

Judicial independence with accountability

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In every society the judiciary (and judges) play a vital role in upholding certain values: they represent the establishment and uphold the 'status quo'; they interpret the law either in the narrowest interpretive sense or in the 'activist' sense of making 'judge law'; by virtue of being predominantly from the 'upper classes' and male; they ignore the interests of others; they are also seen as a body which is totally unrepresentative and even considered at times to be promoting the interests of a small section of the society, for example, the armed forces. I, therefore, find the present suspicion vis-a-vis the judiciary quite understandable. It is in this context that I would like to examine certain issues.

Judicial Independence

The principles of judicial independence are, in general terms, long established and well respected. They have received both national and international formulation. They are, in general terms, observed in most jurisdictions. However, as with freedom, the price of judicial independence is eternal vigilance. The tensions that arise from time to time between government and judiciary are a natural and inevitable part of life. The general concept of judicial independence was in 1988 stated by Sir Nicolas Browne-Wilkinson, then Vice Chancellor, and now Lord Browne-Wilkinson, a Lord of Appeal in Ordinary:

"If you were to ask a thinking man whether he regarded the independence of the judiciary as important, he would almost certainly answer 'Yes.' If asked to explain what he meant by the words, he would probably say that a judge should be free of any pressure from the government or anyone else as to how to decide any particular case... If pressed further and asked why judicial independence was important, our thinking man might at first hesitate.

But in due course the answer would be along the lines, 'the courts are there to protect the rights of the individual as against the state by ensuring that executive powers are lawfully exercised.'

Sir Richard McGarvie, Governor of Victoria (Australia), stated more formally:

"It is vital to identify clearly what in this context is meant by judicial independence. It refers only to independence in making decisions in court cases between litigants. It means only that in making such decisions a judge must be individually independent in the sense of

being free of pressures which would tend to influence a judge to reach a decision in a case other than that which is indicated by intellect and conscience based on a genuine assessment of the evidence and an honest application of the law."

International organizations have made efforts to create universal or international standards of judicial independence. Clause 1 of the 'Basic Principles of the Independence of the Judiciary' endorsed by the General Assembly of the United Nations on 29th November 1985 was:

"The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."

The standard or principles of judicial independence was formulated by the Chief Justices of the Asia Pacific region at a meeting in Beijing in 1995, known since then as the Beijing Statement. Under the heading of 'Judicial Independence' it states, inter alia:

1. The Judiciary is an institution of the highest value in every society.

2. An independent Judiciary is indispensable to the implementation of this right [of fair and public hearing by a competent, independent and impartial tribunal established by law].

3. Judges shall uphold the integrity and independence of the Judiciary by avoiding impropriety and the appearance of impropriety in all their activities.

The independence of judiciary is required, according to the Beijing Statement, in order to:

1. ensure that all person are able to live securely under the Rule of Law;

