LAW *update*

UPDATED

HUMAN CLONING

Legal problems arising from patent policy

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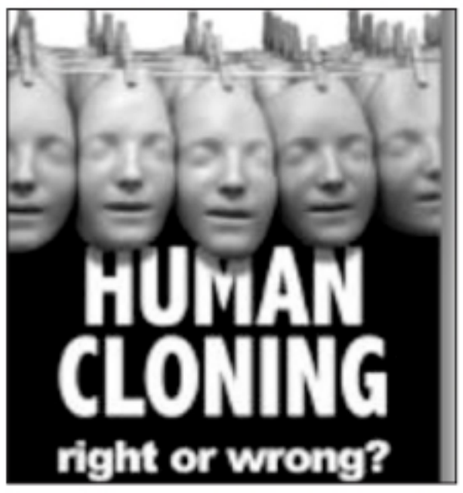
CLONING first smack the front page of news papers when scientists at the Roslin Laboratories (near Edinburgh) cloned Dolly a lamb by using the nucleus of a cell from her mother's body. But even before then, human cloning has caught the public imagination. Many prominent writers used the idea of human cloning in their science fictions in last hundred years. In simple terms, human cloning is processes of producing genetically identical human beings i.e. the process of designing people with known pedigree. ÊIn general biological terms, human cloning is defined as "the asexual replication of an existing genome or individual, or 'a replica of a DNA sequence, such as a gene, produced by genetic engineering." Cloning of human embryos has already been achieved. Though successful cloning of humans has not been yet proven (In November 2001, Advanced Cell Technology (ACT), a company specializing in biotechnology, revealed that it had cloned a human embryo. More recently, on December 27, 2002, Clonaid, a biotech corporation, claimed it had facilitated the birth of the world's first human clone).Ê

Cloning law at a glance

On an international level, a global comprehensive treaty banning human cloning is not yet received universal acceptance. Ex- President Clinton in the United States of America (USA) in 1995 nominated a National Committee of Bioethics in order to scrutinize the legal aspects of human cloning. In June 1997 the Committee reached a decision against human cloning and thus bills were rushed into both the US Senate and House of Representatives aimed at banning the cloning of human beings. In July 2001 USA tried to ban human cloning permanently by passing The Human Cloning Prohibition Act of 2001 (HCPA 2001).The proposed measure mandated civil and criminal penalties for anyone who performed, attempted to perform, or participated in an attempt to perform human cloning. But unfortunately, the HCPA 2001 died on the Senate floor and it has been revived in the form of the Human Cloning Prohibition Act of 2003 later. The Human Cloning Ban and Stem Cell Research Protection Act 2003 is another bill addressing the issue of human cloning was introduced on February, 2003. This Act, "would make human reproductive cloning punishable by up to ten years in prison," but would allow the use of SCNT (Somatic cell nuclear transfer) to create stem cells for research under limited circumstances. However, Arkansas, Iowa, Michigan, North Dakota and South Dakota laws extend their prohibitions to therapeutic cloning, or cloning for research purposes. Virginia's law also may ban human cloning for any purpose. Rhode Island law does not prohibit cloning for research and California and New Jersey human cloning laws specifically permit cloning for the purpose of research.

Recently, the Canadian Parliament passed legislation permitting research on stem cells from embryos under specific conditions. The law bans human cloning and prohibits the sale of sperm and payments to egg donors and surrogate mothers. Cloning for reproductive and research purposes have been prohibited in most of Europe by the 1997 Council of Europe Convention on Human Rights. In 1998 the Commission of the European Convention in Paris ratified a Protocol signed by the leaders of 24 countries. This Protocol prohibits all those methods that can create identical human beings. Unfortunately, not all countries have signed the protocol. For instance, Germany refused to sign it because it did not ban all research on human



embryos. On the other hand, Britain did not sign Paris Protocol because they felt that it was too restrictive. But Britain explicitly disallowed human cloning by incorporating the article 3-3-d/1990 in English Law. Similarly, Spain also banned human cloning (article 2B of the Spanish Law 35/1988). But there are many countries who still impliedly encourages human cloning .Greek legislation is one of them .No legal framework exists to prohibit human cloning under current Greek Law. In the Greek legal system, no statute exists against cloning of human beings. Cloning prohibitions are also not strong in Asia. Although Japan enacted a law that bans human reproductive cloning and penalizes violators for up to ten years in prison, stem cell research is allowed. Other Asian countries, such as China, Singapore, and South Korea, also allow experimentation with stem cell research. In Bangladesh still cloning prohibition law is absent. Legislators should take proper steps to provide guidance regarding the human cloning.

