

Separation of Judiciary

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In *Secretary, Ministry of Finance v. Masdar Hossain* (2000 BLD (AD) 104) the Appellate Division gave certain directions to ensure independence of judiciary and to effect separation of judiciary from the executive. The direction for financial independence of the Supreme Court was implemented by the previous Government. Draft rules and the amendment of the Code of Criminal Procedure were being discussed when the Care-taker Government was formed. The draft rules and the proposed amendment of the Code of Criminal Procedure were finalised by the Care-taker Government, but those were not promulgated because, as we were given to understand, the present Prime Minister requested the matter to be left for the present Government to complete the process. We are getting information through the press that some politicians and the bureaucrats are opposing the separation of judiciary from the executive.

The Appellate Division having given the direction and rejecting the review of the some of the directions,

the question whether the directions of the Court should be complied with or not cannot arise. The Appellate Division gave the decision in *Masdar* case after serious consideration of the issues and the logic and reasons behind the decision are impeccable. Apart from the binding effect of the said decision, good governance requires that the decision be implemented. We shall discuss herein the provisions of the Constitution to show that those who are opposing the implementation of the decision are taking a position which is constitutionally not sustainable.

Independence of the judiciary is a basic feature of the Constitution. This was implicit in the judgment of *Anwar Hossain Chowdhury v. Bangladesh* (1989 BLD Spl 1) and this was expressly found in *Masdar* case. Article 116 of the Constitution as originally formulated provided that the control of the members of the judicial service and the magistrates exercising judicial functions vested in the Supreme Court. The Fourth Amendment of the Constitution vested the control with the President. Later, by Martial Law Proclamation it was provided that the said control would vest in the

The total number of magistrates is huge and the executive contends that it will create an impossible situation if the Supreme Court is to be consulted every time a magistrate is posted or transferred. On this plea, the requirement of consultation with the Supreme Court as mandated by the Constitution cannot be avoided. The only course open for the Government is either to create a separate cadre of judicial magistrates or to have the functions of judicial magistrates performed by the members of the judicial service.

President to be exercised in consultation with the Supreme Court.

The original art.116 was consistent with the aforesaid basic feature of the Constitution. The Fourth Amendment as also the aforesaid Martial Law Proclamation, so far as they relate to the control of the members of judicial service and magistrates exercising judicial functions, are void being violative of the said basic feature of the Constitution. No challenge having so far been made, the Supreme Court had no occasion to pass a judgment on such question, but the matter is so obvious that there can hardly be any doubt about the unconstitutionality of the present art.116 once the Supreme Court has endorsed the theory of unamendability of the basic features of the Constitution.

However, as the basic feature theory was not pressed in aid, the Appellate Division decided *Masdar* case on the basis of the existing provisions of the Constitution. The Appellate Division has pointed out that the existing art.115 requires separate recruitment rules to be made by the President in respect of judicial service and magistrates exercising judicial functions. The existing art.115 makes it obvious that the magistrates who shall exercise judicial functions are to be appointed in accordance with the rules made under art.115 by the President and Parliament cannot make any law providing for recruitment of judicial officers and magistrates exercising judicial functions. Deductively, it follows that magistrates appointed under any law or

rules made under art.133 of the Constitution cannot perform judicial functions.

We may now come to the existing art.116 of the Constitution which stipulates, "The control including the power of posting, promotion and grant of leave and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court." In *Aftabuddin v. Bangladesh* (48 DLR 1) the consultation with the Supreme Court was held mandatory.

So far with respect to posting, transfer and promotion of magistrates exercising judicial functions no consultation with the Supreme Court was being done in total disre-

gard of the provision of art.116. In *Idrisur Rahman v. Shahiduddin* (1999 BLD 291) posting of one Chief Metropolitan Magistrate was challenged for want of consultation with the Supreme Court and the High Court Division held such posting void.

On the passing of this judgment, all Metropolitan Magistrates at Dhaka refrained from holding court as they were posted without consultation with the Supreme Court. Placed in a very embarrassing situation, the Government obtained from the Appellate Division an order staying operation of the judgment of the High Court Division. The executive is prone to thinking that the Court is insensitive to the difficulties of the administration. But this is a very uncharitable attitude of

the executive towards the judiciary. The Appellate Division rejected the leave petition filed by the Government in *Idrisur Rahman* case as the Attorney General had to concede the correctness of the judgment of the High Court Division, but in rejecting the leave petition, the Appellate Division, considering the consequence of the judgment of the High Court Division, resorted to the doctrine of prospective overruling, thus saving the past actions of the Government in this regard from the mischief of unconstitutionality.

