Star LAW *analysis*

Article 58C and assumption of office of the Chief Adviser by the President

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THE 13th Amendment to our Constitution providing for non-party Caretaker Government (NPCTG) was effectuated in the aftermath of nationwide upsurge and demand for free and fair elections to be conducted under such a government. Under prevailing circumstances then the amendment was made in a great haste and without holding sufficient deliberations on the detailed provisions of the Amendment Act. Presumably it also did not receive sufficient critical expert observations and vetting, for the acceptance by the then ruling majority of the very concept of NPCTG and moving a bill in the Parliament to that effect was the main and immediate concern, and it took away attention from consideration of the details. This left its marks on the wordings and logical aspects of the provisions of the impugned amendment from which it is now becoming difficult for the nation to come out clean and safe.

The present write-up aims at examining the linguistic, logical and legal weaknesses and lacunae of Article 58C that provides for the appointment of the Chief Adviser of the NPCTG by the President. Our contaminated politics has taken gross advantage of these weaknesses to interpret Art.58C in a manner threatening to the very concept of the NPCTG.

Yes, words of Article 58C are susceptible and even vulnerable to diverging interpretations. Even there is scope for mala fide interpretation and then taking the plea of innocence. If such plea is backed by the factor of state and political power, consequences can be dangerous. Bismarck who unified Germany in the middle of 19th century said he would first do by whatever means that which was politically profitable to him and then find hundred lawyers to justify his acts legally.

Interpretation of legal instruments is one of the most important topics in juridical science. Law has developed over the years on true interpretation of its various provisions to provide justice. US Constitution contains only seven Articles and 27 amendments. The rest running into volumes of constitutional laws are the works of interpretations by the US Supreme Court. Legal science has developed scores of canons, principles and methods of interpretation for making out the true meaning of any legal document. Gone are the days when a Roman general would offer to his rival general to surrender his troops on condition that he (Roman) would not take revenge and shed blood, and then, after the surrender, bury the prisoners alive without shedding blood, as promised!

Jurisprudence of legal interpretation at our disposal when applied bona fide clarifies beyond reasonable doubt the true meaning of Art.58C. From volumes written on the issues of interpretation it appears that text of law and intention of law makers (so called letter of law and spirit of law) are the prime considerations in any interpretation. Text is important because intention is ordinarily assumed to be reflected in the text. However, it may not always happen for various reasons, i.e. ambiguity, double meaning, general construction of the words etc. Then there comes the main task of interpretation to make out the true intention of law and law makers by using various other means, i. e. objective of law, context in which law was enacted, logic, common sense, implication etc.

Art. 58C ought to be interpreted keeping the above in mind. Owing to weak formulation of the Art 58C, strictly textual or literal interpretation may lead to two opposing results. One put forward by the then ruling alliance has been taken and acted upon by the President. The other textual approach visibly nearer to common sense and 'intention' approach and hence nearer to true meaning of the law has not been accepted by the President. Let us explain.

Proponents of the first textual approach have argued that Article 58C(3) specifically mention only two retired Chief Justices in order of retirement, the second qualifying for the job of the Chief Adviser in case the last retired Chief Justice, the first claimant of the job, is not available. Because second last retired Chief Justice Mainur Reza Chowdhury expired, the list has been exhausted, they insisted, and option therefore must shift to the category of retired judges of the Appellate Division under 58C(4). This is an utterly mechanical approach. In fact, the text has not limited the list only to two Chief Justices, rather has simply indicated an order of succession of Chief Justices as possible candidates for the Chief Adviser, limited inter alia by the age bar of 72. This becomes obvious when Article 58C (3) and (4) are read together. We see that in 58C(3) when the last retired Chief Justice is not available, to consider the second last Chief Justice the qualifying word 'such' is used to render the wordings as " Provided that if such retired Chief Justice is not available or willing ….", thereby indicating a specific person whose absence would shift the choice to the next option.

