



LAW alter views



LAW week



Apex court ruling on separation of judiciary

A case of enforcer becoming violator

PROFESSOR M RAFIQL ISLAM

THE enforcement of successive rulings of the Supreme Court from the separation of the judiciary from the executive remains as elusive as ever. In May 1997 in *Secretary Ministry of Finance v Masdar Hossain*, the Supreme Court issued a binding directive to the government to effect the separation of the judiciary as required by the Constitution within eight weeks. This landmark decision was upheld on appeal in November 2000 and reconfirmed upon revision in June 2001. The Court even worked out the procedures for such separation, which could be implemented without any constitutional amendment. These rulings have gone unheeded by the government through the tactics of procrastination. It has persistently been seeking and receiving time extensions for implementation, most recently on 27 July 2006, the 23rd such extension, showing no sign of compliance. Hearing has now been adjourned until 12 November 2006. The government is legally bound to implement the decisions of the Supreme Court under Articles 102 and 112 of the Constitution. The incumbent government's posture on the implementation of these rulings seemingly undermines its constitutional obligation and pre-2002 election pledge that it, if elected, would separate the judiciary within the first 100 days in office. This non-compliance has caused an extra-ordinary public confidence crisis in the independence of the judiciary, a cornerstone of the Constitution under its Article 22.

The Constitution of Bangladesh expressly provides judicial independence under Article 22, imposing a specific obligation for the separation of the judiciary from the executive. This constitutional scheme of separation is designed to afford the judiciary the maximum possible independence in order to perform its responsibilities efficiently. The Constitution has made the judiciary a medium for the exercise of the judicial power of the people on behalf of the people, who will always remain the focal point of judicial concern: *Mohiuddin Farooq v. Government of Bangladesh* (1997) 49 DLRAD 1. The overarching goal of judicial independence has overtly been reflected in subsequent constitutional provisions in order to ensure its functional independence.

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Article 109 places all subordinate courts under the direct control and supervision of the High Court Division (HCD) of the Supreme

Court. Article 115 deals with the establishment of subordinate courts and appointments of their judicial officers by the President. Ensuring Article 116 spells out how the President shall exercise this authority and make rules to that effect. It has made the exercise of this presidential authority conditional upon consultation with the Supreme Court. Article 116A requires all judicial officers of subordinate courts to be independent in the exercise of their judicial functions. The operation of subordinate courts under the direct control of the constitutional system of judicial hierarchy is intended to make the former responsible and accountable to the Supreme Court, not to the executive. Therefore the compliance with the constitutional arrangement under Article 116 conferring on the President the regulatory competence over subordinate courts to be exercised in consultation with the Chief Justice would go a long way in ensuring judicial independence.

The original Constitution of 1972 devised a scheme of completely built independent judiciary in terms of appointment and removal of judges and their security of tenure, salaries and privileges. This scheme however underwent major changes in 1975, when the Mujib government brought the fourth amendment to the Constitution. Under the original Constitution, the authority of appointment of the Chief Justice (CJ) was bestowed on the President, but other judges were to be appointed by the President in consultation with the CJ (Art 95.1). The fourth amendment introduced the presidential form of government and authorised the President with real power to appoint judges without any consultation. The authority of these highest judicial appointments was thus vested exclusively in the realm of political power. The consultative role of the CJ in all judicial appointments by the President was a major safeguard against political and expedient appointments. Despite this change, the judges of the Supreme Court continued to be appointed in consultation with the CJ.

This consultative process has been followed so consistently since the British rule in India, even in the absence of any legal requirement, that it has become a constitutional convention in the sub-continent.

The Supreme Courts of both India and Pakistan have developed persuasive judicial precedents to support the consultative link between the judiciary and the executive: *S P Gupta's Case* 1994 AIR SC 268 and *Al-Jehad Trust v Federation of Pakistan*, 1997 PLD SC 84. Despite the reintroduction of the parliamentary form of government in Bangladesh in 1991, the



judiciary is yet to be fully independent as enshrined in the 1972 Constitution. The independence of the judiciary in performing its functions is hamstrung in reality by other constitutional provisions on the appointments, tenures, and terminations of judges of the Supreme Court. The determination of their service conditions continues to be controlled by the executive along the lines of its political party affiliation. As a result, the requirement of consultation with the CJ is still abandoned from the Constitution. The current status of the President as the titular head makes no difference, as he is obliged to act on the advice of the Prime Minister (Art 48.3), who exercises the real power.

The Bangladesh Nationalist Party (BNP) government for the first time ignored the unwritten constitutional convention of consultation in February 1994 by appointing nine judges to the HCD without any consultation with the CJ, who indeed objected to such method of sole executive appointment. These appointments were cancelled, followed by consultation with the CJ, leading to seven out of nine appoint-

ments. Subsequent appointments however failed to comply with the convention of consultation with no recourse to redress.

