Why is the Majority Decision of the US Supreme Court Flawed?

The critics believe that the majority decision is likely to render unbelievable damage to the standing and integrity of the Rehnquist Court in the eyes of the public both inside and outside the US. There is a view that the Judges of the Supreme Court of the US are unlikely to be perceived as being "the guardians of the people's rights". This is a sad reflection on the US Supreme Court which many believe it could have averted.

by Harun ur Rashid

THE historic legal battle for the White House is finally over. Vice President Al Gore in his formal concession speech to the nation summed up aptly: "The battle ends tonight." Vice President Al Gore conceded the defeat graciously with a firm determination to fight for the causes he advocated. He called every American to stand behind Mr. Bush, the President-elect.

On December 12, the US Supreme Court in a split decision (5-4) awarded the Presidency to Governor George W. Bush. While Al Gore disagreed with the decision he accepted the verdict in his concession speech.

The split decision was based on ideological conservative and liberal lines. The majority five said that there was not enough time to recount the votes in terms of constitution. The four dissenting judges, however, disagreed strongly with this view and held that "the Court's conclusion that a constitutionally adequate recount is impractical is a prophecy the Court's own judgment will not allow to be tested".

Vice President Al Gore needed the recount to have any chance of overcoming Mr. Bush's razor-thin majority lead in Florida and of winning the electoral votes (25) from Florida to win the Presidency. Although Vice-President Al Gore received about 3000 more popular votes countrywide than Bush, he lost the Presidency because the majority decision of the Supreme Court did not allow thousands of machine-rejected ballots to be counted manually in the Florida state.

The 25 electoral votes from Florida went to Mr. Bush who had secured 271 electoral votes as against 267 by Al Gore out of total 538 . It is believed that Mr. Bush will be the first President without getting electoral votes from the larger states, such as New York (33) and California (54). Vice President Al Gore will be the fourth Presidential candidate in the American history who secured more popular votes but could not win the Presidency. It seems both Mr. Bush and Mr. Al Gore will have a place in history.

Deeply Divided Supreme Court

The majority decision has sparked mixed reactions both inside and outside the US. One British law professor in a TV interview found the majority decision strange and unusual because the court accepted the case but provided no remedy. It is perceived that the court by a narrow majority (not the people or the Congress) has decided on essentially a political issue, namely who is to become the next President of the US for four years.

Although seven out of nine judges found the manual count of votes without uniform standards in Florida unconstitutional, they differed emphatically on the remedy to correct the situation.

The majority of five judges (Rehnquist, O'Connor, Scalia, Kennedy and Thomas JJ) technically remanded the case to Florida Supreme Court for devising a uniform standard of counting of votes but at the same time they took the view that time (by 12 Dec) had run out to do this. (Incidentally the judgment was delivered on 12 December).

While four judges (Stevens, Souter, Ginsburg, and Breyer JJ) disagreed with the majority decision and held that the time had not run out and the counting of votes could have proceeded until 18 December when the members of the Electoral College meet. Another judge argued that the material date in question was 6 January in terms of the US constitution when Congress would take a decision on the presidency.

The deeply divided decision of the court on the US Presidency has left the four judges with dissenting opinions with harsh words on their colleagues who delivered the majority opinion.

I am tempted to quote Justice Stevens who in his dissenting opinion said: " The endorsement of that position by majority of this court can only lead credence to the most cynical appraisal of the work of judges throughout the land.....

One thing however is certain. Although we may never know with complete certainty the identity of the winner of this year's presidential election, the identity of the loser is perfectly clear. It is the national confidence in the judge as an important guardian of the rule of law." These are very strong words indeed.

When a higher court is narrowly split in its decision, it is always the dissenting opinions which make interesting reading and provide food for thought. Furthermore, it has not been infrequently found that the dissenting view of the judges is endorsed in the long run by the court or finds expression in statutory reform by the legislative bodies. For example, British judge late Lord Denning's dissenting opinions were eventually held by the British courts.

What was the Issue before the Court?

To put simply, the issue before the court was whether the votes that were rejected by the machines were required to be counted manually or not. The Florida law provided the manual count in such circumstances. But the law did not however set a uniform standard in the state to ascertain the intention of the voter from the punch-voting card.

