Judiciary faces erosion of credibility

MD. ASADULLAH KHAN

BITTER TRUTH

Some recent incidents relating to interference by the chief justice of the apex court of the country have raised a fundamental question: does this formidable reputation, even if it is constitutionally guaranteed, make the judiciary -- and the judges -- above the domain of public criticism? People would have felt relieved if they had followed the famous line of Shakespeare: "It is excellent to have a giant's strength, but it is tyrannous to use it like a giant."

An independent judiciary is a pillar of strength of the country's democracy, but it has often stumbled in the past: it is also a cause of justifiable pride. We might recall that the judiciary has a long tradition of overruling the government where it thought that the executive has acted against the letter of the law.

Recalling our poignant history during the cataclysmic year of 1970, the year when Bangalees revolted against the Pakistani occupation forces, we still remember with pride that the then Chief Justice of East Pakistan, Justice B.A. Siddiqui, refused to administer oath to Lt. Gen Tikka Khan, who was appointed Governor by President Yahya Khan, replacing the senior-most Bengalee naval commander in the then Pakistan Navy. Even in our neighboring country, India, instances of the judiciary taking on the executive are galore. In 1975, a high court judge nullified the then prime minister's election to the Lok Sabha on the grounds of campaign irregularities.

Painfully true, our country seemed to have different laws for different people, and that's why the judiciary was compelled to step in, where our leaders feared to tread. Undeniably true, people in the country these days are completely disappointed with the executive and legislature. The only solace is that, the delays and expenses notwithstanding, the judiciary continues to be vibrant and energetic, something reflected in recent Supreme Court decisions involving the EC's defiance of a High Court ruling regarding updating of the voter list. In such a context there is no dispute over this: the judiciary continues to be an institution of "Last Hope" in the country. To a great extent it is an honorably acquired reputation, for justice does not often reach out from the ruler to the ruled here.

Now some recent incidents relating to interference by the chief justice of the apex court of the country have raised a fundamental question: does this formidable reputation, even if it is constitutionally guaranteed, make the judiciary -- and the judges -- above the domain of public criticism?

Sadly, the Chief Justice of the Supreme Court, in an unusual display of constitutional power, stopped the proceedings of a high court bench, on November 30, involving three writ petitions challenging the legality of the president's taking over as chief adviser. The chief justice's ruling came minutes before the High Court bench was to issue a rule. Shocked by the order, lawyers and others present in the court burst into anger and vandalized different sections of the Supreme Court, and set fire to the vehicle of the state minister for law in the past cabinet.

While the vandalism that happened in the country's highest court premises must be condemned in unequivocal terms, and the perpetrators of such a dastardly act must be identified and brought to book. It must also be seen that some honorable judges do not shy away from their sacred duties, however difficult may be the situation they are confronted with. Newspaper reports suggested, supported by video footage that the ransacking of court documents and property was not carried out by people donning robes. Rather some interested groups having a stake in the mayhem stormed into the High Court premises when pandemonium prevailed inside the courtroom.

While reflecting on the incident legal luminaries in the country, as well as the people, opine that such a stance by any judge, or judges, in the country's apex court would be a patently unconstitutional move. It would be an impediment to the right of a citizen to approach the Supreme Court for the enforcement of fundamental rights, or redress of grievances or injustice done to an individual or a collective body by any state organ. To curb such rights would be atrocious. Where will people seek remedy if the doors of either the High Court or the Supreme Court are closed for them?

Reacting to the CJB's issuing of the stay order involving the three writs, former Chief justice Mustafa Kamal said that in his career of 40 years, both as lawyer and judge, he had never seen a chief justice exercising his authority in the way the present chief justice had on November 30. Eminent lawyer Dr. Zahir, presumably having no political color and affiliation, expressed the same opinion that never before in his 40 year legal career had he seen any C.J issuing a stay order before the bench had even admitted a petition.

Since the inception of Bangladesh, an activist apex court was the formidable moving spirit behind any rights movement, either civil or PIL cases. Moreover, in advanced countries like the U.S and U.K, a good, or bad, judgment becomes the subject of constant debate among academicians, legal experts, research institutes and law schools. In the absence of any such institution here, the role of the country's apex court is ultimately that of a moral teacher. The only real checks are public opinion and the press.

