The Political Seduction of Law

Elevating Judges in Supersesion and its Effects on the Independence of the Judiciary

By Omar Sadat

"All games have morals; and the game of Snakes and Ladders captures, as no other activity can hope to do, the eternal truth that for every ladder you climb, a snake is waiting just around the corner; and for every snake, a ladder will compensate. But it's more than that; no mere carrot-and-stick affair; because implicit in the game is the unchanging twoness of things, the duality of up against down, good against evil; the solid rationality of ladders balances the occult sinuosities of the serpent; in the opposition of staircase and cobra we can see, metaphorically, all conceivable oppositions, Alpha against Omega, father against mother; here is the war of Mary and Musa, and the polarities of knees and nose... but I found ...that the game lacked one crucial dimension, that of ambiguity -- because, as events are about to show, it is also possible to slither down a ladder and climb to triumph on the venom of a snake." *Salman Rushdie (1981): Midnight's Children, London, Picador, p. 141.*

Recently, the government has appointed two judges in supersesion to the Appellate Division of the Supreme Court in breach of the long standing and time-honoured convention. In doing that, what the government may have considered as a ladder to consolidate its influence on the judiciary may well turn to be a snake, which with its venom shall cause the demise of the independence of judiciary. The apparent triumphalism of the government in ensuring and enhancing the destruction of judicial independence shall be considered a tragedy, as soon as it leaves the government office and sits in the opposition benches.

The events of the last few days have been the most undignified and demeaning in the history of the Bangladesh Supreme Court. Last Wednesday the President of the country, in advise of the Prime Minister, has appointed the 2nd and the 4th senior most judges of the High Court Division to the Appellate Division of the Supreme Court to fill up its two vacant positions. This was in supersesion of the 1st and the 3rd senior most justices of the High Court Division. These acts of supersesion by the executive authority of the government are nothing but a ploy to destroy the scheme of our constitution. On Thursday the Chief Justice had performed the oath taking ceremony of the newly elevated judges, who by their own qualities commands great respect. During and after the oath taking ceremony some lawyers, mostly belonging to the opposition, have resorted to unprecedented forms of protests in front of the room of the Chief Justice. The situation worsened when the pro-government lawyers came and forcefully tried to remove the protesting opposition lawyers. The behaviour of both sides of lawyers was totally unbecoming of their professional calling. Subsequently, the Senior Lawyers intervened and the situation was neutralised.

Accordingly, it is very important that we analyse firstly, why this has happened; secondly, who is responsible for this; thirdly, what effects it shall have on the independence of the judiciary; and lastly, how we can rectify what has been done.

Lionel Trilling in his book 'The Liberal Imagination' once wrote of the bloody crossroads where the politics and literature meet. We can very clearly see in Bangladesh of the even bloodier crossroads where the law and politics meet. In its last two terms, as the parliament has ceased to be a effective institution due to absence of the respective oppositions, the Supreme Court has become the main forum for airing the grievances of the people and political parties. The political decisions, which should have been adopted in the legislature, are sought from the Supreme Court. Thus, the Supreme Court judges, depending on the merits of the case, are forced to take position with one side or the other. However, the politicians have succumbed to the idea that it is the judges' personal political belief, rather than the legality of the specific case lying before him, decides the outcome of the case. To the politicians, it is coming to be denied that anything counts. Not logic, not objectivity, not even intellectual honesty of the judges that stands in the way of obtaining the politically desirable outcome. Hence, comes the seduction of politics in law and politicisation of the appointment and elevation of judges.

Although the responsibility of the current fiasco lies with the present government, the opposition cannot avert its liability of being a part of it. The main mischief was inflicted in 1991 when the Article 48 (3) of the Constitution of Bangladesh was amended in co-operation of both the political parties. Although, in our constitution the President is entrusted with the power of appointment of judges in both division of the Supreme Court, in this amendment apart from the appointment of the Prime Minister and the Chief Justice, it was stated that the President shall act in accordance with the advise of the Prime Minister. Thus, as the effective power of appointment and elevation of the Supreme Court judges was vested with the executive authority of the country, the government is now misusing this power in the false hope of influencing the Supreme Court judgements in its favour.

