JUDGMENT REVIEW

Re Prof. Yunus: Where 'Law' duels 'Dignity'

M. JASHIM ALI CHOWDHURY

FOR obvious reasons the W/P No 1890 of 2011 i.e., *Prof Muhammad Yunus v. Bangladesh* got sparking media sensation and public gaze. It is perhaps the most classic example so far in Bangladesh which painfully exposed the judiciary to a burden of doing justice to 'expectation' rather than to 'law'. Prof Yunus's right to be dealt with as per law was overshadowed by people's expectation to see him dealt with dignity and honour. This write up is an attempt to review the High Court Division's judgment where avoiding 'what ought to be', the court simply brought out the 'what was'. Page numbers of the full text judgment has been put within brackets.

Dr. Yunus and the Grameen Bank

Grameen Bank was established under the Grameen Bank Ordinance, 1983. In accordance with the original Section 14 of the Ordinance, the Ministry of Finance and Planning appointed Prof. Yunus as the Managing Director of the Bank in 1983. Subsequently, Section 14 of the Ordinance was amended by the Grameen Bank (Amendment) Act, 1990 providing that the Managing Director shall be appointed by the Board of Directors with prior approval of Bangladesh Bank. Accordingly, in 1990 the Board of Directors appointed Prof. Yunus as the Managing Director a fresh with the required approval from Bangladesh Bank.

Subsequently, in 1993 the Board adopted the Grameen Bank Service Regulations. It determined 60 as the age of retirement for the permanent workers of the Bank. In 1999, in the 52nd meeting of the Board, the issue of Prof. Yunus's retirement was raised since he was above 60 then. This time the Board resolved by a resolution that since he had been appointed by the Board itself, the age limit of 1993 Regulations would not be applicable to him.

Later on in 1999 Bangladesh Bank observed that its approval had not been obtained regarding the 1999 Resolution. Thereafter the Board made the Regulations of 2001 regarding the terms and conditions of service of subsequent appointees as the Managing Director. In its next Report of 2001, Bangladesh Bank did not make any observation regarding the issue. Lastly, it is in 2011 that after some corruption allegations against Grameen Bank, the present government discharged Prof. Dr. Yunus from the post of Managing Director of Grameen Bank on the excuse of passing 60 years age limit.

Arguments for Dr. Yunus

The most laudable point was that the Nobel Peace Laureate was removed from his office against *thousands years of civilization and public interest* and as such he should be treated *not only in accordance with law, but also with honour*, respect and dignity (Dr. Kamal Hossain arguing, p 8).

Second, the age of retirement being not mentioned in both the 1983 Ordinance and his appointment letter of 1990, he had the right to continue his service as long as he wishes (p 7). The Service Regulations of 1993 and 2001 being subordinate legislation under the Ordinance, they were *not retrospectively applicable* to his service (Barrister Rokon Uddin Mahmud arguing, p 10).

Third, Bangladesh Bank had a very limited role to play under Section 14(1) of the Ordinance except only to grant prior approval to the appointment of the Managing Director. *The Ordinance did not otherwise confer any power to Bangladesh Bank* to dictate or determine the terms and conditions of the service of the Managing Director including the age of retirement (p 7, 9, 11).

Fourth, Advocate Mahmudul Islam submitted that by allowing Prof Yunus to function as the Managing Director for about 11 years, the government *impliedly approved* his appointment creating a vested right in him to continue and as such now the government was *estopped* from relieving him from his post on the plea of expiry of his retirement age (p 10).

Fifth, no notice had been served by any authority or person upon Dr. Yunus. It *not only constituted malice in law, but also malice in fact* violating the principle of natural justice (p 9).

The Court responds

Hearing the Attorney General on behalf of the government, the Court proceeded straight to the demand for treatment *not only in accordance with law, but also with honour*, respect and dignity. And it remained stiffly cold, "Any question of the propriety or legacy of the Nobel Prize is in no way involved in the writ petition (p 12)."

Then turning to the legal issues involved the Court took up the question whether the 1993 Regulations would apply to Dr. Yunus. The Court answered yes on the following grounds -

1.Section 14(4) of the Ordinance specifically envisages that the Managing Director shall serve under the Bank on such terms and conditions as may be prescribed by regulations (p 19).