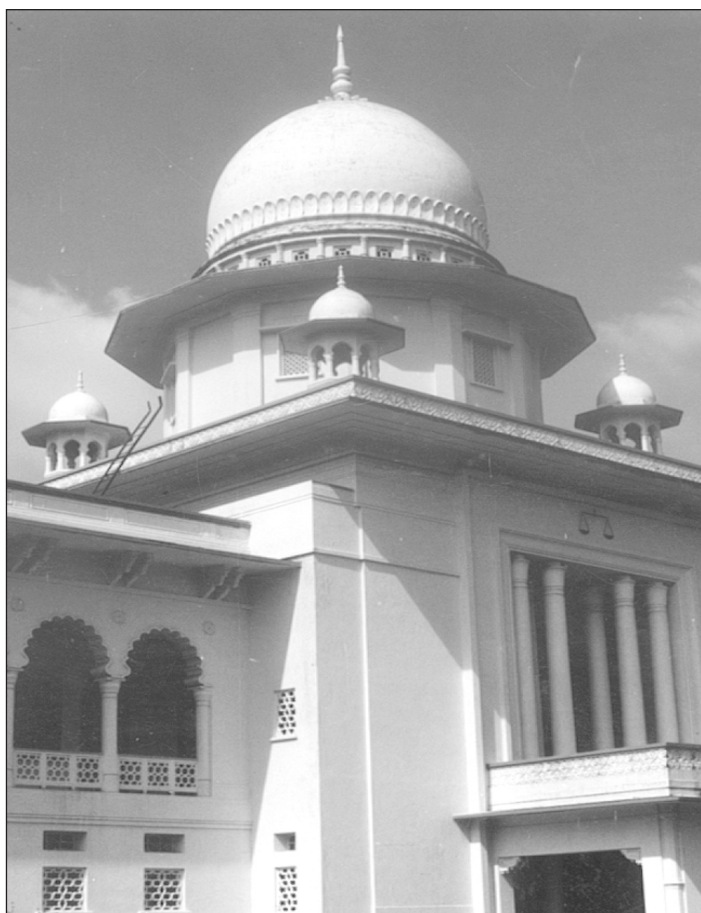
2. promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

3. administer the law impartially among persons and between persons and the State.

The objectives, as stated in the Beijing Statement, cannot be attained if the judiciary lacks people's confidence. The authority and legitimacy of the courts are dependent on the users of the courts and the general public as whole having respect for what they do and being able to trust them to maintain a high professional standard. It is, therefore, not sufficient for the courts to be independent and maintain a high professional level. It must also be evident for all to see that such public confidence is clearly manifested.

Lack of public confidence in the functioning of the judiciary could ultimately undermine the bedrock of any society, that is, the rule of law. The judiciary in Bangladesh is now faced with such a challenge, and the onus is on all responsible citizens to address this issue, particularly the policy makers.

In the heat of the moment we should not forget the fact that an inadequate judiciary will be detrimental for the society at large. However noble the cause may be we should resist the temptation of making the judiciary the battleground of competing political ideologies and religious tenets. It is worth stating, with due humility, that judges should also avoid not-so-subtle traps and decline to be drawn



in quasi-judicial matters. Judges and lawyers have been trained to interpret laws as made by the legislature and executive; the former should not take on them the role of the latter, however much the latter would seek the approval of the former. Neither can the legislature and executive hide behind the cloak of the judiciary if bad laws are interpreted badly. As Rousseau wrote "Good laws lead to the making of better ones; bad ones bring about worse" (The Social Contract, 1762). It is also important to stress the need for complete independence of

the judiciary and the judicial process. The executive should bear full responsibility when they indulge in the self-fulfilling prophecy of the judiciary being unable to deliver justice when the judicial hands are tied by the rope of executive-administration interference. No amount of excuses will redeem the executive of its primary responsibility of creating a conducive environment within which the judiciary could function independently through proper checks and balances.

Independence is not a purpose or a function of anything: it is a condition which makes possible the discharge of a function a means to an end, not an end in itself." (What are judges for? By Conor Gearty, London

established norms are broken and shortsighted precedents are set for the judiciary, and by implication the rule of law, is put on the slippery slope towards abyss. In India, it is well known that when the executive enjoyed a decisive voice in the matter of appointment of judges, it was a disaster. Appointments were made on considerations other than merit and seniority. Political, partisan and other extraneous factors were said to have determined some selections. The question was considered by a nine-judge Bench in Supreme Court Advocates on Record Association vs Union of India (1993). Mr. Justice Verma, delivering the majority judgment, stressed the Constitutional purpose of selecting the best available persons as judges. The result of the landmark judgment was that the wings of the political executive were clipped and its arbitrary powers curbed. In India the appointments had still to be made by the President on the advice of the Council of Ministers. But the Chief Justice, in consultation with other senior judges, was supposed to be in the best position to decide upon the best persons to sit on the Bench. While the executive could exercise the necessary check before forwarding the advice to the President, it was not expected to substitute its own judgment for that of the Chief Justice in regard to the suitability of those to be appointed.