As we said earlier, some counties prohibits human cloning and few others allows it .This made 'an unparalleled inconsistency' to spout in transboundary legal world .For instance, America has strong laws against human cloning but Italy did not show her reluctance against the Reproductive Cloning of Human Beings. So, what is illegal in USA, is legal in Italy. A corrupt scientist can use this legal loophole easily .For this reason, scholars are demanding a unilateral transnational law forbidding Cloning of Human Beings. The United Nations "decided . . . to include in the provisional agenda of its 58th session the item entitled "International Convention Against the Reproductive Cloning of Human Beings," which could lead to an universal comprehensive agreement banning human cloning.

Patient law and ambiguities arising from it

To promote scientific advancement, the lawyers drafted the Patent Clause as a means of rewarding the labour of inventors. In exchange for disclosure of the details of an invention, an inventor receives a patent from the government. Depending on the patent, a patent grants its holder a 14 or 20 years right to exclude others from making, using, or selling the patented invention. If the invention is a process, the patent also grants its holder the right to exclude others from making, using, or selling the products of the patented invention. With increasing advancements in the field of embryonic research, Biotechnology companies continue to submit various patent applications for the process of human cloning and for the resulting human clones. Seeking to avoid the debate on patenting embryos, the U.S. Patent & Trademark Office (PTO) stated that it "does not issue patents drawn to human beings" because the Thirteenth Amendment prohibits such patents.

In 1980, the US Supreme Court reviewed this decision of U.S. Patent & Trademark Office in Diamond v. Chakrabarty (447 U.S. at 309 (quoting Committee Reports on the Patent Act of 1952, S. Rep. No. 82-1979, at 5 (1952); H.R. Rep. No. 82-1923, at 6 (1952)).In this case it was held that an organism could be a "manufacture" or "composition of matter" .The Court reasoned that "the relevant distinction [is] not between living and inanimate things, but between products of nature, whether living or not, and human-made inventions." The Court stated that the statutory subject matter "include[s] anything under the sun that is made by man." Thereafter, relying on its interpretation of the Chakrabarty decision, the patent authorities in USA announced that it would consider "non-naturally occurring, nonhuman multicellular living organisms, including animals, to be patentable subject matter within the scope of prevailing law." It should be remembered, until Chakrabarty, living organisms were not considered patentable and after Chakrabarty, life forms became patentable if it is created by genetic or artificial manipulation. In Chakrabarty, the Court by stating that "anything under the sun that is made by man can be patented" made an absolute statement, presumably exempting nothing from cloning. Human beings would seem to fall within the ambit of Court's decision. Human embryos can be man-made through genetic manipulation.

As we discussed earlier in this article, in accordance with the patent law, the patent holder has the right to reproduce, or clone, the human being and to exclude others from cloning that human being. For example, presently, cloning is legal in the Bangladesh (as there is no law against cloning). Therefore, each human being in Bangladesh presumably "owns" the right to clone himself and to exclude others from cloning himself. A patent in a human being takes that right away from the human being and gives it to the patent holder, thus giving the patent holder ownership in the human being. It means (one) a patent holder has the right to control the cloned human being's activities and to prevent others from interacting with the human being or (two) a patent holder has the right to contract out, or sell, the cloned human being and his services. Our constitution forbids such use of human beings. Therefore, the patent gives a right forbidden by the constitution. Furthermore, the patent gives the patent holder the right to forbid the patented human being from "selling" himself (i.e., contracting for employment). This rule also goes against of the main spirit of our fundamental rights. Moreover, if patent law implemented on a cloned human, he may not enjoy the right of reproduction i.e. he may be prevented from having son or daughter which is also against our fundamental rights. The issue relating to 'the right of the reproductive freedom' is vividly discussed in two famous cases. In Skinner v. Oklahoma, [316 U.S. 535.], a plaintiff challenged an Oklahoma statute that required sterilization of repeat felons convicted of moral turpitude crimes. The Supreme Court applied strict scrutiny in ruling that the state statute violated the Due Process Clause of the Fourteenth Amendment, confirming that "[m]arriage and procreation are fundamental to the very existence and survival of the [human] race."

The right to reproductive freedom was further extended in Einstadt v. Baird [405 U.S. 438, 453 (1971)] The Supreme Court held in this case that "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." For various reasons, infertile couples who seek to have a child may choose to use the cloning process as a method of reproduction. Since this would entail a reproductive choice, it would involve the

right to reproductive freedom. As such, the cloning process could properly be designated as a right protected by the Constitution.

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LAW *interview*

PHOTO: AFP

INTERVIEW: KOFI ANNAN WITH THE BBC

Iraq war illegal

KOFI ANNAN

The United Nations Secretary-General Kofi Annan has told the BBC the US-led invasion of Iraq was an illegal act that contravened the UN charter.

He said the decision to take action in Iraq should have been made by the Security Council, not unilaterally.