2.Again the Regulations of 1993 apply to all 'worker' of Grameen Bank. As per the Regulation 2.1(Cha) 'worker' means all permanent and temporary officers and employees of the Bank which includes the Managing Director as well.

3.Moreover, Clause 2.0 of Prof. Yunus's appointment letter of 1990 clarifies that he *shall be treated as a regular employee* of Grameen Bank (p 18).

Next the validity of the 1999 Resolution exempting Dr. Yunus from the scope of the Regulations was taken up. The Court found the submissions made by Dr. Yunus's Advocates *misconceived, unreasonable and irrational* for following reasons

1.The Service Regulations, 1993 is a subordinate legislation under the Ordinance, but the resolution is simply a decision having no force of a law (p 21)

2.It is not conceived in any judicial system, which upholds rule of law that by any resolution or decision any law can be repealed, amended, suspended and made applicable or inapplicable (p 22).

3.Alternation of the terms and conditions of the petitioner's service by the 1999 resolution obviously required prior approval of Bangladesh Bank as per Section 14(1) of the Ordinance which was not taken (p 22).

The objections regarding retrospective effect of the 1993 Regulations were also overruled by the court. It was one of the conditions of Prof Yunus's 1990 appointment that his service would be regulated by the regulations to be made in accordance with the Ordinance (p 16). Having accepted the condition and enjoyed advantages and benefits thereunder, he was *estopped* from raising any objection regarding retrospective effect (p 20). Moreover, it is settled by case law that subordinate legislation may get retrospective effect if authorized by the parent law. The retrospective effect of the 1993 Service Regulations was envisaged by Section 14 of the Ordinance (p 29).

Regarding Natural Justice concern, it was found that the issue was being placed before the Government since 1999 (p 24). Therefore for not issuing any notice, Prof. Yunus was not prejudiced. The fact of the expiry of his retirement age being admitted, service of any notice would not serve any fruitful purpose and so it was not reasonably required by the Principle Natural Justice (p 25).

As to the *implied approval*, it was found that the appointment of 1990 was duly approved by the Bangladesh Bank. But after alteration of the terms and conditions of the petitioner's service by the resolution of 1999, even no proposal for such approval was placed and consequently the plea of 'implied approval' or 'approval by conduct' to such *imaginary appointment* should have no basis (p 23). It is a long established principle of law that *there can be no estoppels or waiver against any statutory provisions* (p 25).

A silent expectation remains unfulfilled

The writ petition was summarily rejected. The Appellate Division confirmed the High Court Division verdict in toto and hence now Prof. Yunus is none for Grameen Bank. Presumably the Court had to do justice though the heaven falls and it has done so. Yet a silent expectation remains unfulfilled. Was there no other way 'outside the court' to uphold the dignity of the Nobel Laureate? Or could the Court have passed one or two suggestive comments as to what should be done, especially when now-a-days the court frequently makes such urges to the policy makers? The answer seems to be beyond our laymen's acumen. We only see the doctrine proved, 'Law is not the respecter of persons.' Sometimes not even of one who may be respected!

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FOR YOUR INFORMATION

'Multiculturalism' debate and European Muslim identity

KAZI HAQUE

(...from previous issue)

THE timing of this speech can't be worse - politically, socially and economically. While the rift between militant Islam and western militarism is ever widening, such political maneuver will heavily come down on chances of reconciliation. There is heated debate in western media and intellectual circles over differences between Muslim and western lifestyles. Discrimination against ethno-racial minorities like immigrant Muslims is getting new low under ongoing economic recession. Cameron's speech tried to dispel some of those 'Islam versus west' stereotypes but that cannot right away remedy socio-cultural divide running deep in European societies. Morevoer, he refused to accept the roles of discrimination and deprivation in fuelling extremism.

Cameron's understanding of multiculturalism also seems to be a narrow one unlike the comprehensive definition from UNESCO. As per the latter, multiculturalism is a fusion in which cultures borrow from one another and creatively transform themselves instead of confining people into separate ethno-religious boxes. If multiculturalism actually unites rather than divides then the real problem lies with its practice rather than the idea itself. That is the suggestion from sources other than the centre-right establishments led by Cameron, Merkel and Sarkozy. Such alternative evidence indicate that the problem of European Muslim integration is not multiculturalism rather its lack thereof.

