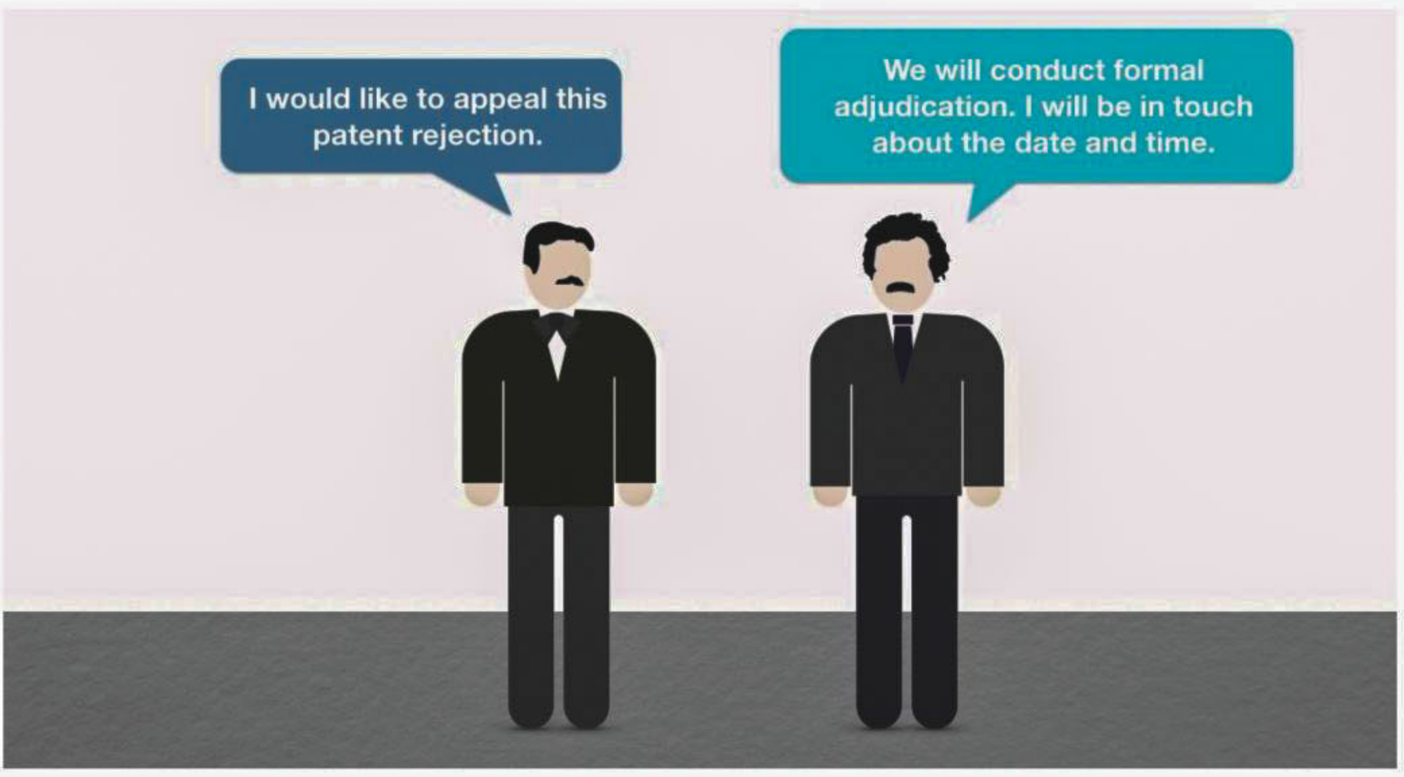
"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH • dslawdesk@yahoo.co.uk

LAW REFORM

Effectiveness of adjudication



KHALED H CHOWDHURY

IT is fair to say that alternative methods of dispute resolution (ADR) seeks to avoid the uncertainty, unpredictability, delay and high cost that are often associated with traditional litigation, while still offering a structured and predictable process to litigants.

