



SEPARATION OF JUDICIARY

The Judgment in Masder Hossain Case, 1999: How long will it be a matter of pull and haul?

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It has been more than five years since the historic judgment in Masder Hossain's case, popularly known as 'separation of judiciary' was pronounced in December 2, 1999 by the Appellate Division of the Supreme Court. The Court directed the Government to implement its 12-point directives to separate judiciary from the clutches of the executive. In these long period three governments- respectively have sought extensions of times on one pretext or other as many as 18 times to implement the directives. Back in November 2004 the Government sought for four months time, which was allowed by the Court. However, on November 29, 2004 the Appellate Division had to issue a show cause notice to nine Government officials to explain why they would not be prosecuted for contempt of court for distorting the judgment of the court and the rules approved by the court for separation of judiciary. On 16th April, 2005 the matter came up once again for the court to see the progress of the government with regard to the implementation and to hear the contempt of those nine officials. The Government asked for another four months extension. However, the court extended time again till 17th October. But the question is how long will this tactics of time extension continue? How long will be a judgment of the Supreme Court matter of pull and haul at the hand of government? Apart from this delaying tactics, in very recent past a statement from governmental level pointed out that the separation of judiciary was not a popular demand and the government may go for a referendum on this issue. When such a statement is posed from the Governmental level the legitimacy of the judgment of the apex court itself comes under attack. What could be the reason behind such delaying tactics and policy statement?

The reason lies, as I wrote back in 1998, with some provisions in the original constitution of Bangladesh regarding the dependency syndrome of the subordinate judiciary which has left the idea of separation of judiciary largely a policy matter rather than judicial determination. Under the express wording in article 112 of the constitution all authorities, executive and judicial, in the Republic shall act in aid of the Supreme Court. But when the Government states that separation of judiciary is largely a policy matter; again it reiterates that it will implement the judgment today or tomorrow what can the apex court do? How long the arms of the apex court could go to catch the wrongdoer or someone who is not obeying the judgment of the court or undergoing delaying tactics? True it is that the Supreme Court of a country cannot modify the course of history; neither can it catch hold and throttle someone who is disobeying its decision; it can only pronounce judgments and refer to the other departments of the government to execute it; if the executive disobeys its decision, it can at best contempt someone but it does lack any real stick to beat the executive. The machineries of democracy are not supposed to run in that hostile manner; they are built on the concept of check and balance and this balance is provided for in article 112 of the constitution as far as the implementation of the Supreme Court's decision is concerned which the executive must bear in mind. If the executive flouts the decision of the apex court so will do the beneficiaries of political parties leading the country into a land of politico-legal anarchy. The judgment in Masder Hossain case by the Supreme Court to direct the government to separate judiciary is not something like a bolt from the blue. Since independence almost every mainstream political parties made pre-election pledge that if voted to power, they would separate judiciary from the executive but every government has betrayed with their pledge to this effect. It is pledged in article 22 of the

constitution that State shall ensure the separation of the judiciary from the executive. Every Prime Minister and Minister takes their oath of office that they will preserve, protect and defend the constitution though the irony is that they quickly forget their pledge leaving behind the poor litigants in an endless suffering. How long will the people have to wait see the judiciary separate? In line

i) All magistrates are linked with the executive functionaries. Magistrates are discharging dual functions- judicial and executive. They are controlled by the Ministry of Establishment, the Ministry of Home Affairs and also the Ministry of Law, Justice and Parliamentary Affairs. In discharging their judicial functions they are very often dictated and influenced by the executive. As

The main crux of the problem of separation of judiciary lies in the magistrates' courts. Ensuring justice and independence of judiciary will remain a far cry until magistrates' courts are separated from the executive. The dual function of magistrates and also the dependency of the lower judiciary upon the executive is a legacy of the British rule. During the very British days there was a demand for the separation of judiciary from the executive. The British administration did not make this separation thinking that separation might go against their colonial interest. After independence in 1947 though some positive steps were taken, eventually they were not implemented.