The Beijing Statement, on the matter of appointment of judges, had the following to state:

1. To enable the Judiciary to achieve its objectives and perform its functions it is essential that judges be chosen on the basis of proven competence, integrity and independence.

2. The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguard against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.

3. In the absence of a Judicial Services Commission, the procedures for appointment of Judges should be clearly defined and formalized and information about them should be available to the public.

4. Promotion of judges must be based on an objective assessment of factors such as competence, integrity, independence and experience.

In recent times interest groups and media have shown disproportionate interest regarding the com-

position of the judiciary and the procedures for the appointment of judges. Such a high level of scrutiny is on one hand, unhealthy because it implies that there is a lack of identified criteria for judicial appointment and that the procedures are neither public nor open. On the other hand, it offer an opportunity to the executive and judiciary to look closely at certain issues which have been neglected or needs to be modernized in view of the dynamic nature of the present information technology age.

Related to the issue of judicial appointment the other anxiety is that the Bench is failing to attract leading members of the Bar, the traditional recruiting ground for judicial appointments. The difficulty partly stems from the escalating disparity between judicial remuneration and the earnings of successful advocates, partly from the diminution in the status of the judicial office, and partly due to the fact that the Bar is failing to attract the best and the bright. This situation is not unique to Bangladesh but can be found in other more mature common law jurisdictions, such as, the United Kingdom, Australia and the United States.

Worries are being expressed nowadays in Bangladesh regarding the relationship between the Bar and the Bench. Given the worldwide trend, and noticeable also in Bangladesh, of judges becoming more of lawmakers rather than just working out the meaning of the words in statutes it is even more important that judges are not labeled as pro or anti 'whatever'. Therefore, the appointment process needs to be transparent and swift, and once the decision had been taken then that should be accepted with grace and finality. The law is costly and mockery of the institution will cost us all dearly.

Today's contributions to the continuing debate surrounding the judiciary are without malice. They are only expressions of genuine concern. The judiciary is akin to the immune system of our human body. If the judiciary fails to function in any society then, like HIV aids, the body politic will be susceptible to other ailments and won't be able to produce anti-bodies to fight those new viruses. We all know about the deadly consequence of HIV aids. We, as a society, ignore the present malaise of our judiciary, which is also a reflection of our society, at our peril.

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The two sides of the coin

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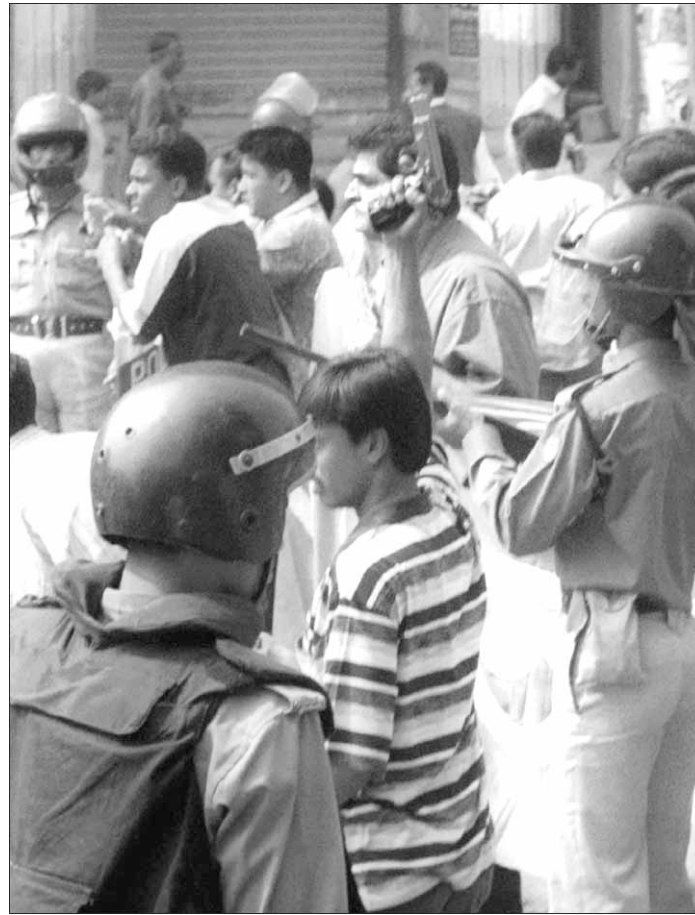
RECENT confrontation between the 'Mullahs and the Awami League government (armed with the support of some NGOs), has further escalated lawlessness in the society. In recent days, we have been beheld with shocking and distressful news starting with the abduction of Advocate Nurul Islam of Laxmipur and the repression of women in that area to the deadly attack on an UNB Journalist at Feni. Unfortunately but true, all these human rights violations has been allegedly committed by the leaders and workers of the ruling party or in some cases with the support of the ruling party MPs.

