

Decentralization of Judiciary and the Role of Lawyers in Bangladesh: An Analysis

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Abstract

What ever may be the form of government wellbeing of the people should be the moto of governance. In Bangladesh, after independence, both civilian and military governments adopted overwhelming plans and programs for the socio-economic and political development of the people. General H.M. Ershad, capturing state power through a bloodless coup undertook the policy of decentralization of power for the benefit of masses. Accordingly judicial institution was brought to the reach of common people by Martial Law Orders and Constitutional amendments. But lawyers as a whole did not support the program and took all mechanisms to foil this people oriented system. This article is aimed at exposing the stand and motive of learned lawyers against the policy of decentralization of judiciary.

Keywords: Decentralization of Judiciary, Lawyers, Movement, High Court Division Bench, District Court, Thana Head-Quarter, Demand, Boycott.

1.1 Introduction:

The role of judiciary is very significant in a democratic polity as because it acts as the guardian of individual rights and liberties. As its members are not elected representative s they are not promise bound to uphold the interest of any particular sector as like as that of the executive and legislature. Hence the judiciary is to act as the guardian of the society as well as the fountain of justice. Under federal system it plays the role of the guardian of the constitution. Though military rule is undesirable yet its leader sometimes creates avenue for the common people to enjoy the benefit of justice. This sort of approach was adopted by Chief Martial Law Administrator H.M. Ershad, a military autocrat, through the process of decentralization of judiciary. Chief Martial Law Administrator H.M. Ershad after taking over of state power over throwing the elected government of Justice Abdus Sattar concentrated in making state privileges to the door of common people. Though he had dormant political ambition yet his steps taken for bringing the benefit of judiciary down to the reach of common people was really an extra-ordinary thought of a benevolent military ruler. Lawyers usually cooperate in administration of justice by maintaining their professional ethics. But in Bangladesh their role was reverse. Although his policy was intended to ensure justice to the common people but his efforts were vehemently impeded by the role of lawyers. They for their group-interest denounced the decentralization of judicial policy of the government. Not only that they adopted dirty tricks as well as steps to uphold their interest depriving the benefit of justice of common people.

1.2 Establishment of Permanent Bench of High Court Division and Financial Loss of the Lawyers:

Immediately after attaining state power Chief Martial Law Administrator H.M. Ershad pledged to bring the state privileges to the reach of common people. Keeping this end in view on April 22, 1982 the Council of Advisers under the Chairmanship of CMLA H.M. Ershad decided to establish permanent Benches of the High Court Division of the Supreme Court of Bangladesh in each divisional Head Quarter or in any other suitable places with jurisdiction over the districts of respective divisions. In the same meeting it was decided that government would establish Munsifs Courts and other courts in Thana Head Quarters throughout the country (excluding Chittagong Hill Tracts) by phase for the trial of suits and cases arising out of local limits of respective police stations. (The Bangladesh Observer, April, 1981)

In order to bring the benefit of judicial system to the door of the common people CMLA H.M. Ershad issued Martial Law Proclamation (2nd Amendment) Order, 1982 on May 9, 1982 and this Order gave the CMLA power to make judiciary accessible to masses. (The Ittefaq, May, 1981) Under this power three permanent Benches of High Court Division were set up and started working at Jessor, Rangpur and Comilla on and from June 15, 1982. (The New Nation, June, 1981)

The Munsifs Courts and Magistrate Courts also started working at upgraded Thana Head Quarters. As a result of this decentralization of judiciary common peoples' sufferings with regard to filing of suits, handling of litigations, expense of cases and time were reduced. Though people started getting benefits of decentralization of judiciary yet the lawyers' interest was affected severely. The number of clients of the law practitioners who stayed at Dhaka reduced to one-fourth. Same was the case with district practitioners. These established practitioners were forced to go to the permanent Benches of the High Court Division outside Dhaka in search of clients and the district practitioners to the Thana Head Quarters vice-versa. Getting positive response of the

common people to the establishment of High Court Benches outside Dhaka government set up another three permanent Benches of the High Court Division at Barisal (The Bangladesh Observer, July, 1983), Chittagong (The Bangladesh Observer, August, 1983) and Sylhet (The Bangladesh Observer, January, 1984).

