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LAW INTERVIEW

Judicial independence to guarantee justice

Today's interview is the continuation of the previous one which was published on 8 November 2016 in 'Law & Our Rights', The Daily Star, where ***Barrister M. Amir-Ul Islam****, Senior Advocate at the Supreme Court of Bangladesh, talked about the trends of constitutional governance vis-à-vis the growth of democracy in Bangladesh.* ***Emraan Azad*** *from Law Desk talks with him on the following issues here in the second part of the interview.*

Law Desk (LD): Recently, the High Court Division of the Supreme Court of Bangladesh has declared the 16th Constitutional Amendment (relating to the system of 'impeachment of the Supreme Court Judges by the Parliament') unconstitutional. As it is now argued that by such declaration the judiciary has basically destroyed one of the founding provisions of the original 1972 Constitution. What do you think about it? Can judiciary do that?

M. Amir-Ul Islam (AI): This was not the only issue in this case. The main issue in this case is the independence of judiciary and the separation of powers. Also, sharing the experience from other jurisdiction particularly in our neighbouring countries (India, Malaysia, Sri Lanka). Finally that ultimately answers, what will help bring and achieve the cordial relationship between the parliament and the judiciary for acting in harmony to fulfill the mandate of the parliament for the selection of the judges based on the criteria as envisaged in the Constitution of Bangladesh. I hope the mandate would be able to adequately inform the people and the concerned quarter to be enlightened with these issues. I am glad that your newspaper is raising this question, but it would be much more useful to deliberate the matter with open mind in order to develop the harmonious relationship between the parliament and the judiciary.

It is presently, the judges to be appointed from among the persons who only have the experience of ten years of practice or service in the judiciary. Article 95 of the Constitution goes on to say:

"95. (1) The Chief Justice shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice.

(2) A person shall not be qualified for appointment as a Judge unless he is a citizen of Bangladesh and –

(a) has, for not less than ten years, been an advocate of the Supreme Court; or

(b) has, for not less than ten years, held judicial office in the territory of Bangladesh; or

(c) has such qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court."

While making the Constitution at drafting stage, questions were raised with regard to the appointment of judges. Original proposal as presented in the first draft contained only Article 95 (1) and (2) (a) and (b). Allow me this indulgence to share my experience in the Drafting Committee deliberation on this issue. Soon after the liberation war, the old East Pakistan Assembly Hall was cleaned up removing all the debris and garbage, and the space was created in a make shift manner for sitting of the Committee without any secretarial help. Hence I resort to my memory as part of an oral history. I raised the issue that Article 95 (2) (a) and (b) at best may serve the purpose of complying with the eligibility. But for the purpose of appointing judges in the highest judiciary we must have clear criteria and guidelines for ensuring the quality and qualification of the judges who would desirably be committed to the constitutional values and dedicated to serve the people through dispense of justice without fear and favour, but with particular emphasis for those who are down-trodden to enjoy the fruits and gifts of the Constitution. Such qualities are to be ascertained and applied in a transparent manner same being pre-requisite for becoming a judge of the Supreme Court. They must be chosen by a competent body like a search committee as to contain in the law to be made as promised in our 1972 Constitution. Our people have always strived and fought for justice (social, economical and political) which was denied to our people and they suffered such deprivation from time immemorial, suffered not only in deprivation of basic needs but also the term "Shubichar" remained absent for the "have nots" in every sphere of their lives. The poor and weak have been deprived of justice not only in economic, social and political arena, but also in the arena where justice is supposed to be dispensed even in the modern court system. Judges of our highest Court therefore must be chosen through a process on the basis of meritocracy having ethical and moral competence fortified with courage and conviction to uphold the constitutional values and having ability to dispense justice without fear or favour, so that they can protect the weakest against the strongest in an environment where the law shall not bend, nor the judge would budge, under whatever pressure or temptation they may be subjected to.

