

REVIEWING THE VIEWS

Parliamentary impeachment of senior judges amid powerful executive: A paradox?

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RECENTLY the cabinet has decided to confer on Parliament the power of impeachment of judges of the Supreme Court (SC). The issue is of paramount importance in the context of good governance propelled by the constitutional principle of the separation of power.

The constitution explicitly provides for an impartial and independent judiciary as one of its cornerstones and the guardian. In reality though, the judiciary has been subservient to the executive since independence. Under the original constitution 1972, parliament had the power to impeach SC judges for gross misconduct and physical or mental incapacity. Changes in the form of government from parliamentary to presidential and the advent of successive martial law regimes were able to gradually make ground in, and assert influence on, the judiciary. The judiciary was brought under the direct executive control by the 4th (1975) and 5th (1979) amendments. The latter established the Supreme Judicial Council to control the higher judiciary. The governments in power, civil and military, placed their political agenda in the highest judicial appointments, paving the way for politically motivated judicial appointments in the SC. These governments made rhetorical promises to separate the judiciary from the executive only to appease popular demand for an independent judiciary.

A dependent judiciary is politically expedient for the executive, which perpetrated many unconstitutional acts in the past with judicially endorsed immunity. It served the political interests of the ruling executive, rather than an independent judicial organ of the Republic, causing an extraordinary public confidence crisis in the judiciary. The rampant domination of the judiciary by the executive led to Masdar Hossain case, in which the SC required the immediate separation of the judiciary from the executive, which went unheeded by the executive in defiance of its mandatory constitutional obligation to implement the judgment. The higher judiciary was eventually separated in 2007 by the then interim government. The 5th amendment was subsequently held unconstitutional by the SC but the Supreme Judicial Council survived. The incumbent executive has decided to abolish the Supreme Judicial Council and restore the 1972 constitutional power of Parliament to impeach SC judges.

Judicial independence necessary for the just exercise of judicial power is not unfettered but contingent on constitutional limits warranting judicial accountability. Judicial independence and accountability arise from the fact that all power of the Republic is vested in the people and under the supremacy of the constitution (s7), which judges are bound by their oath to respect and uphold (s148). Judges are thus accountable to the people in exercising judicial power. Judges are appointed, not popularly elected. Their enormous judicial power has placed them in a vulnerable position, susceptible to power abuses and judicial dictatorship. Exercising judicial power beyond constitutional limits can have far reaching consequences for the reserved domains of the executive and legislature, creating legitimate public

concern. The constitution provides no specific regime for judicial accountability to the people. It is this public accountability of the judiciary that brings parliament, being the elected and representative organ of the people, to have a constitutionally mandated impeachment power.

It is a standard practice in parliamentary democracies, like the UK, to vesting judicial impeachment power in parliament being an elected and representative body of the people to whom judges are accountable. In the Bangladesh context, merely arguing whether parliament can have this power appears to be a simplistic route to a complex journey that conveniently ignores two pressing matters: whether parliament fulfils the standard test of a representative democratic institution and whether it is capable of exercising this



power in the best interest of the Republic. Addressing these matters would require to considering the following.

1. The political circumstances surrounding the national election of 5 January 2014 militate against any claim by the current parliament of its popular representative identity. The election was marked by low voter turnouts amid rampant violence and boycotts by then main opposition parties alliance, resulting in majority (154) MPs elected unopposed and the remaining (146) MPs won with historically low vote cast. The litmus test of parliamentary legitimacy is its popular mandate expressed through a free and fair election. Doubtters at home and abroad question the status of MPs as the democratically elected representative of their constituent people, incapable of overseeing the public accountability of the judiciary.

2. An effective and vibrant parliamentary opposition to keep the government on the right track is indispensable in any parliamentary government, which is historically non-existent in Bangladesh. Political parties in government treated their opposition as political enemy rather than parliamentary opposition, which in retaliation pursued chronic boycotts and walkouts. Current parliament has a tailored opposition manufactured by the political party in power in response to election-boycott by main opposition parties. The chairs of nearly all parliamentary committees have been from the party in power, which violates the par-

liamentary convention of heading these committees by the opposition. In this polarised environment, the executive gains ample opportunity to dictate legislative policy decisions on critical public interests like judicial impeachment without adequate parliamentary inputs.