1.3 Movement of the Lawyers against Decentralization:

Since financial interest of the legal practitioners was injured severely they started movement against the decentralization of judiciary. In order to bring pace in their movement senior lawyers of the Supreme Court Bar Association viz. Aaur Rahman Khan, Mr. M. Bazlur Rahman Talukdar, Vice-President of the Supreme Court Bar Association, Syed Ishtiaq Ahmed, Mr. Sirajul Huq, Khandakar Mahatabuddin, Mr. Shamsul Huq Chowdhury etc passed unanimous resolutions on October 10 and 13, 1982 calling for all out boycott of courts until the withdrawal of the government's decision with regard to decentralization of judiciary.(The Bangladesh Observer, October, 1982) Not only that the lawyers brought out processions and enchanted anti-Martial Law slogans outside the Supreme Court. Consequently they began court boycott all over the country. But government took drastic action against the lawyers. As a part of that action police arrested thirteen lawyers of the Supreme Court on October 17, 1982 on charge of violation of Martial Law Regulations 13, 14, and 17 of 24th March, 1982 and sent them to jail. (The Bangladesh Observer, October, 1982) In the face of stiff action of the government the Supreme Court Bar Association under the chairmanship of Mr. M. Bazlur Rahman Talukdar, ex-Vice president of the Supreme Court Bar Association in an emergency meeting held on October 26, 1982 recalled the resolutions of court boycott passed on October 10 and 13, 1982.(The Bangladesh Observer, October, 1982) Consequently as a gesture of goodwill, CMLA H.M. Ershad ordered the release of the detained lawyers on October 26, 1982.(The Bangladesh Observer, October, 1982)

1.4 Politics of Lawyers:

Though for the greater public interest government took drastic action against the lawyers on October 17, 1982 yet the lawyers all over the country were not suppressed totally. Rather they adopted another light method of creating pressure upon the government by observing periodic court boycott through out the year 1984. Since their call was not heard by the government the lawyers all over the country formed Coordination Council of Bar Associations of Bangladesh with Mr. Shamsul Huq Chowdhury ex-president of the Supreme Court Bar Association as convener and like political parties they placed 6-point demand to the government for fulfillment. The demands were:- (The Bangladesh Observer, April, 1984)

- 1) Withdrawal of Martial Law;
- 2) Formation of an interim national government;
- 3) Restoration of fundamental rights;
- 4) Restoration of right of writ;
- 5) Withdrawal of the order to establish Munsifs Courts and Magistrate Courts at Upazilla.
- 6) Stop decentralization of the High Court Division of the Supreme Court at district Head Quarters.

The Supreme Court Bar President and convener of Coordination Council of Bar Associations Mr. Shamsul Huq Chowdhury urged the CMLA to go back to barrack. (The Bangladesh Observer, April, 1984) He also called for the AL led 15-party alliance, BNP led 7-party alliance and other political parties to be united to achieve their goal. In order to press home their demand they observed a weeklong court boycott from May 2 to 7, 1984. (The Bangladesh Observer, April, 1984) Not only that they observed "Justice Day" on June 14, 1984.(The Bangladesh Observer, June, 1984) They gave an ultimatum to the government that their demands must be realized by June 16, 1984. (The Bangladesh Observer, June, 1984)

Lawyers observed "Oath Taking Day" (The Bangladesh Observer, August, 1984) on August 26, 1984 BNP led 7-party alliance on September 12, 1984 gave their support to 6-point demand of the lawyers.(The Bangladesh Observer, September, 1984) In order to grab the support of all opposition political parties for their cause the lawyers association gave their all out support to every hartal of the opposition political parties. Not only that to have the sympathy of the political parties, the Coordination Council of Bar Association of Bangladesh alone with their 6-point demand placed another five demands before the government and those were:- (The Bangladesh Observer, November, 1984)

- 1) Formation of non-party neutral government and holding parliamentary polls;
- 2) Withdrawal of Martial Law;
- 3) Restoration of fundamental rights and revival of the constitution;
- 4) Abolition of Martial Law courts and right of appeal to civil courts of those tried in Martial Law.
- 5) Holding of Bar Council Election by abolishing government backed Bar Council body.

They observed court boycott for 17 consecutive days from January 20 to February 5, 1985.(The Bangladesh Observer, February, 1985) On February 26, 1985 Mr. Shamsul Huq Chowdhury, convener of Lawyers

Association, denouncing the decentralization of judiciary said that decentralization of judiciary had not brought any benefit to the people at all. The number of un-disposed cases had been 17000 including writ cases and now the case number remained the same without writ cases.(The Bangladesh Observer, February, 1985) But the reality was that jam of cases happened due to the court boycott of the lawyers. He also said bifurcation of the High Court Division cost taka three crores but it had been 48 Lac previously.(The Bangladesh Observer, February, 1985) On February 20, 1986 Awami League led 15-party alliance extended their support to the lawyers cause.(The Bangladesh Observer, February, 1986)