Article 95 is an unique clause for making the legislature so powerful in making legislation in this regard that it can vary and supersede the existing requirement under Article 95 (2) (b). Another significance of this Article is that our Constitution is not rigid. It is flexible in order to ensure the best quality and character to such extent that in this matter law, to be made under Article 95 (2) (c), can bring and introduce a additional qualification (in addition to 10 (Ten) years practice or service). Not to talk about the absence of law, in the past people were subjected to a regime to witness a non-transparent and arbitrary appointment of judges even without consulting the Chief Justice. Mr. Justice Shahabuddin Ahmed had to learn from morning newspaper the names of certain persons who were made judges of which he had no earlier information. Some of them were not even known to him. On that day Bangladesh Bar Council was holding its annual conference in the Supreme Court premises where all the Presidents, Secretaries and other senior leaders from all the District Bar Associations and their representative delegates were present. Dr. Kamal Hossain was presiding and I was conducting the meeting. Honourable Mr. Justice Shahabuddin Ahmed said that "Chief Justice is Mr. nobody" while it comes to the appointment of new judges in the High Court. After the Honourable Chief Justice finished his short speech, everyone was taken by surprise and I announced that we are going to establish that it is the Chief Justice who must not only be consulted but the consultation must be an effective consultation and without his nod judge could not take the oath. The assembly of leaders of all the Bar unanimously endorsed this view. Irrespective of party affiliation, all the leaders of Bar made a deputation and the consultation restored and ultimately Chief Justice Shahabuddin's opinion was given primacy.

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Bangabandhu signing the 1972 Constitution.

LD: What are the challenges that we have now as regards the practice of constitutionalism in Bangladesh?

AI: Education system and the curriculum must include constitutional theme and the values as well as reciprocal rights and obligations of every citizen as mandated by the Constitution. These are needed to be taught in every educational institution from primary, secondary to the higher level, and to be included in the curriculum of every branch of learning and discipline.

Every citizen must share the endowment of the Constitution reinforcing those values for which people made their supreme sacrifice in the liberation war "so that we may prosper in freedom and may make our full contribution towards international peace and co-operation in keeping with the progressive aspirations of mankind."

LD: What will you suggest to reinforce the role of judiciary to protect people's constitutional rights in Bangladesh?

AI: In the case of *Walter Valente* v *Her majesty the Queen* (1985) 2 R.C.S. 673, the Supreme Court of Canada listed three essential conditions of judicial independence and these conditions were reflected in the judgment of *Masdar Hossain* case (1999) 52 DLR (AD) 82. An independent, impartial, competent and ethical judiciary is essential for the rule of law. It is necessary to establish a culture in all our institution and work place to learn how we can establish a society to ensure in our dealings with each other so that we the citizens begin to learn the judicial norms as the judges do, so that we learn how to do justice to oneself as with others in one or all dealing(s) in every sphere of our life in family to start with and in work place and the society we live. It is also indispensable for guaranteeing a fair and impartial resolution of disputes expanding horizon of a written Constitution with clear, just and predictable application of law, and for holding governments and private interests to account which is one of the foremost priorities today.

A legal framework for that structure, must include: (a) the system by which the judges are chosen and appointed, and they are trained in a world class judicial training institution as having been established in many countries including one in India; now high time we should have one in our country as well; and (b) the guarantee of security of the tenure of the judges.

LD: Thank you, sir for talking on important constitutional law issues.

AI: You are always welcome.

LAW LETTER

Appointment of the SC Judges

The process by which judges are appointed in the judiciary is an important factor to safeguard judicial independence. In establishing rule-based government, an independent judiciary plays a substantial role. In Bangladesh, following the *Masdar Hossain* case, the subordinate judiciary was formally separated from the executive in 2007. However, the process of appointment of judges in the Supreme Court of Bangladesh still rests in the hands of the executive.

According to Article 95(1) of the Constitution of Bangladesh, the President can appoint the Chief Justice. The High Court Division (HCD) and the Appellate Division (AD) judges are appointed by the President in consultation with the Chief Justice.

Nevertheless, the President, under Article 48(3) of the Constitution, has to act in accordance with the advice of the Prime Minister except when appointing the Chief Justice. This ultimately vests a significant portion of the power of appointing justices in the hands of the cabinet. Hence, to ensure that the process of appointing judges does not rely on the hands of the executive, a Supreme Judicial Council could be formed like the one during the regime of the caretaker government in 2007-09.

The Council, like the former one in 2008 would be headed by the Chief Justice and include the Minister of Law, three senior-most Judges of the AD, two senior-most judges of the HCD, the Attorney General and the President of the Supreme Court Bar Association. They would recommend, after selection, two competent names against each vacant post to the President for appointing one of them as a judge.

