Rethinking limits of executive authority

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UNDER Bangladesh Constitution, the President is the head of state. He is required to exercise his powers and perform the duties conferred and imposed on him by the Constitution and by any other law [Article 48 (2)]. The limits to the presidential authority is defined in the Constitution [Article 48 (3)]. The President is required, in the exercise of all his functions, to act in accordance with the advice of the Prime Minister. There are only two exceptions for which there is no need to seek advice of the Prime Minister. These are (a) appointment of the Prime Minister and (b) appointment of the Chief Justice. However, even in such matters, the framework of decision-making is provided in the Constitution. There is thus very little scope for the President to exercise his authority with any degree of authority. This is because the Prime Minister is the head of government. The executive power of the Republic is required to be exercised by or on the authority of the Prime Minister [Article 55 (2)].

The need for rethinking

The aforesaid scheme of things leaves no room for the President to act judiciously even in matters which are quasi-judicial in nature. Examples include decisions relating to disciplinary cases involving civil servants. The other example pertains to decisions on the inquiry proceedings involving the conduct of a Judge of the Supreme Court. These are also quasi-judicial in nature. The third example relates to the appointment of Judges in both the divisions of the Supreme Court. This tends to impair the independence of the judiciary

The implications

The implications are nowhere more apparent than in case of the judiciary. The most recent example is the long delay in presidential decision on the findings of the Supreme Judicial Council against alleged misconduct of a Judge of the High Court Division. It is said that the executive organ of the State has been dragging its feet to provide Prime Ministerial advice to the President. The case is said to be pending for 47 days (The Independent 14, 2004). The Law, Justice and Parliamentary Affairs Minister has been quoted as saying that the government is yet to come to a decision on the issue. One may well raise a question whether it is a matter of decision on the part of the government or suggesting a course of action for the President. It is recognised that the dividing line between 'decision' and suggesting a course of action is thin. This need not prevent one from saying that making suggestive action is not very difficult that it should take as many as 47 days.

This is because the case, much publicised in the media, pertains to alleged misconduct of a Judge. Both the head of the government and the head of the state are duty bound to preserve, protect and defend the image and authority of the Judiciary in order that the confidence of the citizens is not shaken. The rather inordinate delay has evoked strong criticism from the president of the Supreme Court Bar Association. He has been quoted as saying that 'the government was also politicising the issue in order to influence the forthcoming elections of the Supreme Court Bar Association'. It was reported that earlier, the Minister for Law, Justice and Parliamentary Affairs had said that the government would act in accordance with the recommendations of the Supreme Judicial Council. Why then is the delay?

At this point of time, one can only hope that the contentious issues, in particular those relating to setting limits to the authority of the Executive in so far as it relates to the Judiciary, will be settled once and for all as has been the case in India.

Example from India

The Transparency International India (TII) held a conference on delays and corruption in the Indian Judicial system on December 18 and 19 of 1999. One of the findings of the conference was that 'Delays breed corruption and if delays are eliminated, corruption can be avoided'. Although the finding is in a different context, it does have relevance to the present case. Another important finding is that the procedure for disciplining of Judges is too complicated and gets politicised with the result that it is becoming impossible to discipline errant Judges even in obvious cases of corruption and misdemeanor.

In Bangladesh context, much of the delays can be avoided if the existing constitutional requirement is suitably amended to allow the Chief Justice to send such findings direct to the President and the President is also authorised to decide the case independent of the advice of the Prime Minister.

Selection, appointment and transfer of Judges: The TII conference referred to above has also identified an area of major concern for efficient and impartial functioning of the Judiciary. The concern relates to the interference from politicians and bureaucracy in the selection, appointment and transfer of Judges, and the creeping in of extraneous considerations other than merit.

Comparative view: India and Bangladesh: It is necessary to have a comparative view of India and Bangladesh in so far as it relates to selection and appointment of Judges in the Supreme Court and the High Courts in India and both the divisions of the Supreme Court in Bangladesh. Until 1981, the practice in India was, for the Chief Justice of India to initiate proposals, generally in consultation with some of his senior colleagues. Following two verdicts of the Supreme Court of India [AIR, 1982 SC 149 and 1998 (7) SSC 739], the power of appointment passed into the hands of the Judiciary and the role of the Executive became merely formal.

Seniority not to be ignored: In case of appointment to the post of Chief Justice of India, seniority has to be followed and cannot be ignored. Both the case laws referred to earlier reaffirmed the principle of strict observance of seniority in the matter of selection and appointment to the post of Chief Justice of India. This principle is not departed from by the Executive.