The Florida Supreme Court interpreted the state law and allowed the manual count of the disputed votes and left the standard to the discretion of the County Canvassing Board. The Florida Supreme Court found that in a system that allowed counties in Florida to use different types of voting machines, the discretion of ascertaining the voter's intention should be left to the discretion of the County Canvassing Board. Many perceive that the Florida Supreme Court had done its job as best as it could in a situation where the state law remained unclear or even conflicting

The US Supreme Court reversed the decision of the state court because manual count without uniform standards violated the Equal Protection Clause of the US Constitution. The court did not provide any remedy to Al Gore in practical terms. This implied that the contested votes would not be counted manually in Florida. It is argued that majority decision was silent on the implication that different voting machines used in Florida had put the voters with an unequal chance that their votes would be counted.

It is the decision of the majority of not allowing the manual count of contested ballots that has drawn the Supreme Court into controversy. It is argued that the majority in fact disenfranchised an unknown number of voters in Florida. In democracy, the will of the people is supreme and the US constitution provides that all political power is inherent in the people.Therefore, the arguments run like this: if the disputed ballots are not counted, how do you ascertain the will of the majority of the voters in Florida? Has the court powers to disenfranchise the voters ? Is it not the duty of the court to provide equitable remedy for the sake of fairness and justice by interpreting the law to suit the circumstances of the case in question?

Why is the Majority Decision Subject to Criticism ?

The court delivered an unprecedented judicial decision of 'political intervention' by a majority, only one in a court of nine judges in a closely contested fight ever made for the Presidency in the US history. The case divided the court bitterly, producing a total of six separate opinions.

Although every citizen in the US will respect the majority decision of the highest court of the land, the critics argue that the decision is flawed for many reasons and some of them are the following:

First, it is strongly argued that the US Supreme Court should not have accepted the dispute for adjudication because it involves the interpretation of the state law. It is the State Supreme Court which is the final arbiter of the state laws. The dissenting Judge Stevens held that although on rare occasions federal statute or federal constitution might require federal judicial intervention in state elections, this was not such an occasion. Another dissenting Judge Breyer held that "given this detailed comprehensive scheme for counting electoral votes, there is no reason to believe that federal law either foresees or requires resolution of such a political issues by this court."

There is a view that in the event of disagreement of the US Supreme Court with the decision of the State Supreme Court, the matter should have been left to the Florida legislature to define a uniform standard of manual count of contested ballots. Furthermore since the US Supreme Court knew that they would not be able to arrive at a clear judgment because of the division among the members of the bench, it was desirable to leave the political issue to the legislative body.

Second, the decision of the majority appears to be political and not a legal one. It is argued that the five conservative judges delivered the judgment on partisan lines. The majority decision was criticised in a robust manner by the four dissenting judges. It is argued that the conservative judges believed in the literal interpretation of the statute and were unable to provide remedy to the situation by interpreting the law in a constructive and imaginative way.

In Britain and Commonwealth countries judge-made law is recognised within the dynamics of the situation. After all law cannot always foresee every situation and the court interprets and applies the law in the given new situation. In other words, the judges are able to instill in their pronouncements "judicial activism" to meet the necessities of time. The majority decision of the US Supreme Court allegedly failed to proceed on that path.

Third, there is a view that on 4 December while the US Supreme Court first remanded case to the Florida Court to take into consideration the US constitution and Federal laws, it is argued that given the constraints of time (Dec 12 was the last date of the counting process according to the majority), the court should have indicated that without a uniform standard the manual count of ballots would violate the Equal Protection Clause of the constitution.

As a result of clear indication at the time, it is argued that the Florida Supreme Court could have devised a uniform standard method of manual count and within the time period from December 4 to December 12, the disputed ballots in Florida could have been counted.

Fourth, it is argued that December 12 dead line for recount of votes as affirmed by the majority is incorrect. Justice Stevens argued in his dissenting opinion that " in 1960 Hawaii appointed two slate of electors and Congress chose to count the one appointed on January 4,1961 well after the deadline. Thus nothing prevents the majority, even if it properly found an equal protection violation, from ordering relief appropriate to remedy that violation without depriving Florida voters of their right to have their votes counted." Another dissenting Judge Ginsburg held that none of the dates had ultimate significance in light of Congress' detailed provisions for determining on the sixth day of January the validity of all electoral votes.

