LAW & our rights

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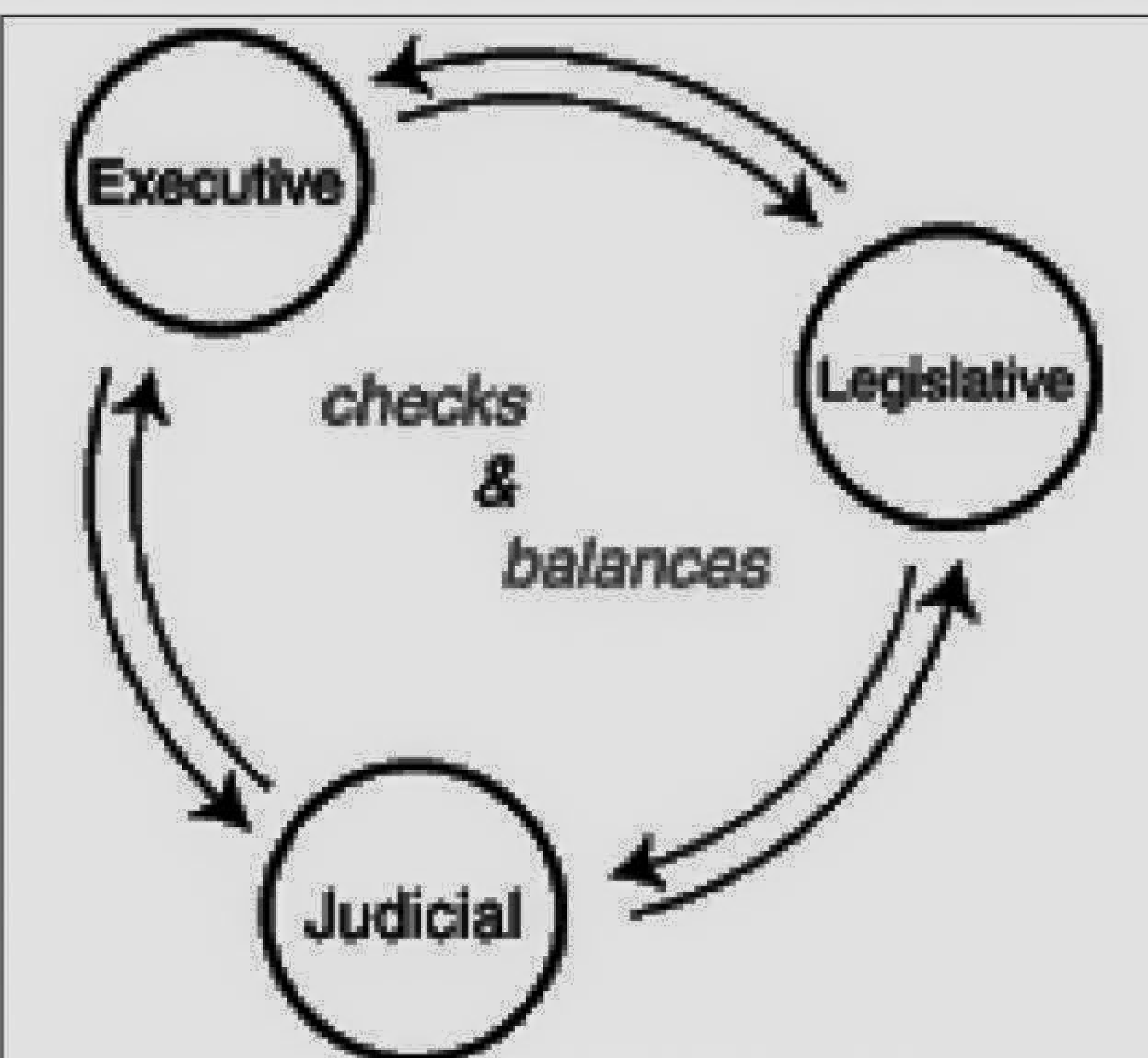
REVIEWING *the views*

Unprecedented warrant of precedence

NAYEEM JAFAR

THAT district judges should be placed above the secretaries and chiefs of three services in the Warrant of Precedence is something unprecedented. No offence meant, and in the words of former Indian Supreme Court Justice V.K. Krishna Iyer, it is "grave goof up, made unwittingly."