Alternatively, a Collegium of judges can appoint new judges in the Supreme Court, as it is done in India, where it is formed of the Chief Justice and four senior-most judges from the AD. The Collegium would submit a list of eligible candidates to the President who would ultimately appoint the most suitable candidates as judges.

In both the abovementioned methods, proper consultation with the Chief Justice will be done by the President and this will ensure that the executive can in no way influence the whole procedure. After all, a fair procedure of appointment of judges of the Supreme Court is the first step towards ensuring actual and absolute independence of the judiciary.

Ali Mashraf
Student of Law
University of Dhaka

LAW WATCH

International law and WTO legal order

MAZHARUL ISLAM

THE particular uniqueness of the Dispute Settlement Body (DSB) makes it rational to consider that the World Trade Organization (WTO) as a particular system has escaped itself from the range of Public International Law (PIL): (a) the DSB has obligatory authority; (b) the advice of the Panels or the Appellate Body are approximately implemented; (c) the DSB presents an appeal system. Thus, the individuality of WTO law may be capable to assert dominance over PIL. The principle of lex specialis points out that the further particular rule, triumph over the more common rule when interpreting the similar subject. Although, International Law Commission (ILC) Report of the Study Group on Fragmentation of International Law, (2002), stated that 'No particular global legal system can be fashioned outside the ambit of PIL'.

Whereas talking about the co-relationship between the WTO and PIL, the first point is that the WTO is a branch of PIL. The WTO has a constitutional agreement, standing organs, unlock membership, recognised funds, and can function under its own name and principles, all distinctiveness of an international organisation, a creation of PIL. Hence, the WTO cannot assert itself from the ambit of PIL likewise; it can be assumed that WTO law has to be synchronised with other international law. The leading case on this is the panel report of *Korea-Procurement*. The panel views 'the customary rules of international law apply to the WTO treaties and the process of treaty formation under WTO.' This report implicitly suggests that the general customary international law always relevant for interpretation of the WTO law.

There are several places in the WTO covered agreements that mention plainly to other international law. TRIPS Agreement refers some intellectual property rights conventions: the Paris Convention, the Berne Convention, and The Rome Convention. Furthermore, article 2 (2) of the TRIPS refers that the TRIPS itself has to be read in such a manner that the provisions it contains do not clash with any of the Conventions stated by TRIPS.

The WTO covered agreements repeatedly refer to the commitment to collaborate with other international organisations. The Dispute Settlement Understanding also refers to the application of other international law in dispute resolution. Article 3 (2) of the DSU requires the Dispute Settlement Body (DSB) to pursue the system of interpretation put in PIL. These indicate that some principles of international law are present in the WTO regime. As it was affirmed in the *US-Gasoline* case, 'the WTO covered agreements are not to be interpreted in clinical isolation of PIL'.

In the *US Shrimp* case, the Appellate Body established that after coming across at the plain text of a treaty, if the interpretation found is uncertain, then the Panel has to glance at the object and purpose of a treaty. Furthermore, the WTO agreement, in its article XIV, acknowledges the English, French and Spanish to be reliable languages. As a result, the issue may arise which description should be accorded preference in case of divergence in the three texts?

Article 33 of Vienna Convention on The Law of Treaties stipulates that, in a case where a treaty has been legitimised in more than one language, the requisites of the treaty shall be supposed to have the similar meaning in each linguistic edition. Although, the outcome in the *Argentina-Footwear* case and the *India-Quantitative Restrictions* case advocates that 'Appellate Body will attempt to narrow interpretations of WTO provisions so as to evade finding conflicting obligations'. Furthermore, the *Shrimp Dolphin* case gives the impression that the AB is unwilling to present any view on the relationship between WTO law and other international law.

The WTO is a permanent bargaining medium among states, hence an organisation similar to the international forums beneath of the established international law. The WTO esteems PIL, although at the same time adjusting it to the certainties of international trade. In fact, PIL fills the gaps by interpreting the WTO agreement with the other international conventions. Therefore, the interaction between WTO and PIL are correlated. Similarly, the WTO norms exist on its own just as HR and IE claim their own legal distinctiveness, but certainly not outside the realm of PIL.

THE WRITER IS PHD RESEARCH SCHOLAR IN LAW AT SOUTH ASIAN UNIVERSITY, INDIA.