The Bar and the independence of the judiciary

DESIGN PICS-KELLY REDINGER

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INDEPENDENCE of the judiciary is an indispensable requirement for establishing democratic governance and the rule of law, and enforcing the fundamental rights guaranteed in the Constitution of Bangladesh.

Independence of the judiciary cannot be secured without subjecting the process of judicial appointments to close scrutiny. However, in the absence of any law or guidelines to regulate the qualifications for appointment of judges of the Supreme Court, the executive has far too often resorted to the practice of appointing persons sympathetic to the ideology of the ruling party as Supreme Court judges.

Recently, the president appointed 19 additional judges to the Supreme Court. The former Chief Justice of Bangladesh, Mr. Justice Mohammad Fazlul Karim refused to administer oath to two of them during his tenure in view of the controversies surrounding them. Debate continues as to the constitutional and legal obligation of the chief justice to administer oath to judges appointed by the president.

The Bar is of the view that the independence of the judiciary would be best served by vesting in the chief justice the discretion to finally decide whether or not to allow a person to assume the high office of a judge of the Supreme Court.

Since the president issues a gazette notification appointing a judge of the Supreme Court in accordance with the advice of the prime minister under Article 48(3) of the Constitution, an additional judge is, in fact, being appointed by the prime minister. As such, there remains in the executive considerable scope for interfering with the independence of the judiciary.

It is, therefore, essential in the interests of protecting the independence of the judiciary that the chief justice has the final say in matters relating to administration of oath to additional judges of the Supreme Court.

The former Chief Justice Mohammad Fazlul Karim acted with a lot of courage and wisdom in not administering oath to the two additional judges, despite being subjected to enormous pressure by the executive. The attorney general's remarks in his farewell speech on September 30, criticising the then chief justice for not administering oath, were unduly harsh, ill-conceived and completely unwarranted.

Rumours are rife in the Bar that appointments are likely to be made to the Appellate Division in the near future disrupting the seniority of judges of the High Court Division. Supersession in the elevation of judges to the Appellate Division is clearly a means of interfering with the independence of the judiciary, which has been entrenched as a basic feature of the Constitution of Bangladesh.

In a recent landmark judgment in the case of Bangladesh vs Idrisur Rahman, reported in 15 BLC (AD) 49 (popularly known as the "Judges Case"), the Appellate Division held that the "independence of the judiciary affirmed and declared by the Constitution is a basic structure of the Constitution and cannot be demolished or diminished in any manner."

Article 95 of the Constitution provides that the chief justice and other judges of the Supreme Court shall be appointed by the president. By convention, the president appoints judges of the Appellate Division from amongst judges of the High Court Division. The president is obliged under Article 95 to appoint judges of the Appellate Division on the basis of seniority of judges of the High Court Division. To give a contrary interpretation to Article 95 would be to sanction supersession of the senior-most judges of the High Court Division by allowing the president to appoint a judge of the Appellate Division at his sole discretion.

Such an interpretation would allow the president to refuse to appoint the senior-most judges of the High Court Division as Appellate Division judges if, for instance, they deliver judgments which do not meet with the approval of the executive. This would gravely undermine the independence of the judiciary by compelling judges of the High Court Division to dispense justice under the threat of being superseded, if they do not fall in line with the views of the executive.

The power of the president, under Article 95 of the Constitution, to appoint judges has to be construed in the light of Article 94(4) of the Constitution, which provides that the judges of the Supreme Court shall be independent in the exercise of their judicial functions. Articles 94(4) and 95 of the Constitution may be given a harmonious construction only if the president is obliged under Article 95 to respect the seniority of judges of the High Court Division in appointing judges of the Appellate Division.

The judgment of the Appellate Division in the "Judges Case" has finally determined the dispute as to the seniority of judges of the High Court Division. Seniority of judges of the Supreme Court is not to be determined with reference to the dates of their appointment but with reference to the dates of administration of their oath.

The executive is under an obligation to comply with the judgment of the Appellate Division in the "Judges Case" and maintain the seniority of the Judges of the High Court Division in elevating them to the Appellate Division.