Not only seniority, like almost all the judges of the Supreme Court, but more so, the superseded judges have outstanding and uncommon intellect, unimpeachable integrity, steady temperament and unrivaled scholarly credentials those are reflected in their thoughtful examination of the broad, fundamental legal issues of our time. Our Supreme Court is still fortunate to be able to draw upon such impressive legal minds who have already devoted so much of their life to the public service. They have brought credit to the Supreme Court, their colleagues, as well as to their country and the constitution. However, it is clearly evident that such credentials were not enough for the government. Recently, the law minister said that they would consider 'other things' beyond seniority when appointing the judges in the Appellate Division. The executive authority cannot and should not be the arbitrator of judging the judges. Further, may be it is about time the government should clarify what they want beyond seniority. Can following the government line be a criterion?

If that is the criterion, then the sacred words like 'Independence of the Judiciary' as enshrined in the Constitution shall become nothing but farce. The elevation of the judges shall become a political process. The nominees of such process (i.e. the High Court Division Judges) shall be effectively compelled by the executives to serve them by consistently giving judgements in their favour and must make the campaign promise to deliver judgements as per the government wishes when they are elevated in the Appellate Division. Moreover, it will deter the judges from speaking or writing on any issue that may upset the government. This will risk the Supreme Court being considered as illegitimate by the people. Further, the fundamental constitutional aim of the society, i.e. rule of law, fundamental human rights and freedom, equality and justice, shall be jeoperdised. The Supreme Court is our pre-eminent symbol of rule of law. If the court comes to seem illegitimate, the legitimacy of law itself declines and the moral obligation to obey it is cast into doubt. What the future holds in this respect is unclear. What is clear is that we have come close to a tipping point and we must draw back.

Lawyers resorted to an unusual form of protest against the supersesion.

The major political parties need to sit together and decide at the earliest that regarding the appointment and elevation of the Supreme Court Justices, the advice to the President shall be made by the Chief Justice not the Prime Minister. Further, regarding the other two judges, they should be elevated to the Appellate Division with immediate effect. Although, it will make the number of Appellate Division judges to seven instead of usual five, there is no constitutional bar against it and as per Article 94(2) of the Constitution it is the discretion of the President to decide the number of judges in the Appellate Division. The Chief Justice may then decide to constitute two benches, i.e. civil and criminal, of the Appellate Division, which shall also ensure the speedy disposal of appeal before the Appellate Division.

Being one of the younger member practicing in the Supreme Court, I have been fortunate to stand under these judges who have not been elevated. They resisted all allurements of power. They taught me, not by precept, but by example, that nothing is more commendable, and fairer, that a person should lay aside all else and seek truth. They themselves are the lesson, which one can take away. And now in return, because I can do no more, I lay my tribute of gratitude and reverence before them. My masters now, my masters always.

The writer is a Barrister-at-Law practicing in the Supreme Court and the former president of the Cambridge University (Graduate) Students' Union.

LAWSCAPE

Towards a Legislation on Medical Termination of Pregnancy

By Imranul Kabir

AFTER the birth of a child the first thing parents want to know is whether the child has a normal feature with all its organs in proper places. One may wonder whether there is any parent who would want to give birth knowing that their forthcoming child will be a stillborn and handicap. If not all, but many parents would want to have an abortion in such circumstances. Our law has declined to consider such a delicate issue, and has only seen one side of the coin.

Section 312 of Penal Code regards it an offence for a person who voluntarily causes a woman with child to miscarry, if such miscarriage was not caused in good faith for the purpose of saving the life of the woman. Section 313 is a similar offence with graver sentence where the miscarriage was done without the woman's consent. It is also an offence for a person who, before the birth of a child does an act with the intention of thereby preventing that child to born alive or dies after birth. The person who caused the above shall be guilty of that offence under section 315 of the Penal Code. Similar provisions can be found in section 1 (1) of the Infant Live (Preservation) Act (IL(P)A) 1929 of the UK. Under IL(P)A 1929 it is an offence to destroy a child capable of being born alive and imposes criminal sanction upon those who intentionally kill any child capable of being born alive. The section makes it clear that an offence will not be committed if the killing is done in good faith for the purpose of preserving the life of the mother. These laws are very much essential to protect the most vulnerable section of us and our futures too.

The above is one of the coin as mentioned earlier. The Legislators did consider the fact that there are some people who encourage miscarriage and abortion to hide their adulterous life. To some people female child is unwanted and abortion or miscarriage is the appropriate solution to them! What the Legislators did not contemplate is that, a mother would like to have an abortion so as to avoid giving birth of a handicap child. The development of medical science of determining the condition of child in the mother's womb is not very recent. India has enacted the law on the termination of medical pregnancy in 1971. That law allows termination with the advice of two registered doctors where there is a substantial risk that if the child were born, it would suffer from such physical and mental abnormalities as to be seriously handicapped. It goes further to say that pregnancy can be terminated, in any case, when the age of the foetus is less than twelve weeks.