3. The ongoing process of democratisation of parliamentary government since 1991 is not matched by the democratisation of political parties, thereby creating a political climate where party leaders can be de facto autocrats and are not amenable to public scrutiny of their actions in parliament. Both government and opposition MPs are inclined to protect the unassailable status of their leaders and enhance the stature of the executive at the cost of parliamentary oversight. Given the trend of no voluntary leadership retire-



ment and no constitutionally fixed parliamentary terms, government MPs pursuing their conscience contrary to their party leader, who is also the head of the executive, will do so at their own peril.

4. Any MP voting against his/her parliamentary party or being absent in parliament or abstain in voting will lose his/her seat. But any independent MP joining a political party is deemed nominated by that political party (s70). This concentration and centralisation of power in the hands of the party leader, if happens to be the head of the executive, can control the tune of parliament, albeit including judicial impeachment.

5. Under the 1972 constitution, parliament had the impeachment power by 2/3rd majority (s96) and the lower judiciary was under the administration of the SC (s116), which was brought under the control of the executive by the martial law order No 4 in 1978. The present move for the restoration of original constitution s96 does not include the restoration of original s116. This partial restoration would allow the executive not only to bring under its control the higher judiciary that has been separated from its control since 2007 but also resuscitate full executive control over the entire judiciary, upper and lower alike.

6. Ministerial responsibility, individual and collective, is the hallmark of a parliamentary government, which is almost non-existent in Bangladesh. The ministerial execu-

tive is hardly accountable to parliament, increasingly becoming intolerant of public criticisms, and using new parliamentary acts to defend many indefensible ministerial conducts. The amendment of the Anti Corruption Commission (ACC) Act 2004 (s32A) curtails ACC power to sue public officials including ministers and the National Broadcast Policy 2014 limits press freedom.

Historically, adherence to the due process of law and justice in the performance of executive functions is religiously absent in Bangladesh. There is a great deal of executive interest at stake in the separation of the judiciary. The domineering culture of executive control over the constitutional imperative of the separation of power frustrated the creation of an independent judiciary. The change of form of government since 1991 is yet to change the entrenched political mindset of executive domination, which can shrug-off with impunity norms of democratic and responsible government. If the higher judiciary functions under the arms of the executive, the preference of judges to judicial restraint over activism may not be gainsaid in view of their vulnerability to judicial impeachment by a parliament devoid of any meaningful opposition and dominated by an all-powerful executive. The higher judiciary may generally abdicate its judicial impartiality and independence in favour of a pliant role, which if eventuates, will be paradoxical to its guardianship of the constitution and hamstringing the progressive development of constitutional good governance.

Arguing that the judicial impeachment power of parliament is common in other parliamentary government does not answer whether Bangladesh parliament can make impeachment decisions apolitically and judiciously at arm's length, free from the arms of the executive. The permeating executive control over parliament and its unwillingness to relinquish influence on the judiciary is still being felt. Instances such as the recently imposed limitation on ACC litigation power and press freedom, arbitrary withdrawal of cases by executive order, sudden transfer of the trial judge immediately prior to the judgment day in the General Manzoor killing case, and mounting list of pending ICT trial and appeal judgments stand not to the wonderment of those apologists who feel the omnipresence of invisible executive hand in legislative and judicial decision-making.

The pressing challenge for parliament is to put its acts together prior to acquiring judicial impeachment power and contain the executive within its constitutional bounds to salvage the marginalised separation of power. So long as the vast executive empire remains politically uncontrollable and legally unamenable to accountability, empowering parliament with judicial impeachment would in effect empower an executive, which is already all-powerful touch in the boundary of autocracy with democratic outfit.

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RIGHTS ADVOCACY

Maternity benefits - Right or Privilege?



SHIMONTI AHMED

MATERNITY leave means the period of paid absence from work. Maternity leave may be termed as a period of approved absence for a female worker granted for the purpose of giving birth and taking care of newborn child. Such type of leave is allowed to a mother before and after the birth of a child. Usually, the term maternity benefit is applied in case of working women. It indicates the payment made to a woman for giving birth of a child. All sorts of costs associated with maternity care may be treated as maternity benefit.

It is evident that, the Participation of women is prominent in the Ready Made Garment (RMG) sector of Bangladesh and with the change of time it is increasing in all other sectors of the society. It may be said that women participation in the economic development of the country is of two-fold. Firstly, women are working in RMG sectors and in factories as worker under the Labour Law 2006 and secondly on the other hand a large number of women are working in banks particularly in private banks, in different private and public organizations and in other sectors of the society.