Fifth, there is a view that a few judges should have excused themselves to hear the case because of the perceived conflict of interest. Two of the judges who held the majority view were appointed by former President Bush, the father of Governor Bush and the appellant before the court. Secondly, a conservative judge's son was working in a law firm which represented Governor Bush at the court.

Finally, there is a view that three judges of the US Supreme Court would retire during the course of next four years and if Republican candidate Bush becomes the President he would be inclined to nominate Republican/conservative judges to this court. It is argued that the conservative judges wanted to ensure that the court would be dominated by persons of conservative outlook. Furthermore, a view prevails that two judges went against Al Gore because he voted against them during the confirmation of their appointment in the Senate.

Conclusion

One matter is certain to occur from the decision of the case: The voting machines and the voting cards will undergo a drastic change so that a uniform system exists in a state prior to the next presidential election. Furthermore, the voters in future will be diligent and careful to use a voting machine so that their votes are counted and not rejected.

It is argued that under the US laws, the public will have access to recounting the votes in Florida and within a few months the total votes in Florida secured by Bush or Al Gore will be known in the media. If the recounting shows that the Al Gore carried the majority of Florida votes, there is a great risk that the legitimacy of Bush's claim to the Presidency is likely to be undermined.

Some say that Bush should have agreed to have the manual count of thousands of ballots under an agreed standard and if he had won, his presidency would not be perceived as a "reward given by the court". Reverend Jackson said that Bush would be President legally but without moral authority as he was put in that position not by people but by the court.

The US Supreme Court has been known in the past for its role in safeguarding the rights of the people. The judgments of Justice Marshall are often cited in Bangladesh higher courts and overseas whenever they are needed to protect the rights of the individual from injustice. The lawyers in general look up to the pronouncements of the US Supreme Court with great respect.

However, in this instance the majority decision of the US Supreme Court is perceived to be perplexing, unfair and that it robbed the voters of their right of ballots being counted. It seems that given the fact where thousands of contested ballots remained uncounted manually in Florida in the closely contested presidential race, the Court led by Chief Justice Rehnquist will be remembered for choosing the Republican candidate Bush as the 43rd President of the US on 'wooden' interpretation of laws. Many constitutional experts believe that there is nothing imaginative or inspiring in the majority decision for the lawyers.

The author, a barrister, is former Bangladesh Ambassador to the UN, Geneva.

All health information to keep you up to date

Fact and fiction

While on treatment, it is essential to check the lipid profile, including the ratio of high density and low density cholesterol and triglyceride levels. Patients often just test for the total cholesterol level in the blood, which may be misleading. It has been scientifically proved that it is the ratio of high density lipids (HDL) to low density lipids (LDL) which is important, and not just the total level. HDL is also known as "good cholesterol". The higher is its level, the safer it is for the patient. It is LDL, or "bad cholesterol", which produces narrowing of arteries.

A person with a normal cholesterol level, say 220 mg% may have a high level of LDL which is quite dangerous. On the other hand, a person with a cholesterol level of 300 mg% (Normal: 150-250 mg%) with high levels of HDL is at a lower risk.

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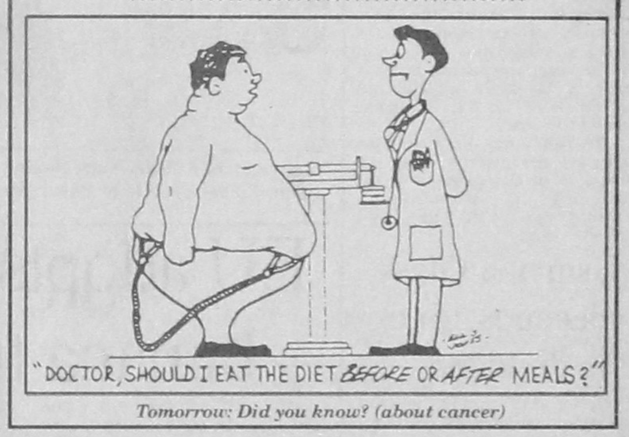

Tomorrow: Did you know? (about cancer)

Choice of Technology in Electricity Production and Distribution

We must not be misled by any dastardly attempts and we should move towards the newer technologies in power production and supply, owned and operated by local companies. It would be better if micro-finance could be linked with micro-power producers of local origin.

by M Shamsul Haque

THE Daily Star reported an interesting aspect of project evaluation on December 3, 2000 in the business news on the Meghnaghat-2 power plant project mentioned above. It is about economic life of the project and deferred payment of initial free electricity worth $45 million as agreed by AES, an American company building Meghnaghat-1 project. Marubeni is currently negotiating the contract and they have been given the documents earlier signed between PDB and AES. Marubeni is offering to pay $5.7 million worth of electricity free before commercial sale to PDB starts at $.0279 cents per unit for the next 22 years. Reportedly it has claimed life of the project to be 35 years and offered to realise the rest of the free electricity when they hand over the project after 22 years. Given the contract signed with AES and also the fact that AES also wanted to build project-2 local experts disagreed with Marubeni's unjust arguments and offer.