These are most critical times for the country. As the president, heading the caretaker government, rides roughshod over the opinion of the advisers, and even backtracks on the resolutions or package formula adopted by the council of advisers, like EC restructuring in a bid to create a level playing field for all the parties, the stay order in the court proceedings relating to three writs added further tension to the already unstable situation. To say the least, with the resignation of four advisers the situation, or rather the atmosphere, for holding a free, fair and credible election has been further complicated.

Recalling an Indian situation that revealed a tussle between the president and the judiciary and the way judiciary in that country stood firm, defying even the president's prerogative, we can hardly take comfort in the present Bangladesh situation. Indian President K.R.Narayanan, in 1999, formally suggested that the Chief Justice of India should give due consideration to the scheduled castes and weaker sections of the society in higher judicial appointments. More importantly, he declared that eligible persons from these categories are available.

It was true that scheduled castes were underrepresented in the judiciary in India but interference by the president was unprecedented and appeared to be constitutionally untenable. It was argued in legal circles in that country that the president, at worst, had committed an impropriety. Undeniably true, the president is the supreme constitutional authority but his statement seemed to defy all rational explanation, and it was not given effect to by the highest judiciary.

Coming back to the Bangladesh context, every appointment and action at the highest level in the country is made at the president's pleasure. But the president's pleasure should not end up being the Republic's pain. While taking a look at the sorry state of affairs in public life, the apathy of the highly placed towards constitutional norms is in direct contrast to the state affairs in the earlier days. One could see that in the past days the court had always grown stronger in keeping with the need of the times, and the need was to enforce executive accountability.

An activist judiciary became the voice of the citizens, invigorating public interest litigation and even taking on the government. We observed to our great satisfaction that whenever there was a crisis in the form of a failure of some agency, the people of the country raised the issue in such a manner that somebody with the capacity and the will to find a solution was available. This is because of the people's innate moral strength and their firm belief in the rule of law.

The three writ petitions in question arose due to the extra-ordinary situation relating to constitutional propriety and exercise of state power, and really called for an extra-ordinary remedy. It would have reinforced the people's trust in the Supreme Court as the last resort. And in dealing with such sensitive cases self-restraint is the only healthy check. Any external interference or check, as it happened in the present case, will prove to be detrimental, not only to the independence of the judiciary but also to the constitutional scheme. The remedy would be worse than the disease if others were allowed to exercise any control over judges. The judges, therefore, have to be sensitized to the need for self-restraint. People would have felt relieved if they had followed the famous line of Shakespeare: "It is excellent to have a giant's strength, but it is tyrannous to use it like a giant."

Recent experiences suggest that with the increase in judicial activism, there has been a corresponding increase in the need for judicial accountability, especially in the apex court of the country. The apprehension gaining momentum these days is whether all the judges in the higher judiciary satisfy the required standards of conduct. They are the ones laying down the rules of behavior for everyone else, and they have to show that the standard of their behavior is at least as high as the highest by which they judge the others.

Despite all that can be said to raise the judiciary to the extent that it fulfills the aspirations of the people, the best cannot be expected unless the flaws in the appointment of judges are removed. Recalling the Indian situation, ever since the supremacy of the executive in the selection of judges was removed in 1993, the judiciary has acquired greater responsibility to ensure the right appointments, or in dispensation of justice to the aggrieved.

Let our judges in the highest judiciary now follow the adage: "Be you ever so high, the law is above you."

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A job to do

MJ AKBAR

BYLINE

The prime minister has a problem with the history of paper-secularism in his own party, the Congress takes Muslims for granted. Since Muslims will vote against the principal anti-Congress party, the BJP, in any case, what option do they have at the ballot box? So all you need is to sprinkle some sincere-sounding phrases their way and string together pious intentions in a garland of fifteen points. There will always be a convenient excuse to postpone anything specific and substantive.

HOAX is one of the more cruel four-letter words in the English language. What happens when you double it? You get government -- and parliament -- policy towards Indian Muslims.

On Thursday, the Lok Sabha approved a bill providing a 27% reservation for "Other Backward Classes" in central educational institutions by a voice vote, which means that there was such unanimity that there was no need for a vote. These benefits have no economic conditionality: the rich among these castes will be the ones who will, of course, benefit far more than the poor.

