Star LAW report

The outgoing speaker may administer the oath to himself if he is re-elected

High Court Division (Special Original Jurisdiction),
The Supreme Court of Bangladesh,
Writ Petition No. 965 of 2002,
Md. Fazlur Rahman
v.
Md. Abdul Hamid Advocate and others,
Before Justice Md. Hamidul Huq and Justice Nazmun Ara Sultana.
Date of Judgement: July 24, 2002.
Result: Rule discharged

Background

Md. Hamidul Haque, J: This Rule was issued calling upon the respondent Nos. 1-3 to show cause as to why respondent No. 3 should not be deemed to have vacated his seat as a member of the Eighth Parliament.

Mr. Khan Saifur Rahman at first referred to Article 67 of the Constitution, which relates to vacation of seats of members of the Parliament. In this Article it is laid down under what circumstances a Member of Parliament shall vacate his seat or under what circumstances seat of a member shall be considered as vacated. Mr Rahman, referring to sub-article (1) clause (a) of Article 67, has again submitted that in this case respondent No. 3 failed to make and subscribe oath as prescribed for a member of Parliament in the Third Schedule within the period of ninety days from the date of first meeting of Parliament after his election. On this point; the case of the respondent No. 3 is that oath was made and subscribed by him in accordance with the provisions of sub-rule (3) of Rule 5 of the Rules of Procedure of Parliament.

The contention of the petitioner is also that sub-rule (3) of Rule 5 is inconsistent with the provisions of Article 148 read with Third Schedule of the Constitution relating to oath of member of the parliament. On the other hand, it has been argued on behalf of respondent No. 3 that sub-rule (3) is in no way in consistent with the provisions of Article 148 read with the Third Schedule of the Constitution.

Mr Khan Saifur Rahman has given emphasis on the word administered as used in the Third Schedule. According to him, use of the above word implies that the oath must be administered by one person to another person and the person who shall administer oath shall be a person specified in the Third Schedule. He has also pointed that admittedly respondent No. 3 before administrating oath to the elected members made and subscribes oath to himself in accordance with the provisions of Sub-rule (3) of Rule 5. So, he has argued that as the respondent No. 3 took oath himself without his oath being administered by the specified person, it is not an oath within the meaning of Article 148 read with Third Schedule of the Constitution. And as such according to him as there was no administration of oath in accordance with the provisions of the Constitution the seat of the respondent No. 3 should be deemed to have been vacated after expiry of ninety days as provided in Clause (1) (a) of Article 67.

On the other hand, it has been argued on behalf of the respondent No. 3 by Mr Shafique Ahmed that when the specified person himself is required to take oath, as there is no express prohibition in the Constitution itself no act illegally was committed by the respondent No. 3. Mr Amirul Islam, the learned Advocate who also appeared on behalf of the respondent No. 3 has argued that the provisions of sub-rule (3) of Rule 5 of the Rules of Procedure cannot be considered as inconsistent with the provisions of Article 148 read with Third Schedule. According to him, it is not provided in the Article or in the Third Schedule as to what shall be the procedure if the specified person himself is to take oath. So, according to him, what is not prohibited expressly by the Constitution cannot be considered as unconstitutional. To meet such a situation provision has been made in sub-rule (3) of Rule 5 of the Rules of Procedure and as such this Rule is not inconsistent with the provisions of the Constitution.

Deliberation

Let us discuss the question as to whether the administration of oath by respondent No. 3 to himself was in accordance with the Constitution or not. Article 148(1) provides that a person elected or appointed to any office mentioned in the Third Schedule shall before entering upon the office made and subscribe an oath or affirmation in accordance with that schedule. The Third Schedule provides that an oath to a Member of Parliament shall be administered by the Speaker in the form prescribed in the schedule. There cannot be any doubt that use of the word "administered" in the Third Schedule signifies that the oath of the Member of Parliament shall be taken by a person and administered by the Speaker. Naturally, when a member is elected to the Parliament his oath is to be administered by the Speaker in view of the provisions of Article 148 read with Third Schedule. The argument of Mr Khan Saifur Rahman is that there is no scope of administering oath to himself by any member. In this connection he has referred to the provision of Article 148(2) and has argued that if specified person cannot administer oath, he may designate another person to administer such oath. According to him, the respondent No. 3 also should have designated another person as provided under article 148(2) to administer oath to him instead of administering oath to himself.

