or for Major Akhteruzzaman too? Can a top leader of his party get elected in Kishoreganj-2? I suppose not. His personal charisma played a vital role. It is the people of the area who elected him, not his party. Those who voted for him may not like his party. Therefore, before vacating his seat the EC should have asked the people of that area by calling a referendum. I think, there should be a provision in our constitution which automatically

calls for a referendum to check whether the people of a constituency want to keep a Member of Parliament if he/she boycotts the parliament for more than 30 working days. Otherwise, election should be held for electing parties, not candidates and each party should be entitled to nominate a Member of Parliament for receiving each 0.33 % of caste vote. Thus, we will have 300 Member of Parliament from different political parties according to proportion of votes they received from people. In such a situation, if someone attends parliament ignoring the party direction his/her seat can be vacated.

We have a question to ask. For last two consecutive governments, we have seen the opposition boycott for years from parliament and if the present opposition fails to form the government after the next election, will it continue boycotting the parliament?



The process of vacating seats in parliament raises a fundamental question-who elects the MPs?