Here, a major difference is that the first group is not literally educated and the second one is highly accomplished under the existing system. The way of working, working environment, remuneration package etc are totally different between these two groups of women but when the question of maternity benefit comes in the light both groups stand on the same footing. It is true that public sector women workers get better benefit than that of private sector, still for all sectors, the maternity benefit of working women is a privilege, not a right.

The maternity leave policy for women in Bangladesh is 16 weeks with full payment.

However, recently the Government has declared that it should be increased to six months.

The Law on maternity benefit in Bangladesh is regulated by the Bangladesh Labour Act, 2006 under Chapter IV called Maternity Benefit. Before the enactment of the Bangladesh Labour Act, 2006 there were three distinct Acts relating to maternity benefits for women for a specific period before and after the birth of child and for the payment during that period. The Acts were The Maternity Benefit Act 1939, The Mines Maternity Benefit Act 1941 and The Maternity Benefits (Tea Estate) Act 1950. All these Acts have been repealed and amalgamated in the new Labour Code 2006.

The Maternity Benefits provided under the Labour Act 2006 is for the workers and the definition of worker as provided in Chapter I, section 2 (LXV) clearly excludes the women who are working at the management level. Unfortunately, there exist no specific laws for management level (women) workers. Other than women workers at public services, the leave period that is granted to management level women workers is at the discretion of the concern organizations. As there is no legal barrier on the part of the employers, employees (women) are left at their mercy. Though employee voice is an essential element in the modern employment policy, there is hardly any scope of women to raise voice in the necessary four dimensions i.e. of free speech rights, participation in decision making, consultation and social dialogue.

In our male dominated society maternity benefit is still considered as a women issue and generally taken as a special benefit awarded to women. Again, there is discrimination or inconsistencies between the Labour Act 2006 and the amended Bangladesh Service Rules. The Amended

Rule 197(1) of Part-I of the Bangladesh Service Rules provides for permanent government servants the right to take six months' maternity leave and the Bangladesh Labour Act provides a worker with the right to take 16 weeks maternity leave. And the women working in private sectors are totally ignored.

It is a well-established fact that maternity leave benefits increase the chances of women to get back to their work and plays a significant role to increase organizational loyalty, efficiency and job satisfaction. When a woman is engaged in economic activities i.e. when a woman is earning only then it is possible for the entire society to move forward. Without economic independence a woman cannot expect respect of the family members or in the broad sense of the society. And to allow women to continue to work maternity benefits must be ensured.

In the English medium schools, particularly in the junior sections most of the teachers are female. For example, in Oxford International School, the junior section of the dhanmondi branch is completely and effectively run by female teachers. Women are capable enough and for this they are working dominantly. But a report of the daily New Age reveals that in many occasion the teachers of such type of schools are left with no option but to leave the job on maternity ground. A survey of Bangladesh Institute of Labour Studies (2010) on Ready Made Garments (RMG) and construction industries showed that in many cases maternity leave provisions are not properly implemented and on many occasion it is allowed without pay.

One of the basic causes of deprivation of women regarding maternity benefits is the weakness of relevant Acts and lack of enforcement of the existing laws. A mother is a mother. It is immaterial for an infant whether its mother comes within the definition of worker or not. The needs of a mother do not vary by the types of work she does. Proper implementation of the existing laws and increase of facilities for private sector working women must be ensured by the Government. Maternity benefits should no longer be treated as a privilege but a right of women.

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LAW EVENT

JUSTICE FOR CHILDREN

Independent non-judicial forum indeed essential

PREETI KONA

CHILDREN who face criminal charges are not only victims of social circumstances but also frequent subjects of harassment by concerned authorities in Bangladesh. Such victimisation of children stems mainly from the lack of awareness about child psychology and child rights which are showcased and guaranteed in various domestic and international human rights law.