We have notice that Speaker is the specified person to administer oath to a Member of Parliament. In the Constitution itself there is no provision as to who shall administer oath if the Speaker himself is elected as member after new election. It has been argued on behalf of the respondent No. 3 that to meet such a situation in the Rules of Procedure, the provisions of sub-rule (3) of Rule 5 has been made. Rules of Procedure of Parliament have been made in pursuance to the provisions of Article 75 of the Constitution. It is provided in this Article that subject to the provisions of the Constitution, the procedure of Parliament shall be regulated by the Rules of Procedure made by it. Naturally, as to how procedure of parliament shall be regulated cannot be incorporated in the main Constitution. So, there was the necessity for regulating the procedure of parliament by framing the Rules of Procedure. The main provisions of the Constitution relating to the members of the Parliament provides as to what should be the qualification of the members of the Parliament, how the seats are vacated, remuneration of the members or other matters.

Rule making power is given to carry out purpose of the main Act. When the Constitution empowers the Parliament to make Rules of Procedure, the Parliament is competent to make Rules to carry out the purposes of the constitutional provisions relating to Parliament. Article 148 of the Constitution provides that before entering upon the office a person elected or appointed to any office shall make and subscribe an oath. The Third Schedule contains the form of oath and it also provides as to who shall administer oath. Some details are still necessary regarding the oath of members. These details are contained in Rule 5 of the Rules of Procedure. So we find that sub-rule (1) of Rule 5 contains the provisions as to who shall administer oath. First, it is stated that the oath shall be administered by the outgoing Speaker and in his absence by the outgoing Deputy Speaker and in the absence of both of them, before a person designated by the outgoing Speaker and if both the offices of the Speaker and the Deputy Speaker are vacant, before a person designated by the President. We find that in the Third Schedule it is only mentioned that the Speaker shall administer the oath. The details as mentioned in sub-rule (1) are necessary to meet different situations and such situation are also mentioned in this sub-rule. Similarly sub rule (3) provides what should be done if the outgoing Speaker is re-elected to the parliament. Here it is provided that if the outgoing Speaker is re-elected he shall make and subscribe oath first before he administers oath to the members, under sub-rule (1). Naturally, such details as to what shall be the procedure of taking oath if the Speaker is re-elected, as member cannot find place in the main Constitution itself and such details may find place only in the Rules. In this case also we find that this procedure has been incorporated in sub-rule (3) to meet the situation when an outgoing Speaker is re-elected to the Parliament. In view of clause (6) of Article 74 there is no doubt that the Speaker shall be deemed to continue to hold office until his successor has entered upon office. So an outgoing Speaker remains as Speaker until his successor enters office. Under Third Schedule the Speaker is the specified person who shall administer oath to a member of the Parliament. Now, when a Speaker himself is re-elected as member of the parliament there must be a procedure for administering oath to such a member and this procedure is laid down in Rule 5. Respondent No. 3 claims that he took oath in accordance with the provisions of sub-rule (3) of Rule 5 of the Rules of Procedure.

Decision

In our view, as the Rules have been made to carry out the purpose of the Constitution and is not violative of any express provisions of the Constitution, it cannot be said that the above Rule is inconsistent with the provision of the Constitution. We are further of the view that there may be circumstances when a person may administer oath to himself and such a circumstances is mentioned in sub-rule (3) of Rule 5. In the instant case, the person who administered oath to him is also the specified person as mentioned in the Third Schedule. We are of the view that there was no violation of either Article 148 or of provisions of Third Schedule. So, according to us, the respondent No. 3 cannot be deemed to have vacated his seat as member of the Eighth Parliament on the ground as taken in this writ petition. So, the Rule is liable to be discharged.

In the result, the Rule is discharged without any order as to cost.

