BANGLADESH has time and again been failed by the legislature and the executive branches of subsequent governments, regardless of whether they came to power through free and fair election, ballot-manipulation, or bullet-mayhem. Time and again, Bangladesh has rest its hope on these two branches in its pursuit of democracy. The Judiciary in contrast remained relatively less talked about. Well, that was until the Supreme Court's Fifth Amendment verdict was delivered. And this time, our political discourse is even risking 'contempt of court' debating the pros and cons of its consequences.

However, the Indian Supreme Court has recently declared that fair criticism of judicial verdict is part of the fundamental right of freedom of speech. In the case of *Hari Nagra v Kapil Sibal*, the Court held that fair criticism must be encouraged as no one, 'much less judges', can claim infallibility. Given the judicial convention of getting influenced by opinions of neighbouring Courts, a standard evident in the Fifth Amendment verdict, this is encouraging.

With that in mind, this article discusses some pertinent matters concerning the Judiciary, using the controversial judicial history of the United States, where the Court not only holds a liberal view on contempt of court, but also has a long history to offer lessons for others.

Watching the watchmen

Ever wondered why the Judiciary has the guardianship to preserve, protect and defend the Constitution -- despite the fact that the Executive and the Legislature are elected representatives of the people?

Alexander Hamilton, whose writings are considered to be a primary source for interpretation of the US Constitution, has given the most eloquent answer to that question:

The judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.

What about people's representatives? He argued:

The Executive not only dispenses the honors, but holds the sword of the community. The Legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated.

Well, holders of the sword and holders of the purse did fail us before. But why is the Judiciary any different?

Hamilton continued:

The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment.

Indeed. Even the thought of being failed by the Judiciary was inconceivable to Hamilton.

But Bangladesh is not America. In *Shesher Kobita*, Rabindranath wrote:

The person with the chain binds the bird with it, by force. One without the chain binds with drug, illusion. The person with the chain binds, but does not hypnotize. The druggist binds, and hypnotizes too.

Taming constitutional dictatorship

To legalise illegitimate authoritarian rules, suspension and retrospective amendment of the Constitution has become all too typical.

Take a Turkish coup d'état for example.

Amid political uncertainty, through a coup d'état in 1980, General Evren proclaimed himself as the president. The military government then abandoned the Constitution, announced a series of laws, and introduced a new Constitution in 1982. An article was inserted into that Constitution prohibiting the Judiciary from prosecuting the military instigators of the coup. The Constitution was then 'legalised' through a referendum. After this so-called 'restoration of democracy', the military ruler got reappointed as the president of the country for the next seven years.

Sounds familiar?

Turkish scholar Ergun Özbudun defined this coup and subsequent transition to democracy as a 'textbook example of the degree to which a departing military regime can dictate the conditions of its departure'.

If the Executive takes the power by sword and then rigs the election to install a 'supposedly legitimate' puppet-Legislature; and using it, amends the Constitution at its own desire to become 'Constitutionally legitimate', then how do we prevent it?

To this end, the US Supreme Court introduced the *Judicial Review* of actions of the other two branches of the government. In the 1803 landmark case of *Marbury v Madison*, the Judiciary held that it has the right to review and question the validity of legislative laws and executive acts.

Did it work?