The questionable role of police and the concerned authorities, after the incidences of sexual harassment both at Jahangirnagar University and at Dhaka University (Badhan incident), the female students of both institutions have been left in a vulnerable and insecure position and at the mercy of the perpetrators. The victims of the incidents are living a clandestine life whereas the culprits are still at large. Our law enforcing agencies have shamefully proven to be partisan when the accused belongs to the ruling party. For example, The Officer in Charge of Feni Thana is known as 'Class Committee', led by the local Awami League MP of Feni.

Most of the newspapers had picture of Liton, bodyguard of a ruling party MP of Dhaka City, chasing the opposition activists with a nine-shooter gun during an agitation programme called by the opposition. Surprisingly no criminal action has been taken against him for carrying an illegal weapon.

The series of adverse incidences allegedly conducted by pro-government activists has put the country in an embarrassing situation. The issue of gross violation of human rights was raised at different levels. However the situation is no better rather it deteriorates further. A bomb explosion at an apparently innocent communist party's meeting, and police and intelligence agencies' confusing and contradictory statements regarding the incident raises a fundamental question - whether the intelligence agencies themselves require an impartial inquiry or not?

The Eleven Party alliance, supported by the Left Democratic Front, called



a general strike to protest the killings at the Communist Party meeting and the anti people policies of the Government on 1 February this year. The hartal activists including the leaders and activists of the Left Democratic Front were attacked by the pro government elements in different parts of the country and in one occasion the attackers were led by a State Minister.

In the meantime a judgement passed by a Division Bench of the High Court Division on Fatwa prompted the Mullah's to take the streets in protest. Mullahs called a general strike to foil a national level meeting called by a section of NGOs, on February 3, where a number of government Ministers were also present. Some stray events including a totally un-Islamic incident, killing of a police officer, were perpetrated by some unknown assailants inside a Mosque in Mohammadpur.

Grabbing this opportunity, the government has gone for a massive man-hunt against the so-called Islamic forces and in the meantime have managed to arrest some of the senior leaders. It appears that government is using religion for political dividend, which may prove to be dangerous for democracy itself. Direct shootings aimed at the torso of victims by the police and BDR in Brahmanbaria has taken many lives and maimed so many people, most of whom come from very poor economic backgrounds.

The Ministry of Foreign Affairs published and distributed a booklet last year when the then President Clinton visited Bangladesh. In that booklet, the government frantically tried to establish the fact that a so called 'fundamentalist' force, with the help of the Opposition, was already present in Bangladesh and the international community should take notice of that.

On 13 February 2001, Opposition BNP-led alliance called a daylong hartal.