The government, and parliament, did not need a special commission, and a report with 404 pages of statistics, charts and comments, to tell them to do this. They just went ahead and did it.

Other Indian communities get jobs on demand. Indian Muslims get commissions. The Rajinder Sachar Committee, appointed soon after Dr Manmohan Singh became prime minister, is the latest one.

The communities who benefit from job and educational reservations are better off than Muslims, financially, socially and psychologically. There are no riots against "Other Backward Classes," for instance, that are aimed at terrorising the community and destroying entrepreneurs who may have set up a means of survival.

The Sachar committee has done a good job of exposing implicit and explicit discrimination. But other commissions before have said this as well. My question is to others: "Does the political class really need another commission to tell them the facts? Don't ministers and MPs see the truth on a million faces when they go to beg and plead for Muslim votes?"

Muslims have a special claim on the government led by Dr Manmohan Singh. Whatever the statistics might say, and I don't think they will say anything particularly different, Muslims believe that it was their focused energy, and their anger against the Gujarat riots, that helped create a decisive swing of thirty to forty seats and bring the present dispensation into power. Their expectations from Dr Manmohan Singh are, therefore, higher. So far all they got from this government is the usual dollop of rhetoric, and there isn't much time left. There is a suspicion that after the Uttar Pradesh elections, even this rhetoric might die its usual death. The tensions within the Congress when Dr Singh suggested that Muslims needed the first right on resources were visible to everyone. The prime minister was forced to fudge, tempting one wag to suggest that he lost the Hindu vote on the first day and the Muslim vote on the second.

The prime minister has a problem with the history of paper-secularism in his own party, the Congress takes Muslims for granted. Since Muslims will vote against the principal anti-Congress party, the BJP, in any case, what option do they have at the ballot box? So all you need is to sprinkle some sincere-sounding phrases their way, and string together pious intentions in a garland of fifteen points. There will always be a convenient excuse to postpone anything specific and substantive.

A fiction that Muslims are also beneficiaries of the reservations regime is the veil that protects the face of paper-secularism. Articles 340, 341 and 342 of the Constitution deal with "backward classes," scheduled castes and tribes. According to the Constitutional (Scheduled Caste) Order of 1950, a convert to Islam or Christianity from the scheduled castes, the poorest of the poor, cannot claim any of the privileges of reservation. In 1956, this was amended to include scheduled caste converts to Sikhism within reservation quotas, and in 1990 this facility was extended to Buddhists. No one has explained why Muslims and Christians are still excluded, and, of course, no one talks about it either. Silence is so helpful when there is a conspiracy of injustice.

Muslim converts from the better-off "OBCs" are, in principle, entitled to reservation benefits. But no one ever mentions how many Muslims actually got jobs against these reservations, because facts will reveal another hoax. The answer is minimal. Take state government jobs. The facts are shocking. West Bengal, by any measure a state with a progressive government, has a Muslim population of 25.2%, next to Assam only, with 30.9%. But only 2.1% of state government employees are Muslims. Delhi, which has secular governments on both tiers, regional and national, has 3.2% Muslims in government jobs despite an 11.7% Muslim population. Kerala has the best numbers: 10.4% jobs for 24.7% of the population, but only because the provincial Muslim League has made effective use of its partnership in power. Uttar Pradesh and Bihar have 18.5% and 16.5% Muslims, but only 5.1% and 7.6% Muslims in state jobs.

There is as much economic inequality among Muslims as there is in any other Indian community, but Islam has no place for caste. There is no one who is backward or forward in a mosque; everyone is equal. Past caste distinctions, therefore, have got blurred. Moreover, many of the traditional crafts that defined the "backward" status, as for instance the jobs of weavers or julahas, have been made obsolete by the progress of modern technology. These people have moved to urban areas and are labourers in a non-traditional environment. Third, Muslims do not retain caste appellations like "Yadav," which they may have had before conversion, and so proof of their "caste status" is difficult, if not impossible, to find. Only Kerala has done something to ameliorate the problem by setting aside a guaranteed 10% to 12% quota for Muslims within the OBC category. The other states make no such provision.

