COURT *corridor*

Separation of judiciary: People's perception

M. HARUNUR RASHID

SEPARATION of Judiciary is the people's mandate of this country and that has been reflected in article 22 of the constitution of Bangladesh which says, "The State shall ensure the separation of the judiciary from the executive organs of the State." That is perhaps one of the main reason why all the rightful citizens of the country always raise their voices in favour of separation of judiciary from the executive and that is also the precise reason why all the political party does include this in their election manifestos. This is how until recently it remained a popular political slogan rather. It has gained momentum when 12-point directives were given by the Apex court of the country in a case field by the judicial officers claiming a separate pay structure and status as well. Implementation of these 12-point will somehow or other makes sure separation of judiciary to some extent. The Government in the process of implementation of the 12-point directives has come up with an idea which has already created an unprecedented uproar in the minds of legal community in general and two fractions of civil service in particular namely the administrative service and the judicial service.

'Magistrates exercising judicial powers'- its meaning

In order to implement the 12-point directives the government has formed a cabinet sub-committee, which has already interviewed representatives of the two fractions of the civil service mentioned above. The proper implementation of 12-point directives given by the court will somewhat fulfil the election pledge of the government but leaving the things half way through will not reflect its bona fide intention. The progress made in the cabinet sub-committee was highlighted in media. It appears from the press report that some of the member of cabinet sub-committee and the representative of the Administrative Service Association have formulated an idea that our constitution has contemplated a separate entity for 'magistrates exercising judicial function'. In support of this idea they have frequently referred to Article 115, 116 and 116A of our constitution. But the legally educated people are fully aware that the interpretation of the constitution can not be given by plain reading of any of the articles of the constitution. The interpretation of the constitution largely depends on the scheme, spirit and intention of the framer of the constitution. It is true that in articles 115, 116 and 116A of our constitution 'magistrates exercising judicial function' has been mentioned but the purpose of mentioning this in the constitution has nothing to do with the separate entity. The purpose and the intention of framers of the constitution were otherwise. Before I make out my case it would be expedient to quote those articles one by one.

Article 115 of our constitution says, "Appointment of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with rules made by him in that behalf."

Article 116 says, "The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President and shall be exercising by him in consultation with the Supreme Court."

Article 116A says, "Subject to the provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions."

Intention of the framers of the constitution

It is clear that 'magistrates exercising judicial functions' has been clearly mentioned in the three articles quoted above but the purpose was transitional and temporary. Before I substantiate my point of view about the interpretation of Articles 115, 116 & 116A of the Constitution, I would like to go for a diligence search as to the intention of the framer of the Constitution.

Separation of judiciary: how long will it remain a dream?

The framer of the Constitution foresees that the separation of judiciary would be a gigantic task of the State and ensuring separation of judiciary in a country like ours certainly would be a time consuming matter and that has indeed happened.

The control and superintendence of Sub-Ordinate Judiciary has been vested in the High Court Division of the Supreme Court of Bangladesh. Article 109 of our constitution says, "The High Court Division shall have superintendence and control over all courts and tribunals sub-ordinate to it." Article 115, 116 and 116A do say 'Judicial Service' and the judicial service has been defined in Article 152 of the constitution which says, 'Judicial Service' means a service comprising persons holding judicial post not being post superior to that of a District Judge and this is perhaps one of the precise reason why 'magistrates exercising judicial functions' has been mentioned in articles 115, 116 and 116A of our constitution and this is how the ambit of article 109 has been extended. Other reason is until the State can fulfil its constitutional commitment with regard to separation of judiciary, any persons other than officers belonging to judicial service as defined in the constitution may exercise judicial functions and when they will be exercising such functions they should also be kept under the control and superintendence of High Court Division of the Supreme Court as envisaged in article 109 of the constitution.

Transitional and temporary nature of magistrates exercising judicial powers

Coming back to establish my earlier point that mentioning of magistrates in Articles 115, 116 and 116A of our Constitution was transitional and purely temporary and this can be well substantiated by quoting article.

Article 6(6) of the Fourth Schedule (Article 150) which says, "The provisions of chapter II of Part VI (which relate to subordinate courts) shall be implemented as soon as is practicable, and until such implementation the matters provided for in that Chapter shall (subject to any other provision made by law) be regulated in the manner in which they were regulated immediately before commencement of this constitution." The language and meaning of the article quoted above is clear and unambiguous and therefore, I find no reason why the legal community should be in difference of opinion as to the reason why 'magistrates exercising judicial functions' was mentioned in Articles 115, 116 & 116A of the Constitution. It does not in any way mean that the Constitution contemplated a separate entity for the magistrates and it does not make any sense too.