A procession led by the former Mayor of Dhaka City, Mirza Abbas, came under attack at the Malibagh crossing area by a ruling party Member of Parliament, Dr. HBM Iqbal. The latter fired shots at the pro hartal procession, which killed four persons - including a policeman. In the press photos of the next day's newspaper the police men who were escorting Dr. Iqbal's procession were seen running for shelter.

The most appalling thing was the press statement issued by the Police Headquarter, which took a direct partisan line and blamed the pro hartal (Mirza Abbas-led) procession, which came under attack from the procession of Dr. Iqbal. The police, thereby, even failed to uphold the truth regarding the death of their fellow serviceman.

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Prison condition in 2000

ODHIKAR

HERE has not been any positive change in the year 2000 in the state of prison in Bangladesh. The picture is more or less the same: the militarization in the prison administration, over crowding of inmates, insufficiency of food, scarcity of medicine, lack of a hygienic environment and proper sanitation, corruption, maladministration and above all, gross violation of the human rights of prisoners are still there.

Odhikar, a human rights organization, has always had a special emphasis on monitoring the human rights situation in prisons. During the last year, Odhikar, as usual, monitored the prison administration, behavior towards prisoners, their visitors, and the implementation of relevant laws.

The Prison System of Bangladesh is primarily governed, under the Prison Act, 1894; the Prisoners Act, 1898; the Jail Code of 1837, the Code of Criminal Procedure 1898, the Penal Code, the Police Act, the Civil Procedure Code. The Special Powers Act is also broadly exercised in the prison system in Bangladesh as well.

Prison Administration
Dissatisfaction and silent anxiety in the whole year within the prison administration regarding the post of Inspector General of Prison (IGP) continued as the position has been occupied again by the military administration. Prison administration is a civil administration controlled and supervised by the Ministry of Home Affairs. But the top brass of the prison directorate is headed by a military officer in the rank of Brigadier General. Regarding the post of IGP, the relevant laws, rules and orders clearly reveal its status as a civil administration and the qualifications of the persons have been defined there. The Officers and Staff (Department of Prisons) Recruitment Rules, 1984 clearly provides that the provision of recruitment of the Inspector General of Prisons should be "by promotion on the basis of merit-cum-seniority from amongst the DIGs of prisons and if none is

found suitable for promotion by transfer on deputation of a suitable officer holding a post equivalent to the post of joint secretary".

The Parliamentary Standing Committee on Ministry of Home Affairs recommended, at a meeting of 16 September 1999 that in Clause 3(d) of the said Recruitment Rules of 1984, there should be steps to appoint personnel in the senior posts of jail administration, by promoting the departmental officers as per the recruitment rules. Following the rules, a senior assistant secretary of Ministry of Home Affairs vide letter No. // E-2-86 Jail 11/164 dated 13.3.97 requested the establishment secretary to withdraw the present IG Prisons Brig. M. Waliur Rahman Chowdhury within six month.

In 1982 the single member Marshal Law Committee comprising of Brig. M. Abdul Halim also recommended to recruit the IG Prisons by promoting the departmental officers. The most significant thing is that the present IGP Brigadier Waliur Rahman himself sent 32 recommendations to the Parliamentary Standing Committee on 13 May 1999 for proper management and administration of prisons. Among others he himself recommended, "The post of IGP be fulfilled from the departmental candidates as per the Recruitment Rules".

Prison Management
80 prisons out of which 9 central jails, 55 District Jails and 16 Thana Jails are the focal points of prison management. The prison management mainly vests upon the jailors who are directly handling the inmates. Very few of them are careful about the human rights of the inmates. The life standard of the

administrative personnels of prisons including the jailors are higher than their salary scales. Bribery, misappropriation of allotted funds to food, miscellaneous charges from the visitors are the common features of prison management of the country. It is hardly seen and gathered that any action has been taken against the corrupt practices of the prison officials. Human Rights training to the prison officials are mainly obstructed by the Ministry of Home Affairs surprisingly not by the prison directorate.