Along with a number of other avenues depending on the context of the dispute, adjudication a form of ADR, though not much in focus in the near past, is now immensely popular in the construction and procurement disputes . In the UK for example, in over 90% cases decisions of an adjudicator are either accepted or results in final settlement. Same is the view in South Africa but the difference being adjudication is now backed by statute in the former (so as in Australia, New Zealand, Singapore &Hong Kong) whereas it is a matter of contract in the latter. In the public procurement sector also the World Bank is advocating that such procedures be used to project its funds. Same can be seen in the UNCITRAL's Model Law on Public Procurement.

In Bangladesh, construction industry most commonly adopts adjudication as a matter of contract between the parties and the Public Procurement Rules (PPR 2008, Part 6, clause 42) also directs adjudication to be held, failing amicable settlement, which may be followed by arbitration.

An adjudicator generally is a third part intermediary, expert in the relevant field, who is appointed by the contracting parties to resolve disputes whose decision is final and binding unless the parties choose to have it reviewed by arbitration or litigation. The method is faster and more cost effective than arbitration. An adjudicator is completely independent and paid jointly by the parties.

It can also be said that adjudication often concerns money claims , best suited for larger projects with sophisticated contractors. One the other hand, consumer adjudication schemes operated by trade associations, industry sectors or large companies with a consumer focus, are also now quite common to help deal with consumer complaints about their members, and generally focus on low value claims and aim to provide efficient results.

Adjudication can be made mandatory or a default provision so that the person declaring a dispute can best decide whether this is the most appropriate method in that context. As a comparison with arbitration it can be said that during the course of the contract, the dispute is likely to be about payment and the contractor will probably opt for adjudication, but at the end of the contract, where the dispute may be about the final account, he will prefer finality over speed and rather opt for arbitration. In mediation, although the mediator controls the process, he does not impose any resolution or opinion on the merits of the case, promoting a win/win situation, leaving the disputants themselves to control the outcome. Adjudication is a quasi-judicial process which is not directly enforceable in the absence of a court order.

A typical adjudication will be completed within 28 days or be extended up to 42 days. An Adjudicator has the duty to act impartially and has immunity from suit unless something is done or not done in bad faith. Many organisations such as Centre for Effective Dispute Resolution (CEDR), Construction Industry Council (CIC) in the UK have developed their own rules of adjudication. A Court may order mandatory injunction for complying with the order of an adjudicator and often a judgment in summary form follows in quick time.

An adjudicator's order is not appealable and when arbitration or litigation takes place following adjudication, the matter is heard afresh. Having said this, an order may be resisted for lack of jurisdiction, or for error of law and procedural unfairness. Hence if an adjudicator decides an issue not falling within the scope of the dispute or answers a wrong question in law or fails to give parties reasonable opportunity to present its case or acts with bias – his decision may not be enforced.

In substance its popularity has led to the view that adjudication should be applied to all categories of construction contracts, at both prime and subcontract level, and should be a mandatory requirement for the settlement of disputes prior to the completion of the contract. However, since enforcement of adjudicator's decision is crucial for its success, it would have been more effective if the method was backed up by legislation which has happened in the UK and a number of other countries.

It is hoped that adjudication will be in use more often in Bangladesh in various larger projects which will in most likelihood save the parties from cost, complexity and delay.

THE WRITER IS AN MCIARB, A BARRISTER AND AN ADVOCATE OF SUPREME COURT.

LAW WATCH

Mainstreaming biodiversity

MD. ASRAFUL ALAM

22nd May has been observed as the International Biological Diversity day globally with the theme of 'Mainstreaming Biodiversity; Sustaining People and their Livelihoods' with a view to increasing awareness of biodiversity issues.

Marine biodiversity is the variety of life in coastal and ocean environments. Bangladesh is a maritime nation having a large maritime boundary in the Bay of Bengal; especially after two historical legal victories with India and Myanmar. The region is very familiar and important for marine biodiversity. The Bay of Bengal has a large diversity of cetaceans. The highly productive tip of 'the Swatch of No Ground' has been identified as a cetacean hotspot with a relatively high abundance of at least four small and one large cetacean species. Flora and fauna is an important component of marine diversity in the Bay of Bengal.