After the Appellate Division's judgment in *Idrisur Rahman* case, so far as we know, the provision of consultation is being followed in respect of Metropolitan Magistrates, but not in respect of the other magistrates exercising judicial functions all over the country. These magistrates including the District Magistrates and the Additional District Magistrates are exercising judicial functions under the Code of Criminal Procedure besides performing executive functions. These magistrates having not been posted or transferred in consultation with the Supreme Court cannot exercise judicial functions and as they are exercising judicial functions, their

posting, transfer, etc are unconstitutional for non-compliance of the provision of art.116. The total number of these magistrates is huge and the executive contends that it will create an impossible situation if the Supreme Court is to be consulted every time a magistrate is posted or transferred.

On this plea, the requirement of consultation with the Supreme Court as mandated by the Constitution cannot be avoided. The only course open for the Government is either to create a separate cadre of judicial magistrates or to have the functions of judicial magistrates performed by the members of the judicial service. If the consultative process is not made applicable for all the magistrates exercising judicial functions, somebody may challenge the posting and transfer of the magistrates exercising judicial functions as unconstitutional as was done in *Idrisur Rahman* case.

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Natural gas security in Bangladesh

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NEITHER Bangladesh's geological prospects for finding natural gas are same in all parts of the country, nor the prospects for discovery of large gas fields on land (out of about 60 leads and prospects delineated so far) appear promising. Yet, with the remaining recoverable natural gas reserve of 11.20 trillion cubic feet (Tcf) in 2002, Bangladesh is faced with the pressure of export of 3.65 Tcf gas (almost 32.5 percent of the total) to India. According to an estimate by Petrobangla, a State enterprise, the present gas reserve is likely to be depleted within about two decades. Almost eighty five percent of the country's electricity generation and one hundred per cent of urea fertilizer production depends on indigenous natural gas. Besides the plants under production, new power and fertilizer plants expected to come into operation in 2005 or later would also have a life cycle of 25 years. Moreover, the demand for natural gas from competing consumers (particularly electricity) would grow at a much faster rate in the future decades. Thus, the demand forecast has put the gas sector into a challenging situation. It has become more challenging because the IOCs are putting serious pressure on marketing gas outside Bangladesh ignoring the energy security of the citizens of the country. In their campaign for export, hypothetical numbers regarding gas reserves are being used through over estimation of figures on the one hand and underrating the gas demand on the other hand. This has brought a new dilemma for the people of Bangladesh.

assigned by the government to review the gas reserves position of Bangladesh and also to conduct a demand projection for 50 years. The outcome was published in a report (April, 2001) entitled "Natural Gas Demand and Supply Forecast: Bangladesh (FY 2001 to 2050)". According to the report the Gas-Initially-In -- Place (GIIP) of proven and probable category was estimated at 24.74 Trillion cubic feet (Tcf), out of which initial recoverable reserve was estimated at 15.50 Tcf. Out of 22 gas fields discovered since 1955, 15 gas fields (with an estimated reserve of 11.58 Tcf) have so far been brought under production (three of them were suspended from production on technical grounds) and seven fields with an estimated reserve of 3.92 Tcf are yet to come into production. Till June 2001, cumulative production was 4.3 Tcf, leaving a net recoverable reserve of 11.20 Tcf, in the ground. According to Petrobangla, the current reserve would be exhausted by 2019 and from thereafter the supply will fall short of demand. This clearly demonstrates the need for further exploration through Bangladesh Petroleum Exploration Company (BAPEX), which was slowed down abnormally in the 1990s. The redeeming feature is that even a pessimist would admit that the potential for finding more gas in undrilled (undiscovered) geological prospects are undeniable, but the prospect of a bonanza (1 Tcf or more) is very slim in the on-shore geological structures in the near future.

Since the first wildcat well drilling about 90 years ago, 67 exploration wells have been drilled with the discovery of 22 gas fields (exploration to discovery ratio being of 3:1). Incidentally, the R/P ratio in the early 1970s, with an annual production of

What is most essential now is to concentrate on a proper reserve estimation and certification of reserves. In fact, the gas (energy) pot must stand on its own legs in accommodating its development to achieving the nation's energy goals. The sooner we realize this, the sooner we will stop stepping on our own feet and creating more energy problems rather than solving the one we have now. There is one inescapable reality: During the next two decades we must continue to depend upon gas to satisfy the majority of our energy needs, while alternate sources are being developed.