In our new constitution adopted in 1972 it was provided in article 22 that "the state shall ensure the separation of judiciary from the executive organ". In article 116 the term "magistrates exercising judicial functions" have been used. Dr. Kamal Hossain the chairman of the Constitution drafting committee stated that by the term 'magistrates exercising judicial function' the constitution makers wanted to mean judicial type of magistrates and after the constitution was given effect everybody took this term for judicial type of magistrates but the government did not separate them. Ultimately the matter of judiciary separation came as a judicial determining factor before the Supreme Court in much-talked Masder Hossain case.

Conclusion:
In the Masder Hossain case as mentioned above the executive has been ordered to undertake the task of overhauling the whole lower judiciary with two big commissions- Judicial Service Commission and Judicial Pay Commission which is certainly a matter of policy rather than a dispute. However, there are strong evidences to show that our Supreme Court has dealt with policy matter under the paradigm of 'judicial review' or the doctrine of 'basic structure' of the constitution as we saw it in the celebrated 8th Amendment Case and this is not something unsupported by the constitutional arrangement. It is true that except appointing the Prime Minister and the Chief Justice the President has to exercise every function in consultation with the Prime Minister. However, a harmonious construction of articles 114, 115, 116 and 116A of the Constitution will give a necessary idea that in the matter of subordinate judiciary the policy matter has not been left to the sweet will of the parliament or the president alone; the executive has to exercise its power in consultation with the Supreme Court in this sphere. Under article 115 appointments in the subordinate judiciary are to be made as per rules made by the President; article 116 envisages that control and discipline of the subordinate judiciary have to be exercised in consultation with the Supreme Court; and article 116A envisages the independence of the judicial officials and magistrates. Given this integrated scheme as designated in these articles if the parliament or the President attempts to make law to separate judiciary without involvement of the Supreme Court, that law will certainly come under judicial attack. The task of separation of lower judiciary is thus a shared responsibility of the executive, legislative and judiciary as envisaged in articles 114 - 116A of the constitution and therefore the government cannot claim it as a sole executive or legislative policy prerogative. The best course for the government therefore would be to implement the judgment of the Masder Hossain case without resorting to any delaying tactics on the ground of policy matter or public demand.

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with the spirit in the part of the 'Directive Principles' of the constitution both India and Pakistan have completed the task of separation of the judiciary long ago compared to us. 33 years have passed since we achieved our independence. If we still vaunt in a colonial mastery to ourselves- "what will the court do if we do not separate the judiciary?", will there be any merciful mystery angel to complete the task for us?
Lower judiciary: An acute dependency syndrome in Magistrates' Courts
Let me get back to the concept of dependency syndrome of the subordinate judiciary particularly the magistrates' courts, which is the main problem in ensuring independence and separation of the lower judiciary. Three tiers of Magistrates' Courts, i.e. 3rd Class, 2nd Class and 1st Class Magistrates' Courts- all these are the courts of first instance for criminal cases. Given that criminal cases filed in a year are far greater in number compared to the number of civil cases, these criminal courts have a great potential in shaping the base of our legal system. However, unfortunately for reasons, principally, of some legal shortcomings these courts are playing negative role at a greater extent frustrating the very purpose of criminal justice. The shortcomings are as follows:

a result, they cannot independently discharge their judicial functions. It is impossible for a judge to take a wholly independent view of the case he is trying, if he feels himself to any extent interested in or responsible for the success of one side or the other. It is equally impossible for him to take an independent view of the case before him if he knows that his posting, promotion and prospects generally depend on his pleasing the executive hand.
ii) Magistrates who discharge judicial functions are never appointed from persons with legal background. It is sometimes impossible to expect justice from a person who has no institutional legal education. Being administrative first class officers magistrates sometimes do not care abusing their power. This is mostly the case because, firstly, they are taking the opportunity of illiteracy and ignorance of law of mass litigants and secondly, there is inherent lack of administrative check and balance in magistracy and thirdly, they are not under any administrative control of the Supreme Court.
iii) In almost all magistrates' courts bribes are now-a-days openly claimed as a matter of right. Any-one defaulting has to pay a price at his cost. In magistrates' courts bail depends not on law but on the amount of bribes.