Magistrate, as we all know, is not a substantive post of any cadre of the Service of the Republic. Magistracy is a power which can be vested by the government in any First Class Gazetted officer. In most of the cases government vest magisterial powers in the officers belonged to administrative cadre of the Service of the Republic which frustrates the purpose and latent spirit of Articles 35 of our constitution. Article 35 (3), a part of the fundamental rights of our constitution, says, 'Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law." The administrative officers who exercise judicial functions can not be independent and impartial as their transfer, posting and promotion are controlled by the executive organ of the State which often becomes subject to political interference.

The people of this country have witnessed that the Government, the executive organ of the State, is in the habit of interfering with the judiciary which is one of the three organs of a State. The law abiding people of any country always expect independent judiciary which should be free from all interference and therefore, people always raised their voice for ensuring separation of judiciary. Had it been the case that the judicial functions are not exercised by officers other than officer belonged to the judicial service, it would not be a pressing demand of the people of this country as it is now.

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RIGHTS *column*

Institutions and democracy

ISHTIAQ AHMED

At the heart of the democratic structure of Pakistan should be a dedicated and daring mass media. State monopoly on television and radio channels is not compatible with democracy

The existence of a sovereign parliament, a neutral bureaucracy, an independent and progressive judiciary and a free press are the most central institutional prerequisites of a modern democracy.

The importance of institutions has received theoretical attention rather recently in political theory, although before he wrote his controversial work, The Clash of Civilizations, Samuel P. Huntington did, in his 1968 work, Political Order in Changing Societies, advance the hypothesis that the longer an institution had existed the greater was its impact on the overall reproduction of a system. Thus for a system to be democratic it was not enough to have a constitution. The rules, principles and values present in a constitution needed the backing of institutions in order to be realised.

The reason: institutions represent authority, and authority can be distinguished from power in the sense that while the institutions are obeyed habitually, power requires the exercise of some degree of coercion and threats. In other words, a constitution gains authority to the extent that its rules and values are reflected in functioning institutions.

Having made this incisive argument, Huntington observed that Third World societies lacked the resources, material as well as cultural, to practise full-fledged democracy. Consequently he recommended a gradual and controlled initiation of the people into the democratic process. He also made an interesting positive connection between overall economic development and the sustainability of democracy. He hoped that an all-round development in the economic, social and political spheres would create a secure foundation upon which Third World societies could take off and graduate into proper democracies.

Much of Huntington's theorising took place in the context of Cold War when the US was on the lookout for strategies to thwart the spread of Communism. He recommended the creation of a "controlled democracy" to US allies so that such systems may respond to all sorts of internal and external demands and challenges in a non-dictatorial manner. Pakistan's experiment in Basic Democracy during the Ayub regime was a product of such thinking and innova-

National election was held in Pakistan on October 10, 2002

tion. It is doubtful if that experience helped lay the foundations of democracy in Pakistan. On the contrary its critics hold it responsible for undermining the parliamentary institutions inherited from the colonial period. We need to research more into that phase of Pakistani history before a definitive position can be taken on it. It is, however, important to underline that Huntington's idea of institutions as the building blocks of a political system is in itself of great intellectual and academic merit.

One can safely note that the world has changed dramatically since Huntington wrote about controlled democracy. Pakistan does not face any type of leftist threat to its existence. On the contrary anti-modern, anti-liberal and anti-democratic rightwing political forces have been advancing their project from as early as 1951 when Maulana Abul Ala Maududi succeeded in getting the leading Sunni and Shia ulema to support his 22-point programme for an Islamic state by signing their names on that document.

The vicissitudes on the way have been many, but since the late 1970s Pakistan has been a laboratory for all types of so-called Islamic reforms whose purpose has definitely not been the advancement of democracy in any of its normal meanings, although if wordplay and twisted logic were to be the measure of such experimentation then the Pakistani people have been enjoying better democracy called "theo-democracy". Such a democracy requires the Pakistan National Assembly to exercise its sovereignty within limits imposed by Islam, bifurcates the authority of the judiciary between those applying principles of Common Law and those of dogmatic Sharia so that nobody can tell for sure what justice is all about in Pakistan; makes the civil servants protrude an unconvincing Islamic piety while in office which they quickly discard later in the day when powwowing with their chums on the golf course or at their peer clubs; gives birth to a type of journalism which would in other countries be charged routinely with inciting racial, religious and sectarian hatred within the domestic sphere as well as externally.

If Pakistan is to be a democracy it would need to make some clear choices. Pakistan's elected parliament needs to be sovereign. Additionally there should be some requirement that all parties include women and minorities among their candidates and, following the results of an election, allocate a certain portion of seats to them. It would also be necessary that trade unions and peasant organisations be involved in the legislative process so that the interests of all sections of society are reflected in the laws. The legal system of Pakistan cannot retain patently repressive and barbaric features without undermining its claims to be a just and progressive institution. Moreover, the civil service will have to distinguish itself in terms of efficacy, competence and strict neutrality in acquitting their duties.

