Quo Warranto the Bangladesh Supreme Court?

by Khurshid Hamid

FOR the less initiated, quo warranto, which literally translates "by what warrant", in history means a writ formerly issued in England by the King's Bench Division calling on a person to show by what warrant he held or exercised an office or franchise. The pedantic rhetorical question in obscure Latin was evoked by the Right Honourable Prime Minister's recent remark that, like herself in the executive and the legislative branches of the government, the Honourable Justices of the Supreme Court (and ah! the gentlemen of the press too, which is not my subject in this essay) should be accountable and function transparently. This expectedly raised a tempest in a largish teacup. One was furthermore provoked that the honourable justices themselves indulged in surprising self-criticism, reminiscent of the Chinese Cultural Revolution, in a seminar by such frank remarks as "I unequivocally acknowledge that because of erosion of values the judiciary is facing questions of transparency and accountability," that "we cannot ignore the reality that the image of the judiciary is also tarnished to a substantial extent in Bangladesh," that "the judges are also not above board," that there are complaints of motivated judgements in about 30 per cent cases and it is blamed that these judgements are made by non-judicial influences.

Although the Prime Minister's remarks were apparently off the cuff and egregious, she has unwittingly raised profound issues of the quantum leap in the role of judges and the rule of law in a liberal democracy. The learned judges at the seminar, at least according to press reports, do not seem to have delved too extensively or deeply into these issues. And the flurry of newspaper editorials and articles on the subject that have been published smack of dragonfly flippancy and skimming on the surface. This dissertation, starting on the premise that they walk easier who have first learned to dance, both physically and intellectually, will examine the raison d'être in democracies to hand over increasing amounts of power to the gavel and the robe in the higher courts, and argue that accountability and transparency of the unelected judges are already there and that the mechanism for rectification of errant judges is in place.

The honourable justices who sit in our Supreme Court, as they have acknowledged, must in today's world get used to the public vilification as well as the praise. Fortunately in Bangladesh it is the government and its hard-core supporters who have vilified them, and the opposition politicians and the alienated civil society have praised them. To the government they are unaccountable elitists, aging men (and alas no woman) in black who meddle in politics where they do not belong, and thus thwart the will of the people. To civil society they are bulwarks of liberty, and champions of the individual against abuses of power by scheming government politicians and arrogant bureaucrats. To the ultra-liberals they are the defenders of the faith, even in a clean-cut democracy, for the weak minority against the tyranny of the executive branch of government, acting in the name of the brute majority (read 34 per cent of the votes culled by the BNP against 37 percent by the Awami League in the 1996 elections).

The stakes are indeed high. The Supreme Court judges deal with the most contentious cases, involving issues which divide the electorate or concern the very rules by which the country is governed. The losers are bound to question not only the judges' particular decisions, but their right to decide at all. This is especially true when judges knock down as unconstitutional a law passed by a democratically elected legislature, as one of our judges has averred they must not hesitate to do if they deem it so, or when they issue a show cause on the government on whether proper procedures for the purchase of Mig planes under a bilateral agreement or in promoting or forcibly retiring a civil servant has been followed. How dare they?

Yet the puzzling fact is that despite the continued attacks on the legitimacy of judicial review, it has flourished in the past 50 years. All established democracies now have it in some form and the nascent democracies have followed the trend with enthusiasm. The standing of Supreme Courts has grown almost everywhere. In an era when all political authority is supposed to derive from voters, and in the west every passing mood of the electorate is measured by pollsters, the growing power of the Supreme Court judges is a startling development.

The Supreme Court justices have witnessed the growth of their power vis a vis state power in a two-fold manifestation. To take the second one first, the judges have also seen an exponential growth of their role in what is known as administrative review, in which they rule on the legality of government actions, usually of the executive branch. This too has dragged judges into the political arena, frequently pitting them against elected politicians in controversial cases. But the expansion of the modern state has seemed to make administrative review inevitable. The reach of government; for good or ill, extends into every nook and cranny of life—though thankfully much less obtrusive in a developing country like Bangladesh (surprise! surprise!) than in a developed society. As a result, individuals, groups and businesses all have more reason than ever before to challenge the legality of government decisions or the interpretation of laws. Such challenges naturally end up before the courts.