Mr. Khan Saifur Rahman with Mr. Syed Golam Mostafa, Mr. Mohammad Ali Khan, Ms. Umme Kulsum Rekha and Mr. MBI Munshi, Advocates for the Petitioner.
Mr. M Amir-Ul Islam with Mr. Shafique Ahmed and Mr. Fazlur Rahman Khan, Advocates for respondent No. 3. Mr. Zaman Akhtar, AAG for respondent Nos. 1 and 2.

LAW week

Gram Sarkar Bill passed

The parliament has passed the Gram Sarkar Bill 2003 for introducing the lowest body of four-tier local government system. The Gram Sarkar Bill provides for establishment of village government (Gram Sarkar) in each ward of the Union Parishad for involving grassroots people in planning and development activities. Each Gram Sarkar will be constituted with a chairman, one advisor and 13 members. Concerned elected ward member of Union Parishad will be the head of the Gram Sarkar. The tenure of a Gram Sarkar will be five years from its first meeting. The government in a gazette notification will fix a date for formation of the proposed Gram Sarkar, which will be an auxiliary organisation of the Union Parishad. Among its activities, the Gram Sarkar will prepare plan for construction of village roads and culverts and supervise development activities. It will build united resistance against various offences like women repression, terrorism, and theft, ensure law and order and report to the Union Parishad. The Gram Sarkar will also oversee literacy program of the government and look after education in primary schools and madras's. It will extend cooperation in implementing primary healthcare programmes including nutrition and immunization. Besides, the Gram Sarkar will deal with family planning, supply of pure drinking water, collection information about birth, death, marriage and divorce. It will look after VGF and VGD schemes as well. There will be a fund for the Gram Sarkar. The fund will be raised from the UP budget and other sources. *Law Desk*

Artho Rin Adalat Bill 2003 tabled

The government introduced a bill in the Jatiya Sangsad to set up courts for speedy recovery of long pending bad loans. State Minister for Law, Justice and Parliamentary Affairs Shahjahan Omar piloted the Artha Rin Adalat Bill 2003 proposing repeal of a similar Act passed in 1990. The Minister said that the previous law was not enough to deal with bad loans. He also said that passage of this law would enable the country to have a healthy economy by eliminating the unhealthy practice of defaulting on loans. The bill proposed formation of several Artha Rin Adalats in each district or one for several districts, whichever is convenient. The Artha Rin Adalat will dispose of a case within 90 days after submission of written reply by the accused. However, the court may get another 30 days if there is 'proper reason'. The court will not accept any written reply from the accused after 40 days of his or her presence in the court and settle the issue unilaterally. The court can extend the time limit to 20 more days on condition that the accused has to bear a cost between Tk. 2000 and Tk. 5000. The government will appoint judges for the Artha Rin Adalat from among deputy district judges after consultation with the Supreme Court. The court can also dispose of a case through 'camera settlement conference' where both the parties and their lawyers will be present. However, the judges cannot press the parties to accept his or her proposal at such conference. According to the proposed law, financial institutions will not file any case with the Artha Rin Adalat without selling off the mortgaged properties of the accused on which it has legal control. The financial institutions will have to adjust the amount realised from selling the mortgaged properties with the loan. However, if any financial institution file any case without selling the mortgaged properties, it would have to sell those as soon as it files the case. *The Daily Star, 03 March.*

Independent investigation cell soon

The government is contemplating to constitute soon an Independent Investigation Cell with a view to ensure fair and neutral investigation into criminal cases. Ministry of Law, Justice and Parliamentary Affairs has already begun examining the proposed structure of the cell and the process of its functioning. Law Minister Mr. Moudud Ahmed said that the government will create an independent cell to investigate criminal cases, as conducting impartial and fair investigation is not always possible by the police. It may be mentioned that such investigation cells are in operation in many foreign countries. The investigation cell will be given autonomous status so that it can investigate criminal cases freely and fairly. Law Ministry is likely to refer the proposal for the formation of the investigation cell to the Law Commission for its opinion. *Bangladesh Today, 27 February.*

