



Concept of free press

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HERE is a general impression that the press in Bangladesh had never been so free and independent as it is now. A number of spokesmen of the present government also on different occasions boast about this freedom as if it is they who have assured and guaranteed this freedom. Naturally, one may ask, is the press as free as is claimed by them and other different quarters?

In this respect, before making an analysis of the present 'free atmosphere and suitable environment', I may quote Mr. Timmerman, an Argentine journalist. I met this courageous journalist about a decade back at a seminar at Hilvesum in Holland. He had just been released from the jail of the Argentine dictator. After coming out of jail he wrote a book titled "Prisoner without a name, cell without a number."

Discussing about his book and content relating to press freedom he told me, he was not sure whether the press in his country had earned freedom though it at last achieved democracy after the fall of the dictator. He explained that "democracy and press freedom are in one sense dependent on each other but also becomes antagonistic when the question of establishing the democratic values comes to the fore-front. Interestingly, a democratically established government is more suspicious of a free press than the autocrats." His final verdict was "the press is free when it feels to be free in any system of government."

Mr. Timmerman's observation is worth a detailed study if we are to express the feeling whether in the present political situation in Bangladesh the press is really as free as claimed by different quarters. I have myself on different occasions stressed the freedom of the press is now enjoying. But this observation is relative to the concept of a free press. For understanding this conception we have to make a comparison between the situation the press experienced during the autocratic periods and the real condition in which the press and the journalists are working now, or during the last decade.

In this comparison first we have to say in what condition the press in the past felt that it was under bondage. It may be remembered that between the period from 1947 and 2000, the press and journalists worked under subjugation for about four decades out of five. What kind of subjugation was that? In general we categorise this subjugation as (i) censorship, (ii)

threat of closure, (iii) imprisonment of the journalists and the editors, even owners and publishers. In some countries like ours there are some other leverages used by those who want to keep the press under their domain. These are categorised as (i) control on advertisement, distribution and newsprint quota, (ii) distribution of favours among journalists and buying them out in one way or other. In addition in this country the autocratic rulers also invented some other means of intimidating the journalists. One of them was known as 'press advice' which meant 'behave well or else.'

There are two different conceptions of the free press in two opposite circumstances of autocracy and democracy. To feel the real difference one has to find out the answer to the question what is the relationship between freedom and independence and whether they are synonymous. Or is a free press independent?

Therefore, in the above context and with reference to the sayings of Mr Timmerman the press itself has to say whether the factors discussed above do or do no longer exist or hamper the freedom of the press at the present moment in Bangladesh, especially during the two successive periods of democratically elected governments. Of the two categories discussed above the first ones i.e. arrest, closure etc. do not overtly exist. Thanks to interim government of Justice Shahabuddin the instrument to close down the press arbitrarily was done away with. During the periods however, there had been specific criminal and civil cases against journalists under the laws of the land. But it should be accepted as reality that journalists and the press are not above law. But as for the second category i.e. control on advertisements, restriction on supply of newsprint or facility for buying newsprint at favourable and subsidised price, the situation is not different from what was during the autocratic regimes. In fact the two democratic regimes we had in the last decade partly and fully adapted these tactics or techniques of the dictatorial regimes. So the natural question is, echoing Mr. Timmerman, in this circumstance can the press feel fully free or use their freedom freely, unequivocally and without hesitation and hindrance. The answer is definitely "no." But even then the press is free to write and express its views ignoring these indirect barriers which can be termed not as restrictions but as pressure or pinpricks of occasional harass-

ments. In some cases we call it "self-censorship." Moreover, another factor has cropped up in restricting the freedom of the journalists, though not the freedom of the press in particular. That factor is the clash between the running of the press professionally and other business interest of the owners-publishers-cum-editors.

Some quarters in the press express their disapproval of control on advertisement distribution. This control relates to government provided advertisements only and there can be a debate why a newspaper has to

depend on these particular sources of revenue when there is now a wide range of private sectors. Dependence on government advertisement means dependence on the favour of those who are in the helm of power. Whether wielding of the power by them is immoral or unethical, is a different question.

It may be concluded that if we accept the general definition of a free press and independent journalism, we definitely had a free press for the last one decade. But the situation is not as utterly satisfactory as appears to be and as claimed by different quarters, and above all, as expected by the press itself. To be specific (i) we had press censorship and press advice, we now have intimidation and threats, (ii) we had been threatened with jail and closure of newspaper, now the journalists are physically tortured and brutally murdered. In the past a journalist lost his job and means of subsistence, now he or she can lose one or two limbs. This means in the past our freedom of expression was hindered, now our right to live is at stake. I, often explain this in this term, in the past the press did not have freedom of expression now it doesn't have freedom after expression, if the press tried to assert its freedom in the past the press was gagged or closed down. Now those who run the press themselves, the journalists and the editors are eliminated, no need to shut down the press.