But the parallel expansion of constitutional review, in which judges rule on the constitutionality of laws and regulations, is all the more remarkable in a democratic age because it was resisted for so long in the very name of democracy. The United States was the pioneer in constitutionalism, and although its written constitution, the first in a modern democracy, nowhere explicitly gives the Supreme Court the power to rule laws invalid because of their unconstitutionality, its right to do this was first asserted in the 1803 Marbury v Madison case, and then quickly became accepted as proper. Latterly in the 1950s under Chief Justice Earl Warren the court embarked on the active protection and expansion of civil rights, and controversially this plunged the court into the mainstream of American politics, where it remains, though less pro-active, till today. Europe, however, earlier held back on judicial review, their democrats believing that as the voting franchise expanded, the will of the voting majority should theoretically become ever more sacrosanct, and parliamentary sovereignty reigned supreme. But with the rise of fascism in the 1920s and 1930s and then the destruction wrought by the second world war, attitudes changed and many European democrats were convinced that individual rights and civil liberties needed special protection by the courts and thus the usefulness of judges.

So much for the history and experiments of constitutionalism. Now the Bangladesh context. Bangladesh has had a turbulent history of power-play and military dictatorships from Karachi/Rawalpindi twice over and counterfeit democracy, then the savage brutality and violence of the liberation war, next the post-liberation difficulties and even a short-lived experiment with one-party democracy, again two indigenous and sustained military dictatorships and their counterfeit democracies, and finally two doses of progressively illiberal democracies, the second of which is still running its course. No nation on God's good earth should have more gut awareness that free and fair elections alone, in an emerging democracy, no longer guarantees a reliable obstacle to the rise of dangerously authoritarian governments and some would say even of fascism.

As a philosophical aside perhaps it is all a question of power. Lord Acton, a 19th-century liberal, has famously observed that "power tends to corrupt, and absolute power corrupts absolutely". Because of Stalin, Emperor Hirohito, Hitler and Mao Zedong and their horrors of absolute power, what is generally remembered is the second half of Acton's phrase. But the first half is, if anything, more important. And the point it contains, that holders of power will, sometimes consciously, sometimes unconsciously, exploit it for their own ends, lies behind the liberal democrats' eternal suspicion and dread of governments, even in democracies. Man is not perfectible, but neither is government.

Why then hand over such salient powers as to decide whether the constitution has been breached or not by the government and how it should be applied, or whether the rights and freedom of an individual or an institution have been run over rough-shod or not, to the justices of the Supreme Court on a silver platter, without their sweating in the heat and dust of elections in our country? The first and last reason is because the Supreme Court has no direct power of its own. This is why Alexander Hamilton, who helped write the U.S. constitution, called the higher judiciary "the least dangerous branch of government." The Supreme Court has no vast bureaucracy, revenue-raising ability, army or police force at its command—no way in fact to enforce its rulings. If other branches of government ignore them, it can do nothing. Its power and legitimacy, especially when it opposes the executive or legislature, depends largely on its moral authority and credibility.

It is worth remembering that the higher courts' justices are not the only public officials who exercise large amounts of power but do not answer directly to voters. Full-time bureaucrats and officials actually perform most government business, and many of them have enormous discretion about how they do this. It has been said that even elected legislators and prime ministers are not the perfect transmitters of the popular will, but enjoy great latitude when making decisions on any particular issue.

To criticize the Supreme Court as a political meddler is to mistake, for its role is both judicial and political. If constitutions are to play any part in limiting government, then someone must decide whether this is happening in real life governance. Furthermore, the Supreme Court as the final arbiter fits so well with the whole design and spirit of our constitution itself, a careful reading of which will show that its purpose was as much to control the excesses of popular majorities as to give the people a voice in government decision-making. When the court makes an administrative review or interprets the constitution, its decisions are political by definition—though they should not be party political.

