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JUDGMENT REVIEW

JUDGES' APPOINTMENT CASE

A quagmire of judicial activism

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There are some significant limits to judicial activism and the Court has been repeatedly confronted with a tradeoff between activism and restraint. Excessive judicial interest in policy issues may risk the Court being shackled by limited impact its judgment may create on the ground.

AS far as judicial review and activism are concerned, most of our commentators have been laudatory and complementary. There are skeptics and they refuses to uphold interference by the judiciary in legislation and policy-making. Admittedly, there are some significant limits to judicial activism and the Court has been repeatedly confronted with a tradeoff between activism and restraint. Excessive judicial interest in policy issues may risk the Court being shackled by limited impact its judgment may create on the ground.

The High Court Division's (HCD) sort of advisory opinion in relation to judges' appointment in *Ragib Rouf Chowdhury* case seems to have pushed the limits of judicial activism. The "suggestions" given by the HCD in this case may be taken as a good case for judicial adventurism (Nupur Chowdhury, From Judicial Activism to Adventurism, *Asia Pacific Journal of Environmental Law*, Nov. 2014). On a plain reading, the writ petition seeking "direction" upon certain parties to frame a "guideline" for the appointment of judges in the Supreme Court appears clogged within a quagmire of untouched legal questions, indeterminate parties, half-hearted reasoning and a curious ending.

The petitioner, as lawyer, became concerned over the current appointment process (p. 2 of the full text judgment available in Supreme Court website), as it is susceptible to "control or influence by or of other organs of the State" (p. 4). The petitioner's case in brief is that independence of judiciary being a basic structure of the constitution (p. 6), depoliticised appointment of judges (p. 8) and also the appointment of persons of appropriate intellect and acumen is highly important for earning respect from bar (pp. 11-12) and ensuring the independence of judiciary. While a preliminary inquiry into the sufficiency of interest of the persons pursuing a PIL is a norm, nothing of this sort was attempted in this case at all. The Court however had to concede that the petitioner did not come to enforce any the fundamental rights guaranteed under part III of the Constitution (p. 31 of the judgment). Had this been the observation, the Court could have rejected the writ petition following the guideline 6 of the recent *National Board of Revenue* v *Abu Saeed Khan decision* of the Appellate Division (18 BLC (AD) 116, para. 38) which has cautioned the HCD to see whether public interest litigation turns into a "publicity interest litigation."

Most important point of the case, which unfortunately was not hard pressed by the petitioner with necessary elaboration and precision, was whether a system of public announcement of judicial vacancies and call for interest could be a constitutionally viable option. The Supreme Judicial Commission Ordinance issued in 2008 was declared void by the HCD (*Idrisur Rahman* v *Bangladesh* 60 DLR (HCD) 714) on the ground that the President could reject the recommendation of the Commission and primacy of the Commission was not ensured there (p.9).

Apart from drawing inspiration from the UK National Judicial Appointment Commission (p. 11), the petitioner did not explore the other salient features of the Commission system introduced in 2008 and positive nods given by the HCD to some of those. While opposing the open call system, the Attorney General and one of the amicus curies Barrister Shafiq Ahmed argued that the judges of the Supreme Court being appointed through President's satisfaction are not persons employed in the service of the Republic. Therefore, unlike other services of the republic, open applications may not be called for (p.18-19). This argument, however, ignores the *Masder Hossian* opinion of the Appellate Division where the judiciary was declared an integral part of the service of the Republic (52 DR (2000) (AD) 82, para. 27) and *Justice M A Aziz* decision of the HCD where 'service of the Republic' in relation to article 99 was interpreted as including all posts or offices of the Republic (60 DLR 2008 (HCD) 511, para. 223). Ironically, neither the petitioner nor the Court offered any rebuttal to this misplaced argument. The Court merely pressed that the Commission system has been rejected in India (pp. 38-39).

