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The Daily Star

LAW *opinion*

Judicial Independence

Do we really want to hear the people?

NASER ALAM

THE role of judges in the establishment of fair judicial process and in acting as the vanguard of fundamental rights has become a household issue in the past few years. The debate as to the smooth functioning of the 'justice-holders' is by no means a new one in Bangladesh. The last two governments have equally been accused, either wrongly or rightly, of politicising the whole process and leading it to a political bog. It seems everyone wants to get something out of it and the civil society ultimately suffers from this enormous tension.

Framing the issues

No doubt our judiciary has been entrusted with the toughest constitutional duty to maintain the rights of the people. In a fragile democracy like ours, the judiciary has performed its duty with honesty, integrity and with great courage at times of national crisis to maintain the supremacy of our Constitution. Well, it seems this very trend and practice have been sought to be undermined.

Two broad issues have been debated recently - the issue of judicial appointments and the judicial separation. Both bear an inherent link and one cannot be solved without solving the other.

The dilemma different thoughts

I am a great admirer of our bench, but I seem to ponder were my Lordships' effort in creating a "roadmap" for the independence of the judiciary a well thought one? I have two reasons to confine myself to this: was it a good idea to leave the whole matter (in real terms) of independence of judiciary to the government? Why did we not think about creating an independent commission of distinguished professionals to detail the roadmap? Can we really get an independent judiciary where the government is the ultimate planner and decider? I doubt. I am sure we are focused elsewhere. Well, time has not stopped to act on this. Leaving it to the government and directing them to perform under the guidelines of our Lordships is simply counter-productive. We have seen why. Judicial independence has not yet been achieved and we would not achieve it unless we begin with an independent authority commissioned to do it to examine what the government is doing, even if the government if minded to achieve a benevolent result.

We have failed to choose a consultation process. But, the guidance is an excellent example of a dialogue between the two organs to achieve a goal.

Public participation

Did we forget that the Constitution is for the people? My reason in saying this is simple do we hear the people. There have been various fronted movements to unseat or seat various judicial appointments. There have been political undertones in many of them, but was there a due process to hear the people? Here I come back to my argument that leaving it to the government to plan, decide and implement are taking the general people out of the decision making process. The result is a clash of belief. Their Lordships did have honest intentions, but would it not have been better to involve people into the process rather than wait for people to revolt against a defective mechanism?

There are stronger reasons to allow for public participation in these decisions making as it affects them in every way and the risk they bear in having to be subjected to a non-consensual process is far greater than the risks faced by the governments. I do not think referendum is an effective choice, simply because people would not trust it.

Why bother about people?

I quote Lord Falconar, the Lord Chancellor of UK on this. He said recently, Judges preside not only over the cases which arise in the criminal and civil justice systems but their decisions affect society in many other areas such as human rights, judicial review, family law etc. They are very often entrusted to chair major inquiries whenever an impartial, independent investigation is required.

STAR FILE PHOTO

Even if the government decides to separate the judiciary now, let's say in a matter of a day, would there be public confidence with the process and on the judiciary? I doubt greatly. I hope the government also understands the danger in keeping the matter of "road mapping" the independence process exclusively at its domain. Should it not be delegated to an independent authority to start with?

The core of judicial independence

This is what a recent consultation paper in UK as to judicial appointment had to say:

In a modern democratic society it is no longer acceptable for judicial appointments to be entirely in the hands of a Government Minister. For example the judiciary is often involved in adjudicating on the lawfulness of actions of the Executive. And so the appointments system must be, and must be seen to be, independent of Government. It must be transparent. It must be accountable. And it must inspire public confidence. Once appointed, judges have security of position - judicial independence depends upon it. So the decision to appoint must be the right one, in every case. Another central theme will be accountability. Those responsible for judicial appointments must be accountable to Parliament without it becoming part of the political process and consideration will need to be given to ensuring that this is achieved.

A Judicial Appointment Commission?