We now come to the vexed question of the accountability and transparency of the Supreme Court justices, as raised by the Prime Minister. Supreme Courts in general and that of Bangladesh in particular are certainly not unaccountable. As a judge in the seminar has said there is nothing confidential or secret in the work of a judge, his work in all its aspects is transparent and exposed to public view, and this transparency guarantees accountability. One shall only add that the judges must always justify their rulings to the public in written opinions. Their judgements are poured over by the print media and in the developed countries also by the electronic media, and by lawyers, legal scholars and other judges. If unpersuasive, judgements are sometimes evaded by the lower courts. Furthermore, if the complexion of the court changes by new appointees, it can result in the reversal of earlier decisions which failed to win public support. Finally, a judge can be over-ruled by constitutional amendment, if two-thirds of the parliament disdain his ruling, although this recourse is rare.

The judges' self-criticism in the seminar about the image of the judiciary being substantially tarnished, of judges not being above board and about 30 percent of the cases resulting in motivated judgements (it is presumed to be all referring to the Supreme Court) raises far more grave issues. (One has not dilated here on the lower judiciary, as they are appointed and controlled entirely by the government, and the spectres of insurmountable corrupt equilibrium and lack of political will are raised.) Why lament this fact and why is this true? Surely the Constitution provides for the Supreme Judicial Council to take care of any complaint of gross misconduct of a Supreme Court judge and to inquire into the capacity and conduct of a judge, and this Council could and should be activated to discipline errant judges. It is imperative that the civil society's faith and reliance on the Supreme Court as the last bastion of ethics and credibility against runaway misgovernance should not be fractured.

Supreme Courts have varying records in new democracies. Hungary's constitutional court may be the most active and powerful in the world. Russia's, after a promising start, was crushed in the conflict between Boris Yeltsin and his parliament, and hence the country's venalities. But in some countries where governments have long been riven by ideological divisions or crippled by corruption, such as Israel and India respectively, Supreme Courts have filled a political vacuum, coming to embody the legitimacy of the state.

I remember the President of France's Constitutional Council, at the World Economic Forum in Davos, Switzerland several years ago, descanting at length to me, over lunch, how he had the deepest adulation and respect for the Indian judicial personages he had met on several trips there, and how very pro-active they were in defending human rights and the rule of law in the country. Similar noises of praise for the Indian judiciary and their activism were made to me again by eminent judicial personalities of the United States and England at the San Egidio Conference on World Peace a year or two later in Rome, Italy.

Bangladesh's Supreme Court has witnessed a sharp rise in recent years in its activism for the protection of the citizens' rights and defence of the rule of law in the country. The civil society fervently hopes that this trend remains so. The Supreme Court exists to ensure that everyone, including the government, stays and plays within the constitutional rules. The Supreme Court justices have the delicate, sometimes impossible, task of checking others' power without seeming to claim too much for themselves.

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Dialectics of Judicial Independence and Judicial Accountability

by Professor M Shah Alam

WE have a written Constitution which resembles many features of the American Constitution. Although the British unlike us have an unwritten Constitutions for the most part, we have a parliamentary democracy of the British type. As for the judiciary we have inherited common law system which is the pride tradition of both the Americans and the British. We are fortunate to have before us many years of American and British Constitutional and judicial practice to help us have a batter grasp of the problems of judicial independence and accountability.

As for the legislative and executive branches of the government, our constitutional scheme is clear. They are accountable to their electors. But the judiciary is not so accountable, for the judges are not elected by the people, rather they are appointed by the executive under the Constitution. While the judiciary is not directly accountable to the people as the legislature and the executive are, there is clear check and balance between the three branches which under the Constitution makes one accountable to and dependent on the other in various different ways. Checks and balances of the three organs and their mutual dependence and accountability is one thing and their ultimate accountability to the people as the legislature and the executive are so accountable, is another thing. The latter accountability is what makes the rule of the people real. Such accountability of the judiciary is not expressly provided for in our Constitution. Considering the peculiarities of judicial functions, it is only natural that the judges are not to be so accountable. Yet, they are not above accountability.

What do we mean by judicial accountability? To whom accountable? Why and how? To answer these questions we also need to define and determine the premises of judicial independence and study these two categories in their dialectical relationship i.e. in their complementarity and mutuality. We talk of independence of the judiciary; we do not talk of independence of the legislature or the executive. This is quite legitimate, and logically follows from the characteristics of the powers the legislature and the executive do posses. Once elected, they wield sufficient physical and financial powers to secure their own independence. Judiciary's case is different. It subsists on the decisions of the other two organs, and its own decisions have to be executed by the executive branch. Although such execution by the executive is a constitutional requirement and all branches of the government are to act in aid of the judiciary, it has to be made sure that in the constitutional scheme of checks and balances judiciary's position and power is so designed as to accord to it maximum independence to enable it to perform its constitutional obligations effectively.