Bangladesh case

The Constitution of 1972, prior to any amendment, envisaged in article 98 that the Judges shall be appointed by the President 'after consultation with the Chief Justice'. This requirement was deleted under the fourth amendment of the Constitution in 1975 (Act II of 1975). The tenth amendment of the Constitution effected through the Second Proclamation Order in 1977, replaced chapter I relating to the Supreme Court. This is the present position under article 95: the President appoints the Chief Justice and other Judges. This has provided scope for extraneous considerations in the matter of selection and appointment of Judges in both the divisions of the Supreme Court. In practice consultation with the Chief Justice does take place. It is another matter if the views of the Chief Justice is accepted or not. Available evidence indicates that there had been departure from what the Chief Justice had recommended and what ultimate decision of the President was. This raises the issue of the difference, between 'concurrence' and 'consultation'.

The element of incongruity

The requirement of consultation with the Chief Justice in matters relating to posting, promotion and discipline has been made mandatory under article 116 of the Constitution in cases relating to the control of subordinate judiciary. It can be argued that you cannot have islands of consultation that divide the subordinate judiciary from the higher judiciary. Integrity in decision-making is needed as much for the subordinate judiciary as for the higher judiciary. A related issue is the place of posting of members of subordinate judiciary, in particular, the district and sessions judges.

The Supreme Court because of its monitoring functions and also by virtue of being the final authority to assess the quality of judges in the subordinate judiciary, is in a much better position to decide this without any let or hindrance. The citizens have no information at all with regard to arbitrary selection of places of posting by the Executive. Worse still, in such cases, the selection of places of posting may be influenced by extraneous considerations. The way out perhaps is to amend article 116 and vest complete authority in the Supreme Court or to establish a healthy convention of accepting the recommendations of the Chief Justice as mandatory. A third option would be to establish some sort of independent advisory committee whose decision in this regard will be final.

Conclusion

The High Court division is said to have issued a rule upon the government, the BNP-led four-party alliance and the Awami League to show cause why the fourth and the fifth amendment to the Constitution pertaining to the Judiciary should not be declared ultravires and void (The Daily Star, March 15, 2004). The court also asked them to explain why the original provisions of the Constitution adopted in 1972 should not be restored. At this point of time, one can only hope that these contentious issues, in particular those relating to setting limits to the authority of the Executive in so far as it relates to the Judiciary, will be settled once and for all as has been the case in India. At the end, it is relevant, in this context, to refer to the observations of Sir Henry Gibbs, the Chief Justice of Australia (1987): "Judicial commissions, advisory committees and procedures for consultation will all be useless unless there exists, among the politicians of all parties, a realisation that the interest of the community requires that neither political nor personal patronage nor a desire to placate any section of a society, should play any part in making judicial appointments." Will this fall on deaf ears of those in Bangladesh for whom it is meant?

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Whither financial sector reforms?

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WORLD Bank recently sanctioned a loan of $37 million for strengthening Bangladesh Bank and helping privatisation of three big nationalised banks and improving their management structure. According to the conditionalities of the loan, the programme will be managed by consultants and equipment brought from abroad even though there are many experienced local bankers able to do the job. Recommendations of Bank Reforms Commission are also available with the government awaiting implementation. One special feature of this loan is that substantial portion of the cost of this project has to be borne by Bangladesh Bank out of its own resources.

According to press reports, Price, Waterhouse Cooper of Hongkong has been given the contract involving Tk 36 crores to renovate and restructure the working and management of Agrani Bank and then perhaps to sell it to private sector. Incidentally, the parent organisation of Price, Waterhouse and Cooper served as an auditor of now liquidated BCCI in England and year after year had given clean report on the working of that institution. Subsequently it was fined for neglect of its statutory duties. Its sister organisation in USA also came for censor of regulatory agencies for some audit lapses in some of the corporate scandals.

Earlier, in June 1990, the World Bank sanctioned a loan for $ 175 million to Bangladesh for the same purpose. The main aim of that loan was the same-pervasive reform of financial sector deficiency which was "constraining the growth of non-traditional exports of private sector, to respond to changing competitive sector." Along with this, a large component of $ 19.4 million grant was provided by USAID. One important element of the loan was to provide funds to Bangladesh government to enable it to inject money to nationalised banks for increasing their capital structure which was wiped off by their non-performing loans.