The petition rested on the question as to who was to be directed to frame the guideline and for whom the "guideline" is to be framed. Relying on *Ministry of Justice* v *Md. Idrisur Rahman* (2010), the petitioner argued, and the court agreed, that only the Chief Justice reserves the right to initiate an appointment process in the highest court and government may only suggest suitable names to the Chief Justice (p. 7). Chief Justice would propose candidates to the President and President would appoint therefrom. President however is constitutionally required to receive the Prime Minister's advice. Hence, Dr. Kamal Hossain claims that the process is actually the reverse. The appointment is still being initiated by the executive and the Chief Justice is consulted on the basis of list of candidates provided by the executive (p. 22). Whatever be the process, theoretically it remains unclear who is to be guided on the selection criteria – President, Prime Minister or the Chief Justice? Interestingly, the petitioner filed the writ against all – President (through the Ministry of Law), Prime Minister (through the Principal Secretary and Cabinet Secretary) and Chief Justice (through the Registrar General of the Supreme Court). The petitioner argued that if there were some definite guidelines for the Chief Justice in initiating the process and government in suggesting names it would be better (p. 7).

Bulk of the amicus curies, Attorney General and even the Court agreed that law making responsibility in this regard rests with the parliament as per Article 95(2)(c) of the Constitution and the judiciary is not in a position to issue mandamus to the parliament (p. 32). Also, in absence of any express delegation of the law making authority from the parliament to the executive, the government also is not in a place to frame the guideline sought (p. 30). Then who else is to be directed? If it is the Chief Justice then the Court however opined that such an attempt would "undermine" the power of the Chief Justice (p. 40).

The Court therefore disposed of the 'misconceived' writ petition (p. 44) against the political executive. Yet it ended up in suggesting some 'eligibility criteria' to the honourable Chief Justice – at least one of which has political implication and almost all of which are less likely to have any practical impact on the ground. That's where we may think judicial activism turns into a judicial adventurism.

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LAW IN-DEPTH

Clarity of 'consent' in rape law

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THE indictment hearing of the sensational Banani rape case is scheduled to begin on 9th July, 2017. This in turn marks an official courtroom-beginning of the case.

Consent, being the fact in issue in every rape case, requires legal scrutiny and attention in this particular case at hand as well. In relation to the filing of the case, the victims said to *The Daily Star* that they were invited as guests at a birthday party in Banani's the Raintree Hotel where they were allegedly raped (*The Daily Star*, May 7, 2017). Neither were the alleged rapists complete strangers to the victims, nor the victims unwillingly happened to be at the place where the offence was reportedly committed. These two things are equally important to those who, from a patriarchal standpoint, will blame the victims, depending on the age-old rape myths and stereotypes. The judgment may and may not be in favour of the complainants. However, the underlying idea behind this endeavour is to 'legally' show how these two things may create a complication to get justice for the rape victims in general, given the present legal framework relating to the prosecution of rapes.

The Penal Code of 1860 along with the Prevention of Oppression against Women and Children Act 2000 don't give an inclusive definition of rape and make penile penetration sufficient in order to constitute the offence. This in turn makes the act of penetration necessary to the commission of rape too.

India has brought an amendment in 2013 bringing rape within a broader purview and under the title of sexual offence. This amendment has categorically brought various non-penetrative acts and acts which do not amount to penile penetration within the ambit of the same head of sexual

offence. This amendment is said to be brought in the backdrop of the *Nirbhaya gangrape* case (2012) in which the laws fell short of addressing the particular brutality involved concerning the use of an object (an iron rod) in the commission of the offence.

Going one step ahead, another tremendous and praiseworthy change in the Indian laws was an explanation introduced thereto defining 'consent' exhaustively as an unequivocal voluntary agreement by a person to engage in sexual activity. The definition seems to be a 'yes means yes' approach taken by the Indian legislature providing an affirmative and unambiguous standard of consent. 'No means no' rape laws basically face criticism for requiring a verbal resistance on part of the rape victim. The critics often take this verbal resistance as to be on par with the archaic standards (i.e. physical resistance) often considered as an evidence to prove or disprove an act of rape. Such a requirement also puts a burden on the victim making them responsible to prove resistance on their part.

Keeping the thesis and antithesis of 'no means no' rape laws aside, apparently it seems that the philosophy behind not taking a negative approach in India was a conscious effort to keep marital rapes and postpenetration rapes (withdrawal of consent in the middle of an act of rape) outstanding. It was in tune with the section itself which has made marital nonconsensual sex an exception to sexual offence.

In Bangladesh, the idea of introducing postpenetration rape laws seems to be utopian when the existing law is more than a hundred year old and doesn't even define rape itself properly. However at least a definition of consent can be a lot helpful just to draw a line and break through the walls of stereotypes.