Repeal of indemnity law demanded

Speakers at a seminar demanded repeal of the 'controversial' law that indemnified the joint forces for their action during a country wide anti crime drive. They suggested that the victims of actions against crime should go to court challenging the law. They said that the Joint Drive Indemnity Ordinance 2003 was against the sprit of the Constitution. In her keynote paper, Dr. Shirin Sharmin Chowdhury pointed out that the passage of the law not only violated human rights, but also demeaned commitment made by the country in the international forum. She said the Act has undermined the democracy and rule of law of the country. The speakers called on the civil society to come forward to protect the human rights. *The Daily Star, 01March.*

Reform of Judiciary needed to protect HR

Former Chief Justice Mostafa Kamal called for a radical reform in the judiciary to protect human rights. He said this while addressing a workshop on 'Reporting on Human Rights, Legal Aspects and Limitations' organised for the crime reporters of newspapers and news agencies. Justice Kamal said human rights issues didn't come prominently during martial law-once after 75 and again in 82. Justice Kamal emphasized massive reforms in the judicial system. He revealed that reformation of civil law is going on under a project and such major reforms should also be brought in criminal justice system. Former advisor of caretaker government and retired IGP ASM Shahjahan said human rights couldn't be protected fully until and unless the CrPC, which was introduced in 1861, is reformed. He put emphasis on reform in Section 54 of Criminal Procedure Code for protecting human rights. He also said that it is not possible to effectively protect human rights with the existing criminal laws. *The Daily Star, 28 February.*

Amendments of banking laws approved

The Cabinet has approved amendments to Bangladesh Bank Order 1972, Bank Company Act 1991 and Bangladesh Bank (Nationalisation) Order 1972 with a view to reforming and strengthening country's banking sector as well as making it transparent. The amendments include providing limited autonomy to the central bank, raising the paid-up capital to Tk. 100 crore from the existing Tk. 40 crore, restricting the number of directors to 11 from 21 and confining their tenure to six years and appointment of two directors from among the depositors. When the amendments come into force, the central bank would get limited autonomy. The amendments also suggested that controlling power of the Finance Ministry would be withdrawn and the entire supervisory function would be vested in board of directors of the central bank. *Law Desk.*

FOR YOUR information

LAW DESK

Madrid Agreement Concerning the International Registration of Marks: Multilateral convention agreed to at Madrid in 1891. It allows an applicant seeking to register a trademark or service mark to make a single application with the World Intellectual Property Organization that is equivalent to making a filing in all of the member states.

Common Regulations under the Madrid Agreement concerning the International Registration of Marks and the Protocol relating to that Agreement (in force from January 1, 1998). Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (signed at Madrid on June 28, 1989)

Madrid Agreement for the Repression of False or Deceptive Indications of Sources of Goods

Multilateral Convention agreed to at Madrid in 1891. It requires member states to deny importation to goods bearing false or misleading indications as to their source.

Mandate System

An arrangement established by the League of Nations for the governance of the former colonies and territories of the states that were defeated in World War I by transforming those colonies and territories into mandates to be governed by the victors under the supervision of the League.

Market access

The General Agreement of Trade in Services (GATS) requirement that a World Trade Organisation member state accord to services and service suppliers of other member states treatment no less favorable than that listed in its GATS Schedule.

Minorities System

A system created by the peace treaties that ended World War I for protecting racial, religious, and linguistic population groups within newly independent and reemerging states and in certain special territories under the guarantee of the League of Nations.

Montreal Protocol

Amendment to the Convention for the Protection of the Ozone Layer adopted on September 16, 1987, and in force from January 1, 1989. It requires states parties to equitably control the total global emissions of substances that deplete the ozone layer.

Multifiber Arrangement

Agreements established under the General Agreement on Tariffs and Trade of 1947 that allowed participating states to establish restrictions on the importation of textiles on a country-by-country basis contrary to the GATT's most-favored-nation rule. The General Agreement on Tariffs and Trade of 1994 requires that these agreements be phased out.

Multilateral Investment Guarantee Agency (MIGA)

Agency of the World Bank created by the Convention Establishing the Multilateral Investment Guarantee Agency and in operation from April 12, 1988. It promotes the flow of foreign direct investment to its developing member countries for economic development. It does so primarily through investment guarantees against the risks of currency transfer, expropriation, and war and civil disturbance ("political risks").

