

## The Politics of Supersession and Our Judiciary

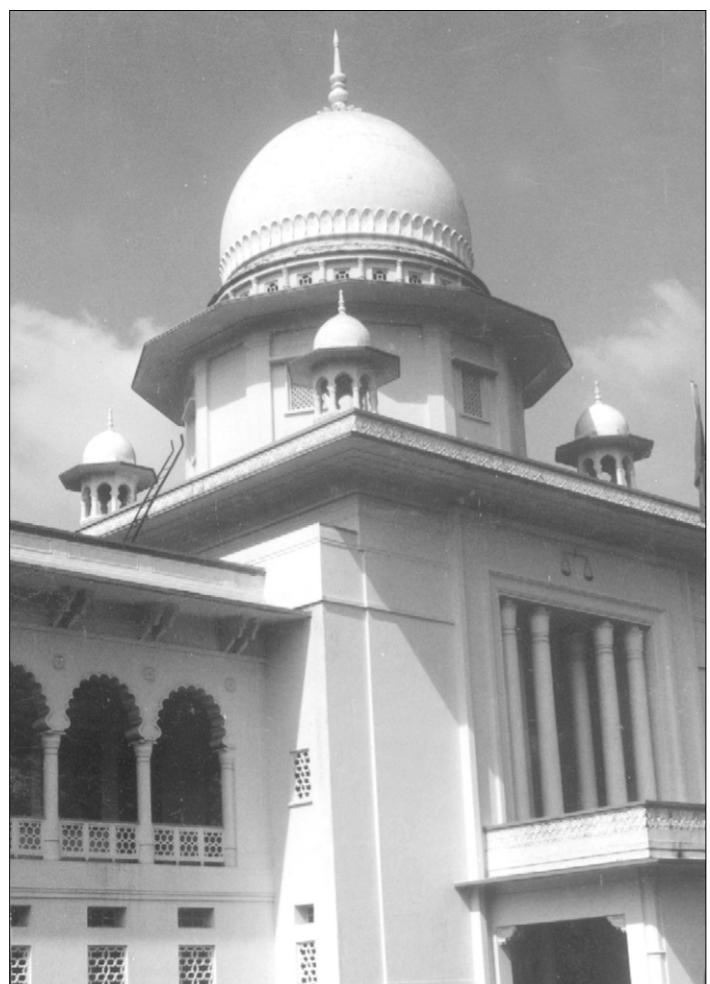
By Sarwat Siraj

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 Four Justices have so far been superseded under the present Awami League government.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 siege 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 vented 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 apprehend 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, reifications 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 is however 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 Fourth Amendment 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-slinging 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 Moshed 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 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 fulfil their pledge of separation of power. Separation of power has become one of those perpetual pledges of convenience - a 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.

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.

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