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The Daily Star

LAW *vision*

The problems of separation of judiciary from the executive

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THE question of separation of the judiciary from the executive organ of the state is not new for our judicial system. So far many erudite articles written by highly intellectual persons of the relevant fields were published in the leading newspapers of our country. But those intellectual exercises have gone unheeded so far. There were of course commitments of the political parties every time before the elections were held. We must seek the reasons why this very important organ of the state has so far not been given the shape as enunciated in the sacred constitution where the nation has solemnly affirmed for an independent judicial system.

Of the total people constituting the electorate of our country, I am sure, more than 10% voters do not know what actually is meant by the separation of the judiciary and for that matter what is the bright side of the proposed separated judicial system. To address these questions we should have at least an average knowledge of our present judicial system. I shall be mainly dealing with the administration of criminal justice in the lower judiciary, which runs from Magistrates of the third class to the courts of the Sessions Judge in different districts throughout the country.

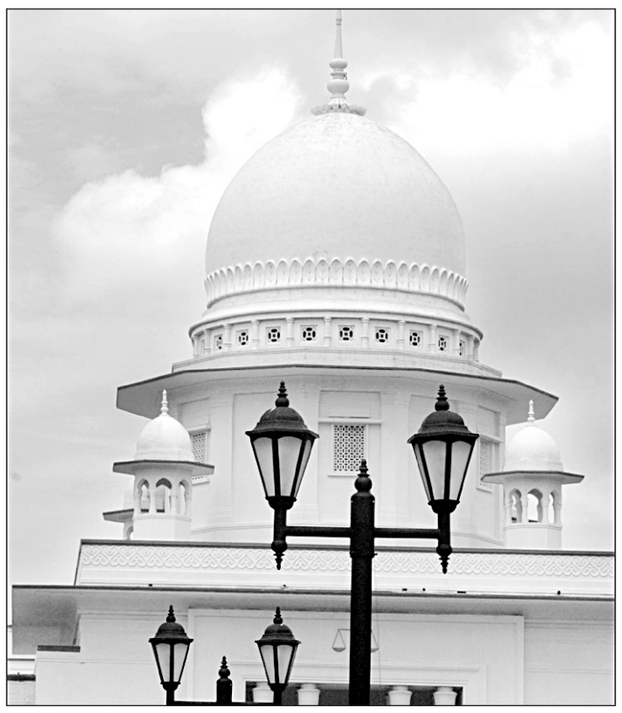
A district Judge has two capacities: As a District Judge he acts as the final adjudicator of civil matters in a division which coincides with an administrative district and as a Sessions judge he acts as the chief judge of all criminal matters in a division which also coincides with an administrative district. The gamut of the civil laws is vast. It includes family laws such as marriage, divorce, maintenance, inheritance and succession etc. It also includes the law of property such as ownership, rights or enjoyment, partition, transfer, acquisition, tenancy, rents etc. The law of contract also comes within the jurisdiction of a civil court. The Civil Procedure Code 1908 is the most important Statute Book followed by the Civil Courts. On the other hand the Criminal Courts conduct trial of criminal cases and punish the offenders. Normally the criminal offences are defined and their punishment prescribed in the Penal Code 1860. During this one century and a half many new offences have cropped up in our society and in consequence thereof, many new statutes had to be enacted by the acts of Parliament for keeping the society in order and to ensure safety and security of the people. The Code of criminal Procedure, 1898 is the principal book on the procedure of trial in the criminal courts and the Evidence Act, 1872 contains the rules of taking and sifting evidence, admissibility and relevancy of papers documents etc.