The practices of multiculturalism often turned into approaches of assimilation or segregation. The observations made by Gassan Khorani, a Danish immigrant from Palestine should be noted here: "The Danes think that integration means becoming fully Danish. Immigrants have to eat, drink and live just like the Danes. But those who come here think integration means earning some money, having their kids speak Danish and going to Danish schools. That's why there's a discord."

Then such multiculturalism went simultaneously with discrimination and the latter undercut the former. In response to Angela Merkel's branding of multiculturalism as failure, immigrants in Germany argued that all their efforts to integrate into society are thwarted by discrimination. This is supported by recent survey findings of Freidrich Ebert Stiftung (FES), a German foundation. About one-third respondents felt that immigrants were coming to exploit the country's welfare system and should be sent home when jobs are scarce. They also felt that Germany was being overrun by foreigners. Such stigmatization, exclusion and domination are also not unfamiliar to Muslims in UK. Baroness Warsi, the co-chair of ruling Tory Party and the first Muslim woman to serve in British cabinet observed back in 2009 that anti-Muslim hatred had become Britain's last socially acceptable form of bigotry. She recently said that prejudice against Muslims has become socially acceptable in the country. Many Britons accept this as normal and uncontroversial.

Social stigmatization is reinforcing institutional discrimination and rendering identity crisis of European Muslims acute. They are often facing a trade-off between social-institutional inclusion and retaining cultural identity. In different European countries, Muslim women are forced not to wear headscarf or similar Islamic veil in the names of religious freedom, gender equality, secularism and anti-terrorism. In Germany, Anissa Feras, a German of Turkish origin cannot send her daughter to public schools since they do not allow learning Turkish and cultivating Islamic tradition. "To be honest, if there was a German school which would respect (my child's) religion, I wouldn't mind her going to that school," she said. That is why Chair of UK's Equalities and Human Rights Commission Trevor Phillips' comments are pertinent here. He said in response to Cameron, "People (mostly) don't choose not to integrate. There are a few people on the edges who don't want to integrate with anybody else but most people, if they don't mix, it's because they don't have the choice." The government therefore has to renew its battle against discrimination and ensure access to jobs for people of all backgrounds, he said.

The contemporary European Muslims (in Germany, UK, France and the rest) are already in their 2nd or 3rd generation. The identity of the younger generations is not those of their parents or grandparents. But their identity is also not similar to native Europeans who are white and faith wise catholic or protestant or secular. They are both Europeans and Muslims at the same time. These two identities are not conflicting and can go along together, a fact that is even acknowledged in Cameron's Munich speech. They shouldn't be (also can't be) forced to trade off between the two. They should rather be allowed to flourish as European Muslims under equal opportunities and non-discrimination in all spheres of life --- economic, social and political. And the only effective governance approach to that end is comprehensive adaptation of multiculturalism not its rejection or half-hearted application. (Ended)

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LAW EVENT

Accede to HR protection convention

A group of 35 media persons and human rights defenders urged the government to accede to the International Convention for the Protection of All Persons from Enforced Disappearance 2006. Odhikar, organised a media workshop on May 26, 2011 in BRAC Centre Inn, Dhaka with the support of the Embassy of Switzerland. The workshop titled "Enforced Disappearance and Role of Media in the Ratification of the Convention "was designed to promote the understanding about the Convention, its contents and the role of media to promote acceding to the convention.

The convention adopted by the UN General Assembly Resolution 47/133 on 18 December 1992, came into force on December 23, 2010 following ratification by 20 countries. As of February 2011, this Convention has been signed by 88 states and ratified/acceded by 23 states. The convention defines enforced disappearance as arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorization, support or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

Gabriele Derighetti, Deputy Head of Mission, Embassy of Switzerland said that within next couple of months Switzerland will accede to the Convention after completing domestic processes. Facilitators have stressed the importance of adjusting domestic laws of Bangladesh accordance to the provisions of the convention in the process to acceding to the Convention.

While presiding over the session Farhad Mazhar, Advisor of Odhikar, stated that enforced disappearances in Bangladesh are not a new phenomenon. We have witnessed its severe form in our liberation war of 1971. Killing of national intellectuals he said, clearly resonates a chapter of brutal enforced disappearance. Dr. Ahmed Ziauddin, Advisor of Odhikar and an expert on international law, elaborated the concepts and contents of the Convention.

Press release.