JUDGMENT REVIEW

The warrant of precedence:

redeeming the 'demeaned' judiciary

M. JASHIM ALI CHOWDHURY

WARRANT of Precedence is the instrument for determination of relative status of different public rank holders in the eyes of the citizenry. Apart from the State and ceremonial occasions, it is observed for 'all purposes of the Government'. The first Warrant of Precedence of Bangladesh was adopted in 1975. Thereafter a new one was adopted in 1986. In the latest one the District Judges are placed in Serial Number 24 along with Deputy Commissioners, Lieutenant Colonels and the Commandant, Marine Academy. The prime consideration behind such placement was the territorial jurisdiction of the offices of District Judge and Deputy Commissioner, both being at the peak of the district judiciary and administration respectively. Mr. Ataur Rahman, an Additional District Judge and the Secretary General of the Judicial Service Association, challenged the Warrant of Precedence for being *ultra vires* the Constitution (Md. *Ataur Rahman* v. *Bangladesh* and Ors 30 BLD (HCD) 154). Since his 'Office with the Association and Membership with the Judicial Service created a sufficiency of interest' to draw attention a public wrong causing a public injury, the Court found a person aggrieved in Mr. Ataur Rahman and decided to entertain the challenge (Para 63). And creating a lot of curiosity in public mind, the Division Bench comprising Moyeenul Islam Chowdhury J and Justice Syed Refat Ahmed JJ delivered its judgment on February 4, 2010 declaring the Warrant of Precedence *ultra vires* the Constitution.

Asserting the Judicial service as a class apart

The petitioner was soliciting the place of Judiciary as an independent organ of the body politic Constitution has given the Judiciary a special place in Chapter II of Part VI. To the petitioner judicial service of Bangladesh is not a mere 'service' and the judicial officers are not 'public servants' in the same sense as the executive administrative officials are. The judicial officers exercise sovereign judicial power in that fashion as the Cabinet members exercise the executive power and legislators the legislative power. Being at par with the political executives and legislators, they cannot be equated with the executive administrative functionaries (Para 5). While framing the Warrant of Precedence it was completely ignored that constitutionally, functionally and structurally the judicial service is a class apart (Para 24, Dr. M. Zahir arguing). In light of all these, the petitioner claimed that Warrant of Precedence be amended accommodating the constitutional post holders first and the constitutionally defined, referred or recognized posts like the District Judges or the Chiefs of Staffs thereafter (Para 20).

Judiciary vis-à-vis Administration: Arguing for a parity

In defence of the Warrant of Precedence, the respondents declined to recognize the judicial service as a class apart having any superiority over other services. 'Defence services, local governments, judicial services and other services are duly dealt with in places and articles of the Constitution and nowhere the Judicial Service is given superiority over other services,' the respondents claimed. Moreover the Judicial service is a 'public service' for all intents and purposes of the term. Service conditions of the Servants of the Republic stipulated in Articles 133 and 135 apply to the Judicial Officers as well. This confirms that the civil executives cannot be inferior to the judicial officers (Para 11). In all respects the Judiciary is a co-ordinate and co-equal organ with the other two organs of the State (Para 12). Hence the placement of the District Judge with Deputy Commissioner in Serial No 24 is duly justified.

An independent Public Service

The Court accepted the defence arguments to the effect that Judicial service is a public service and that the judicial officers are not constitutional functionaries (Para 66). First of all it is clear that the Subordinate Courts cannot be at par with the Supreme Court. While the Supreme Court is a creature of the Constitution, the Subordinate Courts are of the laws as per Article 114 (Para 65). The Judicial Service being a service of the Republic (Para 68), the judicial officers cannot be equated with constitutional post holders as well (Para 66).

Thereafter, referring to *Mujibur Rahman* v. *Bangladesh* 33 DLR (AD) 111, Para 71 the Court confirms that the Supreme Court and Sub-ordinate Courts are the repository of judicial powers. And this places the Judges in parity with the political executives and

legislators, and of course, above the executive administrative rank holders. The later assists the political leadership while the judges function independently in a separate arm of the State (Para 75). While independence of judiciary is guaranteed by the constitution, the administrative executives are always at the beck and call of the political executives. From this point of view, the Chiefs of Army, Navy and Air Staffs also stands beneath the judicial officers (Para 78).

Inconsistencies in the Warrant of Precedence

The Warrant of Precedent was found to be hapazardous, arbitrary, irrational, inequitable, unreasonable (Para 89), ill-conceived and ill founded (Para 97) for reasons some of which are as follows:

1.The Pay Scale, a pre-eminently determining factor of the Warrant of Precedence (Para 74), places the District Judges in the 3rd Grade with Joint Secretaries of the Government. But quite inconsistently, the Warrant of Precedence accommodates them in Serial No 24.

