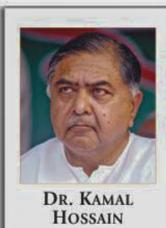


THE RULE OF LAW AND INDEPENDENCE OF THE JUDICIARY

# Vital for protecting people's rights



DR. KAMAL HOSSAIN

NOTHING touches the welfare and safety of a citizen more than his sense that he can rely on the prompt administration of justice. The rule of law therefore requires that the law must be applied impartially and effectively and not in a partisan manner or arbitrarily. This can only be achieved where the courts are independent and impartial.

Judicial independence in the purest sense connotes a situation where the members of the judiciary are appointed on the basis of their competence and are able to dispense justice in accordance with their oath of office and their own sense of justice free from any influence or pressure. These requirements are important for the rule of law, if judiciary is to function effectively without any fear of reprisals and dispense justice impartially. Appropriate provisions should be made for appointment and removal to be free from political interference.

The need for judicial independence in the dispensation of justice free from interference from other arms of the state is enshrined prominently in most written state constitutions and international conventions, such as Article 14(1) of the International Covenant on Civil and Political Rights, (ICCPR)1966, and Article 10 the Universal Declaration of Human Rights, (UDHR)1948. Since our judiciary is vested with the powers to interpret the Constitution, it is the custodian of this organic law and protector of the fundamental rights embodied in it.

In addition to national constitutional safeguards against judicial politicisation, countries in Europe, Africa and America also have supra-national mechanisms provided under the European Convention on Human Rights 1950, African Charter of Peoples' Rights 1982, and American Convention on Human Rights 1969, which buttress judicial independence against executive or other encroachments.

The rule of law requires the exercise of restraint on part of the executive as well as the recognition of the pre-dominance of law, binding all equally and with an obligation of state organs to observe established constitutional principles. In Bangladesh, though Article 94 of the Constitution directs that the Chief Justice and other judges "shall be independent" the Constitution expressly requires the state to ensure separation of the judiciary from the executive (Article 22).

In determining a nation's rank as a

civilised political society, no test is more decisive than the degree to which justice as defined by law is actually realised in its judicial administration. Only a judiciary that is both institutionally and functionally free from fear or favour in the dispensation of justice can ensure the realisation justice.

**INSTITUTIONAL INDEPENDENCE**

Institutional independence of the judiciary relates to the office of the judge while functional independence relates to the duties of the judge. For the judges to be independent and impartial in the dispensation of justice they must be free from any threat of insecurity which can compromise their independence and quality of justice. Therefore, the laws concerning their appointment and tenure of office, power of transfer and removal from office need to be clearly defined and strictly regulated so as to alleviate potential abuse or capricious use of powers by the executive. The high purpose for which the judiciary is established cannot be realised where there is lack of probity and freedom in the exercise of their functions. The existence of those necessary qualities depends in large measure upon the methods by which the judges are selected.

The means of appointment of the members of the judiciary is of paramount importance and should be done through some established system. In England, before appointing a judge the Lord Chancellor's office consults not only other judges but senior members of the Bar and others who may be in a position to provide reliable

strict scrutiny by the Senate Judiciary Committee who evaluate and ensure that the candidate possessed the necessary qualifications and competence for the post of a judge and their career and personal life can stand up to public scrutiny and earn public confidence.

As judges in Bangladesh are appointed not from a list of jurists with high legal acumen, integrity and independence prepared by an independent board or council, but at the discretion of the executive, favouritism and party political considerations can also influence the appointment of judges. In the worst scenario, partisanship or politicisation of the judiciary through appointment can be deployed under this system which can undermine the independence and integrity of the judiciary. There is wide consensus that a law should be enacted to prescribe the

been guilty of gross misconduct. Article 96 was amended by the Sixteenth Amendment enacted in 2014 which provided for removal by impeachment, through adoption by Parliament of a resolution supported by a majority of two-third of the total number of members. This enactment was held to be unconstitutional by a judgment of the High Court Division, which is at present the subject matter of a pending appeal in the Appellate Division.

**FUNCTIONAL INDEPENDENCE**

It is through ensuring independence of judges that the judiciary derives its legitimacy and continues to enjoy the confidence of the public in the administration of justice. Article 94(4) of the Constitution stipulates that "subject to the provisions of this constitution, the Chief Justice and other judges shall be

office to try the same case as a judge.

Further, the absence of an effective administration system for the judiciary coupled with the lack of a system for the management of the caseloads, allows excessive control over case processing by lawyers and litigants. With regard to the lower tier of the judiciary, the mode of the appointment and the training of the members of the lower judiciary are critically important to ensure the independence provided for.