Now in this article we like to examine the question of the separation of the judicial organ of the state from the executive organ. In the sacred constitution of our Republic very great emphasis has been laid on the necessity of separating the judicial organ from the executive organ. " The State shall ensure the separation of the judiciary from the executive organs of the State." Article-22 of the Constitution. Although it is included in part II " Fundamental principles of the state policy." There is no reason why this provision should not be treated as a mandatory provision and should not be taken as a fundamental responsibility of the State. We have entered upon the 33rd year of our independence from the dictatorial and autocratic rule of Pakistan. In 1991 we claim to have set up a democratic government. But we have so far made little progress in practising parliamentary culture. Our leadership instead of guiding the nation toward setting up a strong parliamentary democracy has so long been engaged in the politics of mutual hatred and vengeance. Tolerance and respect for opposition party is now foreign in our politics. Such intolerance and enmity between political parties have adversely affected the nation as a whole and virtually has divided the nation into some groups antagonistic to each other. This inimical attitude of our political parties has not only polluted the politics of our nation but has created groupings among public servants in general and bureaucrats in particular. Of late the highest judiciary has reportedly been politicised.

In any civilised state the judiciary is the last shelter for the people to seek relief against offenders and wrong doers. Now, because of this antagonism in the political parties the people even of the grass-root level have lost confidence in the total judicial system. For example, if a man, known to have no allegiance to the party in power, is entangled in some litigation, it is widely believed that he is not going to get justice from the court. Because the stronger party with the blessings of political channels finds it easy to manipulate the situation in their favour. Such belief has taken its root from the fact that the lower judiciary starting from a Magistrate of the third class and to the court of the District and Sessions Judge is administratively under the direct control of the executive branch of the Government formed by the major political party * (Article 115 of the constitution: Appointments of persons in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with rules made by him in that behalf.) It is noticeable in this article that the President while exercising this power is not required to consult the Chief Justice of Bangladesh. We know that the President cannot exercise his powers whatever, without the advice of the Prime Minister, except of course his power to appoint the Prime Minister. This is how the executive organ of our state is controlling the judiciary. Their appointments, postings, transfers, promotions. punishments etc. are at the hands of the President or for that matter, the government. It is true like day- light that the governments established since after the ouster of the autocratic regime in 1991 have worked with partisan spirit and not with neutral attitude to the people and the public servants. We have a British style of permanent and neutral bureaucracy and not a 'spoils system' like that of the United States. But the neutrality of the public servants in our stagecraft is now a history.

Separation of the judiciary from the executive organ is of utmost importance in any democratic system of the government. In our existing system the lower judiciary is under the executive organ of the state as has been stated in the foregoing paragraph. Demand of the people for separation of the judiciary from the executive is a very old demand. During Pakistan regime this matter got little or no attention. Although the central Government of Pakistan had no interest at all to leave the judiciary to work independent of the executive control, the people of the then East Pakistan had shown great interest in matters of the separation of judiciary. After a long exercise in 1956 the East Pakistan Assembly had passed an Act known as the Code of Criminal Procedure (East Pakistan Amendment) Act, 1957, incorporating a complete separation of the judiciary from the Executive. (East Pakistan Act No. Xxxvi of 1957). But due to the executive disinclination and reluctance the notification required to put the law into operation was never issued. The lower judiciary headed by the District and Sessions Judge and manned by other judges and the magistrates is perhaps the beehive in the whole realm of the administration of justice. The political authority in an unholy alliance with the top executives does not like to get this beehive out of their hands. But it will be too let when they will have to do it.

The High Court Division of the Supreme Court of Bangladesh in a judgement directed the government to take steps for separation of judiciary from the executive organ quite a few years back. But the government has so long remained heedless and negligent to the High court Division's directives. When the government itself does not honour the highest court of the country, how can



the people in general confide in the judicial system and such underhand practice? It is strongly felt everywhere that immediate steps are taken for separation of the judiciary from the executive organ of the state. It is recommended that: (1) an independent Judicial Service Commission be constituted to recruit judicial magistrates and asst. judges(.2) an independent anti-corruption commission should be constituted with a serving High Court judge as its Chairman.(3) And such other steps as will be required for securing complete independence of judiciary.

It may not be out of place here to mention that the sub-continent of India had been under the British colonial rule for about 200 years and it was ruled by the same acts, rules, regulations etc. India completely separated their judiciary from the executive organ in 1974. To my knowledge even Pakistan did it in 1973. But unfortunately in a small country like ours the government finds an insurmountable problem to handle this matter, which is of the greatest public interest.