2.The Government professed that highest district level executive and judicial officers have been placed in 24, after accommodating the national level officials like Secretaries and Additional Secretaries. Interestingly the Deputy Secretary, another national level official is placed in No 25 (Para 82).

3.Even then the status of the District Judges has been compromised further by adding a phrase "within their respective charges". In case of the Professors of Medical and Engineering Colleges placed at No 23 there is no fetter imposed on their status by adding phrase like "within their respective charges." In the same 24 serial, the Lieutenant Colonels and Commandant Marine Academy have no such fetters though their posts have local implications (Para 99).

4.Judges of the Supreme Court has been placed in Serial No 9 while a District Judge is at 24. In case a District Judge is appointed as a Judge of the Supreme Court, all on a sudden his status makes a quantum leap from No 24 to No 9, which is quite unreasonable. Naturally the District Judges should have been placed at a place in close proximity to the Supreme Court Judges (Para 98).

5.The Cabinet Secretary, Principle Secretary to the Government and the Chiefs of Stuffs have been bracketed in No 12 but stunningly enough some constitutional office holes like Attorney General, Comptroller and Auditor General and Ombudsman are found at serial No 15 (Para 89). To the Court, it is a staggering blow to the Constitution (Para 89). Even the law-makers MPs, finding place in No 13, are downgraded by the Cabinet Secretary, the Principle Secretary and Chiefs of Stuffs (Para 91).

6.In 1975 Warrant of Precedence, the Speaker and the Chief Justice were bracketed in No 4. The Speaker is now in No 3 and the Chief Justice is at 4. The Court thinks that it would be pertinent to bracket the Prime Minister, Speaker and the Chief Justice in the same serial (Para 90).

7.In the Serial No 16, the Chairman of the Public Service Commission, a constitutional office bearer, has been equated with the Secretaries of the Government (Para 92). The Members of the Public Service Commission has been equated with the Additional Secretaries (Para 93).

In light of all above, the Court came out with a cure to the maladies. The formula is simple. Place the constitutional post holders first. Then accommodate the holders of constitutionally mentioned, recognized and referred posts like District Judges, Additional District Judges and Chiefs of Staffs etc (Para 80). In this second category, the District Judges and Additional District Judges, being at par with the political executives and legislators, should come before the Chiefs of Staffs. It is only after them that a Secretary to the Government, may he be the Cabinet Secretary himself, could come (Para 104).

Since the Warrant of Precedence has a tune of ceremonial showdown, the degraded placement of the District Judges has demeaned the judiciary before the public at large for all practical purposes (Para 79). Accordingly the Court felt that the District Judges have an 'inalienable' right to be treated in accordance with the law declared by the Appellate Division in *Mujibur Rahman* (Para 101). Therefore, 8 point directives were issued upon the Government (Para 104). It required an amendment of the Warrant of Precedence within 60 days of the receipt of a copy of the Judgment. The new Warrant of Precedence was to be submitted within 13.05.2010 without fail (Para 105). Presently the Order remains stayed and waiting its turn to be considered by the Appellate Division, the peak of the judicial pyramid.

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LAWSCAPE

"No Smoking Please!"

MD. ISHTIAQ AHMED

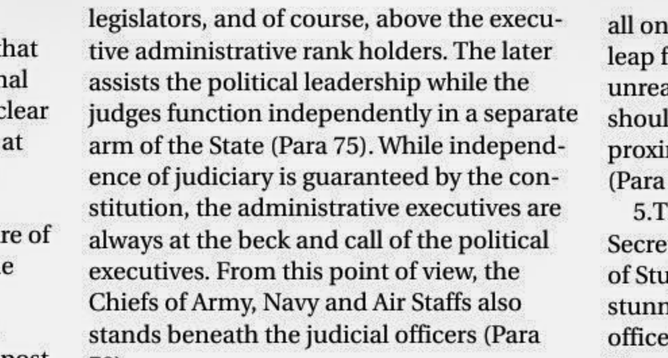
SMOKING is one of the potential bad habits that are destroying our society. I write the word "potential" due to its productiveness in light of terrible impact on starting different other horrific habits. It not only opens the door to different other unsocial and illegal activities but also leads our young generation to violate our social norms and customs.