LAW quotations

"The law is a great thing, because men are poor and weak, and bad. And it is great, because where it exists in its strength, no tyrant can be above it."
Anthony Trollope (1815-1882), British novelist.

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"The law of humanity ought to be composed of the past, the present, and the future, that we bear within us; whoever possesses but one of these terms, has but a fragment of the law of the moral world."
Edgar Quinet (1803-1875), French poet, historian, politician.

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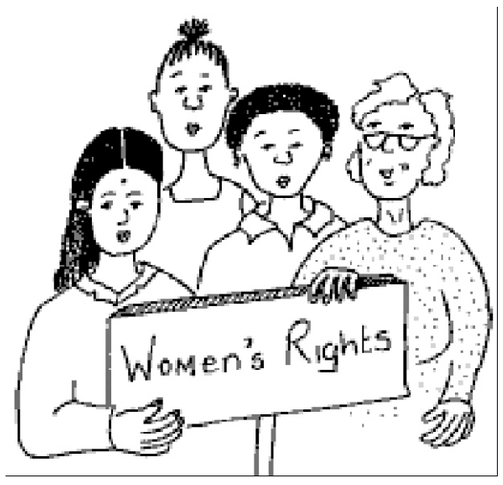
"Law without education is a dead letter. With education the needed law follows without effort and, of course, with power to execute itself; indeed, it seems to execute itself."
Rutherford Birchard Hayes (1822-1893), U.S. president.

RIGHTS corner

Women's rights as human rights in international community



RADHIKA COOMARASWAMY

In some ways women's rights are the most popular of international initiatives, but they are also the area with the most profound disagreements. As of January 1996, 121 nations had ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, or the Women's Convention). Although it enjoys the privilege of having this exceptionally large membership, CEDAW is also the human rights convention with the largest number of state reservations. This says much about the international community and the question of women. Relative to other fields, women's rights are more fragile, have weaker implementation procedures, and suffer from inadequate financial support from the United Nations.

Articulation of women's rights as human rights

Both in Vienna at the U.N. World Conference on Human Rights in 1993 and in Beijing at the U.N. World Conference on Women in 1995 women's rights were recognised as human rights. For the first time their articulation was accepted as an aspect of international human rights law. The underpinning of women's rights with human rights would give women's rights discourse a special trajectory, emerging as a major innovation of human rights policy within the framework of international law. But before we analyse the discussion of women's rights as human rights, we must meet the argument challenging the very premise of the debate.

Many scholars from the 'Third World' argue that human rights discourse is a product of theeEnlightenment and therefore not universal. This type of limitation is often introduced and underscored in the area of women's rights. Women are seen as the symbol of a particular cultural order. To grant universality to their rights is to undermine the cultural framework of a particular society. When it comes to issues such as female genital mutilation, Sati (Hindu widow immolation on husband's pyre), punishment according to Shariah (Muslim personal) law, and other practices that are particular to cultural communities, this argument is made even more forcefully by those who believe that many values are culturally relative. It is therefore necessary to underscore the universality of human rights as an essential first step in the recognition of human rights as women's rights.

Substance of human rights law

In many ways the privileged personality of international human rights law is the so-called enlightenment personality a man, endowed with reason, unfettered and equal to other men. This construction of the world underpins most of the instruments on international human rights law. What is essentially called liberal feminism is now keen on extending these postulates to women who should also be recognised as endowed with reason and unfettered in spirit. This project to extend the Enlightenment ideal to women received widespread support from all sectors of the women's movement as an important starting point for the discussion of women's rights, especially at the international level. However, to accept such postulates in many parts of the world is to acknowledge the cultural victory of Enlightenment Europe, a truth that is often unpalatable in the non-western world. I would like to deal with this issue, the question of the universal legitimacy of women's rights as human rights. If human rights doctrine has its origins in Enlightenment Europe and in North America, should we work toward its universalisation? This dilemma is a real one for all academics who are concerned with the development of political values in the non-western world.

This is an abridge version of Radhika Coomaraswamy's Edward A. Smith Lecture delivered at the Harvard Law School, in Boston, Massachusetts, U.S.A.

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