"We need an independent Judiciary" sounds very pro, but how? We need a radical change to the judicial appointments system to enable it to get closer to ensuring justice for all, to the people and to those who govern them and to meet the needs and expectations of the people. A Commission can achieve judicial independence, will make the system for appointing judges more open and more transparent, and will work to make our judiciary more reflective of the society it serves. The commission can work as a hedge against monopolisation of power by the government. Would it really? Commission's independence depends on the independence and transparency of the appointment process of its members.

Improving credibility and legitimacy

The recent appointments are devoid of public confidence, perceived as biased, unaccountable and lacking in transparency. This perception has damaged public confidence in the administration of justice and deters qualified candidates to become a part of the higher judiciary. If this continues, we have reason to be worried about great social danger.

The UK consultation paper aspired that an independent Judicial Appointments Commission will be able to bring a wide range of experience, professional background and fresh ideas to the process, to help ensure that judicial appointments are underpinned by best practice in recruitment. This requires the creation of the processes, systems and culture which are needed to ensure that the selection and appointment procedures are fair, equitable and transparent to all, and which help to ensure the widest range of candidates for the modern judiciary. It is important to consider how members of the new Appointments Commission are themselves appointed since the independence from Government of the new Commissioners must be beyond question. These reforms are of very real and lasting importance. They must be implemented in a way which commands the widest possible support.

Concluding remarks

The whole nation not only has a democracy crisis, but leadership crisis is rife. The judges are the passive leaders of any democracy and social justice. If we lose this institution, there would be permanent damage to the balance of social powers within the nation. Its consequences are even hard to imagine. Hope we are all listening.

Naser Alam is a Barrister and Advocate, Supreme Court of Bangladesh.

HUMAN RIGHTS *monitor*

Impunity for army in Nepal?

At least 18 people were shot dead in Nepal by members of the Royal Nepal Army (RNA) in August. Reports of the massacre emerged on the eve of peace talks between the government and representatives of the Communist Party of Nepal (Maoist). Ten days later, on 27 August, the seven-month ceasefire agreed by both sides collapsed.

A large group of Maoists reportedly met at the house of primary-school teacher, Yuva Raj Moktan, in Doramba village, Ramechhap district, on 17 August. The same day, a group of around 80 army personnel in civilian dress led, according to local people, by a captain and a major, went to Doramba from the district headquarters at Manthali. They stopped several people to ask about Maoist activities in the village. At about 10.30am they encircled Yuva Raj Moktan's house and shot dead Tek Bahadur Thapa Magar who was on his way to the meeting.

Several people outside the house who heard the shot managed to run away. The army then forced their way into the house and took 19 people, including Yuva Raj Moktan and his son, Leela Moktan, into custody.

Their hands were tied behind their backs. The soldiers searched the house, overturning cooking pots and breaking utensils, and found one 303 rifle, two pistols and 14 home-made grenades. An hour later the army marched the detainees to Dandakateri, about three hours' walk away. They allegedly made them stand in rows and shot them dead.

The RNA conducted its own investigation into the Doramba incident, and concluded that "the army only retaliated after being attacked first by the rebels." This was later contradicted by the independent investigation conducted by the National Human Rights Commission (NHRC).

A fact-finding mission conducted by the NHRC about a week later, collected forensic evidence at the scene. It examined 18 bodies (five women and 13 men) and interviewed witnesses. It concluded that most of them had been shot in the head at close range with their hands tied behind their backs.

On 25 September, the UN Acting High Commissioner for Human Rights, Bertrand Ramcharan, called on the government of Nepal to "act swiftly on the findings of the Commission and ensure there is no impunity."

AI is calling on the Nepalese government to implement the NHRC's recommendations to conduct further investigations, bring those responsible for human rights violations to justice and compensate the relatives of the victims. In order to make the process more transparent, members of the army believed to be responsible should be brought to justice under normal criminal procedures and not before a court martial. AI believes a public trial would help to prevent further human rights violations and break the cycle of impunity prevailing in Nepal.