Visitors

Division	No. of Jails (excluding 16 thana jails)	Actual capacity		Present number	
		Male	Female	Male	Female
Dhaka	17	6502	221	19285	615
Rajshahi	16	4728	422	12686	389
Chittagong	11	4206	101	13669	338
Khulna	10	3542	133	9435	333
Sylhet	04	1627	38	3804	91
Barisal	06	1806	156	9435	333
Total	64	22411	1051	61553	1836

The relatives, friends and other visitors of the inmates are the victims of gross humiliation and harassment while they go to visit their inmates. Though there is a government rate of visiting charge, it is followed, if any body wants to visit his son or friend in any district jail, he will have to bribe Tk.50/- to 100/- for one visit. But even this visit is not so easy. Because, there are 3 or 4 iron rod fences with a little ventilation. One can hardly see the face of other clearly.

Prisoners inside the Prison

The condition of the prisons and their inmates in Bangladesh are deplorable. In all the prisons specially in the old, ill equipped ones,

over-crowding, poor condition of health and hygiene system, almost non-existent sanitation facilities, lack of proper health-care combine with corruption are creating a nightmare.

Over crowding in prison is a common problem like the other years. The accommodation capacity in 64 jails excluding the thana jails are in total 23462 but they host around 63489 inmates.

The problem of overcrowding is mainly due to the delay of holding trial, as the number of under-trial prisoners is very high.

There are 16 thana jails in all

ers and 429 female convicted prisoners; 44293 male under trial prisoners while 1382 female under trial prisoners. The use of bar fetter is a glaring instance of another gross violations of human rights.

Crimes and Diseases

Crimes and diseases are other factors of the miserable life of the ordinary prisoners. The infected diseases are quickly spreading among the other inmates which is going beyond the control. The diseases mostly affecting the prisoners are mainly tuberculosis,

jaundice, heart ailment, cancer, drug addiction and infectious skin diseases.

The under-trial prisoners, especially youngsters, are developing a tendency to get involved in crimes after coming in touch with hardened criminals. The number of drug users inside the jail also increased manifold, as drugs reach their hands regularly.

Homosexuality is also affecting the inmates very sharply.

The terrorists specially the surrendered ones in the South-Western parts of the country are detained in the prisons who have been designing blue print of crimes from inside the prisons. These alleged offenders are working as a crime syndicate from the jail.

Annual budget

The total annual budget of our prisons in the year 2000 was only Tk. 110 crores. Out of this amount the salaries of the numerous prison staff, the food, clothing and other expenses of over 63 thousand inmates for 365 days are being covered. Given the disparity

between the budget and the expenses it has to cover, anybody can presume the real situations of our prison system and the quality and quantity of food, medication and clothing the prisoners actually receive.

Death in Prison

In the year 2000, total 29 Prisoners were died in the prisons but no sufficient cause or information was disclosed in pursuant to their death. Against the backdrop we should develop our prison system to ensure the human rights and fundamental rights for the prisoners who are also the citizens of the country.

The following measures should be taken immediately to improve the existing prison system and condition and ensure the rights of the prisoners:

Allocating sufficient and substantial annual budget for the prisons and increasing the accommodation capacity of the existing prisons.

Ensuring immediate sufficient and standard medication, food, clothing and recreation facilities;

Improving sanitation and ventilation facilities;

Ensuring speedy trials to decrease the number of under trial prisoners;

Ensuring education, legal awareness and right to work of the inmates;

Ensuring free visiting hours for the relatives of the inmates;

Establishing the prison correction/reformative institutions;

Implementing parole, probation and after care services;

Providing proper wages to persons under rigorous imprisonment for their work;

Appointing the Inspector General of Prisons from prison department;

Trying the corrupt officials of the prisons;

Giving proper human rights training to the prison officials and others concerned and to the prisoners as well.

Report prepared by Md. Asaduzzaman on behalf of Odhikar, a coalition for human rights.