

Is there a risk of judicial over-reach?

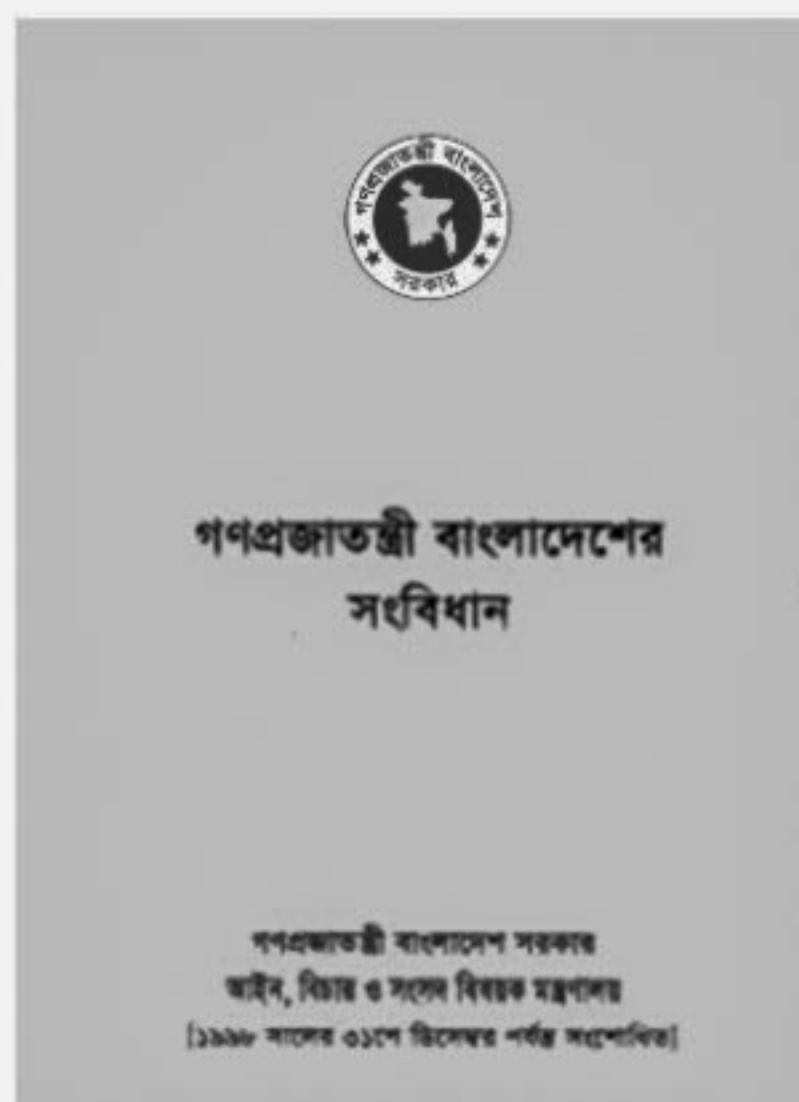
It requires a high degree of maturity and political sophistication to ensure that a democracy does not turn into a tyranny of the majority. It requires equal vigilance and self-restraint to prevent an over-reliance on the unelected branch of the government. The courts are probably being called upon to do too much.

AHRAR AHMAD

THE Court's decisions to nullify the 5th and 7th amendments have been received with understandable celebratory enthusiasm in the country. I wholeheartedly agree with the sentiments of the Court, and personally believe that the military has absolutely no right to usurp political power and impose its arbitrary rule on the people. The Court's stern admonishment to previous military regimes, and its acknowledgement that some of the decisions and undertakings of those governments may be liable to criminal prosecution, should send a clear cautionary warning to future military authorities who may covet state power.

In this regard, the intentions of the Court are commendable, and its posture laudatory. But, the situation becomes a bit problematic if one considers its implications. It may be entirely possible to argue that these judgments, by blurring the distinction between the political and the constitutional, indicate a judicial over-reach of rather spectacular proportions that may, ultimately, jeopardize the very democratic and constitutional principles it seeks to protect.