1.5 Seventh Amendment and Movement of the Lawyers:

The Constitution (7th Amendment) Act, 1986 legalized all established permanent Benches of the High Court Division of the Supreme Court of Bangladesh outside Dacca and, Munsifs courts and Magistrate courts at Thana Head Quarters.(The Ministry of Law, Justice and Parliamentary Affairs, 1986) But Barrister Nazmul Huda filed a writ petition challenging the legality of the six Circuit Benches of the High Court Division of the Supreme Court in the Division Bench of Mr. Justice Sultan Hossain Khan and Mr. Justice Amirul Rahman Khan on November 12, 1986.(The Bangladesh Observer, November, 1986) The petitioner submitted that after the restoration of the Constitution on November 10, 1986 and withdrawal of the martial law operation of the six Circuit Benches of the High Court Division of the Supreme Court had become unconstitutional because it was against the provision of article 100 of the constitution of the People's Republic of Bangladesh. However the petition was turned down.(The Bangladesh Observer, November, 1986)

In reply to the submission Chief Justice Mr. F.K.M.A. Munim on November 24, 1986 issued an order directing the continuation of the operation of the six circuit Benches of the High Court Division of the Supreme Court outside Dhaka. (The Bangladesh Observer and the Ittefaq, November, 1986) The Supreme Court Bar Association under the Chairmanship of Mr. Shamsul Huq Chowdhury termed this order as against the provision of article 100 of the constitution of the People's Republic of Bangladesh.(The Bangladesh Observer and the Ittefaq, November, 1986) In protest of that order the lawyers of the Supreme Court Bar Association started boycotting both Benches of the Supreme Court from November 30, 1986 and declared that their boycott would continue until the withdrawal of the order. (The New Nation, December, 1986) However in March 1987 the lawyers suspended their boycott for one day after the assurance of the Chief Justice on March 1, 1987 that the Circuit Benches of the High Court Division would be withdrawn. (The New Nation, March, 1987) Since the assurance was not materialized the court boycott started again from March 3, 1987. (The Inqilab, March, 1987) They on April 20, 1987 demanded the withdrawal of the Upazilla courts as well as the removal of the Chief Justice Mr. F.K.M.A. Munim.(The Independence, April, 1987) They hoisted black flag atop the Supreme Court building on June 14, 1987. (The Independence, June, 1987)

On April 4, 1988 Mr. Shamsul Huq Chowdhury, the president of Supreme Court Bar Council deplored that the Chief Justice Mr. F.K.M.A. Munim had violated the constitution by constituting six permanent Benches of the High Court Division of the Supreme Court outside Dhaka beyond the scope of article 100 of the constitution. He also alleged that Chief Justice had done so under the direction of the president.(The Inqilab, April, 1988)

1.6 Constitutional Sanction of Decentralization of High Court Division:

Though CMLA H.M. Ershad set up six permanent benches of HCD outside Dhaka for the betterment of common people yet it antagonized lawyers all over the country. In spite of it's endorsement under the Constitution (Seventh Amendment) Act, 1986 lawyers brought allegation of gross constitutional violation by this set up against the military government of Ershad. In order to die down the question of legality of decentralization of HCD outside Dhaka the Constitution (Eight Amendment) Act, 1988 ensured the working of six permanent Benches of the High Court Division at Barisal, Jessore, Rangpur, Sylhet, Comilla and Chittagong by amending article 100 of the Constitution of the People's Republic of Bangladesh.(The Ministry of Law, Justice and Parliamentary Affairs, 1988) New article 100 had six clauses and the clauses were (1) the permanent seat of the Supreme Court should be in the capital.(2) The High Court Division and the judges thereof should sit at the permanent seat of the Supreme Court and at the seats of it's permanent Benches.(3) The High Court Division should have a permanent Bench each at Barisal, Chittagong, Comilla, Jessore, Rangpur and Sylhet, and each permanent Bench should have such Benches as the Chief Justice may determine from time to time.(4) A permanent Bench should consist of such number of judges of the High Court Division as the Chief Justice might deem fit. If necessary he might nominate any judge to the Bench from time to time and on such nomination the judges should be deemed to have been transferred to that Bench. (5) The president should in consultation with the Chief Justice assign the area in relation to which each permanent Bench should have jurisdiction, powers, functions conferred or that might be conferred on the High Court Division by the constitution or any other law. And (6) The Chief Justice should make rules to provide for all incidents, supplemental or consequent matters relating to the permanent Benches.