The judiciary depends for its effectiveness on the public confidence that it enjoys. This was eloquently expressed by a distinguished US Supreme Court Justice, William O'Douglas, as follows:

"The judiciary has no army or police force to execute its mandates or compel obedience to its decrees. It has no control over the purse



PHOTO: DPLF.ORG

*In the absence of a functionally independent judiciary there can be no guarantee for the Rule of law in the country or protection of the citizens' fundamental rights enshrined in the Constitution.*

process for appointment of judges. The lack of the existence of a proper appointing procedure for judges, Bangladesh has exposed the institutional aspect of the independence of the judiciary to potential abuse.

Although under Article 95 the qualification requirements are expressly stated and is expressly provided for other qualifications to be prescribed by law, has not as yet been enacted for this purpose. Nor is there an institutional mechanism established for carrying out an objective assessment of the suitability and competence of a candidate and, therefore, of a proper evaluation of a prospective candidate for appointment to the high office of a judge is not under the current system.

Article 96 provided that a Judge can only be removed by the President after the judicial council (comprising of the Chief Justice and the two next senior judges) reports to the President after enquiry that in its opinion the judge has ceased to be capable of properly performing the functions of his office or has

independent in the exercise of their judicial functions". Thus the independence of the judiciary in Bangladesh is expressly declared and forms a basic pillar of the Constitution. Judges must not be seen to represent either the government or the interests of any particular group or individual, or be partisan. When that happens the judiciary loses its independence and public confidence in the administration of justice begins to suffer.

Under our current practice of appointing judges from the list of candidates recommended by the government there is no guarantee for the principles of functional independence of the judiciary. Such unfortunate scenarios are however, rare in other jurisdictions where failures in national systems are checked through supra-national regional mechanisms. In the case of *Peiasack vs. Belgium* 1982, the Europe Court of Human Rights held that Article 6(1) principle of "independent and impartial tribunal" (court) had been violated by the appointment a person previously working in the prosecution

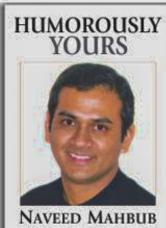
strings of government. Those two historical sources of power rest in other hands. The strength of the judiciary is in the command it has over the hearts and minds of men. That respect and prestige are the product of innumerable judgments and decrees, a mosaic built from the multitude of cases decided. Respect and prestige do not grow suddenly they are the products of time and experience. But they flourish when judges are independent and courageous."

To earn public confidence judges must, in the last analysis, have the moral and intellectual fibre which must sustain their own spirit of judicial independence.

In the absence of a functionally independent judiciary there can be no guarantee for the Rule of law in the country or protection of the citizens' fundamental rights enshrined in the Constitution.

The writer is Senior Advocate, Supreme Court of Bangladesh, an eminent jurist and one of the architects of the Constitution of Bangladesh.

## Lapbottom



HUMOROUSLY YOURS

NAVEED MAHBUB

I won't say Bangladesh is backwards, I would say that some air-lines/countries are backwards for still not letting passengers departing

from Dhaka to check-in online. So, I stand in line for a regular check-in, expecting nothing better than being confined to a middle seat. But it's the least of my concerns this time around as I notice the confusion among the ground staff on whether to allow me to carry my laptop into the cabin as opposed to checking it in. I'm sure there was a similar mass confusion among immigration officials at US airports right after Donald Trump's Travel Ban 1.0.

"Yes, your laptop has to be checked-in."

"But I'm going to London, NOT the US."

"Yes, you still have to."

Then another colleague of his says: "Wait, you're going to London? That WILL take place soon."

"Ok, so I don't have to check my laptop in now, right?"

"You can, if you want to."

"No, I DON'T want to."

So, for now, my inseparable laptop accompanies me to the cabin. But it's a given that whatever the US does, UK follows. The only exception is Brexit, where the US follows the UK with its own version of Brexit - Brain Exit from the Oval Office.

First it's water, then it's liquid gels, now laptops. What next? "Infants cannot be carried into the cabin and must be checked in"? Or eventually "Passengers must check themselves in as check-in luggage", which is fine - I can then work on my laptop in the cargo hold. I'll surely take some *kachchi biriyani* with me in there.

With the ban on the laptop as a carry-on item on flights to the US operated by Middle Eastern carriers and originating from the Middle East, one such carrier has come up with a marketing campaign: "Who needs a laptop



PHOTO: NAVEED MAHBUB

when you have our in-flight entertainment?" True, but for us workaholics who get all their work done on a plane, there should perhaps be a campaign: "Who needs a laptop, when you have the back seat for graffiti?"

Maybe now passengers will be forced to fly US carriers where the laptop is a necessary means of maintaining sanity from being fed peanuts and pretzels by pre-historic flight attendants.

