High Court Division verdict.

Then the petitioners appealed against the High Court verdict on the ground that while condoning, 'the High Court Division cannot pick and choose the provisions at its sweetwill' [sic] (p-19).

The Appellate Division upheld the High Court Division verdict, but expunged some of its observations and reverted a few decisions such as the issue of Bangladeshi identity. This time, however, establishment of Supreme Judicial Council by martial law proclamation was also condoned for being a 'more transparent procedure than that of the earlier ones' and for 'safeguarding independence of judiciary' (p-177).

Amid all the media controversies re the verdict, it is perhaps pertinent to recall another part of Lincoln's speech quoted earlier:

> "*while it is obviously possible that such decision [by Supreme Court] may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice*".

From Judicial Activism to Politicisation

There is no denying the opinion that the Judiciary shall not enter into politics. Judges around the world are also critical of *Judicial Activism*. But even Political Question doctrine fails to save judiciary from controversy when people are politically divided on supposedly non-political issues or when legal and criminal issues become subjective enough to constitute a political question.

So when Justice Thurgood Marshall, best known for his legal battle for American civil rights movement, was asked about his judicial philosophy, he simply answered -- 'you do what you think is right and let the law catch up'.

Though the Judiciary cannot endorse any political party, the judicial leanings of the judges -- conservatives or liberal -- are well known. And that well known reality has its implications. Appointing judges who are more likely to rule in ruling Executive's favour became a typical exercise. Over the past decades, appointments of Supreme Court judges have become contentious, intense and often politically hostile.

Justice Scalia's appointment is seen as one of the most successful appointments by the Republican Party. Over the last two and a half decades, Justice Scalia has not only offered most conservative interpretations of the Constitution, he also persistently opposed and fought to overturn women's abortion rights given in the case of Roe vs Wade.

One might hypothesise that in the long run, even the Basic Structure doctrine might get overruled in Bangladesh by a different panel of judges appointed by a different government.

Hamilton believed that the holder of the *Judgement* should never possess the *Sword* or *the Purse* to protect its integrity. Well, things have changed.

In November 1975, following grizzly massacres in Dhanmondi and the Central Jail, Justice Abu Sadat Mohammad Sayem, the first Chief Justice of Bangladesh, was made the President and Chief Martial Law Administrator of the country. In 1990, the Chief Justice was made the Acting President by our political leaders. The Eleventh Amendment of the Constitution was made to re-appoint the Acting President as the Chief Justice.

Then, through the Thirteenth Amendment, we made the Caretaker system of government permanent and reserved the Chief Advisor's position for the last retired holder of *the judgement* (that is, the head of the Judiciary).

Hamilton's concept of the Judiciary having 'neither force nor will' is obsolete in Bangladesh.

Here, the stakes are higher.

Notes

1. Hamilton, Alexander. 1788. "The Judiciary Department", The Federalist No. 78, First published in the Independent Journal Saturday on June 14, 1788.
2. Özbudun, Ergun. 2002. Contemporary Turkish politics: challenges to democratic consolidation. London: Lynne Rienner Publisher, p-117
3. Lincoln, Abraham. 1861. First Inaugural Address of Abraham Lincoln, March 4, 1861. Library of Congress.
4. The desegregation was not easy and President Dwight Eisenhower even had to send army troops to a school at Little Rock, Arkansas to get nine African American students enrolled.
5. Rhode, Deborah L. 1992. Letting the Law Catch up. Stanford Law Review, Vol. 44, A Tribute to Justice Thurgood Marshall (Summer, 1992), pp. 1259-1265

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