On the other hand, when second Chief Justice is also not available or willing, Article 58C(4) has not used the qualifying word 'such' not indicating any person and thereby keeping the possibilities of any available and willing Chief Justice within the prescribed age limit to qualify for the Chief Adviser. Article 58C (4) unequivocally states, "If no retired Chief Justice is available……," option will shift to the retired judges of the Appellate Division. The same argument will also be valid for appointing the Chief Adviser from amongst the retired judges of the Appellate Division when the list of Chief Justices is exhausted. When the list of the retired judges of the Appellate Division will be exhausted in the like manner, option will shift to clause (5) to appoint the Chief Adviser from amongst the citizens of the country. This is also textual interpretation, but strongly backed up by all cannons and principles of interpretation. Let us explain.

Rationally, logically and commonsense wise, the lawmakers could not have contemplated judges of the Appellate Division to be candidates for the Chief Adviser while a retired Chief Justice within the age limit was available. Moreover, the first interpretation, one adopted by the President, limits the scope for candidature only to four persons who might not be available for various reasons. This makes the very concept of NPCTG vulnerable to potential arbitrariness of the President who is a ruling party choice, which is what has exactly happened on October 29, 2006. Even after this mechanically textual interpretation, the President had the opportunity to appoint someone as Chief Adviser from amongst the citizens of Bangladesh. Article 58C (5) requires the President only to consult major parties and then use his prerogative to appoint the Chief Adviser. Formally, the President did hold consultations with major political parties, but did not appoint any citizen to the job. Instead, he hurried to go to last option i.e. clause (6) to assume the functions of the Chief Adviser. In fact, in breach of constitutional provisions he offered to become the Chief Adviser himself even before formal consultations with political parties started.

Combining the functions of the Chief Adviser and the President in one person has led to mass of legal contradictions and puzzles, and is against the basics of the concept of NPCTG. Under 58C (8) advisers are to be appointed by the president on the advice of the Chief Adviser. Now, the Chief Adviser would be advising himself as the President to appoint the advisers, or under clause (9), should such need arise, the Chief Adviser would be submitting resignation to himself. Most notoriously, the Chief Adviser as part of NPCTG would be responsible to himself as the president! Balance of power is totally gone. In fact, inclusion of the provision of the possibility of a party president assuming the functions of the Chief Adviser in the Amendment is unfortunate and a legal blunder. List of persons under clause (3) and (4) may be exhausted, but list of persons under clause (5) i.e. qualified citizens for the purpose of the appointment of the Chief Adviser cannot be exhausted. So, there is absolutely no scope for the creation of legal vacuum on the non-availability of persons qualified to become Chief Adviser.

Whatever may be the violation of the Constitution and setting of a bad precedent, assumption of the Chief Adviser's functions by the President has seemingly become a fait accompli, unless the process is stopped by intervention from the Supreme Court, the possibility of which under prevailing circumstances in the country is quite remote. Now the only option open to the President in view of his assuming Chief Adviser's functions, not in the best of manners (I refrain from using the word 'usurpation'), is to acquire political and social legitimacy by his neutrality beyond reasonable doubt. Only this would accord validity to his rule to hold free and fair elections.

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FINANCIAL MARKET *regulation*

SEC facing internal incapacity

BARRISTER TUREEN AFROZ

SECURITIES market in Bangladesh suffers from various setbacks. The market is yet to recover from the 1996 shock. Domestic investors continue to exhibit lack of confidence in the market, especially in the secondary securities market. Only a limited number of foreign investors are showing interest to venture the capital market of Bangladesh. It is estimated that from 1997 to July 2003 the total foreign investment in the initial public offerings in Bangladesh stood at very poor level - on an average less than $1 million a year. Many even claims that shares of a large number of listed companies are currently being traded far below face values at the two stock exchanges. It has also been reported (in 2004) that almost 50% of the brokerage houses at Dhaka Stock Exchange are currently remaining dormant.