So, the final checklist before boarding your flight for the US - passport, visa, dollar, laptop hard drive off and Facebook post: "#MakeAmericaGreatAgain". Speaking of which, I have a feeling that President Donald Trump believes that laptops are Muslims. "Believe me, laptops are bad *hombres!*" And then poor Sean Spicer is in the hot seat - after all, his job is to EXPLAIN Donald Trump!

Biman, capitalise on it! "Fly directly to London, do not pass [through] the Middle East, do not collect a baggage tag for your laptop."

Well, if it keeps the skies safe, I am fine with my laptop becoming my lapbottom - being relegated to the cargo hold in the bottom. I will then resort to finishing a novel on a long haul flight or actually try to sleep, as in the good old days of aviation. But the big question remains, how do you stop a lone wolf from driving into a crowd of innocent people before stabbing a cop to death? And even more alarming - as I arrive in London less than 24 hours after the Westminster tragedy, the Immigration official asks me just 2

questions while pointing to my arrival card:

"Is this the address of your hotel?"  
"No, it's my friend's place."  
"What's his nationality?"  
"He is a British citizen."  
"Welcome to the UK."

And I thought the maniac at Westminster was also a British citizen...

From the airport, I go straight to my comedy show where there is a mainstream British audience, ready to de-stress after a tragedy. And they laugh like they had never laughed before. Ah, now this service notice makes sense: "All terrorists are politely reminded that THIS IS LONDON and whatever you do to us, we will drink tea and jolly well carry on. Thank you."

And jolly well they ARE continuing BAU - Business As Usual.

London - stay strong, stay safe, stay resilient...

The writer is an engineer at Ford & Qualcomm USA and CEO of IBM & Nokia Siemens Networks Bangladesh turned comedian (by choice), the host of ATN Bangla's *The Naveed Mahbub Show* and ABC Radio's *Good Morning Bangladesh*, the founder of Naveed's Comedy Club. E-mail: naveed@naveedmahbub.com

*Biman, capitalise on it! "Fly directly to London, do not pass [through] the Middle East, do not collect a baggage tag for your laptop."*

**QUOTABLE Quote**

**the CRUEL BIRTH of BANGLADESH**  
Memoirs of an American Diplomat

Archer K. Blood

Excerpt from the *The Blood telegram* sent by Archer Kent Blood on April 6, 1971

Our government has evidenced what many will consider moral bankruptcy, (...) But we have chosen not to intervene, even morally, on the grounds that the Awami conflict, in which unfortunately the overworked term genocide is applicable, is purely an internal matter of a sovereign state. Private Americans have expressed disgust.

**CROSSWORD BY THOMAS JOSEPH**

**ACROSS**

1 Moola  
5 Make baskets  
10 Skating spins  
12 Consumed  
13 Pretend to be brave  
15 Mag. workers  
16 Crumb carrier  
17 Maiden name indicator  
18 Look over  
20 Crystal gazer  
21 Delaware capital  
22 Screws up  
23 Pueblo material  
25 Pouchlike parts  
28 Tin or tungsten

31 In --(stuck)  
32 Worn down  
34 Peaks: Abbr.  
35 Poem of praise  
36 Royal flush card  
37 Offer resistance  
40 Stood up  
41 Effort maker  
42 "-- is an island"  
43 Ticked off

**DOWN**

1 Copier need  
2 Oozed  
3 "Get a move on!"  
4 Winter bug  
5 Filling yarn  
6 Corn serving

7 Penitent person  
8 Furniture layer  
9 Keys in  
11 Didn't punish  
14 Constellation near Cassiopeia  
19 Sailor's cry  
20 Handle  
24 Deprived  
25 Chinese boat  
26 Music's Toscanini  
27 Usual practice  
29 Slow tempo  
30 Lewd fellow  
33 Raison --  
35 Frank  
38 Can. neighbor  
39 Apr. 15 org.

**BEETLE BAILEY** BY MORT WALKER

YOUR WIFE IS ON THE PHONE  
TELL HER TO CALL ME ON LINE 2  
WE DON'T HAVE A LINE 2  
THAT'S WHY I WANT HER TO USE IT

**BABY BLUES** BY KIRKMAN & SCOTT

THIS LIVING ROOM NEEDS TO BE PAINTED.  
YEAH, IT PROBABLY DOES.  
THANK YOU!  
WE'LL GET AROUND TO THAT, ONE OF THESE DAYS.  
YOU NEVER SEE THESE THINGS COMING, DO YOU?

**YESTERDAY'S ANSWER**

CAVE SHAFT  
IRAN TERROR  
VOLT RACINE  
I MEAN IT TED  
CATNAPS TAO  
GUIS GERE  
STALL GERMS  
TITLE GAM  
APT DOGSTAR  
GOO INSTYLE  
EVOLVE OPEN  
SENIOR NERD  
RANTS EATS