Source: Amnesty International.

COURT *corridor*

Contempt of Court

Clear understanding of the issue is urgently needed

BARRISTER M. MOKSADUL ISLAM

ONCE a lawyer was not really happy with a Judge and although he was trying his best to make his submission in an articulated way, however, his face became very red. The Judge politely wanted to know whether the lawyer was trying to show his contempt. The lawyer in a cold, calm and humble voice respectfully replied that no actually he was trying to hide his contempt.

Contempt of Court is so manifold in its aspect that it is really difficult to lay down any exact definition of the offence.

We cannot, as we are accustomed to, or do not want to see that our country is in a mess. Politically, economically or judicially it is like havoc everywhere. It may not be wrong to say that, with some notable exceptions, our judiciary is still in its primitive stage and taking shape everyday. As a last resort people beg before the judiciary, although sometimes in vain, as they have no other place to go, be it against the administration or otherwise, for justice. However, an order of the court may not always redress an aggrieved person unless it is obeyed by the person against whom it was decreed. There are many who know the means to bend the law in a subtle way and many would simply ignore the order of the Court.

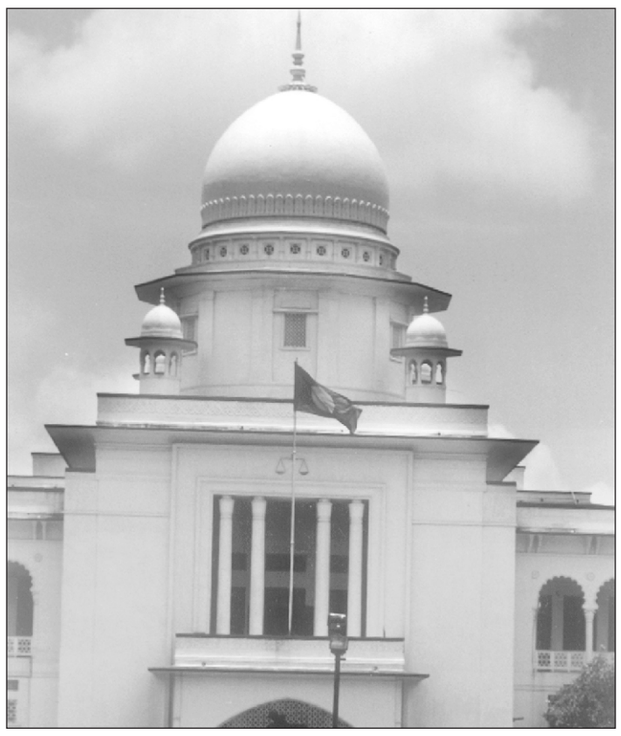
Contempt of Court may work as a deterrent in these situations when someone does not comply with the court order. However the question is whether it is easy to convince the court to hold someone on contempt in such circumstances and what happens even if someone is found guilty of contempt of court?

If a contempt proceeding is drawn up against a contemnor, trend shows that, the contemnor, usually, only have to offer an 'unconditional apology'. Which begs the question in a country where there is hardly any guilty plea, in any criminal proceedings; how come, in almost every contempt proceedings, all the contemnors offer 'unconditional apology'. Do they really mean that? Or simply bends the law by offering the so-called 'unconditional apology' when actually he was not asking for any forgiveness and was not sorry at all for his action. I take a pause here for our Judges, who certainly are in a better position to ascertain whether 'unconditional apology' offered for a contemnor passed the 'subjective' and the 'objective'

(reasonable) test because I believe an 'unconditional apology' should pass both tests under the legal yardstick. Otherwise a contempt proceeding against a contemnor would mean nothing but simply a proceeding to ask for an 'unconditional apology' and which obviously would waste precious judicial time.

If no one brings an application before the court, the court itself has the discretionary power to take notice or cognisance of an incident or a violation and issue a suo moto (on its own initiative) Rule to draw up contempt proceedings if someone oversteps the forbidden line. It is a discretionary power of the courts which the courts suppose to use reasonably.