HUMAN RIGHTS advocacy



"Angel of Burundi" to receive Nansen Refugee Award



that day are here, in this mass grave."
She managed to save 25 children, taking them under her wing in the chaos of the conflict. "At the beginning there were 25 children whose parents had been killed, then after one year there were 100, then 500 and now it's more than 10,000. So I began to look for land, and I thought, why don't I use my parents' land?"
Thus Maison Shalom was born, providing a home where orphans and separated children can grow up in "families" - in security, education and love. Today, Maggie and her team run four "children's villages" around the country, as well as a centre for orphans and other vulnerable children in the capital, Bujumbura.
The children learn about health education, how to manage a household and tend to livestock, and how to engage in income-generating projects and apprenticeships. They run a cinema, a public swimming pool, a restaurant, a hairdressing salon and a guesthouse in Ruyigi.
Other projects range from health care provision to HIV/AIDS prevention and family reunification. In addition to orphans and separated children, Maggie has also helped former child soldiers, children with HIV, and young refugees from Rwanda and the Democratic Republic of the Congo.
Maison Shalom has also reached out to Burundian refugees returning from years of exile in Tanzania, helping the women and children to rebuild their lives. In the communes of Kabuyenge, Cendajuru and Giharo, the NGO has worked with returnees and displaced people to establish small income-generating projects like sewing, carpentry and soap making. It has also set up UNHCR-supported carpentry projects for returnees in Gisuru commune, a major area of return.
Maggie's work has been widely recognised. In 2004, she received the Four Freedoms Award from the Franklin and Eleanor Roosevelt Institute, and the Voices of Courage Award from the US-based Women's Commission for Refugee Women and Children. Her other awards include the World's Children's Prize (2003), the Spanish Committee for Aid to Refugees' Juan Maria Bandrés Prize for Asylum Rights Advocates (2003), the North-South Prize (2000), as well as the French government's Human Rights Prize (1998). In 2004, she was awarded an honorary doctorate by the Catholic University of Louvain in Belgium.
The Nansen Refugee Award, created in 1954, is named after Fridtjof Nansen, the celebrated Norwegian polar explorer and the world's first international refugee official. Previous recipients include Eleanor Roosevelt, King Juan Carlos I of Spain, Queen Juliana of the Netherlands, Médecins sans Frontières and the late Tanzanian President Mwalimu Julius Nyerere. Last year, the award went to the Memorial Human Rights Centre, a Russian non-governmental organisation which has helped tens of thousands of refugees and internally displaced people in the Russian Federation.

Source: UNHCR

LAW news

Bangladesh and Myanmar exchange prisoners

DR. UDATTA BIKASH
BANGLADESH and Myanmar (formerly Burma) exchanged 192 prisoners on 27 April 2005. This was done following a flag meeting in the border town of Teknaf in Cox's Bazar between the Nasaka, Myanmar border security forces and Bangladesh Border Security force.
Bangladeshi authorities handed over 172 Myanmar prisoners to the Nasaka Officials while Myanmar authority handed over 20 Bangladeshi prisoners to the BDR. The Myanmar prisoners included one child and 3 women.
According to different sources including the Narinjara News, Bangladesh-based e-news service run by exiled Rakhine, about 572 Myanmar prisoners have been languishing in different jails including Cox's Bazar, Chittagong, Bandarban and Comilla jails etc. Some are even in detention for years after serving the jail terms. According to press reports, the Myanmar authorities, in the first round of exchanges accepted only 172 released prisoners.
The fates of 400 remaining Burmese prisoners in Bangladeshi jails are unknown. Some even are not interested to go back to Myanmar fearing arrest, detention and persecution by the authority concerned.
It is learnt that there are 43 Bangladeshi prisoners in different jails in Myanmar. Out of them 20 are already handed over. Among them, 16 were fishermen who were arrested by Nasaka on 4 April 2005 and four were woodcutters.
On 12 March 2005, Myanmar and Bangladeshi authorities have agreed to exchange each other's prisoners. However, the Myanmar authorities continually postponed the date of exchange due to their doubt regarding the number of Myanmar prisoners in Bangladesh. It is learnt that the Myanmar authorities used to interrogate Myanmar prisoners released from Bangladeshi jails when they arrive back at their homeland, Narinjara News quoted a teacher from Maungdaw as saying, So, the fate of the handed over Myanmar prisoners, may be few are totally at risk of being persecuted.
Considering the human rights record of Myanmar which is ruled by the military dictators over the years and where there is presence of gross human rights violations, the authorities in Bangladesh should be more cautious and responsible for the sake of human rights. There should be a system of screening to verify those who really fear persecution in Myanmar and really are in need of international protection. Bangladesh government should take the assistance of the Office of the United Nations High Commissioner for Refugees (UNHCR). The national human rights organizations should also come forward in this regard. Unfortunately, generally these organizations are not interested to the plight of the unfortunate Myanmar prisoners including the Rohingya who fled the country due to gross discrimination against them and with a well-founded fear of persecution. According to official figure, the number of the remain Rohingya refugees are around 21,000. However, more than 200,000 of them have been staying in Bangladesh illegally and with out any status as estimated.

