



Bangabhaban, the official residence of the President of Bangladesh.

PHOTO: DHAKA TRIBUNE

LAW OPINION

Office of Profit: a “Common Sense” understanding

The constitutional foundation of the integrity branch is based on objectivity, neutrality, and insulation from political co-optation. While one cannot question a political government’s right to choose its presidential candidate, a candidate so chosen must be open to constitutional scrutiny.

DR M JASHIM ALI CHOWDHURY

In a generic sense, all the posts, positions, and offices of the republic, including the presidency, are “offices of profit”. That is because article 152(1) requires us to take the meaning of a constitutional phrase or word in its generic sense “except where the subject or context requires” thinking “otherwise.” In this write-up, I propose to consider two such “subjects or contexts”– the differentiating philosophies surrounding the representative and integrity branches of the state. I endorse what Justice ABM Khairul Hoque called a purposive and “common sense” interpretation of the constitution [Advocate Ruhul Quddus v Justice M A Aziz 60 DLR (2008) (HCD) 511].

The Representative Branch

Article 66(2)(f) bars the holders of the office of profits in the service of the republic from seeking membership in parliament. As per the opening clause of article 66(2), if an MP candidate is found to hold any office of profit, they are disqualified. If a sitting MP takes any office of profit, he/she becomes disqualified to continue as an MP. Article 66(3), however, declares the offices of the President, Prime Minister, Speaker, Deputy Speaker, Minister, Minister of State, and Deputy Minister as offices not of profit for “the purpose of this article”. It must mean that the listed offices are the offices of profit for all other purposes. The High Court Division judgment in Justice M A Aziz’s case confirms this understanding. Around 12 years earlier, Barrister Asrarul Hoque also pressed this view in Abu Bakar Siddik v Justice Shahabuddin Ahmed 17 BLD (1997) 31.

The constitution framers made some offices not of profit for the MP candidates or sitting MPs because these posts are meant for the political government of the country, for which the politicians and elected representatives

should generally be considered a natural fit. It is also natural that people who held those offices previously could return to the parliament later, as the opposition MPs, for example. Hence, the exclusionary clause in article 66(3) is context-specific and politically sensible.

Interestingly, the office of the President was not on the list until 2011. But unlike other posts, a presidential candidate need not necessarily be a sitting MP, nor are the former presidents usually expected to seek the MP election later. Whatever the intention of the 2011 government was, the position remains the same – article 66(3) is an exception only to be applied to the elected representatives and political office-bearers.

The Integrity Branch

The integrity branches are institutions responsible for working as the fourth branch of the state. Comprised of unelected, tenured, job-secured and functionally independent office-bearers, these organisations run a powerful machinery of political neutrality and legal accountability against the political branch. It is, therefore, pertinent that they are insulated from political manipulation and post-retirement aspirations. Hence, the 1972 version of article 99 enunciated that retired judges are not eligible for “any other post or office” after retirement.

On the former judges’ appointment to the presidency, we have Justice Shahabuddin Ahmed’s case. In that case, the court validated Justice Shahabuddin Ahmed’s nomination and election to the presidency in 1996. Prominent lawyers like Dr Kamal Hossain, Barrister M Amirul Islam, Barrister Rafiqul Hoque and the then Attorney General Barrister K S Nabi supported the nomination. They relied on some technical, I would say literal, differences between the presidency and other offices in the services of the republic. Those arguments had similar resonances to some of those we

hear today – such as the President does not take remuneration (it’s an honorarium rather), the office of President is a constitutional post, President is an elected (not appointed) post, President is the head of the state (not a servant of the republic), etc.

When pitched against the constitutional philosophies behind the integrity institutions, these arguments are destined to fail. The jurists who pressed those literalist arguments in Justice Shahabuddin Ahmed case shunned them in Masder Hossain case 52 DLR 2000 (AD) 82. They argued, and the Appellate Division agreed, that these types of technical distinctions could not stand. Advocate Mahmudul Islam and Barrister M Amirul Islam were categorical in claiming that all posts – ‘parliament, executive, and judiciary’ are the posts in the service of the republic.

A Common Sense Approach

Justice M A Aziz’s case took the matter a step further. In this case, the court overruled another precedent named Shamsul Hoque Chowdhury v Justice Abdur Rouf 49 DLR (1997) 176. In Abdur Rouf, the court held that constitutional posts are not offices of profit. In M A Aziz, Justice ABM Khairul Hoque denounced it and called for a “Common Sense Approach” to constitutional interpretation. His common sense told us that the office of profit should mean any post or office of the republic which has anything to do “in respect of (not, in) the government”.

To conclude, the constitutional foundation of the integrity branch is based on objectivity, neutrality, and insulation from political co-optation. While one cannot question a political government’s right to choose its presidential candidate, a candidate so chosen must be open to constitutional scrutiny.