So the change in the concept of press freedom from the past autocratic

period to present democratic atmosphere is noteworthy. The threat to freedom remains, only difference is the mode and the shape have changed. When we speak of the state of working environment in the press in the early period we cite the examples of the arrests of journalists, quote the number of newspapers closed, methods of harassments used. During the last two decades of democracy we sadly quote the number of deaths, the names of journalists who have lost their hand or legs or even head and those injured in police action while performing their professional duties.

However, it must be admitted that in general term the press and the journalists feel free to write whatever may be the consequence. Now, in the democratic atmosphere they can at least cry out for freedom whenever it is denied in the slightest form. In the past the press was gagged so much so that it could not even moan about the bondage. And that's a difference. There are covert attempts from the citadel of power and overt actions from other quarters. In spite of that the journalists are now free to express even though they may have to pay the price of that freedom after the expression. In the past there were directives against writing, now there are only advice from unsolicited quarters about being objective and honest journalism, whatever that may be.

One last observation that occasionally crops up, when discussing about the state of affairs in the present-day press, is that it may be free but is it independent? My answer is after decades the press is free. But its independence is somewhat, if not fully, hampered by different quarters by those who own it, those who being in power use the leverage, pamper the journalists by distributing favours, and those who hold the finger on the trigger of the gun aimed at the free and courageous journalists. To summarise the discussion I may say there are two different conceptions of the free press in two opposite circumstances of autocracy and democracy. To feel the real difference one has to find out the answer to the question what is the relationship between freedom and independence and whether they are synonymous. Or is a free press independent? My answer is the press is now fully free if there is comparison between the situations prevailing two decades ago and now. As for its achievement of full independence that goes with the free press I am still skeptic. Because, my conception of freedom of press is that it has to be both free and independent. So, is the press now free? Yes, it is. Independent? I doubt.

Independence of judiciary: A distant dream?

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LEXICOGRAPHICALLY any claim of judiciary to absolute independence means, "Not subject to control of any person, country etc; free to act as one pleases, autonomous; not affected by others..." Undoubtedly such type of judicial independence is a misnomer, perhaps utopian. In most cases, judiciaries across the world are guided and supervised by constitutions, enactments, or conventions. However, they enjoy freedom from interference by other organs of governments, e.g., executive or legislatures. Functionally, they should be independent of the dictates of executives or legislatures for the ends of justice.

The concept of 'separation of judiciary' is derived from the theory of 'separation of powers'. This means that the three organs of the state, the executive, the legislature and the judiciary should exercise their powers separately and effectively, enforce checks and balances in all respects, where judiciary should act independently as the custodian of the Constitution, as the final place for protecting and enforcing the rights of individuals. Separation of the judiciary from executive is a sine qua non for guaranteeing its independence.

Appointment and removal of

judges, security of the judges in terms of tenure, promotion, salary or other remuneration and pension plus institutional independence must be ensured. In our context, judicial and administrative appointments, and financial independence are also preconditions to an independent judiciary. To establish its separate entity, it cannot be part of the civil, administrative or executive services of the country. For the very distinct nature of its structure and function, judiciary stands on a different platform from civil, administrative and executive services of the country.

How far is it independent? Although the higher judiciary in Bangladesh is enjoying some independence from the executive, the situation of the subordinate judiciary is altogether different. The judicial magistracy is still under the direct control of the executive. There is no doubt that the higher judiciary is independent in respect of exercising its judicial functions, but the theory of separation of powers is not followed in respect of appointment of judges in both the Divisions of the Supreme Court.

Unfortunately, the Supreme Court of Bangladesh is increasingly coming under pressure and threats from the executives and the stalwarts of the party in power. Granting of bail, discretion of the court based on clear legal principles and reali-

It is clear that mandating the independence of the judiciary, which is a basic structure of the supreme law of the land will be meaningless if the whim and caprice of the executives are allowed to prevail over the decisions and discourse of the judiciary. The two successive democratically elected governments wilfully ignored the aspiration of the Constitution.

ties, have turned into a source of heated political controversy. The executives have unleashed a series of scathing attacks against the judiciary for being liberal in granting bail. The incumbent Prime Minister has already been accused twice on the charge of contempt of court. Last year, when several benches of the High Court Division expressed their embarrassment to hear the death references of the Bangabandhu murder case and sent them to the Chief Justice for reallocation, senior leaders of the ruling party, including the acting chief of the party, led an unprecedented procession of thousands of its workers, carrying sticks and wearing shrouds, demanding the execution of death sentence of the convicts of Bangabandhu murder case by a deadline decided by themselves. Later, a gathering of the protestors was told that judges who feel 'embarrassed' to do justice should be removed from their offices.

The recent elevation of two



judges of the High Court Division in supersession to the Appellate Division of the Supreme Court breached a long-standing and time-honoured convention. It raised serious questions about the intention of the executive and the independence of the Supreme Court.