Conceivably, the logic behind is an over-zealous interpretation of the Constitution. True, judges of the Supreme Court are constitutional position-holders, but their brethren in lower judiciary are not, explained in whichever



Warrant of precedence is sometimes a factor for checks and balances of power

fashion. Like their counterparts in the BCS Administration and similar cadres, they are simply "public servants." Hence, unlike judges of the apex court who receive "remuneration," they receive "salary." Be that the lower court judges enjoy the same judicial independence the Constitution accords them, they are still "government employees." It is not rocket science!

That is not to argue that our warrant of precedence in its present form is perfect. Perhaps it cannot be perfect anywhere. For example, in India, the Chief Justice and Speaker of the Lok Sabha occupy the same position (6th), while in Bangladesh the Chief Justice is placed a step below the Speaker of the Parliament. This is a contravention to the concept of equality of the three organs of the government. Likewise in Pakistan, the position of the Chief Justice is not as exalted as it should be. He ranks below the Chairman of the Senate and the Speaker. In India again judges of the Supreme Court rank one step below the Union Cabinet Ministers but two steps above Union Ministers of State. However, in Bangladesh, judges of the Supreme Court (Appellate Division) and Ministers of State occupy the same spot (8th). Our Cabinet Secretary, Principal Secretary, and Chief of Staff of the Army, Navy and Air Force regardless of their military rank are placed in the same category (12th), above the Attorney General and Comptroller and Auditor General (15th). The Indian warrant of precedence on the other places the Attorney General and Cabinet Secretary at the 11th position, a step above the Chiefs of Staff (12th), while Secretaries to the Government of India, President and Prime Minister and officers of the rank of full General occupy 23rd position. Deputy Commissioner/District Magistrate and District Judges in states across India are almost uniformly placed in the same bracket. In Sri Lanka, Permanent Secretaries to the Ministries and Attorney General precedes the Chief of Defence Staff. Needless to say, there are variances in warrants of precedence in countries around the world.

The argument that the position of district judge is the highest in the country's career judicial service and hence merits highest pay similar to other sister services is quite sound. The latest pay-scale for district judges attempts to bring about some parity in this regard. It is utterly unsound to reason however that salary equates position and thus district judges and secretaries should occupy the same spot in warrant of precedence, in this case even above the secretaries who control them administratively in consultation with the Supreme Court. "State Protocol" for district judges is an overly large claim, but a seat in the VIP enclosure in official functions within their respective jurisdiction would be just fine.

The debate and tension over warrant of precedence involving particularly the judiciary and the administration is uncalled for and rather juvenile. Much-warranted quality and competence should precede the warrant of precedence. Reality is that our bureaucrats are not the rightful heirs of their CSP and the lesser EPCS predecessors. They are a sorry bunch. The crudity and lack of intellectual depth and social grace is abysmal. A former top dog in the bureaucracy confined that there are perhaps only five secretaries in the entire government who can meaningfully conduct negotiations in English with their foreign counterparts. Our judges are in an equal sorry state. We are no more endowed with the likes of ICS district judge Annada Shanker Roy or Ahsanuddin Chowdhury (later President) of the Bengal Civil Service. Now it is ordinary men and women, coping fitfully with their own failings. Their craving for "status" in warrant of precedence, as opposed to the judicial distance that they are required to maintain with public and administration in particular, is a display of their vainglorious mediocrity. Officers in defence forces are no exception.

The fracas over the warrant of precedence has now reached the Supreme Court. Let's not pretend that the court is a panacea for all menace. We do hope however that it would re-look into the issue in a holistic fashion, and produce an outcome that is reasonable, if not entirely satisfactory.

The writer is a freelance contributor to the Daily Star.

Manifestation of judicial activism

ANISUR RAHMAN

FOR many days there have been a question in my mind that why our Supreme Court played submissive role during different crisis (particularly during the military regime) of the nation. Especially, turning down the 8th amendment of the constitution (relating to establishment of High Court Division benches in the divisional cities) as well as the Upazila Parishad (Kudrat-E-Elahi Panir case) caused heavily my mind and raised a question whether judicial activism in Bangladesh is pro-people. Recently two decisions of the High Court Division, the 5th amendment case and the decision relating to warrant of precedence wake me up. The golden age of judicial activism begins!