The only way to declare a part of the constitution to be null and void is through another amendment. For example, the 18th amendment to the US constitution passed in 1919 (relating to the Prohibition), was repealed by the 21st in 1933. Part 9 Article 142 of the



Constitution of Bangladesh spells out the relatively easy process through which this procedure can be adopted. Passage of an amendment requires only a two-thirds majority in Parliament, and in some instances specified therein (involving articles 8, 48, 56, etc.) can be put to a public referendum where a majority vote becomes necessary. Therefore, if there has been an egregious

violation of the constitution that had taken place in the past, it is the Parliament, and in a few instances, the opinion of the people directly, that can undo it. That authority has, presumably, not been vested in the Courts. It is important to bear in mind that even if the earlier amendments had been illegally incorporated into the constitution, they cannot be amended by non-constitutional means today. One unconstitutional act cannot be corrected by another.

The court is the guardian of the constitution, its interpreter, even perhaps its arbiter. But, it has to be remembered that it derives its power from the constitution, NOT the other way around. The courts are creatures of the constitution, bound by it, and subservient to it. The constitution can define the structure, parameters and authority of the courts. But, the courts cannot dictate what the constitution may contain. The courts can declare unconstitutional all parliamentary laws, executive ordinances, Presidential proclamations, bureaucratic regulations, specific policies pursued by any government, or its own previous judgments. It can also serve in

an advisory capacity to the President if s/he wants a legal opinion on an issue. But, it cannot pass laws. Nor can it declare any part of the constitution itself to be unconstitutional, and all amendments are ipso facto parts of the constitution.

Article 7 of the Constitution clearly states that "The constitution is, as the solemn expression of the will of the people, the supreme Law of the Republic, and if any other law is inconsistent with this constitution, the other law shall, to the extent of this inconsistency, be void". The decisions of the court do not reflect "the solemn expression of the will of people", the Constitution does. To argue otherwise would not only subordinate the constitution to the courts, it would also trigger a legal mess that is fraught with moral and structural ambiguity. This is not a technicality. It is a fundamental aspect of the constitutional process. The suspect amendments must be removed through the legally specified procedures clearly outlined in the constitution. Otherwise, an earlier political wrong is simply being compounded through a current procedural confusion.

It requires a high degree of maturity and political sophistication to ensure that a democracy does not turn into a tyranny of the majority. It requires equal vigilance and self-restraint to prevent an over-reliance on the unelected branch of the government. The Courts are probably being called upon to do too much "Judicial activism" in the cause of equity and justice is fine, and the courts must also play a pivotal role in guaranteeing the system of checks and balances within which our democratic institutions are expected to function. But there are limits, both practical and jurisdictional, that must also be understood. The Courts have demonstrated exemplary courage and political sagacity in arriving at their decisions, and the justices were manifestly encouraged by their commitment to democracy and their repugnance of "unconstitutional adventurism". But, it is perhaps ironic that in seeking to uphold democracy expressed through constitutional supremacy, they may have, unwittingly, served to weaken an essential premise.

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RECOGNITION TO KOSOVO

Advisory opinion by the ICJ should clear the way

The international community, and Bangladesh in particular, should fully support the genuine aspirations for freedom and democracy of the ordinary men and women of Kosovo whom I have seen and met in thousands, day in and day out, in the cities and the remotest villages, nook and corner of Kosovo, by granting recognition to Kosovo.

S.M. RASHED AHMED

I have written previously in The Daily Star, and addressed number of seminars and gave TV interviews pleading the case for the recognition of Kosovo by Bangladesh based fundamentally on our national interest and ideals of our liberation war. Regrettably, this has not yet been done due to objections raised by Belgrade supported by a number of countries including Russia.

Their opposition to the recognition of Kosovo is based, among others, on the reasoning that the declaration of independence of Kosovo is illegal as per international law, contrary to UN Resolution 1244, and would set a bad precedent for secessionist movement elsewhere. Based on this argument the Serbian government referred the case of Kosovo to the International Court of Justice (ICJ) seeking its advisory opinion on the legality or otherwise of the declaration of the independence of Kosovo.

The ICJ, on July 22, gave its advisory opinion in favour of Kosovo's independence. More specifically, ICJ found that Kosovo declaration of independence did not violate the international law or UN resolution 1244.