The present system of judicial administration has been structured in violation of the constitutionally mandated in-built independence of the judiciary. In appointing the judges of the AD, the executive has neither acted upon the recommendation of the CJ nor disclosed the reasons for non-compliance. It implies that the executive might not have any plausible reason to disclose. Ironically, the President who did not comply with the recommendation of the CJ in appointing judges in 2001 was the same person, who opposed the appointments of nine judges in 1994 for want of consultation with the CJ. He even did not feel any need to inform the CJ of the reasons for which the recommendation could not be honoured. The consultation is a function, not discretion, of the President. The only difference in approach of the same person on two occasions is that he was the CJ in 1994 and the President in 2001. This very fact candidly suggests that the real

appointing authority rests with the Prime Minister, who exercises it through the President. Such an exclusively political power oriented approach to higher judicial appointments militates against the independence of the judiciary and is likely to induce the judges to have expressed political allegiance for promotion. Greater transparency and credibility in appointments strengthens and endures the confidence of the litigants and public in the judiciary. It is the CJ, not the President or the Prime Minister, who can efficiently and professionally judge the judges, both in case of promotion, confirmation or removal of those who have been serving directly under the CJ and in case of new appointments. A credible and dignified justice system demands such a cardinal role of the CJ. The judges of the higher courts are best suited to competently adjudicate the candidature since the selections are to be made from amongst those functioning in judicial and legal sphere. This is why the constitutional convention requires the executive to consult with the CJ, whose opinion should have the

primacy in the event of conflict and when the executive fails to convince the CJ otherwise. The executive in Bangladesh has scanty regards for such a role of the CJ. It has transgressed constitutional and conventional bindings on higher judicial appointments and diminished the independence of the judiciary and the public confidence on the justice system to its rock-bottom level.

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The second part of the article will be published in the next issue.

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Sircar rejects all 162 opposition notices

Speaker of Parliament Jamiruddin Sircar rejected all notices from opposition lawmakers demanding discussions in the House on various issues ranging from much talked about electoral reforms to acute shortage of power supply and skyrocketing prices of essentials. The notices were submitted throughout the current session of parliament. Awami League (AL) and Jatiya Party lawmakers submitted as many as 162 notices demanding discussions on different issues adjourning the scheduled business of the House. In their notices the opposition lawmakers also demanded discussions on unbridled corruption, government's failure to deliver according to its promises, rise of Islamic militancy, Phulbari killings, August 21 grenade attack on an AL rally, and proposed reforms in the caretaker government system and Election Commission. But the speaker accepted none of the notices neither had he allowed any formal discussion on any of the topics throughout the current session of parliament. "I hope the government will take steps to control prices of essentials and corruption," the speaker told the House while scrapping the notices. In defence of his decision of not allowing any discussion on the topics, the speaker categorically said the issues of August 21 grenade attack, killing of former finance minister Shah ASM Kibria, Kansat killings, and grenade attack on British High Commissioner Anwar Chowdhury are not current affairs. --*The Daily Star, October 2*

Talukder's removal opposes constitution

The way Major General (retd) Anwarul Kabir Talukder was removed from the post of state minister for power contradicts the constitution. With the controversy mounting over whether Talukder resigned willingly or was removed, the law minister expressed his ignorance over the matter while the Speaker said in parliament the state minister "resigned" from his post. According to the constitution, the office of a minister shall become vacant "if he resigns from office by placing his resignation in the hands of the Prime Minister for submission to the President". "The prime minister may at any time request a Minister to resign, and if such Minister fails to comply with the request, may advise the President to terminate the appointment of such Minister," the constitution says. However, the provisions have not been followed while removing Talukder as the PM neither requested him to resign nor advised the president to terminate his appointment. Talukder told the media several times that he was not asked to resign from his post; rather, he decided to resign consciously taking all responsibilities for the failures in the power sector. Just hours after his Friday announcement to resign the next day, the Prime Minister's Office (PMO) relieved Talukder of his office at late night. --*The Daily Star, October 2*

AL to place 31-point reform proposals

Awami League (AL) General Secretary Abdul Jalil will place 31-point electoral reform proposals at the beginning of the much-awaited dialogue with the ruling BNP Secretary General Abdul Mannan Bhuiyan, sources said. "We are awaiting government response to our proposals from the BNP secretary general at the talks," said a senior AL leader, asked about the party strategy at the one-to-one dialogue over reforms in the caretaker government system, Election Commission and electoral laws. The leader said the government's response will make it clear whether they are sincere to make the dialogue a success or agreed to hold it only to kill time before handing over power to caretaker government after its tenure ends on October 27. "We don't want to make the dialogue a lengthy process, rather want a quick outcome," he asserted seeking anonymity. Meanwhile, in last minute preparations for the talks, the AL set its strategies after separate meetings of senior leaders of the party and its allies in the 14-party combine. Leader of the Opposition and AL chief Sheikh Hasina chaired an emergency meeting of the party presidium, the highest policy making body of the party. At the meeting, the leaders said they would not compromise on a number of points that include reservations about Justice KM Hasan as caretaker government chief and MA Aziz as chief election commissioner. --*Prothom Alo, October 3*