The case of Masdar Hossain There has been institutional resistance by the executive to the independence of the judiciary. Two hundred and eighteen judges of the subordinate judiciary, who are either District Judges or Subordinate Judges or any other Judges in the subordinate judiciary, filed a writ petition in 1995, on service matters. Their grievance was directed at the Bangladesh Civil Service (Re-organisation) Order, 1980, which outlined 14 Bangladesh Civil Services cadres, Bangladesh Civil Service (Judicial) being one of them. The Division Bench of High Court Division in the Md. Masdar Hossain and others v. Government of Bangladesh and others (Civil Appeal No. 79 of 1999) declared the Order ultra vires the Constitution. They also pleaded for a separate pay and allowance and claimed that separation of judiciary needed no constitutional amendment. Mr. Justice Md. Mozammel Hoque and Mr. Justice Hassan Ameen, the Judges of the High Court Division of the Supreme Court, in their judgment and order mentioned that, "the provisions of separation of judiciary are already there in the Constitution itself and it is to be implemented or carried out or given effect to only by making rules under Article 115, and enactment if it is so necessary. We further hold that the

Supreme Court shall have overall control, supervision and management over the Subordinate Courts along with the Judicial Magistrates and the Executive will have no control, supervision and management over the same in any manner whatsoever".

In their judgment the Judges referred, "Article 109 provides that the High Court Division shall have superintendence and control over all Courts and Tribunals subordinate to it... So according to this provision of the Constitution, it appears to us that the Courts and Tribunals subordinate to the High Court Division are under direct control and supervision of the High Court Division in all respects and as such no further Constitutional provision is necessary to bring the Subordinate Courts under the supervision and control of the High Court Division".

The Judges continued that, "the present petitioners and other judicial officers are not required to go to the Administrative Tribunal for redress of their grievances". They further ordered that, "all the judicial officers of Bangladesh i.e. all the Judges of the different Courts from the Assistant Judges to the District and Sessions Judges are not required to go and submit before the Administrative Tribunal for any grievance or relief with regard to their service conditions and all other matters including punishment of any kind in as much as the Courts are not subordinate to the Tribunal and the said judges and magistrates performing judicial functions shall be guided under Article 115, 116 and 116A of the Constitution and according to our findings."

They asserted that, "in order to give effect, carry out and implement fully the separation of judiciary from the executive organ of the State no Constitutional amendment will be

necessary as the provisions for such separation are there in the Constitution itself. It is directed that the services of the judicial officers and the magistrates performing judicial functions shall be known as 'Judicial Service of Bangladesh' under the direct control and supervision of the Supreme Court".

In the said case the High Court Division commented on Article 22 of the Constitution as follows; "This Article No. 22 was not meant for beautifying the Constitution as an ornament, but the will of the people was intended to be implemented within a reasonable time and this period of 25 years from independence is definitely a reasonable period to implement the cherished will and desire of the people..."

Although the Government did not contest the Writ Petition No. 2424 of 1995, they preferred an appeal before the Appellate Division of the Supreme Court of Bangladesh being the Civil Petition No.788 of

Supreme Court, after hearing submissions from the both the sides, partly accepted the position taken by the High Court Division of the Supreme Court in the case of Md. Masdar Hossain and others Vs Government of Bangladesh and others and issued a guidelines. No steps have been taken by the government to implement these guidelines.

A constitutional myth?

Maintaining the independence of judiciary is a constitutional obligation imposed on the state and its government. It is, as rightly proclaimed by the Appellate Division of the Supreme Court in the judgment popularly known as the Constitutional Eighth Amendment Case Judgment, an unalterable basic structure. In the words of the then Chief Justice of Bangladesh Shahabuddin Ahmed:

"But in reality basic structure of the constitution are clearly identifiable. Sovereignty belongs to the people and it is a basic structure of the Constitution. There is no dispute about it, as there is no dispute that basic structure can not be wiped out by a amendatory process... Supremacy of the Constitution as the solemn expression of the will of the people, the Democracy, Republican Government, Unitary State, Separation of Powers,

Fundamental Rights are basic structure of the Constitution. There is no dispute about their identity... These are structural pillars of the Constitution and they stand beyond any change by amendatory process."

It is clear from the above assertion that mandating the independence of the judiciary, which is a basic structure of the supreme law of the land will be meaningless if the whim and caprice of the executives are allowed to prevail over the decisions and discourse of the judiciary. The two successive democratically elected governments wilfully ignored the aspiration of the Constitution. Article 22 proclaims in clear terms "The state shall ensure the separation of the judiciary from the executive organs of the state." Unfortunately, this article becomes a myth rather than guidance. Moreover, the political commitment of separating judiciary from the executive loses all its credibility. Perhaps through judicial activism, the judiciary itself has to pave the way for a functionally independent judiciary accountable only to constitutional mechanisms of checks and balances.

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