There is no doubt that the 5th amendment of the constitution destroyed the spirit of our war of struggle wholly as well as changed the nature of our state, our identity as a whole. Unfortunately we the mass had to bear it until the verdict came from the court. One might say that there was none to challenge the 5th amendment in the court. I would, gently, argue that it is the Supreme Court who is the sole protector of the constitution and it is the judges of the Supreme Court who have to take oath to protect and to defend the constitution before their coming into the office. Therefore their failure to protect and to defend the constitution cannot be simply ruled out. I would agree that there was no democratic government in true sense until 1991 in Bangladesh. But we did not see any such move from the Supreme Court as a whole to come forward during the last three consecutive democratic governments.

The tension between the judicial service and the administrative service in Bangladesh is not new one or one might say not unexpected. We inherited a hybridised colonial judicial system where the prosecutor and the judge was the same person (magistrate) in criminal trial. Despite the constitutional guarantee for separation of judiciary from executive (that means the prosecutor and the judge should not be the same person) no successive governments pay any head to it.

Therefore civil servants were enjoying the judicial power until the Supreme Court's historic verdict on the Masder Hossain case. The verdict made the civil servants apparently unhappy as they thought that their judicial power has been taken away. As a result the tension comes to the forefront. We may recall the address of the Rokon-Ud-Doula one of the civil servants who was enjoying judicial power for a long time. He challenged the government when it went on to legislate to accomplish the separation. We were taken aback that how come a civil servant could challenge the government under the banner of an association.

Since the civil servants are historically nearer to the government (for legitimate purposes) they always deprive the judicial personnel (I do not want to call them officer) by various ways. Warrant of precedence is one of them. No successive governments took initiative to re-adjust the warrant of precedence of the judicial personnel especially the district judge. Therefore they took up the matter to the court as a last resort, which declared the previous warrant of precedence illegal since it is discriminatory to the judicial personnel especially to the district judge. Mizanur Rahman Khan has pointedly mentioned that the High Court judges perhaps considered the constitutional position and the position mentioned in the constitution and defended by the constitution over the position, which is mentioned in the constitution but does not defend by it (See Prothom Alo, February 8).

Without going into detail of the verdict I would just like to say that the highest position of the judicial cadre service is the district judge. In other words district judge court is the highest trial court, which can pronounce death penalty, the highest criminal punishment of the land. The irony of fate is that the position of this office holder of this important office is below the Secretary, the highest position in the civil service.

Does not the district judge deserve the same position with a secretary at least in the warrant of precedence? Many opined that it will create a hazard in the working of the different ministries since many district judges are working there which made me anxious about the outcome of the separation of judiciary. Therefore re-arrangement of warrant of precedence will not create any problem for the working of other government officials. If there is any district judge working in other ministry he/she should send back to the native place immediately to honour the Masder Hossain case verdict.

Efficient civil administration is a key to effective service delivery and a government cannot run without an efficient civil administration. Besides, coordination among the three wings of the government is a must to effective governance. But we should not forget the status of the judiciary. Though it is one of the wings of the state it's status is not similar to the civil administration. We should not forget also that a judge is not a servant of the state, which makes the fundamental difference between a civil servant and judicial personnel. This distinction is not personal rather their nature of job makes the difference.

The duty of a civil servant is to obey or follow the government's agenda while the sole duty of a judge is to follow the law and only the law. Therefore the dignity of the judiciary must be protected and it is the holy duty of the civil servants to protect the dignity of the judiciary. Unfortunately the way they reacted to the verdict of the High Court Division is unexpected (according to reports of the different dailies top civil servants had several meetings and expressed their dissatisfaction over the verdict). After all the matter is not going out of their hand since there is another highest forum to be exhausted.