Hence, as the Sachar Committee reports, "Muslim OBCs are significantly poorer than Hindu OBCs" and "land holdings of Muslim OBCs is almost one-third of that of Hindu OBCs."

The most revealing statistics are written on the faces of impoverished Muslims eking out a marginal existence in the by-lanes of Kolkata, the slums of Mumbai, the illegal sprawls of Delhi and thousands of villages of Bengal, Bihar, Gujarat and Uttar Pradesh.

Will reserving seats for Muslims as category help? The instant answer is yes, if this is the way the political game is being played, then why should Muslims and Christians be excluded from the game? Almost everyone else has been allotted a piece of the cake, so why not them? Are they paying the price for being "foreign faiths," that is, religions that originated outside the Indian subcontinent? If that is the truth, then the establishment should change the truth before the people change the establishment. If that is not the truth, then someone should let us know what the truth is.

The reality is that there isn't much of the cake left. The major growth of jobs is now in the private sector, not the public sector, which is excellent news for the country. To seek reservations in the private sector, as some backward militants insist on doing, would become a negative burden on growth. In a democracy, economics must occasionally pay a price to politics, but that would be a price too high. There have to be other means through which we can straighten the imbalance of decades.

Economic empowerment through credit to entrepreneurs is definitely more effective than a squabble over clerical jobs. Urban Indian Muslims have organised their economy into small businesses; this is one of the fortunate unintended by-products of job discrimination. But the key to the future lies in education, and, more specifically, English education. Urdu is a beautiful language, but it is not a language in which jobs can be found anymore. Instead of creating Urdu universities from the budget allotted to Muslims, we need institutions that can make the young professionals in contemporary sciences like management, IT and media.

Where the four-letter words are concerned, 'jobs' is such an improvement on hoax.

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Non-party caretaker government: Is it working?

HARUN UR RASHID

BOTTOM LINE

The Constitution is, in essence, the expression of the will of the people. It is for the people and not the people for the Constitution. The Constitution is not set in stone and already it has undergone fourteen amendments. The last amendment was adopted in May 2004. Another amendment of the Constitution will not make the sky fall.

IN mythology, when the ancients were desperate for an answer, they would present themselves to the Sphinx and ask their question. The Sphinx would reply with a riddle. The riddle would reveal the needed wisdom. But to go to the Sphinx was an act of desperation because if they failed to answer the riddle correctly, the Sphinx would kill them.

Many people think that they stand before the Sphinx at this moment. They desperately want an answer as to how the coming election can be held in a free, fair and credible manner, the very purpose for which the non-party caretaker government was conceived and incorporated in the Constitution.

Extraordinary turn of events

Most people: (a) Never contemplated a situation in which the retired last chief justice could not take up the post of the chief adviser.

(b) Never anticipated that the president could not find a non-party citizen in the country eligible to assume the post of the chief adviser under Article 58C.5 of the Constitution (while 14 non-party persons are easily found to constitute the council of advisers).

(c) Never imagined that the president would assume, concurrently, the post of the chief adviser, the last option under Article 58C(6).

(d) Never expected that four advisers, pricked by their conscience, would resign from the caretaker government for their (advisers') perceived failure in creating an environment for a free and fair election.

The chain of events is extraordinary and has made many people sit up to take a hard look at what they thought the caretaker government would achieve, and its current performance.

All these signs demonstrate that the objective of the caretaker government has run into deep trouble. It is partly because the provisions of the caretaker government were poorly conceived and drafted, and partly because of major disagreements among political parties on the interpretation of the Constitutional provisions relating to the caretaker government.

Why the caretaker government?

In parliamentary democracy, as in Britain, Australia, Canada and New Zealand, as soon as the date of election is announced and parliament is dissolved, the ruling government goes into caretaker mode, bereft of taking any policy decisions. If any policy decision is to be made it has to be in consultation with the opposition political parties.

This means that during the election period, the ruling government has no "teeth" and, therefore, cannot "bite." It runs routine day- to-day functions until the new government is constituted.

Bangladesh departed from this practice because major political parties did not trust each other to hold a free and fair election. They had no trust in the ruling political party to hold the election. They suspected that the ruling party would try to win the election by unethical means, depriving the opposition parties.