The Justice Verma Committee (December 23, 2012) assigned to put forward recommendations introducing the amendment in India, examined the law of consent in Canada and England and Wales. Under Canadian law, the accused cannot subjectively believe there was consent; he must demonstrate that he believed there was consent because he took reasonable steps to ascertain the same. Canadian standard seems to be really praiseworthy for us to take inspiration from. An objective, unambiguous and affirmative definition of consent at least would show that the statutes do not support the rape myths or stereotypes.

Moreover, law should not leave blatant loopholes and vagueness feeding the patriarchy involved in blaming a rape victim for her previous acquaintance with the accused, her presence and friendly appearance with the accused before the commission of the offence or her clothes.

Rape is an invasion of a human's body and hence a violation of bodily integrity and of sexual autonomy. Therefore, the existing statutory standard (or vagueness to be specific) in order to prove rape falls short of being in tune with constitutional rights of a woman as well. This area deserves a legislative concern, now.

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RIGHTS WATCH

Advocating for alternative sentencing

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ADMINISTRATION of criminal justice system is established to maintain peace and tranquility in the society by punishing the criminals. The state foresees that by giving harsh punishments to the offenders, they will deter other like-minded people; the victim's vengeance will be satisfied; the very same convicted person will be prevented to commit any further offences; he will be reformed in the prison and ultimately crime rates in the society will decrease in future. But the modern penology suggests that harsh punishments are not effective enough to reduce crimes and resist recidivism in any given society; rather severe nature of punishments makes the prisoners stubborn that leads them to be obstinate criminals after being released from prison. From a humane point of view, however, the offenders should be given well-treatment in lieu of severe punishments. Alternative sentencing, specially alternative to imprisonment, are often used in many legal systems to reduce overcrowding in prisons and ease the rehabilitation and reintegration of released prisoners in the society.

Till date, the prisons of Bangladesh are overcrowded with more than double number of inmates that deteriorates overall prison condition including violation of human rights of inmates, breeding criminal activities in prisons due to possible association with notorious criminals. The offenders are not accepted normally and as such the released offenders and their family members face troubles in reintegration to the society. In such a situation, development and use of non-custodial punishments may be proper alternatives with a view to reducing pressure on prisons and aiding the released prisoners to reenter in the society easily. The UN Minimum Standard Rules for Non-custodial Measures (the Tokyo Rules) 1990 and the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) 1985 along with the Probation of Offenders Ordinance 1960 and other domestic penal laws allow the frequent use of alternative sentencing in the administration of criminal justice of Bangladesh.

At present there are various types of common alternative sentencing, inter alia, fine, probation, parole, furlough, community service, conditional discharge, house custody, compensation to victims and open jail. Among them we may develop and use the suitable ones considering socio-legal environment of our country. Fine, probation, parole, community service and open jail may be introduced in Bangladesh in large scale with some pilot projects for some selective convicted offenders.

As regards to fine, the Penal Code 1860 treats it as both alternative to imprisonment and collateral to imprisonment by providing '…shall be punished with imprisonment or with fine or with both' and 'shall be punished with imprisonment and shall also be liable to fine'. Fine, as a punishment, does play an efficient role to achieve penological goals; lessen economic pressure on prison administration and help the convicted offenders reintegrate in the society. Our criminal courts may utilise this possible avenue as alternative to imprisonment in some petty offences. The Probation of Offenders Ordinance 1960 envisages probation scheme as alternative to imprisonment for certain offences and it is detailed by the Bangladesh Probation of Offenders Rules 1971. Any offenders punished with imprisonment not more than two years for certain offences and any women punished with other than death penalty may be at the discretion of courts sent to probation scheme under supervision of probation officers. The Children Act 2013 stipulates the provision of probation for juvenile delinquents and the Special Privileges for Convicted Women Act 2006 provides for appointment of probation officer. The judges and lawyers of the criminal courts should be given necessary training and a separate Department of Probation of Offenders may be set up in this regard.

The Jail Code of Bangladesh allows the concerned authority to release a prisoner before completion of terms under certain conditions of parole scheme where a prisoner is allowed to stay with the family members. A prisoner is entitled to this special privilege after serving half portion of sentence subject to good conduct in jail and having training on trade. The prison authority may apply this scheme in massive scale setting up a separate parole wing in collaboration with social service department and play role in reducing congestion in prison. Community service, as a penal measure, may be incorporated in the Penal Code for particular petty offences with view to embracing modern correctional philosophy.

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