This discretionary power of the court gives the court discretion to act as it pleases which include not doing anything even if many would consider that it was necessary for someone to do something about it as it cannot be expected that the court would be policing everything. Just to mention here that this power of the court to 'do nothing' is also a significant power and can lead to injustice and discrimination. A discretionary power may lead to arbitrariness if it is not used reasonably. Uniformity in using any power ensures equality before law and is guaranteed under our Constitution.



Within a very short span of time Supreme Court has issued few suo moto Rules in succession for drawing up contempt of court proceedings. Firstly, against five police officers for not knowing or ignoring the Precedent of Warrant; which led to another Rule against the Inspector General of the Police for contemptuous reply to the High Court's query. Recently the Supreme Court also issued another suo moto Rule of contempt proceeding against a Judge of the subordinate court for his surprise departure from a longstanding practice to attend a Supreme Court Judge. Both these rules aroused significant media hype and curiosity.

The underlying and noteworthy feature of all these recent suo moto Rules is that it was issued only when the court itself was aggrieved by some action unlike the citizen of this country. And another usual suo moto Rule as can be seen in the morning paper is against the newspapers for reporting something by crossing the forbidden line.

It is for sure that the judiciary does not always relax in the back seat and turned a blind eye on everything but sometimes eager to take the driving seat and issue show cause notices, on its own initiative, against injustice. On other occasions the court interprets an Act giving a legislative force which may sometimes seem like that the court is making law although it is not their function to make law. Similarly when concerned authority failed to take notice of an incident which may lead to injustice the judiciary have the discretion to take off their blindfold and take cognisance of the event.

However, let us try to see all the recent suo moto Rules from a lay man's point of view. An ordinary reasonable man would probably say that in all the abovementioned situations the court issued suo moto Rule for contempt proceedings only when a Judge personally or his office was aggrieved by someone's action. If that is so then the next question arises would the court be so kind enough to draw up a contempt proceeding easily when an ordinary citizen of the country brings an application for contempt proceeding for violating an Order of the Honourable Court issued in favour of the said humble citizen.

Moreover what is the consequences of contempt proceedings if it only means an 'unconditional apology'? When it can be ascertained for sure that the person who offered the 'unconditional apology' is not sorry at all for his action and he should not be let off the hook very easily. Most importantly for sake of justice an order of the court, given in favour of an ordinary citizen, should be implemented on time otherwise order of the court would mean nothing but an ordinary piece of paper. To ensure implementation of an order of the court it has become absolutely imperative that courts hold the perpetrator on contempt of court and punish him accordingly.

Barrister M. Moksadul Islam is an advocate of the Supreme Court.

LAW *news*

Singapore set to pass law banning human cloning

Scientists who try to clone humans in Singapore could be jailed for a decade and fined up to 100,000 Singapore dollars (£34,000) under newly-proposed legislation.

The bill, which is expected to pass into law early next year, would also require researchers to get health ministry approval before beginning research on human stem cells.

The legislation aims to prevent scientists from abusing Singapore's open attitude toward human stem-cell research, which has attracted scientists from all over the world, including Alan Colman, the British researcher who helped to clone Dolly the sheep in 1996.

Scientists have come to Singapore because countries such as the United States have imposed tighter restrictions on human stem-cell research, which requires the destruction of embryos.

Scientists hope that one day, human stem cells, which produce the tissues and organs of the body, will be used to regenerate or replace damaged or destroyed organs and develop treatments for victims of Alzheimer's and Parkinson's disease, diabetes and spinal cord injuries.

The bill indicates that although Singapore's government favours stem-cell research, it opposes human cloning. The move by Singapore comes after a group representing more than 60 scientific bodies across the world called in September for a worldwide ban on human reproductive cloning.

The Inter-Academy Panel on International Issues' proposed ban on cloning would, however, exclude therapeutic cloning, which is the production of early-stage embryos for research into the treating of diseases.

Source: The Scotsman.