0.0271 Tcf, was 375 years which started reducing drastically in the 1980s and the 1990s. With an annual production of about 0.371 Tcf in 2001, the ratio of reserves to production is now estimated at 30 years, compared with 91 years in Russian Federation (with 1700 Tcf as reserves), 55 years in Algeria (with 132 Tcf reserves) and 30 years in Norway (with 52 Tcf reserves) and 30 years in Indonesia (with 72 Tcf reserves) etc. In Canada, with a new formula, reserves are to be sufficient to meet domestic demand for 25 years (previously the ratio was for 50 years). However, Reserve to Production (R/P) ratio is only indicative. More scientific calculations are now based on net reserves to demand projections. On both the counts Bangladesh's position do not appear to be satisfactory.

Internally, the history of gas mirrors the evolution of energy development in Bangladesh. It is increasingly playing an important role in the economic activity of the country. Starting with an estimate by Shell oil Company (10.01 Tcf) in 1974 (prior to selling out their gas fields to Petrobangla), the estimated recoverable reserves stood at 15.50 Tcf in 2001. So far (during 1974 to 2001) as many as 14 (fourteen) different assessments have been conducted by various companies/specialist agencies etc. Of them,

Hydrocarbon Habitat Study (HHS) in 1986 and 1KM study in 1992 provided the most useful data and analysis. It may be noted that gas reserves had been evaluated upon discovery, but they were not fully updated using latest data and technology as per (gas) industry practice. Further, most of the gas fields have not been brought under the standard appraisal programme by Petrobangla. Nevertheless, the results of the various appraisal in the past 28 years also varied in quality (both the Petrobangla fields as well as IOC fields). The IOCs, also did not follow the internationally accepted norms and practice prior to initiating their production. For instance, the gas reserves of neither Sangu gas field (in the off-shore) nor the Jalalabad gas field (in the on-shore) was appraised/evaluated properly and certified by any internationally reputed independent specialist company (as Bibiyana field). Consequently, there is always a possibility that a conflicting situation would arise between the contractor (IOCs) and the owner (Petrobangla) on the issue of reserves and production of gas under the production-sharing contract (PSC).

Recovery factors (of each gas field varies on technical grounds) used for the purpose of estimation were based on, among others, the reservoir drive mechanisms that the field (s) will be abandoned at the abandonment pressure varying from 1150 psig to 300 psig, which resulted in variation of recovery factor from 51 percent (Titas), 52 percent (Habiganj), 61 percent (Bakhrabad), 58 percent (Rashidpur), 70 percent (Saldanadi), and 76 percent (Bibiyana). A recent study by the Norwegian Petroleum Development (NPD) experts in association with the Hydrocarbon Unit (HCU) of the Ministry of Energy and Mineral Resources apparently reviewed the recovery factors of the gas fields using new (?) parameters (without substantiating the basis), under the title "Petroleum Potential and Resource Assessment, 2001". The earlier estimates upto 2000 used recovery factor in the range of 51 percent to 70 percent, while the NPD/HCU experts used a recovery factor in the range of 76 percent to 82 percent without stating any basis for change. This obviously created a conflicting situation, which is not desirable in any scientific endeavour. Thus, the new (not yet accepted) assumed recovery factor, Bangladesh's total GIIP (proven and probable) has shot upto 28.792 Tcf (difference 4.05 Tcf and an increment of 16 percent) and recoverable 20.43 Tcf (difference 4.93 Tcf with an increment of 32 percent). More particularly, for instance, the Titas gas field reserves according to NPD/HCU shows 4.138 Tcf against the previous figure (accepted upto early December, 2001) of 2.10 Tcf or 76 percent increase without any basis. These new numbers have created more confusions than solve them.

Based on a statistical or econometric model (through utilization of demographic and economic data) demand projection for a foreseeable future depends on known variables. Long-term demand projection, on the other hand, deals with a lot of hypothetical assumptions on the variables. Industry practice of making long-term natural gas demand forecast (along with an inventory of other alternatives or additional modern energy sources available) is to limit the forecast for a period of 25 to 30 years in a developed economy. But in Bangladesh, natural gas is the only commercial energy source available now. Consequently, the country's energy security is mostly dependent on production and consumption of gas. The scenario has been changing,

particularly with regard to the power sector. The Power System Master Plan (PSMP), projection has been overtaken by the Power Policy Statement / Vision Statement on Power Sector, 2000. The PSMP target was to achieve 9900 MW by 2015, while the Policy Statement aims at 15,000 MW by 2020. The government had, therefore, deliberately decided in 2001 to consider a 50 year gas-demand forecast (2000-2050), which is linked with a wide range of uncertain issues, such as role of non-renewable (fossil fuels) and renewable energy (bio-mass fuels) supply etc. under global energy scenario, regional and sub-regional energy cooperation and energy pricing. The national level issues also included, expected electricity growth (as stated above) and its implications to GDP growth; demand of urea fertilizer of domestic use; price of natural gas reserves. Although experts do have differences of opinion on forecasting gas demands, Petrobangla in consultation with all major stakeholders made a forecast of 13.70 Tcf by 2020, 26.75 Tcf by 2030 and 62.9 Tcf by 2050 respectively. The current reserve is short by 2.50 Tcf even upto 2020.