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LAW *opinion*

International law and EIA: context of River Linking project

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INDIA is interested to implement a mega scheme like the proposed river-linking project that may turn the Bangladesh delta into a desert. It is apprehended that the proposed river-linking project will encounter significant socio-economic, ecological, environmental, biological and gradual deterioration of morphological characteristics of the rivers-systems in Bangladesh.

It is really unfortunate that this time Indian govt. is ignoring the adverse effects it may have upon its neighbouring countries and also the principles and obligation as laid down under international law for conducting an Environmental Impact Assessment (EIA) and social impacts of this project. This article will focus on the necessity of an EIA regarding this project from the perspective of international law and environmental concerns.

Environmental Impact Assessment (EIA)

An environmental impact assessment is a systematic and detailed study of the adverse effects that a planned activity may have on the environment. The EIA is meant to ensure consideration of a project's environmental impacts and to influence policymaking by predicting the implications of a project and aiding in the mitigation and alleviation of any harm. Principle of environmental impact assessment is gathering strength and international acceptance, and has reached the level of general recognition.

United Nations Environmental Programme (UNEP) promulgated goals and principles of environmental impact assessment in 1987. The UNEP document defines environmental impact assessment as "an assessment of the likely or potential environmental impacts of a proposed activity" and encourages the use of comprehensive environmental impact assessment.

International Obligation to Conduct an EIA

The origin of environmental impact assessment can be found in the 1972 Stockholm Declaration, which resulted from the first international meeting on the environment. Twenty years later, at the second international conference on the environment, the Rio Declaration on Environment and Development recognised the obligation to undertake environmental impact assessment. The Rio Declaration under Principle 17 states that "environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse effect on the environment…"

In addition to the Rio Declaration, many other international environmental agreements and treaties promulgated both before and after the Rio Declaration mention, discuss, and require environmental impact assessment on an international level.

Article 206 of the 1982 United Nations Convention on the Law of the Sea also requires environmental impact assessment of any activity likely to cause pollution of or significant and harmful changes to the sea.

Article 2 of the United Nations Convention on Environmental Impact Assessment in a Trans-boundary Context (Espoo Convention) states that an environmental impact assessment shall be undertaken prior to a decision to authorise or undertake a proposed activity that is likely to cause a significant adverse trans-boundary impact.

The United Nations Convention on the Protection and Use of Trans-boundary Watercourses and International Lakes stress on notifying other States of projects with potential environmental effects and provides for the participation of the public that may be affected and establishes a system of post-project monitoring and analysis.

It is worth noting that the Convention on the Law of the Non-navigational Uses of International Watercourses, 1997 refers directly to environmental impact assessment. This list is only a small sampling of the many documents, which mention environmental impact assessment on an international scale.

Practices of International Organisation

In addition to the above list of treaties and documents that include EIA, many international organisations also support EIA procedures. The World Bank Operational Directive on Environmental Assessment (OD 4.01), which is introduced in October 1991, mandated an environmental assessment for all projects that may have significant impacts on the environment. The Asian Development Bank also established procedures for EIA in the early 1980s. The Organisation for Economic Co-operation and Development (OECD) also encourages the use of EIA by states that aid developing countries.

Other organisations like the Inter-American Development Bank, the Organisation of American States, the United Nations Development Programme, the European Commission, the African Development Bank, and the European Investment Bank etc promotes EIA as a prerequisite for funding. Therefore, methodology of EIA is used widely throughout the world for initiating, proposing or funding projects that may have adverse environmental effects.

EIA in River Linking Project

The main argument against the river linking project is that a proper environmental impact assessment of the project is yet to be conducted. An environmental impact assessment is vital to this project as a consideration of potential impacts on all environmental resources, including water and biodiversity, in an integrated manner and adverse effects it may have upon the co-basin states like Bangladesh.

India's claim that the project is still a concept or idea is a trick or a mere pretence for avoiding it's obligations to ensure an EIA, access to information, negotiation in good faith etc. and in the mean time to proceed with the project under veil.