From regulatory perspective, the reasons for such poor performance of the securities market are various. However, the central regulator of the securities market the SEC is beset with a number of internal problems. These problems effectively incapacitate the SEC to perform its role as an efficient regulator of the securities market.

Some of the most obvious internal problems currently faced by the SEC are discussed below.

Autonomy of the SEC

The SEC consists of 5 member commissioners, including one designated as Chairman and the rest as full time members. The Government appoints all commission members. The SEC (Amendment) Act 2000 stipulates that one member of the SEC should be from the private sector. Even though the SEC is operationally autonomous, the Government still controls the SEC funding. To work as an independent entity and to have more regulatory freedom, it is imperative that the SEC becomes a self-financing organization.

Resource constraint of the SEC

The SEC is currently headquartered in Dhaka. It does not have any other regional or district offices in other parts of Bangladesh. The shortage of officials at the SEC has become a major impediment to strengthen its regulatory role in Bangladesh. Apart from the position of the Chairman and the 3 full time members, the SEC is currently running with 23 senior and junior level officers. Nevertheless, the SEC has un-proportionately large supervisory responsibilities. Due to budget constraints the SEC does not have many principal organizational divisions to carry out its objectives more efficiently. Besides, the SEC's salary scale for its officers is substantially below that of the private sector and as such, fails to attract efficient staffs to work under it.

Absence of qualified personnel at the SEC

Bangladesh is yet to staff its SEC with qualified people who would possess necessary knowledge and experience in securities market regulation. It has been alleged that neither the past chairmen nor the members of the SEC had any operational work experience in the financial sector. It is true that over the past years various training programs have been organized to enhance the knowledge and skills of the SEC staffs so that they could perform their supervisory functions more effectively. It is equally beneficial for the regulatory staffs to go for overseas training programs and workshops/seminars so that they could acquire an international exposure of securities market regulation. However, it is unfortunate to notice that several staffs that have undergone training have left the SEC. This should be considered as waste of resources. The SEC should enhance more commitment of its staff. In this regard, recruiting and training of promising and committed young professionals should be encouraged.

Poor internal governance

Governance in the regulatory bodies is a pre-condition to establish governance in those to be regulated. Therefore, it is essential that the SEC, as a regulator, practices its 'internal good governance' to ensure good governance in the corporate sector under its regulatory control. However, it has been alleged from different corners of the society that the SEC had performed poorly in ensuring its internal governance. For example, there were allegations to the effect that a high official of the SEC was awarded 5 undue increments in a single year; an officer of the SEC got his appointment by submitting forged educational certificates; an official who earlier retired from a stateowned enterprise under golden handshake was appointed at the SEC violating rules and regulations and later found to be involved in a series of corrupt practices; legal advisor and a foreign consultant to the SEC was paid large amount of fees without valid grounds and many more.

Image crisis of the SEC

The SEC's poor performance also attracts negative media criticism. It is argued that negative media reports very often erode common people's trust on the SEC as an efficient and reliable regulatory body of the securities market. For example, quite regularly the SEC is found negligent in its routine examination of the prospectus before granting approval to the issuing capital. Questions were also raised as to the SEC's regulatory sanity when the SEC imposed a penalty of Tk. 1.8 million on Orion Infusion Ltd for defaulting in holding AGM two days after the AGM notice was already published in the newspapers. Such publications cast doubt on the SEC's capacity as an efficient regulator and as a result, the SEC faces tremendous image crisis.

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HUMAN RIGHTS *monitor*

Congo: ICC hearing could pave way for court's first trial

THE prosecutor for the International Criminal Court (ICC) must pursue more charges against Congolese rebel leader Thomas Lubanga and prosecute others responsible for heinous crimes in the Democratic Republic of Congo (DRC) if the court is going to bring justice to the Congolese people, Human Rights Watch said.