Marine biodiversity is very much important for Bangladesh as it is going to build up Blue economy based on its marine resources. Our coastal zone contains distinctive development opportunities that can be instrumental in reducing the vulnerability and poverty of coastal communities and can contribute significantly to the national development with diversity of natural resources. In recent years, Bangladesh coastal areas received international attention due to its high potential for exploitation of both onshore and offshore natural gas.

The main reason for loss of marine biodiversity is largely the result of human activity either from land based activities or sea based activities by oil, chemicals, and harmful substances in packaged form, sewage, and garbage. Unsustainable consumption is another vital issue to be threat for marine biodiversity.

In case of marine biodiversity, we cannot but thinking of those legal protection. There are two types of legislation to protect and preserve marine biodiversity; international and municipal. There are a number of international legal instruments responding with the protection and conservation of Marine biodiversity such as the United Nations Conventions on the Law of the Sea, 1982(UNCLOS –III); International Convention on Biological Diversity,1992; International Convention on Oil Pollution,1990; Basel Convention on the Control of Trans boundary Movements of Hazardous Wastes and their Disposal; International Convention on Civil Liability for Pollution of Sea by Oil, 1969; and International Convention for the Prevention of Pollution from Ships, 1973. Bangladesh has ratified almost all of them which create compulsory obligation to protect and preserve marine biodiversity.

Bangladesh has some legislation to protect environment generally. But there has no uniform law to respond with Marine biodiversity in an integrated manner. Some of the laws concerning marine pollution are scattered, partial and backdated defective to coup with the new challenges of marine biodiversity. For example, the Port Act 1908 which is much backdated. Bangladesh adopted the Environmental Action Plan in 1992 focuses on coastal and marine environment but the action plan was not appropriate and integrated. The Environment Conservation Act (ECA) of 1995 (amended 2010), followed by the Environment Conservation Rules (ECR) of 1997, is now the umbrella environmental legislation that provides for overall environmental conservation of the country. But the legislation is general in nature for overall environment and not specifically for the protection of Marine biodiversity. The above mentioned laws are not adequate enough for implementing the international conventions ratified by Bangladesh concerning marine pollution and marine biodiversity. Moreover, Bangladesh has prepared its National Biodiversity Strategy and Action Plan (NBSAP) which contains neither any suggestion to adopt an integrated marine policy nor any legislation to protect and preserve marine biodiversity specifically.

Bangladesh government has emphasised on sustainable Blue economy based on marine resources as the only alternative to our land based resources. It would never be possible to ensure a sustainable blue economy in Bangladesh unless and until it can take an effective marine policy as well as integrated legislation to protect marine biodiversity. We believe that the stake holders are aware of the fact and would be much active to unite us for a marine policy and legislation to give us a environment conscious nation.

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CONSTITUTIONAL ANALYSIS

Impeachment of judges *how and why?*

ERSHADUL ALAM PRINCE

THE recent verdict of the High Court Division declaring 16th Amendment of the Constitution unconstitutional has created a debate in the country, more particularly among the members of the Parliament. Hearing the verdict the session of the Parliament condemned the verdict and the court as well. By the 16th amendment the parliament took back the power to impeach the judges of the Supreme Court (SC). The original provision of the Constitution was restored by the amendment canceling the 5th amendment. The matter is sub-judice, and hence, this piece will reflect on some issues purely on legal and constitutional endowments.

Very recently, party in power has been trying to establish the theory of 'Sovereignty of Parliamentary' which is indeed a theory, let alone the practice in our country. Our Constitution did not manifest sovereign and supremacy of the parliament, rather it established constitutional supremacy.

The principle of article 7 does not necessarily indicate the concept of parliamentary supremacy. Authority of article 7 will be exercised by parliament in accordance of Constitution. The plain reading of title of article 7 is 'Supremacy of the Constitution' which says, "All powers in the republic belong to be people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this constitution." Parliament is subject to the constitution. If any law or any provision thereof made by the Parliament are incompatible with the Constitution, would be void.