II

Lower judiciary in Bangladesh is accountable for its judgements to next higher instance and ultimately to the Supreme Court through appeals and revisions under a clearly defined system of judicial hierarchy. For administration, control and discipline, lower judiciary is accountable to both the Supreme Court and the executive branch (Art 109 and 116). Constitutionally judiciary is independent in performing its functions (Art. 116A). In practice, independence of judiciary depends on many factors including modes of judges' appointments, terms and conditions of their services and termination of their tenure. While our judiciary enjoys relative independence, there are concrete suggestions, which are old and well-known to the community, to enhance this independence further. One such suggestion is to separate the judicial magistracy from the executive branch. Existing dual control of lower judiciary by the Supreme Court and by the executive branch is a stumbling block for its smooth functioning. Lower judiciary for all purposes should be put under the exclusive control and superintendence of the Supreme Court. This would not only enhance its independence but also its accountability to higher judiciary. Higher judiciary, on its part, would then feel more responsible, independent and vigilant in controlling the lower judiciary.

The above suggestions taken into positive consideration would certainly make judiciary, specially lower judiciary, more independent and accountable. On the other hand, it is the accountability of the higher judiciary which is difficult to define and determine, and recently this has been the focus of diverging views and news.

III

The Constitution of Bangladesh has given the Supreme Court the power of judiciary review of the executive and legislative acts and this power implies a power to interpret the Constitution. In a country of written constitution, this power is of great constitutional significance and far-reaching consequences, the full fury of which is perhaps yet to be felt in Bangladesh. Notably, the power of judicial review and interpretation of the Constitution has been established in the USA not by the Constitution but by judicial decision in Madison v Marbury case in 1803. The power of judicial review and guardianship of the Constitution has been so vigorously exercised by the US Supreme Court that the Court did what Jefferson warned against; it made the written Constitution "a blank paper by construction" (William J Quirk, "Judicial Dictatorship," Society, Vol. 31, No 2, 1994, p 36). Only such exercise of power led Chief Justice Even Hughes, while governor of New York, to say, "We are under a Constitution, but the Constitution is what the judges say it is" (Ibid.). Given the actual power the judiciary enjoys, such arrogant pronouncement is perhaps not unnatural. The United States Supreme Court during its more than two hundred years of history has extensively controlled executive and legislative activities by its decisions including one of declaring an anti-slavery act unconstitutional (Dred Scott v Sanford, 1856). The Supreme Court's unreviewable power may lead an unaccustomed observer to wonder whether or not 'the United States is an operating judicial dictatorship'. (W J Quirk, op cit, p 34).

Abraham Lincoln was critical of the Supreme Court's power. He conceded that the court had the power to dispose of the particular case before it but denied it could fix the meaning of the Constitution. This would be the end of people's rule. Much earlier, Jefferson observed absolute power of review and interpretation would place the people under the despotism of judicial oligarchy. Much later Theodore Roosevelt said, "It is the people, and not the judges, who are entitled to say what their Constitution means, for the Constitution is theirs, it belongs to them and not to their servants in office." Ultimately the question is whether the rights of the individuals are safer in the hands of the majority than in the hands of appointed guardians (Ibid. pp. 37-38).

IV

No doubt, powers of judicial review and interpretation of our Constitution must reside with the Supreme Court. There is no alternative. This potentially enormous power will perhaps further unfold to lead the critics to wonder whether we are in an operating judicial dictatorship. We are one day likely to confront the question whether it is the supremacy of the Constitution or the supremacy of the apex Court that must be upheld. Answer ought to be that it is the supremacy of the Constitution, and that the Constitution must not be interpreted where it is not necessary to interpret, i.e. where its meaning is simple and clear, quite intelligible to an ordinary man.