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LAW *reform*

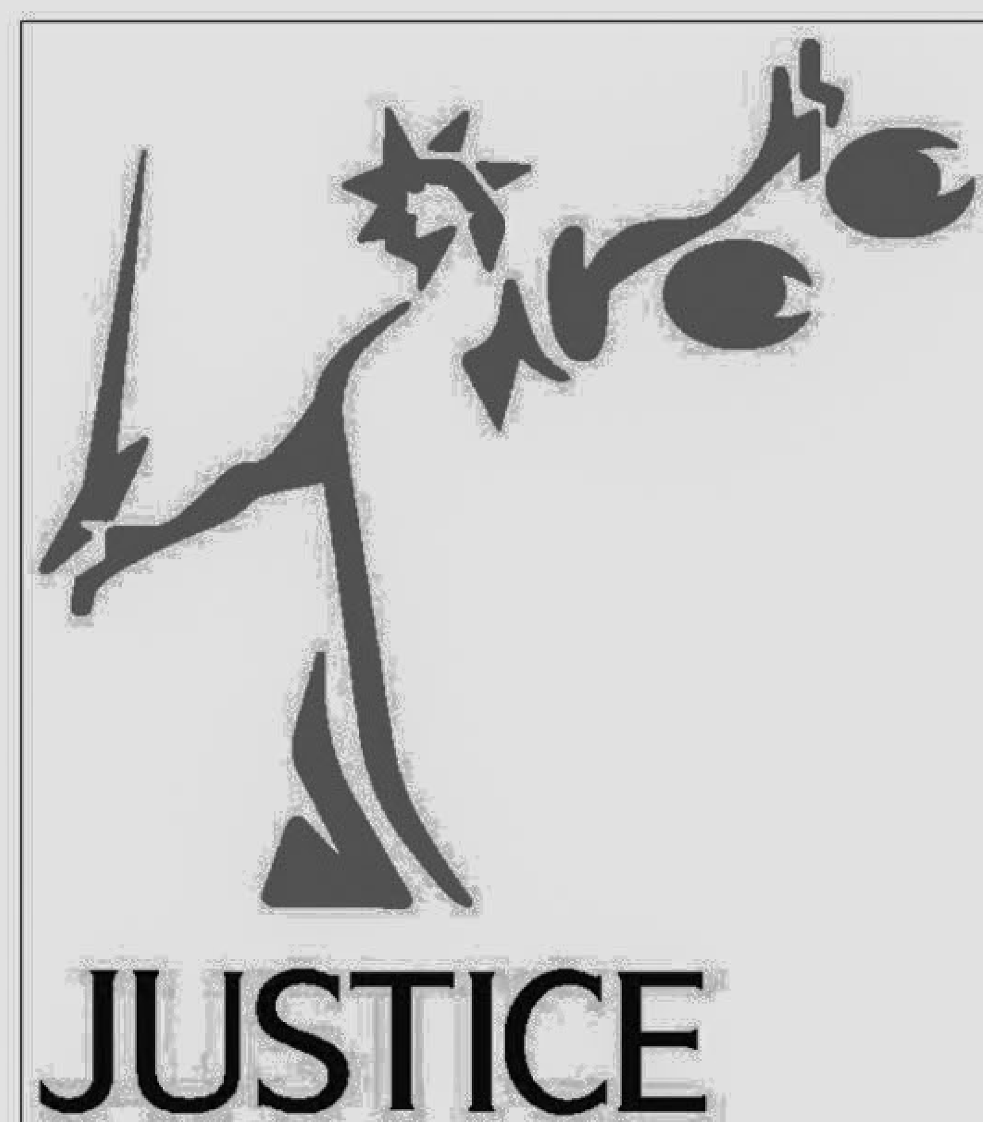
Issues of legal and judicial reformation: few implications

AL ASAD MD. MAHMUDUL ISLAM

IT is needless to say that we are inheriting our legal system from the common law legal system. Most of our statutes came into force at the time of colonial rule of the British Emperor who governed us for serving their own interest and purpose. Although the British had left us more than six decades ago, a large number of enactments introduced by them still remain unchanged and, therefore, now become outdated and useless in the context of our own cultural and social base and also in the perspective of the ever changing modern world. Despite the fact that the British introduced there laws through trial and error method i.e. gradually improving them with the experience in the practical field, the vast differences of culture and religion between the ruler and the ruled left unaddressed while incorporating those Acts. Apart from those enactments, the British left many conventions and practices in the arena of our legal field. After the departure of the British imperialism, we became the subject of new colonialism of Pakistani ruler who cared very little about rule of law and justice, equality and freedom of the people of this terrain. Therefore, the laws introduced by the Pakistani ruler have also had features of the colonial imperialism. Hence, the necessity for changing the enactments dated back to colonial rule and the Pakistani rule is not felt recently. It has become a challenge since the eve of our independence.

The dream of our freedom fighters was to establish a state free from exploitation and a society in which the rule of law, fundamental human rights and freedom, equality and justice- political, economical, and social will be secured for all citizens. The preamble of our constitution states about the cause of creation our state-the independent, sovereign Peoples' Republic of Bangladesh. The sovereignty of this state lies in the hand of the people of this country and they are the real owner of this state. The power conferred upon the political party in government and opposition, the government servant and the Judiciary is explicitly expressed in the constitution, the fountain of all laws. All those powers are vested and exercised on behalf of the people and under the tight frame of law.