The author is human rights advocate.

JS body okays bill for blanket WB immunity

The parliament is likely to pass this month the much-talked-about bill proposing blanket immunity to the World Bank (WB) in Bangladesh, after a parliamentary watchdog okayed the bill amid strong opposition protest.
The representative of the main opposition Awami League (AL) in the parliamentary standing committee on finance ministry gave a note of dissent and walked out of the meeting while the parliamentary panel was scrutinising the bill, terming it a violation of the constitution and democracy. The committee later finalised the bill without bringing major changes and is to submit a report recommending its passage in the next parliament session slated for May 12, meeting sources said.
Once passed, the bill will put the Bretton Woods institution beyond any legal action, a privilege the multilateral lending agency enjoys in no other country of operations.
The International Monetary Fund (IMF) and the Asian Development Bank (ADB) were given legal immunity earlier in 1972 and 1973. The WB was then given partial immunity. *The Daily Star, May 2.*

Mohammad Ali new Attorney General

Additional Attorney General AJ Mohammad Ali has been appointed the 12th Attorney General of Bangladesh to replace Hassan Arif who resigned recently. Mohammad Ali will take over the charge on Monday as President Iajuddin Ahmed appointed him the chief law officer of the state.
Hassan Arif, who resigned apparently over disagreements with the government on several issues, attended his last day in the office. Meanwhile, a group of government law officers after Arif's resignation demanded removal of a few law officers identifying them as "followers of Arif." Branding attorney general Arif a failure, the law officers yesterday demanded ouster of officers who were appointed during the last Awami League regime, accusing them of corruption, nepotism and irregularities. The demands came from a meeting at the attorney general's office yesterday with Assistant Attorney General Waliur Rahman in the chair. Some 20 out of more than 60 law officers attended the meeting.
The meeting noted that Arif did not resign on health grounds - rather the prime minister asked him to quit as in the last three years he miserably failed to run his office.
The hour-long meeting held before the formal appointment of Mohammad Ali, urged the government to appoint an attorney general who will be loyal to the ruling alliance. AAG Rejaul Karim said an investigation should be launched against a law officer who is involved in human rights organisation Odhakar. Without mentioning the officer's name Karim said, "He is making the government controversial." *The Daily Star, May 2.*

CMP chief removed as EC finds him guilty

The government removed the Chittagong Metropolitan Police (CMP) commissioner after the Election Commission (EC) the same day ordered for his removal on the failure to discharge his duties impartially in the run-up to Chittagong City Corporation (CCC) elections.
The home ministry attached M Amzad Hossain, the commissioner, to the Police Headquarters and made Additional Commissioner Mohammed Moniruzzaman as Acting CMP Commissioner.
The EC, a quasi-judicial body, had also directed the home secretary to immediately replace him with a suitable person for holding the May 9 polls in a free, fair manner. Sources close to Amzad, however, said he was going around saying that he would be reinstated in his position once the election is over. The EC order came in the wake of allegations by main opposition Awami League-backed Chittagong Nagorik Committee that the CMP commissioner was harassing its workers and favouring the ruling alliance candidate.
The Nagorik Committee is backing incumbent Chittagong City Mayor ABM Mohiuddin Chowdhury for a consecutive third term in office. The CMP commissioner, after declaration of the election schedule, made a number of arrests that apparently amounted to harassment and intimidation, the EC said in its judgement. *Prothom Alo, May 3.*