Judges of the Supreme Court are also oath bound to uphold the independence of the judiciary. If and when the executive expresses an intention to elevate a judge of the High Court Division to the Appellate Division superseding his brother judges, it is not only the constitutional duty but also the moral obligation of the judge to refuse the unconstitutional offer of the executive.

The power of the Supreme Court to punish for contempt of court is a necessary power to uphold the dignity of the judiciary and to ensure the administration of justice. The dispensation of justice and the maintenance of law and order would be rendered unworkable in the absence of such summary powers of punishing for contempt of court. Such powers are in fact indispensable for ensuring the independence of the judiciary, which has been guaranteed under Article 94(4) of the Constitution.

In the not too distant past, the High Court Division had exercised its powers of contempt of court only sparingly. We remember the magnanimity displayed by Chief Justice A.B.M. Khairul Haque (when he was in the High Court Division) when he chose to take the high moral ground and sometimes ignore contumacious and contemptuous statements made by outspoken citizens, despite having the power to punish them for contempt of court.

We remember the dignity and grace with which he treated individuals alleged to have committed contempt of court in his courtroom. Contemners were asked to sit down (and not made to stand in the dock) and were treated in a manner which was commensurate with the dignity of the Supreme Court. This ensured that persons alleged to have committed contempt of court were not convicted before the disposal of the Contempt Petition. This was and still continues to be the practice of senior benches of the High Court Division.

It is disconcerting, however, to note that in the recent past Contempt Rules have been frequently issued by the High Court Division, which is certainly a departure from the previous practice of this Court. Persons alleged to be in contempt are made to stand in the dock the entire day. Often, the humiliation of having to stand in the dock like a common criminal is harsher than serving a week's sentence in prison.

A reckless exercise of the power to punish for contempt will not result in the dignity of the judiciary being enhanced. Rather it will lead to the dignity and majesty of the institution being compromised. It will impair the authority of the judiciary and shake the confidence of the people in the institution.

The Bar must act responsibly in approaching the Bench with applications for drawing up contempt of court proceedings. The Bench should also act prudently in issuing Contempt Rules, exercising such powers only if and when necessary to uphold the dignity of the judiciary. The Bar and the Bench must complement each other in securing the independence of the judiciary, which alone can ensure the establishment of a truly democratic state.

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Revitalising garment industry

The package was declared after assessing the eligibility of those who suffered during the worldwide economic recession. Why, then, has the government deviated from its original policy? It should immediately make a clear decision on this issue. We do not want to remain hanging any longer.

MD. KARIBUL MOWLA CHOWDHURY

THE garment industry has experienced violence on two occasions in the past; mainly on the issue of increasing wages of the workers. There are a few factories that do not pay as per the scale prescribed by the government and there are some that, on occasion, fail to pay wages in time. Those are usually sick factories. But only the reputed factories that pay in time as per the scale were vandalised on those two occasions.

A monitoring team consisting of the police, intelligence and BGMEA unearthed the quarter involved in vandalising factories. Their finding shows that a big majority of the involved are self-styled leaders and not industry insiders. 22 NGO, too, were found to have contributed in the violence.

We request the government to take necessary measures to give exemplary punishment to the persons/institutions involved, ensure continuous monitoring, and not let any kind of intrusion in future in the industry which will cause repetition of violence.

The primary responsibility of making the platform which helped these elements to get in lies with the owners who made imprudent expansions, causing shortage of workers in the industry. Concentration in Ashulia, Gazipur and Savar too was very high, which is not usually recommended for labour-intensive industry.

A huge number of big factories were built in Savar, Gazipur and Ashulia since 2004 and, when shortage of workers began, the interested quarters grabbed the opportunity and allured the workers by promising higher salaries to go for agitations. This quarter has vandalised many factories in 2006.

Neither the government nor the BGMEA had been sincere enough to give a scale effecting increase of wages after every 5 years. Yet, the industry did not experience any major violence because supply of labour was more then required. A long queue in front of the gate of all factories was a common scene during that period.

The new scale was given in 2006 after 13 years (the last scale was given on 12.01.1994) in the face of agitations by the workers.

Again, a new scale was declared, to be effective from November 2010, with increase of 67% 80% on gross salary. On this occasion the government is reported to have identified the persons/institutions responsible for the violence that marked, at some stage, the agitation of the workers for higher wages.