My object is not to advocate for right to abortion. The object is to show how this strict prohibition is allowing a section of our mushroom diagnostic centers and its related practitioners to escape punishment for their negligent practices. Everyone knows about MR and what happens in the name of MR. Though the purpose of MR is to clean up the urethras of female body so that anything that is stuck in the urine tunnel is removed, in reality it is used as a device of destroying unwanted children. Advertisement of the clinics that performs the job of MR is seen in every lane and by lane. It means whether our law allows it or not child abortion is going on openly. Now the law and the Courts have to pretend, reasonably, that they do not know the fact. The law enforcing agencies keep their eyes shut partially because they cannot deny the necessity of it and partially because they are managed. Unless it is brought to the attention of the Court and proved, Court cannot take action against it. So in spite of absence of lawful right to abortion the business is continuing. Because of the absence of any legal foundation in this matter a group of people are avoiding legal proceedings for their negligent activities.

Diagnostic reports are given to the parents that the child in the mother's womb is perfectly sound. Whereas while diagnosing they found some irregularity in the growth of the child. Without making sure what actually happened they reported that the child is perfectly sound and there is nothing to worry about. The child took birth and it came as utter fear and astonishment of the family when they learnt that the new born does not have the lower limbs of his/her legs or it born with other imperfections. This is to consider the legal remedies that can or cannot be obtained against the negligent diagnosis. Under such circumstances the Court would ask itself, if the diagnosis had been proper, whether the doctor could have an abortion, when they came to learn that there is a substantial risk that an abnormal child is going to take birth. They did not, so the case would be disposed of with an award of nominal damages. The Diagnostic Center owed the duty to take care to the parents and it violated such duty but the loss the parents suffered would have been suffered in any case as they had no right to abortion or miscarriage.

Amusingly, the law would have saved a doctor who had terminated the pregnancy if such termination was by reason of his fear that the life of the mother was at stake, applying section 312 of the Penal Code as referred earlier. In the UK the similar section was interpreted in a way to mean that saving the mother from psychological disorder is synonymous to saving her life. In this case termination of pregnancy of a 14-year-old child who had become pregnant as a result of a terrifying rape was held lawful. The operation was performed with the consent of the child's (the girl's) parents. In that situation the continuance of the pregnancy will be to make the woman a physical or mental wreck" (Bourne [1938] 3 All ER 615). So if the Diagnosis had been correct one may speculate, for the sake of argument, that doctors would have decided to terminate the pregnancy. But when compensating for a loss the Judge would not award the sufferer on the basis of speculation. Moreover, this interpretation is a blanket interpretation of a particular section to safeguard a doctor who had already performed the operation and who otherwise would have sustained a criminal sanction for his act. The parents have not given any right to termination of pregnancy by this decision. It is therefore unlikely that the Court can do anything against this negligent Diagnostic Center other than awarding that meagre compensation.

Our neighbour India is far ahead of us as the Parliament of India has passed specific legislation allowing abortion in specific circumstances. Section 3 of The Medical Termination of Pregnancy Act 1971 (Act No. 34 of 1971) specifically allows a registered medical practitioner to terminate the pregnancy in the following circumstances:

(a) Where the length of the pregnancy does not exceed twelve weeks,

(b) Where the length of pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered practitioners are of opinion, formed in good faith, that-

(i) The continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) There is a substantial risk that if the child were born, it would suffer from such physical and mental abnormalities as to be seriously handicapped.

A stillborn child is a perpetual curse to the family. For a similar negligence the parents could have recovered substantial damages in the West. The parents would have awarded the cost of special accommodation and expenses needed for the child, for the parents' distress, the nursing cost and so on. In our country we end up with pain and sufferings.

The law in our country can not restrain abortion in any case. The country is yet to achieve economic emancipation so as to provide the fundamental needs of the citizens. It will not take the responsibility of those handicapped children. Those who are born deserve our love, sympathy and care. But all of us expect to give birth to a normal child when we have the technology to know beforehand what is the physical condition of the child. A section of people who are in the business of diagnostic center are reaping us off without providing maximum standard. This is our life and a single case of wrong diagnosis out of thousand as a result of negligence should be condemned and punished.

The writer is an advocate of Dhaka Bar.