Knowing the kind of arm twisting of the KAFCO project that Marubeni cosponsored and the loss to Bangladesh, one should be surprised to the kind of offer it made this time. It is immaterial at this stage what will be the life of the project as we are comparing two competing offers. Hence everything should be accounted on the same basis. Still Marubeni has the advantage of applying lower discount rate given that interest rates in Japan are lower than the US, the home of AES. It is widely known that Japanese are quite serious about applying DCF techniques. The authors of one of the first textbook on Capital Budgeting, Bierman and Smidt recognised in the sixth edition of the book in 1984 that Japanese was the first foreign language in which the book was translated. What will be the present value of the remaining cost of free electricity after 22 years is a function of the discount rate to be used. Applying a discount rate of 15 per cent the PV of $39.3 million after 22 years is (39.3x 0.0462)=$1.82 million only. In other words the future value of the payment compounded at 15 per cent per year for 22 years would be equal to (39.3/. 0462) = $850.6 million. It is beyond comprehension even for a layman that Marubeni made such a proposal in a competing project where certain norms have already been established. Or did they have some hidden agenda in getting the project by some shoddy deals as they caused huge losses to the country by arranging a bad deal of the last century for the KAFCO project.

As it is we have got a bad start in getting power plant from such IPP from two accounts. One is the choice of technology and the other is the size of projects. In a paper presented in a workshop organised by Institute of Management Consultant Bangladesh about two months back Mr. Forrest Cookson, President of American Chamber in Dhaka, argued against such highly capital intensive technology as combined-cycle selected for all these projects. He based his arguments analysing cost differentials due to high cost of capital and low cost of natural gas. Bangladesh is short on capital and there is relative abundance of natural gas. Since cost of capital accounts for over 60 per cent of production cost in these power plants, it would have been rational to reduce it by not selecting combined-cycle projects. If gas is cheap, he suggested we should burn more gas for the same output and thus lower price of electricity. The lower cost of electricity could be more economical down the line of uses in industry and agriculture. It is, however, not known what was the trade-off between loss in efficiency in production of power in these plants and loss of economic welfare including high cost of foreign exchange. The excess capital investment is going to cost Bangladesh dearly in the future, Cookson cautioned. He also regretted the misdirection in energy pricing that is taking place over export of gas to India.

Other side of the bad deal is transmission losses from these large projects. Reports on power production technology these days indicate preferences for "micro-power" and "micro-grid" to minimise technical and distribution system losses given that gas can be transported by pipeline to the location of power plants at cheaper cost than coal and oil. We know already a local company (Summit) has contracted to build three such micro-plants for REB and it is raising funds from local and foreign sources for that purpose. Electricity will be sold in Taka instead of dollars as mentioned above for AES and Marubeni. The company chairman, an alumnus of IBA, has pleaded for some lower cost money given the artificially high cost of borrowing in Bangladesh. This kind of enterprising should be encouraged not only to reduce ultimate cost of power supply to the users but also to attain some transfer of technology to local companies in the country besides reducing pressure on balance of payment. The rush of the giant IPP to produce and sell power at fixed rate in dollars for such long periods (22 years) may also be questioned. Are they failing to sell those big machines in their own countries given anticipated changes in technologies, in particular the use of alternate sources to fossil fuel?

In the light of the foregoing it is understandable Marubeni's estimate for life of the project at 35 years is ridiculous and should be scrapped forthwith. After 22 years or even earlier than that those giant plants may be nothing but junkyards. We must not be misled by such dastardly attempts by companies like Marubeni and we should move towards the newer technologies in power production and supply, owned and operated by local companies. It would be better if micro-finance could be linked with micro-power producers of local origin.

The writer is Professor, IBA.

Garfield ®

by Jim Davis