The use of tobacco is increasing amongst the young people in Bangladesh. According to a survey, 2% of young people aged between 13-15 are currently cigarette smokers, among them 3% are boys and the rest 1% are girls; further 6% of young aged from 13-15, currently use tobacco products other than cigarettes, among them 8% boys and 4% girls [Global Youth Tobacco Survey (GYTS), 2007]. This trend of smoking is in dangerous level among the adult above 15 years. According to World Health Organization 2009 survey, approximately 43% of all adults aged above 15 use some form of tobacco [Global Adult Tobacco Survey (GATS)].

Now, what should be done to control the use of tobacco? It would be wrong to say that the framing of strict laws would be the solution, since we already have sufficient laws regarding this, except few flaws on them. We have *Railways Act, 1890* that prohibits any passenger from smoking in any compartment of a train. Section 110 of the said Act prohibits any passenger from smoking in any compartment of a train other than a compartment specifically designated for smoking. The same provision also establishes the penalties for those who violate this provision. Then we have *The Juvenile Smoking Act, 1919*. This Act prohibits a person from knowingly selling or giving tobacco products to minors under 16 years of age. The Act also sets forth penalties, enforcement powers, requirements to institute judicial proceedings, and exclusions. We just need to implement these provisions of law with proper amendment. In our country smoking is completely prohibited in certain public places and workplaces such as healthcare and educational facilities and on certain forms of public transport.

The Smoking and Using of Tobacco Products (Control) Act, 2005 (Act No. XI of 2005) is the principal law governing tobacco control in Bangladesh. The Act is comprehensive and bans smoking in public places making it a punishable offence, according to section 4 of the said Act. *The Smoking and Using of Tobacco Products (Control) Rules, 2006* provide further guidance on these areas. The current law, however, permits the establishment of smoking areas or spaces in public places and workplaces. Furthermore, there is no prohibition on smoking in restaurants and hotels, and that is where the problem lies.

It is unfortunate to articulate that the said Rules indirectly permits smoking and even in the public place. Rule 4 of the Rules of 2006 deals with *smoking zone.* Sub Rule 3 and 4 of Rules 4 permit smoking even in public places. Here it says that where it is a public place or a public transport, one



room if it is a building or if it is a train, steamer, launch or a ferry a separate place or room can be established for the smoker as smoking zone.

This totally contravenes to the guideline of *Framework Convention on Tobacco Control (FCTC)* to which Bangladesh is a state party. The FCTC is a legally binding treaty that provides a broad framework of obligations and rights to Parties to implement various tobacco control measures. According to FCTC Article 3, the objective of the FCTC is "to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke". Parties to the FCTC (such as, Bangladesh) have a legal responsibility to perform their treaty obligations in good faith, as per Article 26 of the *Vienna Convention on the Law of Treaties. According to FCTC Article 8 guideline on Adaptation and Implementation of Legislation* requires complete smoke free environments in all parts of all indoor public places, indoor workplaces, on all means of public transport and in outdoor or quasi-outdoor spaces where a hazard exists due to tobacco smoke exposure.

Now what does the term 'indoor workplace' actually mean? It is clear from the word itself that the indoor work place means a place where the worker works in an indoor situation. Hence all workers, which include those workers laboring in the private houses (the home maker). Therefore, upon ratifying FCTC, Bangladesh can not contravene the provisions of this convention.

Is banning of smoking in public place is only an international treaty obligation for Bangladesh? Isn't it a violation of constitutional guaranteed right to life? To answer the questions, let us consider the consequences and impact of smoking in public places.

The situation is popularly known as "secondhand smoking". Secondhand smoking occurs when a smoker smoke around a non-smoker. Secondhand smoke is also known as "environmental tobacco smoke" (ETS) or passive smoke. It is a mixture of 2 forms of smoke that comes from burning tobacco: side-stream smoke (smoke that comes from the end of a lighted cigarette, pipe, or cigar) and mainstream smoke (smoke that is exhaled by a smoker). Even though we think of these as the same, they aren't. The side-stream smoke has higher concentrations of cancer-causing agents (carcinogens) than the mainstream smoke. It contains smaller particles than mainstream smoke, which make their way into the body's cells more easily.

According to the US Environmental Protection Agency (EPA), the US National Toxicology Program, and the International Agency for Research on Cancer (IARC), a branch of the World Health Organization, secondhand smoke is classified as a "known human carcinogen" (cancer-causing agent) that leads the nonsmoker to death. Hence, secondhand smoking clearly violates citizens' right to life as guaranteed under the constitution. Bangladesh is therefore has constitutional obligation to ensure smoking free public places.

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