It is now time to see government action in the face of international pressure. Launching of industrial police will be another milestone in securing congenial atmosphere in the industry. This department must ensure safety of lives and property.

Further expansion, specifically by way of foreign investment in this sector, should be carefully monitored as long as the labour supply situation does not stabilise. About 10% 15% of the machines in the factories in Ashulia, Gazipur and Savar are idle due to shortage of workers.

The value of labour is determined through interaction of demand and supply; the scale does not have much to help on this point. The minimum wages now is Tk.1,662, and there is about nobody in my factory drawing less than Tk.1,900.

Wages in Grade 3, the highest, is Tk.2,449. The highest amount in different factories ranges from Tk.3,200 to Tk.3,800. In different highly concentrated areas owners are paying even more. It is, therefore, clearly understandable that wages alone was not the cause of the violent agitations.

This industry will get benefit in the second stimulus package that was declared by the government on November 25, 2009. The most important feature of this package was that garment factories exporting up to $3.50 million worth would be entitled to receive 5% on the export made by them in the year 2008 -2009. (There was no other condition for entitlement of this benefit.)

The latest circular issued by the Ministry of Finance on September 8 has surprisingly completely deviated from the original recommendations. For getting the benefit mentioned above it has added the condition that factories not having bonded warehouse facilities and using only local fabrics would be entitled to get this benefit.

There is no factory which uses only local fabrics and does not have bonded warehouse facility. Who, then, will get this benefit? No one. The 5% benefit pledged has been reduced to 1% by adding condition of paying it on value addition (which was earlier on FOB value), which again is a tedious calculation. Benefit on electricity bills and license renewal fees for captive generators has been dropped altogether in the latest circular.

The package was declared after assessing the eligibility of those who suffered during the worldwide economic recession. Why, then, has the government deviated from its original policy? It should immediately make a clear decision on this issue. We do not want to remain hanging any longer.

Industry owners accepted the government prescribed wage structure for the workers of this industry. However, the load on some factories will be rather high. Due to erratic power supply every factory had to buy generators by borrowing from bank, on which it is required to pay interest and installment. There is huge expense on purchase of diesel as well.

The government was not logical in doubling the tax payable by the factories at the same time. If at all required, it could be done in subsequent years after observing the industry situation after increase of wages. VAT on rent payment by factories too needs be withdrawn. The government has kept this industry exempted from paying VAT partly or fully on many heads. A new levy, thus ,does not seem justified.

The situation in the port is bad. Clearance of imported consignments requires an average of seven to ten days, against three to four days during the period of caretaker government. The government should use he same machinery/system it was using during the caretaker government and improve the situation immediately. Interest on borrowing from banks in our country is very high, which should be lowered in phases to match the rate in the industrially developed countries.

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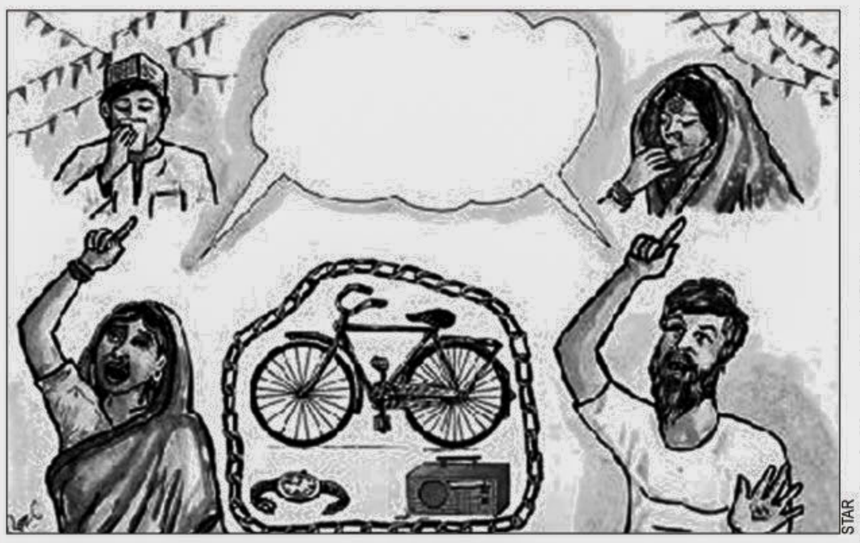
Dowry and extreme poverty



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Without stronger efforts to mitigate dowry, programmes aiming to lift the extreme poor out of poverty may increase the vulnerability of households, with the potential to push them deeper into extreme poverty than ever before.