Judicial power and judicial independence is not the one and the same thing. It is necessary for the judiciary to possess sufficient independence to exercise its power meaningfully and effectively. Higher judiciary in Bangladesh does possess that independence, and it has not only effectively exercised its power of review and constitutional interpretation but has also indicated the depth of this potential power. Eighth Amendment judgement of the Appellate Division in Anower Hossain v State in 1988 pronouncing the doctrine of unamendability of the basic structures of the Constitution and declaring parts of the impugned amendment illegal is one example of immense judicial power. More the power, more is the necessity for its rational exercise. Absolute power may render the judiciary vulnerable and susceptible to its misuse and hence erosion of its authority and legitimacy. Mere self-restraint of the judges and dictates of their conscience may prove insufficient to save the institution. To save the judiciary from the tendency or temptation of usurping the powers of the legislature or of the executive which may befall on it as a result of the enormity of power it enjoys, well-defined and meticulously devised accountability is the only safeguard. Judicial independence and power without corresponding accountability may turn into arbitrariness.

To whom accountable? The singular answer is that judiciary must be accountable to the people. Article 7 of our Constitution vests all power of the Republic in the people. No organ of the government, therefore, can evade accountability to the people. Every organ and institution of the government is assumed to derive legitimacy from the popular sanction of its activity. However, the requirement that the judiciary must be accountable to the people needs elucidation and concretisation. In what concrete forms this accountability is to be realised?

It has been rightly argued that judiciary's institutional legitimacy arises from decision-making fairness. When individual judges render decisions fairly, responsively and competently, the court as an institution will presumably enjoy the respect and goodwill of the citizens and hence greater legitimacy (Kevin M Esterling, "Public Outreach: the Cornerstone of Judicial Independence," Judicature, vol 82, no 3, 1998, p 113). In the United States constructive public criticism of the decisions of the judges helped the judiciary in more rational and fair decision-making. This perhaps prevented the judiciary from being 'autocratic' as it was so apprehended, and rescued it from falling into degeneration.

Reaction of the people at large to the decisions of the courts and their right to criticize the judiciary is a great check on the judicial activities and decision-making. It is not the decision of an individual case which matters, it is the totality of several decisions taken by different courts over a period of time which moulds the attitude of the community towards the judiciary. If the people's general evaluation is negative, well, judiciary loses its legitimacy. People's must be accorded opportunity to express their opinions through press, meetings and general deliberations. Judiciary is likely to benefit from general criticism. People's collective regard for the judiciary ought to form the basis of its legitimacy. The Contempt of Court Act, 1926, is no bar against constructive criticism. If any other law is any bar that law needs to be amended. Honourable Judges of our apex Court have recently observed more than once that judges' decisions can be criticized. Justice Latifur Rahman at a seminar recently (Oct 25, 1999) held in Dhaka has quoted in a positive tone Justice P B Sabanta of India who said, "Absolute power of the Supreme Court without being accountable to the people can be dangerous for democracy."

Judicial independence and judicial accountability are mutually complementary in the sense that accountability to the people would raise judicial legitimacy contributing thereby to its independence and integrity. On the other hand, only a genuinely independent and responsive judiciary would elicit rational public opinion about its activities which is true accountability. Consciousness of the judiciary that it is being constantly watched by the people and that there are forums to ventilate their reactions is a strong safeguard against the judges' power-vulnerability. Possible public reaction in mind, their decisions are likely to be fairer and more responsive. More the general acceptability of the decisions, more is the legitimacy. More the legitimacy, more would be independence and judgement without favour or fervour.

Our judiciary suffers from isolation and aloofness from the community. Contrary to the traditional view, this distancing from the people does not promote judicial independence and integrity, rather poses threat to it. Invisible barrier that separates the community from the judiciary should be removed. For the judicial decisions to be fairer and more responsive and the public criticism of the judicial decisions to be more constructive, judiciary and the community must understand each other better. Community needs to be more aware of the nature of judicial functioning and the process of decision-making. Judiciary too must read social problems and needs. True, judiciary's first concern is to apply laws to facts, but the judges also interpret the law and use discretion. Law and discretion need to be applied in the light of the social needs.

Judges' participation in what the Americans call 'public outreach efforts' may provide them the opportunity to understand the community better and also let the community understand the judiciary better. This will increase mutual confidence on which can be built true judicial independence and accountability. Otherwise there would be crisis of legitimacy of the exercise of judicial power with far-reaching adverse consequences for the state and the society.