Thomas Lubanga Dyilo, who has been in the ICC's custody since March 16, is the former leader of the Union of Congolese Patriots (UPC), an armed group responsible for war crimes and crimes against humanity in the Ituri region of northeastern DRC. The ICC has charged him with enlisting and conscripting children as soldiers and using them to participate actively in the conflict in Ituri. On November 9, the court will begin a crucial hearing in The Hague to determine if there is sufficient evidence against Lubanga to move ahead with what would be the ICC's first-ever trial.

"The hearing to confirm these important charges marks a milestone for the victims in Ituri," said Géraldine Mattioli, international justice advocate at Human Rights Watch. "But these charges only begin to address the horrific acts committed by the UPC. If the ICC is going to have an impact on ending impunity in Ituri, the prosecutor must pursue more charges against Lubanga and target more perpetrators responsible for atrocities."

The UPC under Lubanga committed numerous other serious crimes in Ituri, including murder, torture, rape and mutilation. More than 60,000 civilians have been slaughtered by armed groups in Ituri since the beginning of the conflict, according to the UN.

Other armed groups, including the Lendu militia Nationalist and Integrationist Front (FNI) led by Floribert Njabu, also committed serious human rights abuses. Human Rights Watch believes that the ICC prosecutor should investigate Congolese, Ugandan and Rwandan officials who may be implicated in some of the international crimes committed in Ituri.

The hearing is not a trial to determine whether Thomas Lubanga is guilty or not, but a pre-trial hearing in which the prosecution will have to satisfy the court that there is enough evidence to move ahead with a trial. During the hearing, Lubanga, through his lawyer, can object to the charges and challenge the prosecution's evidence.

Four victims, through their legal representatives, will present their views and concerns about the current charges to the court as independent parties. However, they cannot participate in a manner that is prejudicial to or inconsistent with Lubanga's fair trial rights.

"This is the first time victims will be heard in an international criminal proceeding presenting their own concerns and not just as witnesses," said Mattioli. "It is crucial that the ICC keeps people in the DRC informed about these and other important developments in The Hague."

Human Rights Watch urged the ICC to disseminate information

about the hearing by holding a news conference in The Hague and transmitting it via video link for live broadcast in the DRC. The court should also make available audio, video and written summaries in an easily accessible and understandable format after the hearing.

Background

Ituri is one of the areas worst affected by Congo's devastating wars. A local armed conflict between Hema and Lendu ethnic groups that began in 1999 was exacerbated by Ugandan military forces and aggravated by the broader international armed conflict in the DRC.

Over the past five years, Human Rights Watch has gathered hundreds of testimonies documenting widespread human rights abuses committed by the UPC in Ituri. Survivors told Human Rights Watch how the UPC, a predominately Hema militia group, carried out ethnic massacres, murder, torture, rape and mutilation, as well as the recruitment of child soldiers. For example, UPC combatants under the leadership of Lubanga slaughtered at least 800 civilians on the basis of their ethnicity in the gold mining region of Mongbwalu between November 2002 and June 2003.

Serious human rights abuses were also committed by other groups, including the FNI, a Lendu militia opposed to the UPC led by Floribert Njabu. For example, in March 2003, the FNI attacked the town of Kilo in Ituri and killed at least 100 civilians, mostly women and children, whom they accused of helping the Hema.

The Ituri conflict, as well as others in eastern DRC, highlights the participation of non-Congolese forces. Ituri in particular became a battleground between the governments of Uganda, Rwanda and the DRC. These governments have provided political and military support to Congolese armed groups, despite abundant evidence of their widespread violations of international humanitarian law.

In April 2004, the transitional Congolese government referred crimes committed in the country to the ICC. On June 23, 2004, the prosecutor announced the beginning of the court's investigation in the DRC.

The International Criminal Court, based in The Hague, has broad international support. Currently, 102 countries have ratified the Rome Statute establishing the court, and nearly 130 have signed the Rome treaty.

Source: Human Rights Watch.