1.7 Eighth Amendment and Legal Battle by the Lawyers:

The Constitution (Eighth amendment) Act confirmed the formation and working of six permanent Benches of High Court Division outside Dhaka. On June 8, 1988 Mr. Shamsul Huq Chowdhury chairman of the lawyers association said that the parliament which was not elected by the people (only one percent voter turn out was there in the polls) had no constitutional power to amend the Constitution. He contended that the amendment was beyond the power of amending constitution under article 142. "The parliament can't expand its power to acquire for itself the right to repeal or abrogate the constitution or to destroy its basic and essential features", he maintained further. (The Inqilab, June, 1988)

However president Ershad gave his consent upon the Bill on June 9, 1988. (Ajker Kakoj, June, 1988) On June 15, 1988 Mr. Zakir Ahmed, an advocate of the Supreme Court, filed a writ petition challenging the amendment of article 100 of the constitution to the extent to which it purports to affect the appointment of the judges prior to coming into force of the change of article 100 of the constitution in the Division Bench of Mr. Justice Abdul Matin Khan Chowdhury and Mr. Justice M.S. Ali. (The Bangladesh Observer, June, 1988)

The learned counselor for the petitioner contended that the provision of transfer of judges of the High Court Division to permanent Benches outside Dhaka would only apply prospectively (not retrospectively) to the judges appointed after coming into force of the amendment. They also challenged the amending power of the parliament under article 142 of the constitution. It was also said that setting up of the six permanent Benches of the High Court Division outside Dhaka challenged the unitary character of the state under article 1 of the constitution and it hurt the integrated character of the Supreme Court under article 96 of the constitution. By affecting these provisions parliament had violated articles 7, 48 and 102 of the constitution. (The Bangladesh Observer, June, 1988)

On June 19, 1988 Mr. Jalaluddin filed another writ petition challenging the validity of the Supreme Court (High Court Division) Establishment of Permanent Bench Rules, 1988 in the same Division Bench. (The Bangladesh Observer, June, 1988)

The two writ petitions were heard simultaneously. During the argument on June 27, 1988 Syed Ishtiaq Ahmed said that the Supreme Court (High Court Division) Establishment of Permanent Bench Rules, 1988 was against the integral concept of the highest judiciary in a unitary form of government of Bangladesh. Dr. Kamal Hossain, another counselor for the petitioners, at the time of argument on June 29, 1988 pointed that the Supreme Court (High Court Division) is supreme and integrated, and its integrity is proved by the provisions of articles 101, 102, 108, 110 and 111 of the constitution. (The Bangladesh Observer, June, 1988)

On July 4, 1988 counselor for the state Attorney General Mr. Mohammad Nurullah argued that article 142 of the constitution gives unfettered power to the parliament and the House has absolute power to amend any provision of the constitution under that power. Referring the Indian constitution he said article 368 of the Indian constitution has given conditional amending power to the parliament. But in Bangladesh constitution no restriction "implied or expressed" is imposed on the parliament by article 142. (The Bangladesh Observer, July, 1988) The court rejected the writ petitions on August, 1988 saying that amendment of article 100 of the constitution by the parliament under article 142 was legal and the Rules made for assigning area and transferring cases to six permanent Benches outside Dhaka were also found legal. (The Bangladesh Observer, August, 1988) However on September 2, 1989 the Appellate Division with Chief Justice Shahabuddin Ahmed declared the 8th amendment to the constitution regarding the establishment of six permanent Benches of the High Court Division out side Dhaka invalid. The court said amendment to article 100 and 107 was ultra-vires. But the rest of the provisions of the 8th amendment were declared valid. (The Bangladesh Observer, September, 1989) Here it is required to mention that the court appointed Barrister Ansarul Hossain and Khan Mahbubuddin Ahmed as Amicus Curiae to assist the court in reaching decision. (The Bangladesh Observer, September, 1989) Decentralization of the judiciary under eighth amendment was considered by political analysts for the actualization of one of the spirits of the liberation war as it did benefit the people of remote areas both physically and materially. But the apex court had to nullify the decentralization of judiciary perhaps under the unhappy environment created by Dhaka based law professionals in the name of unitary character of the Constitution.

1.8 Conclusion:

It is the responsibility of intellectual groups to carry out the welfare programs of the government through creating awareness among the people. Ershad government with the object of bringing down the benefit of judiciary to the reach of common people set up six permanent benches of High Court Division out side Dhaka and brought Munsifs Court and Magistrate Court to thana head quarter from district head quarter. Lawyers should have not only proceeded with this program but also engaged all efforts to make this decentralization successful. But it was not happened. They stood against the interest of common people. It created an uneasy atmosphere against this decentralization in the country. For protecting their vested interest they took political programs as well as sought support of agitating opposition political alliances. Not only that, it brought the issue in the court. The court denouncing the interest of common people in the plea of unitary character of Bangladesh,

upheld vested interest of a minority group over the common interest of general people. Such role of the lawyers was not beneficial for the establishment of rule of law and justice in Bangladesh.

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