It may be noted that the total number of households having piped natural gas connection and electricity connections are only about 4 percent and 20 percent respectively. Only 25 district towns out of 64 are connected under gas transmission network. Among them 24 district towns are located in the eastern Bangladesh leaving two-thirds of the country unconnected to gas grid. Natural gas is used in the power, fertilizer, industrial, domestic, commercial sectors, as well as tea estates, brick fields and transport sector. The Natural Gas Sectoral Plan, 2001 therefore, rightly stressed on, among others, substituting imported oil by indigenous gas. The import of energy costs US \$550 million annually (about Taka 3100 crore), while the consumption of gas of about 9 million tons of oil equivalent (MTOE) saves huge foreign exchange equivalent to Tk. 8550 crore. If gas was not available in the country, the import of energy would have cost the country Tk. 11,650 crore or over one-fourth of the total annual budget of the government in FY 2002. About 5% households use kerosene for cooking and lighting and 90% households depend solely on bio-mass fuels for cooking. During the 1990s both natural gas and electricity consumption increased substantially, at an annual growth rate of 7%. During 2000, Bangladesh produced over 2.28 million metric tons of urea fertilizer using natural gas, which is increasing.

In October, 2001, one IOC (Unocal) submitted a proposal to the government for export of 500 million cubic feet per day (MMCFD) gas through a 30 inch dia pipeline to India for 20 years. This export proposal, if implemented, will neither make a substantial increase in income stream for Bangladesh nor will it improve the much publicized balance of trade situation with India. From the proposal, with a commitment to supply of 3.65 Tcf the available gas for domestic use would reduce to 7.55 Tcf. Sccondly, the proposal stipulates an income (for Bangladesh) of US \$ 3.7 billion (equivalent to Tk. 20,000 crore in 20 years or Tk. 1000 crore a year) through supply of the proposed gas to India, which appears to be a deceptive figure. In fact, the NPV of Tk. 20,000 crore in 20 years may be at the most between Tk. 4000 to 5000 crore, which is almost a peanut as price for 3.65 Tcf gas. Assuming a price of US\$ 3 per MCF, the estimated price of 3.65 Tcf gas would be around US\$ 10.5 billion, 50 percent of which is US \$ 5.25 billion (for Bangladesh). More

importantly, the proposed sale through pipeline is a gross violation of the PSC signed for Block- 12 (where Bibiyana gas field has been discovered). The export proposal assumes an investment of US \$ 1.7 billion for infrastructure building, which, if incurred in the western zone of Bangladesh, would create a market for 500 MMCFD gas domestically and the income stream for both Unocal and Bangladesh would be higher.

An irate and baffled citizen and various professional organizations have demanded to know from the government why gas export is necessary? And why gas export to India? Questions have also rightly been raised, "Does Bangladesh have adequate gas reserves to meet the domestic demand (particu-

larly generation of electricity and production of fertilizers)? The big question is: would the proposed export be economically viable for the country? Perhaps the proposed deal would make the US government happy and the IOCs happier. But it is unfortunate that a sovereign government is under severe pressure for export of gas even if it does not bring any reasonable benefit to Bangladesh.

The nation is thus awkwardly stuck in a difficult situation with its limited gas reserves. IOCs backed by the donors and foreign governments, particularly the United States, are in the midst of a campaign underlining the rationale for gas export to spur the country's development efforts. Notwithstanding the country's gas security plan, the pressure is mounting for export. The IOC (Unocal) is luring the confused government to hasten the process of export to India suggesting that this is a good opportunity to monetise the reserves of gas for using it as a development multiplier. But for taking advantage of any opportunity will require an efficient gas sector management, which is absent now. Petrobangla suffers

from indecision and the Ministry of Energy appears to have been overpowered by vested interests.

What is most essential now is to concentrate on a proper reserve estimation and certification of reserves. In fact, the gas (energy) pot must stand on its own legs in accommodating its development to achieving the nation's energy goals. The sooner we realize this, the sooner we will stop stepping on our own feet and creating more energy problems rather than solving the one we have now. There is one inescapable reality: During the next two decades we must continue to depend upon gas to satisfy the majority of our energy needs, while alternate sources are being developed. Consequently, we have to make commonsense decisions on developing our gas resources based on the facts of technological progress rather than on the fictions of unwarranted fears.

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