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LAW LETTER

Bangladesh’s participation in the WTO’s dispute settlement system

SHANTO DEB ROY ARNO

The dispute settlement system of the World Trade Organisation (WTO) is a key mechanism for resolving trade disputes between WTO members. It provides a process for members to challenge measures taken by other member(s) that are inconsistent with the WTO agreements and seek to have such measures removed or modified. As of February 2023, different WTO members have referred 616 disputes to the WTO Dispute Settlement Body. Not all of these disputes required formal rulings for resolution. A mutually agreed solution is always the preferred outcome, and consultations among disputing members within the framework of the WTO dispute settlement can often be sufficient to resolve the matter in dispute.

Bangladesh has made the use of this system to challenge measures taken by other countries and to protect its national interests in international trade. For instance, Bangladesh has successfully utilised this system to challenge the anti-dumping measures taken by India on lead-acid batteries. In addition, Bangladesh was also a third party in the US-India dispute over rules of origin for textiles and apparel products in 2003.

Despite the above successes in challenging the anti-dumping measures taken by other countries, the country has yet to establish a case against such practices. In 1992, for example, Bangladesh faced anti-dumping duty from the USA on Bangladeshi cotton shop towels. This continued for two sunset reviews, but the duty was eventually withdrawn. Bangladesh also faced anti-dumping measures from Brazil for sacks, jute bags and jute yarn in 2013, anti-dumping measures on particle boards from India in 2009, and anti-dumping investigation from Turkey for textile and apparel. In 2013, it also faced anti-dumping duties on imports of bicycle parts from the European Union. Again in 2015 and 2017, Pakistan and India respectively imposed anti-dumping measures on hydrogen peroxide (HP). The investigation process of India was found to be in direct conflict with sub-section 7 of the WTO rules, as they did not provide any actual and mathematical figures. The Supreme Court of Pakistan also relied on secondary information rather than the information provided. In 2019, India again imposed anti-dumping duties on imports of jute goods from Bangladesh.

Bangladesh is lagging behind in filing a case at the WTO Dispute Settlement Body due to the lack of legal expertise, economic barriers, private actors’ concerns, limited access to finance and political factors. Thus, a detailed policy framework addressing all legal and economic aspects needs to be prepared to identify a way forward.

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FOR YOUR INFORMATION

The intricacies of Kabinnama

SURIYA TARANNUM SUSAN

Marriage in Islamic law is of contractual nature. The standard marriage contract form is known as Kabinnama or Nikahnama. Unfortunately, people treat Kabinnama as a mere formal document registering a marriage and are ignorant about the scope of inserting stipulations in it. Islamic law has kept many avenues open for women to negotiate marital rights and obligations and insert relevant details in the Kabinnama. A perusal of relevant clauses of Kabinnama is given below.

Dower

Clauses 13-16 deal with dower. Dower is a strict financial obligation set by Shariah that has to be performed by every husband during marriage. There can be two portions in terms of time of payment of dower: prompt and deferred. The prompt part of the dower needs to be paid immediately and the deferred portion is payable on dissolution of marriage, or on the occurrence of any specified event. Any stipulation regarding non-payment of dower is void. Dower is payable even if the amount is not fixed at the time of marriage. An unpaid dower is equivalent to debt. Unless the wife forgoes her claim, it is one of the first things to be paid out of the dead husband’s estate.



Clause 15 mentions the amount of dower paid. Clause 16 puts forth if any property has been given in lieu of the whole or any portion of the dower.

Special conditions

Clause 17 is of huge ambit. It permits the incorporation of special conditions permissible under law and Shariah. The conditions can vary from fixing the amount of maintenance, place of the couple’s residence after marriage, wife’s right to

work or pursue education, distribution of household chores, restriction on the husband’s right to remarriage, compensation if the husband pronounces a “no-fault” unilateral divorce, etc. A valid condition is legally enforceable. However, the conditions should be unambiguous. Anything requiring further interpretation will create difficulties in enforcement.

Delegated divorce

Clause 18 speaks about the delegation

of the right to divorce to the wife, also known as Talaq-e Tafwid. This right can be delegated unconditionally or with conditions attached by the husband. Prominent scholar Mulla quoted Talaq-e-Tafwid as one of the most important modes of divorce, because it gives a Muslim woman the right to repudiate marriage without the intervention of the court. Unlike Khula, maintenance and dower need not be waived in delegated divorce.

Restriction in husband’s right to divorce

Clause 19 makes room for imposing conditions on husband’s right to divorce. The conditions can be diverse. Monetary compensation can be asked for if the husband exercises the right. In case the husband brings any imputation against the wife, the production of evidence

corroborating the same can be demanded. The conditions in this clause should also be unambiguous.

Documents pertaining dower, maintenance, etc.

Documents concerning the minimum amount of maintenance, property (if the same was given in lieu of dower) if existing, should be presented with Kabinnama under clause 20.

Remarriage of husband

Clauses 21 and 22 mention the perquisites of remarriage. If the bridegroom has any existing wife, he needs to take permission of Arbitration Council pursuant to the Muslim Family Law Ordinance (MFLO), 1961. An application along with prescribed fee needs to be submitted to the Chairman of the Arbitration Council of the area where the existing wife is residing. If the existing wife consents for remarriage, it should be attached in writing with the application. The further proceedings will be as per section 6 of the MFLO, 1961.

If used properly, the intricacies of Kabinnama can be a safeguard against arbitrary divorce and ensure financial security to women.

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