We have ample references in hand where SC declared amendment or any law void with reference to that particular article. The recent argument among the legislators suggesting that the Court does not have the authority to declare the amendment void is not supported by the Constitution. As a guardian of the Constitution, the SC has full authority to declare any amendment or any law void and not as per the Constitution.

The provision of Supreme Judicial Council (SJC) as it was previously enshrined in our Constitution is not a popular form of impeachment of judges of the SC in ideal democracy. It is one of the major arguments from the Legislative and the Executive side of the State. But, to argument for ideal impeachment procedure without having an ideal democracy is rather a hypothetical mêlée indeed.

We do not nevertheless enjoy an ideal democratic culture as aspired in our original constitution where 'impeachment' was vested in the parliament on the consideration that we have obtained that culture and will continue to practice as well. In addition to this, we have article 70 which was also cited in the observation of the court.

The Constitution has the provision for separation of the judiciary from the executive. Revoking the power from SJC to the parliament is also not compatible with article 22. Beside, the provision of article 116 makes article 22 more effective. The lower judiciary is still not independent as aspired in article 22. To allow the judiciary to grow independently, power to remove and rheostat judges need to be vested in the hands of judiciary.

The irony is that the same parliament and the executive that have condemned the recent decision of the HCD had once applauded the judgment of 5th, 7th and 13th amendment.

The need of the time is to have a clear and transparent appointment procedure for our judges. Without having so, we are vocal about their removal procedure. We should first look in to their transparent appointment procedure. If it is settled, the impeachment and removal procedure will work better preserving the dignity of the judiciary.

Even the present provisions of SJC need to be reconsidered in a practical way.

If impeachment is transferred to the parliament, the Chief Justice must be a part of it and majority of the member should have constitutional oath. And other dysfunction of the amendment will prevail in the non-prevalence of two-third majority of the party in the house. What will happen to the judge eligible to be removed by the parliament having no two-third majority by any party?

The only constructive role was played by the law minister on 5th May. He, in the face of protests from his fellow MPs has tabled the bill on remuneration of the judges.

However, the government will appeal against the judgment before the Appellate Division of the SC. The Hon'ble SC will surely come up with observations. As the matter is sub-judice, we must be cautious before comment on it and wait until final delivery. We must uphold the honor and dignity of the judiciary in all our judicial or political issues of any kind.

THE WRITE IS LAWYER AND RESEARCHER.

16 AMENDMENTS TO CONSTITUTION

1st amendment in **1973** empowered the JS to enact law to hold trial of war criminals

2nd amendment in **1973** empowered the govt to declare state of emergency

3rd amendment in **1974** empowered the govt to implement the July **1974** treaty between Bangladesh and India on border demarcation and exchange of enclaves.

4th amendment in **1975** introduced one-party rule and presidential form of govt

5th amendment in **1979** validated the first martial law imposed after Bangabandhu's assassination in 1975 [**scrapped** by the SC]

6th amendment in **1981** qualified the then vice president Justice Sattar to contest the presidential election

7th amendment in **1986** validated the second martial law imposed in **1982** after ouster of elected president Sattar [**scrapped** by the SC]

8th amendment in **1988** set up permanent benches of the High Court in six places outside the capital and made Islam the state religion [**partly scrapped** by SC]

9th amendment in **1989** limited the tenure of the offices of president and vice president

10th amendment in **1990** increased tenure of seats reserved for women in JS

11th amendment in **1991** validated the then CJ Shahabuddin Ahmad's taking charge of interim government after fall of autocratic Ershad [**scrapped** by the JS]

12th amendment in **1991** restored parliamentary form of govt

13th amendment in **1996** introduced polls -time caretaker govt [**scrapped** by the SC]

14th amendment in **2004** increased retirement age of SC judges

15th amendment in **2011** scrapped election-time CG system

16th amendment in **2014** empowered JS to remove SC judges [**scrapped** by the HC]

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You may send us your daily life legal problems, queries, write ups, opinions to: Law Desk, 64-65, Kazi Nazrul Islam Avenue, Dhaka-1215; Tel: 9144330,8124944, fax 9144332; email: dslawdesk@yahoo.co.uk.