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Challenges Facing the SMEs

by Dr Momtaz Uddin Ahmed

THERE is going to be a sea change in the business environment facing the SMEs in the new millenium. The emergence of a "borderless global economy" after implementation of WTO provisions will provide both opportunities and challenges for the entrepreneurs and business of all types and sizes. The SMEs in particular will find themselves in the midst of a fiercely competitive global economy than they have ever experienced before. At the home front also economic liberalisation measures introduced by the government in response to the structural adjustment programme of the 1980s, has created a new business environment which is much more open, liberalised and deregulated than before. It is thus imperative that the SMEs have to become more competitive, dynamic and growth-oriented to withstand increased competition and retain as well as increase their market share to be able to survive and expand.

This note is not only one of caution but also one of optimism, new hopes and aspirations. The new business environment instituted by the Uruguay Round Negotiations will also bring in their wake not only new challenges but also new opportunities. The high rate of technological change, the growth of new market niche, free flow of information and easier access to new knowledge and markets will also facilitate growth of many new SMEs especially in the technology intensive areas i.e. software, telecommunications, electronics and many other new consumer goods. The SME entrepreneurs to be able to take advantage of these opportunities must possess improved technological knowledge and standards and greater adaptive willingness and capabilities. The challenge in this case will be more of development of innovative entrepreneurs as opposed to creation of new enterprises alone. This indicates the need for significant shifts in the SME development policies by putting far greater emphasis on the development of successful and dynamic entrepreneurs who can perceive new business opportunities and are willing and able to take risks, and introduce changes, innovations and modernization. The promotional and support services now being provided by the JOBS, USAID and MIDAS etc., are quite relevant and useful, but are yet to make significant headway.

The supply of innovative as opposed to "Drone" entrepreneurs in most Third World countries like Bangladesh is very limited. Lack of adequate educational background, training and experience and the overall business environment, business ethics and culture etc. make our entrepreneurs and managers more imitative rather than innovative. This is not to deny that significant improvements are at present taking place with increasingly new generation of young and educated (i.e. MBAs) entrepreneurs entering into business, trade and industries in Bangladesh. However, their supply is still modest and needs to be increased through providing appropriate policy support and promotional incentives.

Under the current market economy paradigm, an overall business environment conducive to the growth of free enterprise system is critically important. In this context, an appropriate macroeconomic framework supportive of smooth SME development is an essential prerequisite. The SMEs, due to their scale barriers, generally suffer from unintended discriminatory credit policies, access to information, high tax burdens etc. which need to be revised and reformed to ensure free access of these enterprises.

At the micro level appropriate policy strategies and special support measures may be designed and implemented to encourage growth of the dynamic and potentially dynamic industrial sectors. In other words, emphasis should be placed on the development of SMEs along those lines which have better prospects for growth in the changed environment both at home and abroad. In particular, penetration into export markets has to be eyed as an advantage to be exploited under the liberalised trading regimes.

The entrepreneurs should be enabled to constantly upgrade their management skills through providing them with skill development training in the relevant areas. They should have access to knowledge and information about latest technologies, products and markets. Besides access to training facilities provided by the relevant public and private sector institutions, the SMEs should also have close linkages with universities and specialized institutes like BCSIR, BSCIC, BIM etc. to know about the latest developments and research findings on new process, products, and markets. These institutions may hold seminars to appraise the entrepreneurs from time to time about new technological developments and new markets.

The entrepreneur also has to become responsive and adoptive to such new developments to upgrade their knowledge and experience. To survive and grow in a competitive environment he has to continuously improve and upgrade by making use of the facilities and services available, through looking for them and trying to make the best use of them. In a private sector-led growth process, entrepreneurial dynamism, sensitiveness to markets and other opportunities and above all the urge to grow and expand are the essential qualities that must be possessed by a successful entrepreneur. The Government can only provide broad policy guidelines and create necessary infrastructural and institutional and other support mechanisms required to create and maintain a neutral and pro-active business-friendly environment for the small and medium entrepreneurs who are to take initiatives to utilize them to their best advantage.

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