Under our constitutional scheme, the power of framing laws is vested with the parliament or legislature. It is the supreme body that is supposed to exercise this power with great caution and sincerity. It is believed that the members of the parliament represent the common people and therefore, the desire and will of the common people reflects through the Member of the parliament in framing laws. Again this power of framing laws of the parliament is not unfettered; this power of legislature is subject to constitution and subject to the scrutiny of the Supreme Court of Bangladesh, the guardian of our constitution. Parliament cannot pass a law which the constitution does not



permit. Any law passed by the parliament contradictory to the fundamental rights as enshrined in the Part III of our constitution is ultra vires and every citizen has the right to move in the High Court Division for challenging any law passed by the parliament. Instances are not few that our Supreme Court has declared laws passed by the parliament are ultra vires to the constitution. Unlike supremacy of the parliament in England, in our legal system we are experiencing supremacy of the constitution.

In the developed countries, reformation of the formal justice system is a continuous process. Because, they do not consider administration of justice merely a routine service delivery activities of the state but also deal it with the utmost importance and top priority. Independence of Judiciary is a pre-requisite of rule of law and good governance. Without independent judiciary, the constitutional aim of ensuring justice, equality and freedom remains unachieved and become farce to the powerless and underprivileged. Thus independence of the judiciary is made one of the salient features of our constitution by the framers of our constitution and it is declared as the basic structure of our constitution by the Supreme Court of Bangladesh in the famous Eighth Amendment case. In another famous case, popularly known as Masder Hossain case, our supreme court issued twelve directives for the separation of the judicial organ from the executive organ of the state and accordingly the process of separation has started since 1st November, 2007. Although the complete separation and independence is still in progress, the judiciary of Bangladesh is now thought to be free from the influence of the executive and the political party in power. The benefit of the separation is started to come to the litigant people who had to wait for long in the court veranda and premise for a minute long hearing of their petition or application. In order to gain the maximum benefit of separation, along with the process of independence, reformation of the judiciary is required to be integrated. Again, reformation is a wide term. It must include both infrastructural reformation and supra-structural development. Infrastructural reformation such as increase and development of the court building and number of the courts, court staff and judicial officers, logistics and training facilities of the judicial officers and use of science and information technology are essential for the quick disposal of the suits. Supra-structural reformation such as development of codification and modernization of the enactments, introduction of new ways and methods of the dispensation of justice and initiation of right based approach in the process of the court is also equally important for delivering justice to the vast majority of the poor litigant people. So, the two folded reformation process must start and go in hand to hand. Reformation of such type is always a challenge and hindered by vested interested quarter. Therefore, the struggle for complete separation and independence of the judiciary does not stop in any point.

One of the striking backwardness of our formal justice system is that it is time consuming and very costly. Therefore, research based study and academic effort is also required for addressing the elements of delay disposal of civil suits and criminal cases. Translation of the findings of such study and academic effort into enactment is another challenging task for the reformation of the judiciary.

In this regard we must not forget to promote the means of informal justice systems that also serve the aim of ensuring justice for everybody. The traditional "Shalish" system in our country, the "Ponchayet" system of India and Nepal are the notable modes of informal justice delivery system. The indigenous people have their own legal system based on their own laws and regulations. The concept of Alternative Dispute Resolution, in short ADR, has also achieved momentum and public support at this stage of legal development. Now, it has also been used in the regime of international law. The concept of mediation, arbitration and conciliation have already been introduced in our legal system and now been received with huge applause by the litigant people and others concerned. Now it is required to establish the modes of ADR in our legal system with equal importance to the reformation of formal justice system. For that end, our procedural laws like Code of Civil Procedure and Code of Criminal Procedure are required to be amended with inserting mandatory provision of applying the modes of ADR.

To conclude, it can indeed be said that the judiciary of Bangladesh has been entered into a new horizon of our legal history and legal jurisprudence. Legal and judicial reformation is a must for enhancing its capability to provide real justice and uphold rule of law, a dream set forth in our constitution. To that end, a holistic approach in adopting policy measures for legal and judicial reformation is essential on the part of the legal scholars, civil society organizations, the Higher Judiciary and the government.

The writer is currently acting as an Assistant Judge, Thakurgaon.