Rigging of elections is not unusual in developing countries in Africa, Latin America and Asia. Recently, the opposition party did not accept the outcome of the Mexican presidential election and they boycotted the swearing-in ceremony of the new president on the ground that the ruling party "stole" the election. Last year Uganda's election was allegedly rigged and the opposition started a movement against the result.

Against this background, in 1996, it was agreed by major parties to amend the Constitution (Thirteenth Amendment) to install a non-party caretaker government during the election period.

Many suggest that the provisions of the caretaker government were conceived and incorporated without looking into political ethos and culture prevailing in Bangladesh. The provisions were too idealistic and had little appreciation of the realities on the ground.

It is noted that the 1972 Bangladesh Constitution was also found to be so ideal that it was only suitable for a "Utopian" state, and the original text had no emergency provision even during the war. Within a span of two years, it had to go through three amendments.

Inconsistencies

Experience has shown that there are many inconsistencies in many of the provisions for the caretaker government and some of them deserve mention:

First, since the executive powers of the Republic rests on the chief adviser and his advisory council (Article 58B .3), it is desirable that the administration of the defense services should come within the purview of the caretaker government.

The current split in the administration of the defense services, among the president and other ministries, by the chief adviser together with the council of advisers is not only cumbersome but also raises an element of conflict between the two institutions, in the event of disagreement between the president and the advisers on any issue relating to the defense services.

The powers of the president in the caretaker government may be specifically enumerated, as the caretaker government is "collectively" responsible to the president. The word "collective" may be spelt out clearly as to its meaning.

Second, the president of Bangladesh is not elected on a bipartisan or consensus basis among political parties represented in the Parliament. The ruling party nominates the president, who is elected by members of Parliament, in accordance with the law (Article 48.1 of the Constitution).

It is entirely at the discretion of the majority party to propose the name of the president, either a non-party person or a member of the party.

Against this background, the provision of the eligibility of the president as a last resort to hold concurrently the post of the chief adviser of the non-party caretaker government (not simply caretaker government) arguably defeats the whole purpose because the adjective "non-party" qualifying the "caretaker government" may not have any meaning at all in certain circumstances.

Third, it has not been prudent to involve retired chief justices to be eligible for holding the post of the chief adviser, an executive position. It is counter to the spirit of the doctrine of separation of powers on which the Bangladesh Constitution was founded.

Fourth, there have not been any criteria enumerated in the provision for the president to appoint a citizen to hold the position of the chief adviser, if he failed to appoint any retired chief justice or judge of the Appellate Division of the Supreme Court.

Fifth, the phrase "no retired chief justice is available" employed in Article 58C (4) lacks clarity and is confusing. The phrase is open-ended and therefore has been interpreted differently. For example, does it refer to a pool of retired chief justices or only two retired chief justices (last retired and the next before the last) as mentioned in Article 58C (3), ruling out other retired chief justices?

Finally, the powers of the chief adviser have not been spelt out clearly in relation to what the chief adviser can do, or cannot do, without the advice of the advisers. The absence of such provision has led to confusion as what "collective responsibility" means under Article 58B(2) of the Constitution.

From the above discussions it appears that many of the provisions relating to the caretaker government need drastic changes, not only in concept but also in drafting, so that they work reasonably well.

Against this background, many in the civil society suggest that a committee of legal experts drawn from all political parties may be entrusted to come up with a new draft of constitutional provisions relating to the caretaker government so that confusion or anomalies do not occur in the future. This is for the interest of all political parties, and also for the people.

Supreme Court opinion

Article 106 of the Constitution provides that the president may refer to the Appellate Division of the Supreme Court for an opinion if a question of law, which is of public importance, arises.

The demand of many political parties to hold the general election after the 90-day time limit is purported to come within the ambit of this Article. It is desirable that the president acts on it to resolve the issue.

If there is a necessity to amend or adapt the Constitution to meet the exigencies, there is nothing in the Constitution that is not permissible. In 1990, after the fall of President Ershad, extra-constitutional steps were taken, and later legalized post-facto (after the event), by amending the Constitution.

The Constitution is, in essence, the expression of the will of the people. It is for the people and not the people for the Constitution. The Constitution is not set in stone and already it has undergone fourteen amendments. The last amendment was adopted in May 2004. Another amendment of the Constitution will not make the sky fall.

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