CHRISTOPHER TOMLINSON

IT is not uncommon for development practitioners to compare the impacts of dowry with those of cyclones, floods and other forms of natural disasters. Although dowry is not a natural and unpredictable phenomenon, it is something that has become engrained into the culture of Bangladesh over a relatively short period of time. The cycle of poverty is further entrenched through this continuing practice, which in turn is distorting the effectiveness of existing and continuing poverty reduction programmes.

In 2008, International Food Policy Research Institute cited dowry as the leading cause of poverty in Bangladesh, despite the ongoing efforts of numerous NGOs to curb the practice. Dowry has been traditionally analysed as a part of expanding personal rights of women within the broader poverty agenda, however, further work is required to understand its linkages with extreme poor groups.

This need for further understanding is gaining increasing importance as, over the last few years, the Bangladesh government, supported by donors, has undertaken a number of programmes tasked with eradicating extreme poverty. Some such programmes include shiree, the Chars Livelihood Programme, Urban Partnerships for Poverty Reduction and Brac's Targeting the Ultra Poor programme.

These programmes can be, roughly, separated between distributing fixed assets to households or raising awareness on individual rights and entitlements. Both of types of model attempt to improve household income generating capabilities and ultimately lift their beneficiaries out of poverty. These programmes have proved fruitful in the short-run, but a failure to grasp the debilitating effect of dowry may lead to critical long-term implications.

In rural areas, dowry is often the most important aspect of the marriage. Parents of young men and women spend a considerable amount of time negotiating the "right" amount before the start of the ceremony. Families struggle to raise this often hefty sum, as many people believe that it impossible to get married without dowry.

Research has shown that moderately poor families struggle to raise dowry through several different mechanisms, including taking multiple loans from micro finance institutions or by selling assets including land. In comparison, the extreme poor adopt a different set of coping mechanisms as by definition they have no land, limited assets, low levels of income and no access to micro-finance.

The extreme poor are dependent on the philanthropy and charity of the local community, where dowry is collected through a number of mechanisms including chadda or haat collections, high interest informal loans, and engaging in child labour.

However, the coping strategy is modified when an extreme poor household is engaged through a poverty reduction programme such as those mentioned above.

As extremely poor individuals start to reap the benefits from these programmes, through increased access to income earning opportunities and the creation of an asset base, their status in the community changes.

These individuals are no longer seen as extreme poor, and thus not worthy of charitable support; in many cases beneficiaries have been recipients of sizable asset transfers, while also being connected to and supported by an established NGO.

As a result of this transformation, these once extremely poor individuals adopt similar day-to-day coping mechanisms to that of other moderate poor households -- including the provision of dowry. This reality has, however, the potential to erode any gains that the project tasked with eradicating their poverty may have provided.

As the beneficiaries' position as moderate poor is often newly acquired, their footing in this class is relatively unstable and they are vulnerable to slide back into extreme poverty. This situation often comes true under the premise of the provision of dowry; individuals are forced to sell off their newly acquired assets, part with their meagre savings and any other project inputs they may have received, which in turn forces them back into extreme poverty.

Such a slide can have devastating effects on households; as the community still views the beneficiary as being supported by an NGO, they are reluctant to provide support as they did previously. In addition, other extreme poverty programmes are reluctant to follow suit since the individual remains a beneficiary from another programme. As such, these households fall into a further state of destitution. Such a situation poses significant questions over efficacy over these extreme poverty reduction programmes and their ultimate goal.

Without stronger actions and efforts to mitigate dowry, programmes aiming to lift the extreme poor out of poverty may actually increase the vulnerability of households, with the potential to push them deeper into extreme poverty than ever before. Dowry is not a natural phenomenon, and we should not treat it like one.

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