The UK government responded by saying the attorney-general made the "legal basis... clear at the time".

Mr Annan also warned security in Iraq must considerably improve if credible elections are to be held in January.

The UN chief said in an interview with the BBC World Service that "painful lessons" had been learnt since the war in Iraq.

"Lessons for the US, the UN and other member states. I think in the end everybody's concluded it's best to work together with our allies and through the UN," he said.

"I hope we do not see another Iraq-type operation for a long time - without UN approval and much broader support from the international community," he added.

He said he believed there should have been a second UN resolution following Iraq's failure to comply over weapons inspections.

And it should have been up to the Security Council to approve or determine the consequences, he added.

When pressed on whether he viewed the invasion of Iraq as illegal, he said: "Yes, if you wish. I have indicated it was not in conformity with the UN charter from our point of view, from the charter point of view, it was illegal."

You can not have credible elections if the security conditions continue as they are now.

Curtesy: BBC NEWS, 2004/09/16

LAW *alter views*

Outcry about the appointment of Supreme Court judges: a lawyer's point of view.

M.MOAZZAM HUSAIN

ON the 23rd day of Aug.2004, 19 persons were appointed by the President as Additional Judges of the High Court Division. And on the same day they were sworn in by the Chief Justice. Among them 5 are from subordinate judiciary and rest 14 are from the Bar. The *en masse* appointment is the single largest appointment ever made and that too immediately before a long vacation of the Court for about two months. The large scale appointment to such high posts having considerable financial involvement before a long vacation when it was not at all necessary is also unprecedented. Supreme Court Bar's discontent and deep concern over the recent trend of appointment of questionable persons as judges allegedly on political considerations burst into protest. Immediately following the appointments the Supreme Court Bar sat in an emergency requisition meeting and protested against the same as being made absolutely on political considerations in total disregard to the standard and efficiency of the persons holding such high posts. The appointments, as held by the Bar, were given to such persons as were not fit for elevation due to poor academic, ethical and professional profiles. The lawyers called upon the members of the Bar to abstain from attending the felicitation gathering of the newly appointed judges and also called upon the Chief Justice not to administer oath to them. Since appointments were given to the persons not fit to be judges the lawyers demanded abolition of the tradition of addressing the judges as "My Lords". Supreme Court Bar in a follow-up meeting held on 29th Aug. 04, decided, amongst other things, to file a writ petition challenging the constitutionality, validity and propriety of such wholesale appointment without following the process of 'effective consultation' meaning evaluation of their qualifications, experience and standard and scrutiny of their antecedents, allegations, age and all other relevant information so that inclusion of undesirable persons may be avoided. 'Notices Demanding Justice' were decided to be served upon the Chief Justice, the Law Minister and others to reconsider the appointments and take remedial measures so that the dignity and public image of the Supreme Court may be protected. Supreme Court Bar further decided to boycott the Chief Justice's court from the day on as the Chief Justice did not adhere to the demand of the Bar and administered oath to the newly appointed judges short of which the derogatory and arbitrary selection of judges could be put to a check, the Bar maintained.

A sections of lawyers opposed to Bar's decision organised meetings etc. as countermeasures. They (many of them reportedly not enrolled in the Appellate Division) were also found to flock into the Chief Justice's court room in a bid to stage a show down against the boycott. A kind of confrontational situation is now prevailing between the Bar and the government and the general members of the Bar as against a host of government-backed lawyers *inter se*.

The clear stand of the Bar is it is fighting for the cause of the institution. If the Supreme Court's dignity, standard, authority and public image are impaired in any manner the whole nation will suffer. Supreme Court being the highest seat of justice, guardian of the Constitution and last resort of the suffering masses needs persons of high ethical, moral, professional and academic profiles to be appointed as judges. Any short of it is bound to defeat the cause of justice, democracy and rule of law. And it is the high standing and awe of the judges in particular that pave the way for dispensation of justice free from fear or favour and inspire courage and confidence of the people in the courts. Supreme Court is an institution of global stature and is one of the standard bearers of a nation. The standard of the Supreme Court is reflected in the standard of the judges. No matter which party is in power, there cannot be any compromise in matters of dignity, integrity, impartiality and experience of the judges. This is not a job meant for *tadbirkars* or the party activist by virtue of being activists only. Nor the appointment of judges can be subject to arbitrary decision by the executive government to the derogation of the objective and purpose of the institution itself.

In the past we had come across outcries at the Bar against appointments, non-confirmation and supersession of judges. Question of integrity and inefficiency were also there. But this time the magnitude of resentment and protest seems to be a bit different. Besides being detrimental to the dignity of Supreme Court the appointments have spelt serious demoralising impact upon the Bench, the entire subordinate judiciary and the new lawyers of the Bar expecting to build career.