At the heart of the democratic structure of Pakistan should be a dedicated and daring mass media. State monopoly on television and radio channels is not compatible with democracy. Therefore, independent news media have to be allowed and encouraged. However, such independence should not mean a licence to write irresponsibly. In Pakistan, one can notice a clear difference between the English-language and Urdu-language press. While the former admirably competes with the best traditions of journalism and Pakistani columnists and writers enjoy worldwide respect the Urdu-language press, which ironically reaches a much larger reading public, does not reach the same standards. Some newspapers freely employ expressions and jargon which violate the privacy and integrity of individuals and incite hatred against minorities and sects.

Finally, the question we need to pose is the following: why is a democracy to be preferred to other types of government? The answer is that it allows for a peaceful resolution of conflicts. Politics exists in society because conflicts exist. A democracy seeks not to eliminate conflicts and establish a utopia. Rather it presupposes that conflict of interests is bound to exist in society and the art is to prevent such conflicts from erupting into violent confrontation. In order to do that a democracy needs not only rules and regulations but also institutions whose authority is accepted. Such authority increases over time when institutions perform well.

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GOVERNANCE *update*

The wrong way of rethinking Local Government

DR. BADIUL ALAM MAJUMDAR

IN his recent post-editorial (*The Daily Star* 4/10/2002) on "Rethinking local government," Mr. Hasnat Abdul Hye observed: "...Giving elected members of Parliament development fund of certain amount for use in development activities in their constituency has been successful in both promoting greater momentum of development at grass roots level and for obtaining their support for the local government system...Even in America, legislator's career is made or marred by pork barrel schemes or their paucity in the constituency." By making these observations Mr. Hye appears to provide support for the recent recommendation of the Cabinet Committee on Local Government for giving Tk. 1 crore to each MP per year for local development.

Unfortunately Mr. Hye does not provide any evidence in support of his contention. Nor can we find examples of successful implementation of similar schemes in other countries. We therefore feel that the idea of allocating Tk. 1 crore per year to our legislators is the wrong way - rather the dangerous way - of rethink the future of our local government. Such a scheme will not only make a mockery of our Constitution - the supreme law of the land - it will also further criminalize our politics.

Of all the countries which provide money to their MPs for local development, India is most prominently cited. With respect to the so-called pork-barrel system in America, Mr. Hye has a serious misunderstanding. When a law provides special benefits to a particular legislator's constituency, it is termed as pork-barrel legislation. In the American system, no Senator or Congressman is given any money to spend in his or her constituency nor do they have any direct involvement whatsoever in local development financed by taxpayers' money.

Let us examine the Indian programme, which is called the Members of Parliament Local Area Development Scheme (MPLADS). Under this scheme, announced by the Prime Minister in Parliament on 23rd December 1993, members of the legislature were given Rs. 1 crore (later raised to Rs. 2 crores) each with the freedom to suggest to the District Collector works to be done with a sum not exceeding Rs. 2 crores per year within her/his constituency. The Ministry of Rural Development releases the funds directly to the Collector, who gets the works carried out through government agencies or panchayati raj institutions. The maximum amount allowed for a single project is Rs 10 lacs. Twenty-three specific schemes such as constructing school buildings, village roads, bridges, shelters for the old, buildings for gram panchayats, hospitals or cultural/sport activities, digging of tube wells, etc., besides any other scheme specified by the Union Government from time to time, come under the LAD scheme. All these activities, it should be pointed out, are also carried out by the panchayats and municipalities.

The implementation of the MPLADS has been problematic at best. During the period between 1993 and 2000, the Parliament sanctioned Rs. 5,558 crores for the MPLADS and the Ministry released Rs. 5,018. However, the total amount utilized was Rs. 3,221 crores, representing 64 percent of the funds released. The audit found that the Collectors inflated expenditure amounts to the Ministry. In a sample audit of 106 constituencies, it was found that out of total expenditure of Rs. 265 crores reported by the Collectors, Rs. 82 crores or 31 percent was not incurred at all. The audit also found numerous instances of violation of guidelines and financial rules.

The MPLADS has come under severe attacks by various stakeholders. The most scathing attack came from Mr. Era Sezhiyan, a former Chairman of the Public Accounts Committee of the Indian Parliament:

"To say the least, the management of the scheme is a shambles. The accounting process is abominably anarchic. Some guidelines are blatantly contradictory to the constitutional provisions and the general financial rules...

"There is a fundamental defect in the concept of the MPLADS itself. MPs are primarily responsible to look after legislative work and to ensure accountability of the administration. In the House, they question, debate, legislate, approve grants and taxation measures and give policy directions. On behalf of the House, they work in committees to inquire into the performance of Ministries and government organization and submit their recommendations to the House.