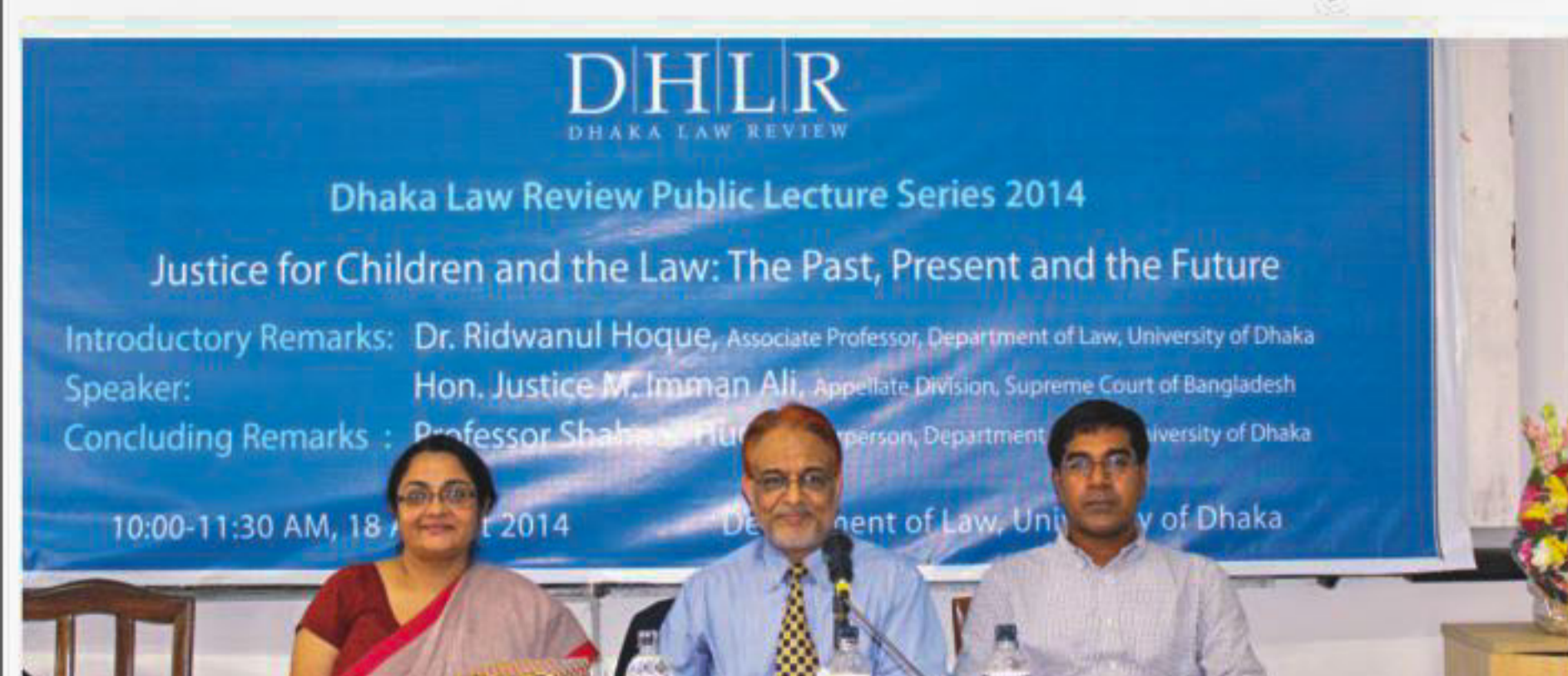
To bring this problem to public attention and to provoke discussion and debate around the issue, Dhaka Law Review arranged a public lecture at the Department of Law, University of Dhaka on Monday, August 18.

On this occasion, Honorable Justice M. Imman Ali of the Appellate Division of the

The lecture also reflected on the trajectory of the country's child law, covering some of the ground-breaking aspects of the newly revised Children Act of 2013. Justice Ali pointed out that in the present law, there is no independent non-judicial forum as contemplated under the International Convention on the Rights of Children (CRC) to deal with children in conflict with law.

He also opined that the use of school-going children for political demonstration or reception of VIPs including members of parliament or ministers at the street is punishable but has not been addressed in the Children Act.

Drawing examples from some cases, the lecture showed how child abuse impacts the behaviour of a child and eventually leads to delinquency. It also showed the problem in our judicial attitude in treating child offend-



Supreme Court of Bangladesh delivered the lecture on "Justice for children and the Law: The Past, Present and the Future". Around 100 academics, professionals, rights activists and students attended the session.

Justice Ali started his lecture by reflecting on the current status of justice for children in Bangladesh with special reference to the causes of delinquency. While analysing the role of the law vis-à-vis child psychology, Justice Ali put specific emphasis on two of the recent judicial decisions he wrote on this issue – one concerning the important age-factor of the child concerned in a juvenile trial and the other concerning the predicament of a particular child in jail pending decision about his paternity.

ers behind bars.

The lecture was concluded by emphasising on the necessity of training the officers dealing with child offender, raising social awareness, and ensuring facilities and child-friendly environment in the juvenile development centers in Bangladesh.

Among others Dr. Ridwanul Hoque, Associate professor of law at the University of Dhaka and Professor Dr. Shahnaz Huda, chairperson of the Department of Law, University of Dhaka spoke on the same topic.

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