I had worked on the ground in Kosovo and seen the indescribable sufferings and agony of the people following the brutal military crackdown unleashed by the Milosovic security forces, involving massive violation of human rights and forcing millions of men, women, children and the aged to leave their hearths and homes to the safety of the neigh-

bouring countries.

This should ring a familiar bell with those who had witnessed, and are acquainted with the history of, our liberation war. I sincerely call upon the Bangladesh government, Serbia and our long-standing friend Russia, which supported our liberation war, to recognise Kosovo.

As a Bangladeshi, I echo the sentiment of the people of Bangladesh that for us Pakistan was dead for all practical purposes on the black night of March 26, 1971, when General Yahya unleashed his forces on unarmed and innocent civilians, killing and maiming thousands and forcing millions to seek refuge in India. So also for the people of Kosovo, Serbia was dead on the gruesome night when Milosovic let loose his hordes on unarmed civilians in one of the worst example of ethnic cleansing in history.

Following the clear and unequivocal advisory opinion of ICJ in favour of the independence of Kosovo it is hoped that there will be national consensus on the issue, based on the fact that no amount of reasoning involving legal niceties, setting precedent of secession or big power pressure would have succeeded in turning the clock back and reverting Bangladesh to the rule of Islamabad after the bloody military crackdown.

It is the same with Kosovo and its people. We cannot and should not expect them to revert to the rule of Serbia after the genocide. It is people's will which has to take precedence. There is a limit to the use of the argument of national sovereignty and secession, and

the ICJ advisory opinion has dealt extensively with the issues and set at rest the confusion sought to be created by such an approach.

I wish to further clarify that possible objections raised against the recognition of Kosovo -- that such a recognition will give encouragement to the secessionist movements and tendencies in the Balkans and elsewhere -- is totally incorrect and based on distortion of truth and reality on the ground, particularly in Northern Kosovo.

The factual position is that after the dissolution of the former Republic of Yugoslavia (FRY) all its constituents, including Croatia, Bosnia, Slovenia, and Macedonia etc., have gained independence except Kosovo. So, the question of secession does not arise. Kosovo has emerged as an independent state like other constituent republic/province of former FRY due to dissolution of the Yugoslav Federation.

As Noel Malcolm, a respected scholar on the Balkan, has pointed out, the independence of Kosovo would involve not setting a new precedent but following an old one -- that of Slovenia, Croatia, Macedonia and Bosnia which gained their independence in 1991-2. In legal terms (according to the Badinter Commission, a committee of experts advising the European Union at that time), what happened when those states became independent was not secession, not the breaking away of a few branches from a continuing trunk; rather it was the dissolution of the entire Yugoslav Federation into its constituent units.

The post-1992 self-styled Yugoslavia, often wrongly described as rump Yugoslavia, is not a continuation of the old Yugoslavia but a new state formed by the coming together of the two ex-Yugoslav units, Serbia and Montenegro. It is a case of complete dissolution of Yugoslavia -- an extremely rare event in modern history. It happened once before with the dissolution of the Austro-Hungarian Empire.

In the twenty-first century the argu-

ment of state sovereignty cannot be used to justify crime against humanity. Nailing the justification for massive violation of human rights on the plea of so-called sovereignty of states in the context of the conflict in Kosovo Mr. Vaclav Havel, former Czech prime minister. Said: "Human rights rank above the rights of states. Human liberties constitute a higher value than state sovereignty. In terms of international law, the provisions that protect the unique human being should take precedence over the provisions that protect the state." On humanitarian intervention in Kosovo he said: "It is fighting in the name of human interest for the fate of other human beings. It is fighting because decent people cannot sit back and watch systematic, state-directed massacres of other people. This is what gives human rights precedence over the rights of states... it has acted out of respect for the law -- for the law that ranks higher than the protection of the sovereignty of states. It has acted out of respect for the rights of humanity as they are articulated by our conscience as well as by other instruments of international law. I see this as an important precedent for the future. It has now been clearly stated that it is not permissible to slaughter people, to evict them from their homes, to maltreat them, and to deprive them of their property. It has been demonstrated that human rights are indivisible and that if injustice is done to some, it is done to all" (Extract from his address to the Senate and the House of Commons of the Parliament of Canada).

Apart from justification for the recognition of Kosovo, based on the advisory opinion of the ICJ, principles and values of human rights and our liberation war, I will briefly touch on other considerations which should be taken into account by our government.