Not only Barrister Rokanuddun Mahmud, President of the Supreme Court Bar who has said he did not see many of the newly appointed judges to appear before courts prior to their elevation to the Bench but eminent jurist like Dr. Kamal Hossain has also said- there are persons among the newly appointed judges 'who do not know how to proceed with a case, will now deliver judgement'. Apart from the allegations that appointments are given to persons not fit in terms of educational and professional standards there are much graver allegations that among the appointees there are persons having questionable past. None can deny that Bar and Bench are the best judges of the performance and standing of a lawyer. But unfortunately, selection of judges still remains to be an exclusive executive-discretion with an apology of consultation with the Chief Justice which again is treated to be a mere formality not binding upon the government. The fatal and ominous culture of *tadbirs* and cut-throat politicisation has crept into the process of nomination of judges of the Supreme Court taking the advantage of absence of any law providing specific guidelines or criteria made for the purpose.

Bar has rather revolted against the appointment essentially on ground of fitness of the persons. As for the Bench, the position may be better guessed than described. I have meanwhile come across some of the judges of the Supreme Court who said by way of reaction that they had lost taste in the word "Justice" and did no more want to be known as justices. There is clear indications of serious demoralising impact in the members of the BCS(Judicial) Cadre and among the district level judicial officers. I have noticed open murmuring among the ministerial staff of the Supreme Court about the quality of judges. The nature and depth of reaction, resentment and frustration on the appointment of judges this time is unprecedented for the simple reason that the Bar, the Bench and all others immediately concerned look at it as the worst ever example of partisan selection in gross disregard to the minimum level of fitness of candidates.

PHOTO: STAR

The hard-line activists among the pro-govt. lawyers are trying to brand the movement as politically motivated. They are defending the appointments as made in accordance with law and in consultation with the Chief Justice. But one thing is missing in the claim of the pro-govt. lawyers that is- this is not as much a question of law, consultation, political consideration or public policy as of the quality of persons appointed which found voice in the protest made at the Bar. Whole thing that is voiced in the protest of the Bar and reflected in the murmuring of the people around essentially revolves round the quality and background of particular persons appointed as judges. If more or less acceptable persons could be appointed the question of 'politicisation,' 'effective consultation' etc. would not have gained ground precisely because the question of legislative gap as to consultation and/or absence of specific criteria or guideline for such appointment has been a long lingering problem shared and harvested from by successive governments without any sincere step to solve it once for all.

Many of the persons appointed being utterly unacceptable as judges of the Supreme Court and there being none to dispute their lack of efficiency pinpointed by the Bar the movement has surpassed the speculation of political, sectarian or personal motives and merged into the common concern of all the conscious citizens of the country. As for myself, I, as a lawyer practising exclusively in the Supreme Court for quite long years, have no hesitation to say that there are persons among the newly appointed judges whose appointments are not only derogatory to the public image of the Supreme Court but also amounts to sowing seeds of degeneration of this great institution. The appointments of those persons have specially damaged the image of the Supreme Court in the locality and the local Bars they have originally come from and in the people they are personally known to.

There is possibly no wrong in political appointment of judges of the Supreme Court provided it is done keeping the eligibility at the top of the agenda. There is a basic truth in the field of knowledge and expertise that thing to be acquired through long study, experience and training cannot be substituted by personal relationship or political affiliations. In the area of knowledge and acumen none can finally gain by bad choice. If someone who matters in the helm of affairs falls ill requiring a bypass surgery and looks for a doctor belonging to his political ideology having no expertise in the surgery he requires should he choose him for the purpose? Even if chosen would he be benefited? So is the case with the judges. Neither the institution nor persons so eagerly appointing or so firmly defending the negative appointments can ultimately gain from them. Virtually everybody suffers and pays the price for the indiscreet and shortsighted acts done.

The serious reservations and roaring complaints about the fitness of many of the newly appointed judges expressed at the Bar and beyond are exceedingly alarming and goes to the root of our attainments so far made. News and articles were published in different dailies ventilating the concern of the legal community and the conscious citizens of the country about the nature and quality of appointments. The uproar sounds like SOS and must be responded positively by all concerned including the government, even if its *bona fide* is doubted by any quarters. The allegations and information are not only alarming from the point of view of the Supreme Court but also indicative of serious infirmities in the selection process of the judges working in the government. The government's usual policy of giving a go-by or suppressing the outcries against it instantly calling them motivated is most likely to prove counterproductive in the peculiar context of the present problem.

The very nature of things demand that all who matter in the helm of affairs should immediately sit together in search of ways and means for upholding and maintaining the dignity and public image of the Supreme Court not as much for the Supreme Court itself as for our civilised existence.

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