Man killed for protesting adulterated oil sale

A young man, struck hard on the head by a grocer after a scuffle over sale of adulterated soyabean oil, died at Dhaka Medical College Hospital (DMCH).
As Abdul Majid, 30, a resident of Karail slum in Gulshan, protested grocer Mohamad Ripon's selling adulterated oil to him the previous day and pressed Ripon for taking back the oil, their altercation turned into a scuffle, said duty officer of Gulshan Police Station. "At one stage, Ripon struck Majid on the head with a wooden stick, leaving him seriously wounded," he added. Majid was rushed to DMCH where he succumbed to his injuries after an hour. Police arrested Ripon. *The Daily Star, May 3.*

Chapa Murder SC overturns HC order

The Supreme Court (SC) overturned the High Court (HC) verdict that had acquitted the three accused earlier sentenced to life imprisonment by the lower court in the Chapa murder case in Barisal 16 years ago. After hearing both sides, the three-member Appellate Bench headed by Justice Mohammed Fazlul Karim upheld the lower court verdict, reducing the punishment of two lifers to seven years. Fauzia Rahman Chapa, mother of a son and wife of Shahidul Alam, one of the owners of REPHCO Pharmaceutical Laboratory, was murdered in her house at Fakirbari Road in Barisal City, when the husband was on a visit abroad.
The court upheld the life imprisonment of Shahidul's brother Zahurul Islam Kamal and reduced the punishment of Nasruddin Jamal, another brother of Shahidul, and their brother-in-law (dulabhai) Zillul Bari to seven years. The court in its judgment directed the convicts, who were set free nine years ago, to surrender before the trial court immediately. On an appeal against the district court verdict, the High Court acquitted them on benefit of doubts in April 1996. *UNB, Dhaka, May 3.*

CJ ducks SCBA sit-in for Faizee's removal

The Supreme Court Bar Association (SCBA) staged a two-hour sit-in in the chief justice's entryway to the Supreme Court, demanding resignation of Additional High Court Judge Faisal Mahmud Faizee. Chief Justice Syed JR Mudassar Husain however avoided any encounter with the demonstrators by entering his office an hour before the sit-in. The protesting lawyers warned that if the chief justice continued to allow Faizee to conduct judicial work, the SCBA would organise a sit-in in front of the chief justice's courtroom, then go for hunger strike and even boycotting the court.
During the demonstration, the lawyers also said, if necessary, they will demand resignation of the chief justice. They accused the chief justice of violating his oath and obliging the government. About 150 lawyers gathered at the Supreme Court building gate and joined a protest rally chaired by SCBA President Mahbub Alam. He urged the chief justice not to make himself controversial for a person like Faizee. Former SCBA president Ozaer Faruk said, "We are protesting the activities of chief justice...if you [chief justice] think our demonstration is meaningless, ask Faizee to show his original LLB certificate." Bar Council member Sahara Khatun told the rally, "We are preparing to file a criminal case against Faizee for lying about his age." *The Daily Star, May 4.*

ACC to probe actions against corrupt officials

The Anti-Corruption Commission (ACC) will probe corruption of government officials getting away with minor punishment on the pretext of departmental action. The Commission will call for records of departmental cases filed against government officials on graft charges to see if adequate actions had been taken against them. The anti-graft watchdog observed that many government officials got away with minor punishment for big corruption, according to Commission sources. "In many cases, respective departments withhold two increments or stop promotion or suspend (officials) for a few months although the officials indulge in huge corruption for which they should face criminals charges," an ACC official told *The Daily Star* yesterday, seeking anonymity. Sources said many trade union leaders and officials and employees with political backing in different government departments escape punishments using their political identity despite doing huge corruption. "Steps taken against them in the name of punishment often amount to mere eyewash," said an ACC source. *The Daily Star, May 4.*

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