Having opened the first Bangladesh mission in Belgrade after independence during the time of President Tito I have tremendous goodwill for all the people of the former Yugoslav Federation,



Kosovo also suffered genocide as we did in 1971.

including Serbia and Kosovo, for the whole-hearted support to Bangladesh during and after the liberation war. (Incidentally Tito was a Croatian!)

After having lived and worked on the ground in Kosovo with the UN for almost five years my objective and honest assessment is that the overwhelming majority of the people of Kosovo, including local Kosovo Serbs (K. Serbs) and local Kosovo Albanians (K. Albanians), are proud to be a part of the historic process of building a multi-ethnic, multi-religious democratic Kosovo based on free market economy.

They are predominantly young, energetic and enterprising people who see their future in an independent and democratic Kosovo joined with an enlarged European Union with borderless economy and free movements of peoples; a vision where the Wilsonian principles of self-determination and Monet's of regional integration will meet. Kosovo and the Balkans will then truly step into the future of enlightened democracies, enduring peace and freedom with the concepts of independence

and sovereignty relatively subsumed within the larger ideals and vision of the European Union.

The international community, and Bangladesh in particular, should fully support these genuine aspirations for freedom and democracy of the ordinary men and women of Kosovo whom I have seen and met in thousands, day in and day out, in the cities and the remotest villages, nook and corner of Kosovo, by granting recognition to Kosovo.

This should be followed by the establishment of diplomatic relationship and economic, trade, investment and cultural cooperation between Bangladesh and Kosovo, which will open wider vista of interactions and exchanges in all areas of mutual interest with Albania, Serbia, Slovenia, Croatia, Macedonia, Bosnia and Southern Europe as a whole. This will invest our diplomacy with much needed fresh vigour and orientation, and will be decidedly in our national interest.

S.M. Rashed Ahmed is a former UN Regional Administrator/ Representative in Kosovo and former Bangladesh Ambassador to Japan.

Islamophobia?

This time again, a golden opportunity of building bridges aimed at creating interfaith harmony has been missed solely because of the vicious anti-Islam propaganda that has literally brainwashed a considerable section of the American public.

EDITORIAL DESK, (The Nation)

THE Ground Zero Mosque controversy raging in the US has to all intents and purposes exposed the myth of American secularism. The American public could be just as petty, intolerant and even fundamentalist as others around the world. A recent poll survey indicating a majority of the New York state voters opposing the mosque is a slap in the face of their notions of free speech and the freedom to practice one's religion.

The Muslim community, which wanted to build a mosque near the site of

Sep 11 attacks, was just trying to express itself peacefully and quietly, and by constructing a mosque they actually intended to convey to the hard-line Christian public in the USA that Islam symbolised peace and love, contrary to what the average American has been misled into believing.

Islamophobic tendencies are also reflected in President Obama's contradictory stand in which he first declared support for the Ground Zero mosque, but the very next day showed his true colours and went back on his word, greatly embarrassing all those who had thought he was different from the



venom-spitting Bush.

He has been rightly called by a writer as United States "Islamophile-in-chief," because, rather than living up to his expectations, his government has outrun even the previous regime in terms of hatred and persecution of the Muslims. Owing to a smear campaign spanning decades, the common mindset in the US unfortunately, is prone to mistaking Islam with terrorism.

The US mainstream politicians, especially the neo-cons, feel no qualms in indulging in vitriolic attacks against Islam, targeting not just the world of Islam but also the Muslim diaspora living in the US. Most damaging to the credibility of the American empire is the fierce brazenness on the part of an extremist church in Florida to indulge in blasphemous activities on September 11 and, despite the warning by the authorities not to take such a

step, the church remains adamant. This, of course, would create a storm of protests all over the world.

Intellectuals and politically conscious people are already pointing out that the US imperial hubris is now rocking the foundations of the American empire. Will Durant's comment that a great civilisation is not conquered from without until it has destroyed itself from within is an apt description of the USA today and its descent into moral and political degeneration.

This time again, a golden opportunity of building bridges aimed at creating interfaith harmony has been missed solely because of the vicious anti-Islam propaganda that has literally brainwashed a considerable section of the American public.

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