One would be curious to know what has been the performance of that loan? Where the money has gone? Why such a massive programme of training staff and increasing managerial expertise has not been able to do the job? Why massive capital was injected into the nationalised banks without first improving their managerial capacity? Why a new loan of the same type is now necessary once again? If Bangladesh government wants to find this out, it will be well advised to dig its old records and discover that in 1996, World Bank's own operation and Evaluation Wing declared the earlier loan as a failure, suffering from lack of proper sequences of measures, rated the programme as unsatisfactory and unlikely to be sustainable. If this is the case why this new programme? Who has certified now that this time measures are well thought-out, measures are properly sequenced and implementable, time frame is adequate and measures are sustainable?

The loan also includes a decision to ban the union activities by bank employees. It is understood, Bangladesh government is going to enact a law to this effect soon. Is not this right of the employees a fundamental one enjoined by our constitution and in a democratic society which Bangladesh claims to be? Should we take away the core labour rights of the people only in order to punish some recalcitrant and misguided labour leaders? Many people like me are wondering how the World Bank could ask the government to take such repressive measure only to enforce its reform programme?

It is also time to ask the World Bank to come out in the open on the success or failure of its various programmes and discuss publicly how the loss sustained by borrowing countries by implementing their wrongly crafted programme should be shared. While willy nilly taxpayers have to carry the load of such non-performing loans it is not understood why the World Bank should get away without even a "haircut". Why should we not write off such bad loans? Similarly, the government of Bangladesh should clarify why reforms of such magnitude touching the lives and livelihood of so many people have been undertaken without adequate public discussion either in the Parliament or outside even though Bangladesh claims to have an elected government. Where are the transparency and accountability which are supposed to be important ingredients of democracy? Did World Bank advise government to go public with the new reform programme?

The World Bank sometimes claims that it is "champion of change" and occasionally awards this honorific award to some adherents of its policy. But it is well known that all changes do not auger well. A child may, for a change, be asked to run when he has not even learnt even to walk properly. Similarly, for a change, workers are replaced by automation and with the help of computers and machines imported from abroad. Will this change be welcome and beneficial without simultaneously modernising other arms of the government? Are not these problems part of larger social and humanitarian issues? Furthermore, in the context of pervasive unemployment in the country now whether modernity at the cost of unemployment is preferable leaves room for debate. Changes per se do not bring modernity or progress or efficiency. On the contrary, they may be retrograde steps under certain circumstances. The public is not aware whether these considerations were carefully weighed by the World Bank officials when they crafted the programme.

Another problem with the World Bank seems to be its failure to realise how important it is to focus on implementation issues at the onset of the negotiations. There are already reports in the Press that the government is trying to drag its feet from reform measures already agreed upon after watching the backlash of public opinion and bank employees.

The entire effort of the World Bank to modernise economies and remove poverty reminds one of what Rousseau once said, "People should be forced to be free". Except as serving as a good example of oxymoron such prescription does not work in real world. This was tried in the Soviet Union for 73 years but eventually it came out unstuck. The current efforts by Western countries to mould the economies and political structures of the poor countries in the image of theirs through the instrumentalities of Brettonwoods institutions coupled with unilateral policy of mindless globalisation and free market is very likely to meet the same fate in course of time -- perhaps sooner than later. Signs are already on the horizon. Globalisation is losing heights and descending.

There are more and more open discussion for "more creative globalisation agenda" that supports universal basic education, fights abusive child labour and sweatshop, strengthens civil society watchdogs and independent monitors, and funds transition assistance to workers and small farms hurt by market opening, while insisting on codes of corporate conduct that support core labour rights. Free market concepts stand exposed to the public through large scale corporate scandals all over the world -- USA in particular. Nation states in the developed and developing nations are appearing once again.

This is the time when countries like Bangladesh should learn to manage their economies without getting addicted to foreign aid further and particularly with lesser recourse to World Bank and IMF for funds and technical assistance. The nations which will be trying to be self reliant are bound to suffer withdrawal symptoms and pain severity of which will be proportionate to the degree of dependence experienced earlier. But these hardships may be mitigated to some extent by following egalitarian measures not hitherto done.

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Self sufficiency and freedom from bondage are rewards by themselves. Also there is no quick fix in economic development. It is a patient, drawn-out process involving wider participation of people. What is more important, it should be organic and not imposed from outside. We should try to find homegrown remedy as far as possible for our home-grown malady. Like Japan we can be modern without being western. Let us pause and cease to move like sleep walkers on the part charted by others. In economic development there is a term frequently used -- cost-benefit ratio. In our development effort let us always keep this in view so that our people do not bear the only cost while benefits accrue to others.

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