"The MPLADS changes the role of the MP...the MP is to 'involve himself in the entire system of implementation and completion of projects'. In the process, the MP unerringly becomes a part of the administrative system of the government and loses his or her capability and moral right, as a member of the House and as a member of parliamentary committees, to scrutinize the 'faithfulness, wisdom and economy' of the expenses incurred in the administrative implementation of the works initiated by himself or by his colleagues under the scheme.

"...As the MPs are involved in the works of the scheme from the beginning, the administration conveniently shift the responsibility and disregards audit objections and reports...The controlling Ministry disclaims responsibility for the implementation of the works. The Collectors do not get utilization certificates and make no effort to return unspent amounts released to them. The Rajya Sabha Report found fault with the element of corruption, mal-implementation, improper channeling of funds and absence of close scrutiny in the works undertaken by the government.

"The failures of the government during the last 50 years have been overwhelmed and overshadowed by the volume and variety of irregularities

generated by the MPLADS in a short period of seven years...

"The government's disowning of responsibility for the works under the scheme and the involvement of MPs in the administrative system, thereby weakening their capability to ensure accountability of the executive to Parliament, cuts at the very roots of the parliamentary system of democracy in the country." (*Frontline,* March 15, 2002).

Others have also spoken out very strongly against the MPLADS. The former Prime Minister, V.P. Singh expressed his serious opposition to it. E.S. Venkataramiah, a former justice of the Supreme Court of India, contended that the MPLADS is "assaulting" the Constitution. Most significantly, the Indian National Commission to Review the Working of the Constitution has recently recommended the elimination of the scheme. So has the Indian Institute of Public Administration.

Variants of the Indian scheme have also been in practice in other developing countries. Philippines is reported to have the worst variant in that the money is given to the MPs without much screening leading to widespread corruption. Thailand has recently abolished its scheme.

The constitutional argument used by Mr. Era Sezhiyan that the MPLADS makes the legislators get involved in executive tasks is also applicable in our case. Article 65 of the Bangladesh Constitution designates *legislative powers* to the Parliament. It states that: "There shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which subject to the provisions of this Constitution, shall be vested the legislative powers of the Republic..." Article 55 assigns the executive powers to the Prime Minister and the cabinet. The Constitution also provides for the separation of the judiciary (Article 22) and makes the Courts the repository of judicial power of the State. The constitutional system of Bangladesh uses the *principle of separation of powers* as its fundamental pillar, and makes the three branches of government - legislature, executive and judiciary - separate and independent of each other, with distinct and non-amalgamable functions. In its landmark judgement on the separation of judiciary, the Bangladesh Supreme Court uses the analogy of oil and water to demonstrate the independence of the branches, especially of the executive and the judiciary.

In a democratic system, all powers are derived from the Constitution. It is clear that our Constitution, the supreme law of the land, is explicit and specific in assigning only the legislative powers to the Members of the Parliament. Nowhere in the Constitution are any other powers, functions, roles or responsibilities - not to speak of any executive power - given to them. Thus if the legislators decide to enact a law giving each one of them Tk. 1 crore per year, it will amount to a *colourable legislation.* The question of colourable legislation arises when something which cannot be done directly is done indirectly.

The proposal to give MPs Tk. 1 crore each and their role in local development itself can be challenged on another ground. The full-court bench of the Appellate Division of the Bangladesh Supreme Court in its verdict on the cancellation of Upazila defined local government as: "it is meant to be management of local affairs by locally elected persons." MPs are locally elected, but they are meant for, according to the Constitution, exercising only legislative powers. Thus involving them in local development will be a violation of the Constitution.

Giving each MP Tk. 1 crore per year will require a total of Tk. 1,500 crore, without taking into consideration the women MPs, during the life span of a Parliament. Can we afford to spend such a huge sum on a programme designed primarily to empower the MPs?

The proposed Tk. 5 crore to each MP during his or her tenure may denigrate the idea of running for national office a "business proposition," inviting a lot of "investors." This will further criminalize our politics and institutionalize corruption. Such a programme will also make professional politicians a dying breed, adversely affecting the quality of such officeholders. This is not a happy prospect, as it will make our Parliament even more ineffective.

It is clear that India, with its strong democratic institutions and a vibrant civil society movement for transparency and accountability, could not make the MPLADS work, and the scheme is marred by widespread corruption. The fact that the MPs did not directly implement the Project under the scheme and the monetary allocations were not directly made to them did not help. The Indian Constitutional Review Commission has already recommended the abolition of the scheme. Other countries have also abandoned similar programmes. Given this, I consider it a dangerous idea to consider giving money to our MPs for local development. Furthermore, we cannot afford to spend such a huge sum of money on a scheme with questionable effectiveness at best.

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