Condemned militants won't be hanged in this govt's tenure

The Jama'atul Mujahideen Bangladesh (JMB) militants condemned to death for killing two judges last year will not be executed during the tenure of the present government as all the convicts have sought permission to appeal against their sentences. The Supreme Court registrar ordered stays of execution of the death penalty of JMB military commander Ataur Rahman Sunny and Majlis-e-Shura member Abdul Awal following their special prayers through the jail authorities for leave to appeal. The decision marks the end of the fevered speculations whether the militant kingpins would be executed within the term of the four-party alliance government. Of the seven militants convicted of murder, six are behind bars while Arif, the other one, is still at large. Although the convicts had earlier said they would not file any appeal with the worldly courts, they have grabbed at the opportunity to appeal against their sentences that were confirmed by the High Court on August 31. Sunny and Awal submitted their prayers to the Dhaka Central Jail authorities, three days after expiry of the seven days' time since reading out of the death warrants to the convicts. The jail authorities sent the prayers to the SC Registrar. The SC registrar later sent separate letters to the home ministry, jail and the other authorities concerned, ordering postponement of the execution. --*The Daily Star, October 4*

Babar regrets police beating of shooters

State Minister for Home Affairs Lutfozzaman Babar regretted police atrocities on shooters and employees of National Shooting Federation complex while physicians said Commonwealth Games gold-medallist Asif Hossain is likely to miss the Asian Games in December. Meanwhile, National Shooting Federation rejected the police statement about the incident and demanded a judicial inquiry. The members and employees of National Shooting Federation wore black badges protesting against police atrocities. Lutfozzaman Babar, while talking to BBC Bangla Service, regretted the police attack on the shooters but defended the police action. "It is impossible that police will remain inactive when some people assault policemen in uniform," Babar said. Asif's physicians said the gold-medallist is likely to miss any competition in the next six months. "I cannot walk due to the beating I received on my soles," Asif said, lying in the bed at Metropolitan Hospital. Quoting doctors, he said the plaster on his hand would be taken off after a month while it would take at least three to four months to heal the injuries to his whole body. "It will take six to seven months for total recovery," he added. --*The Daily Star, October 4*

Moshed shocked at 'proposal' for talks at envoy's residence

Foreign Minister Moshed Khan deplored the proposal for a government-opposition dialogue on a "highly sensitive political issue" at an ambassador's residence. "This is very unfortunate ... I am sad that how any political party could think of going to another country's embassy and use them as arbitrator," he told reporters at the foreign ministry, following dramatic developments surrounding the proposed dialogue on electoral reforms. He made the remarks when asked to comment on the US ambassador's reported invitation to Abdul Mannan Bhuiyan and Abdul Jalil to tea, and a talk for that matter, at her residence. "I don't think the American ambassador has initiated it ... I think some of us might have approached her to discuss the issue at her place," Khan said. He went on to add, "Because I found her a responsible diplomat, she knows diplomatic norms and she knows that political issues cannot be discussed in the domain of another country." Moshed said the foreign ministry took exception to conceiving the idea of holding dialogue at a foreign embassy, and "I am blaming our political parties, whoever they are. This is atrocious." He said the proposed dialogue is so important for Bangladesh that political parties should do it out of their own concern and responsibilities. --*Urb, Dhaka, October 4*

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LAW campaign



SHELTER FOR ALL & HABITAT FOR HUMANITY

Celebrating world habitat day 2006

The United Nations has designated the first Monday of October every year as World Habitat Day to reflect on the state of human settlements and the basic right to adequate shelter for all. It is also intended to remind the world of its collective responsibility for the future of the human habitat.

Cities around the world on Monday marked the 2006 celebration of World

HUMAN RIGHTS monitor



AFGHANISTAN

Honour killings on the rise



about their rights as the key factors driving the practice. A change in attitude on the part of the police and judiciary was also needed. "Regrettably, police forces in Afghanistan either don't arrest such killers or they don't treat them as murderers," Rahmatullah Weda, an information officer at AIHRC remarked.

Afghanistan's government, which says it is committed to human rights and ending discrimination against women, hopes to end the practice but admits there are challenges ahead. Dad Mohammad Rasa, an interior ministry spokesman, said honour crimes were prosecuted, but that the practice was so entrenched that stamping it out would be a long-term project. "We have created a commission in the interior ministry to try and eradicate such cases but it will take a long time to overcome such crimes as it has become a part of many people's culture."

Sobrang blamed weak prosecution of perpetrators and a lack of awareness among women

Despite considerable progress being made

following the collapse of the hard line Taliban regime in late 2001 and women's rights being protected under the new constitution, violence against women such as self-immolation, forced marriages and rape remain widespread in Afghanistan. The increase in such crimes against women has also been explained by the resurgence of the Taliban in Afghanistan's southern provinces. The killing, maiming and beating of women were practically institutionalised during their ultra-conservative rule from 1996 until 2001.

The Afghan rights watchdog has registered some 704 cases of violence against women, including 89 cases of forced marriages and 50 cases of self-immolation so far in 2006, again, a significant increase over last year, it said.

Source: IRIN News.org