We therefore, urge the Government of Bangladesh, concerned officials, transitional civil society members and all the peace loving and environmentalists of the South Asian region to put pressure upon the Indian Government to consider the following before proceeding any further on the project-

- Make available all information on this project for a transparent and independent professional assessment.
- Any withdrawal of water at upper catchments may cause depletion of water resources lower down the river. This may cause severe inter-district, inter-state, inter-country disputes as witness in the cases of Cauvery among different states of India and between Indo-Bangladesh in the case of Ganges.
- A systematic full cost - benefit analysis for the project on ecological changes caused in the total basin may turn out to be economically fatal for the present & future generations.
- The criss-cross of canals for inter-basin transfer of water will completely jeopardise the hydrological balance of the region creating immense problems of water logging and salinisation of land.
- Such a mega project will cause loss and livelihood of lakhs of people both in Bangladesh and India including many indigenous peoples in India. So how this project will compensate the stakeholders both in Bangladesh and India should be considered seriously.
- The mountains, glaciers, rivers, deserts, oceans, forests & climate are all connected like a web in a macro-dynamics of nature. We cannot tamper with such macro forces without a proper understanding.
- The proposal of Govt. of India must go through a series of public hearing throughout India including the affected regions of Bangladesh (because Bangladesh Govt. alone can't permit India without consulting it's affected peoples) leading to the establishment of an 'Independent Commission' consisting of environmental scientist, geologists, geographers, hydrologists, lawyers, sociologist & economist to go through the public opinion to assess the best alternative option to fulfil its justifiable prioritised needs within the parameters of sustainable and equitous development.
- The project, if implemented, would ultimately lead to total decay of the existing river systems, especially deltaic distributaries and invite an ecological disaster.

Concluding Remarks

Although all states have the right to initiate development projects and enjoy their benefits, there is likewise a duty to ensure that those projects do not significantly damage the environment of other countries. As mentioned earlier, yet there is no environmental impact assessment of the proposed project. But after proper environmental assessment the project may not be considered so viable as predicted now and it will cause significant harms in Bangladesh.

Principle of trusteeship of the earth's resources, the principle of intergenerational justice, the principle of development and environmental conservation must go hand in hand with any kinds of development work like the river-linking project. That is why, without EIA India's initiatives on river linking project is a violation of international environmental law and human rights law and any future version of the River Linking Project must be preceded by a complete EIA including it's social and environmental consequences in other co-basin states.

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FOR YOUR *information*

Taxable income from house property

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THE Income Tax Ordinance, 1984 enumerates seven heads of income under which all incomes are classified for the purpose of determination and computation of total income of a taxpayer. 'Income from house property' is one of those seven heads. The concept of income under this head deserves clarification for several reasons, one being that day by day it is turning as the major source of income as a natural consequence of rapid urbanisation. Both tenants and house owners are increasing everyday, so is doing the income from house property, but the collection of tax on the income is not increasing proportionally. Surely, lack of public awareness is a thing, which is one of the various reasons responsible for this. And no doubt, the sole aim of this write-up is arousing public awareness excepting clarifying the concept.

Concept of income from house property

Income from house property is not the actual income from the property but the notional income represented by the annual value. Annual value, in relating to any property let out, shall be deemed to be the sum for which the property might reasonably be expected to let from year to year. However, if the annual rent is in excess of the annual value, then the annual rent shall be the annual value. The tax under this head is upon the owner, legal or beneficial, but not upon the occupant.

The concept of income from this head is confined to the income from 'buildings and lands appurtenant thereto'. Income derived from vacant plots of land does not fall to charged under this head. Even in respect of house property, no tax is payable under this head if the owner occupies the property for the purpose of his residence or if the property is used for the purposes of his business or profession the profits of which is otherwise assessable to tax.

Where two or more persons own property and their respective shares are definite and ascertainable, the co-owners will be assessed individually in respect of his share of the income from the house property.

Computation of income from (rental) house property

In computing the income from house property on rent the following allowances and deductions shall be made, namely-

- Any sum payable to Government as land development tax or rent on account of the land comprised in the property;
- The amount of any premium paid to insure the property against risk of damage or destruction;
- Where the property is subject to mortgage or other capital charge for the purpose of extension or reconstruction or improvement, the amount of any interest payable on such mortgage;
- Where the property is subject to an annual charge not being capital charge, the amount of such charge; the expression 'annual charge' used here includes any tax leviable by local authority or Government but not include the tax under the Ordinance;
- Where the property is subject to a ground rent, the amount of such rent;
- Where the property has been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital;
- Where the property has been constructed with borrowed capital and no income was earned by letting out that property during the period of such construction, the interest payable during that period on such capital, in three equal proportionate instalments for subsequent first three years for which income is assessable from that property;
- An amount equal to one fourth of the annual value of the property in respect of expenditure for repairs, collection of rent, water and sewerage, electricity and salary of darwan, security guard, pump man, liftman and caretaker and all other expenditure related to maintenance and provision of basic services;
- Where, the whole of the property is let out and it was vacant during a part of the year, a sum equal to such portion of the annual value of the property as is proportionate to the period of the vacancy; and where, the property is let out in parts, a sum equal to such portion of the annual value appropriate to the vacant part as is proportionate to the period of the vacancy of such part.

However, no deduction shall be allowed in respect of any interest or annual charge (not meaning income tax) payable outside Bangladesh on which tax has not been paid or deducted as advance payment or deduction at source.

Deduction at source from house property

Deduction at source of rent from house property as advance payment of tax is possible under section 53A of the Income Tax Ordinance of 1984 and Rule 17B. Provision is as follows:

Where, the Government or any authority, corporation or body, including its units, the activities or the principal activities of which are authorised by any Act, Ordinance, order or instrument having the force of law in Bangladesh or any company as defined in clause (20) of section 2 of the Ordinance, or any banking company or any co-operative society bank established by or under any law for the time being in force or any non-governmental organisation run or supported by any foreign donation or assistance is a tenant in respect of a house property, the tenant shall deduct from the house rent paid or payable as advance tax such amount as may be prescribed.

Accordingly, Rule 17B prescribes as follows:

1. Where the monthly payment does not exceed taka 15,000 (fifteen thousand), the rate of deduction of tax at the time of making payment is Nil;
2. Where the monthly payment exceeds taka 15,000 (fifteen thousand) but does not exceed taka 35,000 (thirty five thousand), the rate of deduction of tax at the time of making payment is 3%; and
3. Where the monthly payment exceeds taka 35,000 (thirty five thousand), the rate of the same is 5%.

For the purpose above-mentioned, 'house rent' means any payment, by whatever name called, under any lease, tenancy or any other agreement or arrangement for the use of any building including any furniture, fittings and the land appurtenant thereto.

Where, after the assessment made for the relevant year, it is found that no tax was payable by the owner of the house property or the amount of tax deducted is in excess of the amount payable, the amount deducted shall be refunded in full or part accordingly.

A necessary explanation

It should be kept in mind that a man is charged on his total income though his income under each head may be well below the taxable limit. For example, the minimum taxable limit of the current financial year is taka one lakh. Suppose, Mr. Alim's annual income from salary is only taka 96,000. So, he is not liable to pay tax on this head of income. But Mr. Alim owns a two-storied house building from where his annual income (i.e. rent) is taka 90,000. Hence, his total income reaches taka 1,86,000 that is well enough for incurring tax-liability. Thus, even a little income from house property is not negligible for tax purpose.

Concluding remarks

Evading tax is a common trend of the country people. The house owners form a large part of those trendy people. All govt initiatives seem failing to prevent the evasion. Here are also some undeniable causes. Nevertheless, there is a duty of common people in this respect. They can also help improve the situation. As a matter of fact, as an ideal citizen, it is one's legal obligation to pay tax in exchange of the facilities one does have from the State. So is the obligation to be aware that others are not evading tax. One should always get alert that his/her ignorance or negligence is not harming the State's interest; not hampering the progress of the nation.

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