

Take the SC's comments to heart

It would be a mistake to see it as a judiciary vs. executive conflict

THE THIRD VIEW



MAHFUZ ANAM

GIVEN the fact that the current government has been able to effectively shut down all critical voices and sufficiently silence the media with highly repressive laws—namely the ICT Act—the full verdict of the Supreme Court (SC) judgement on the defunct 16th Amendment to the Constitution may come to the present rulers as somewhat of a shock. In it the SC made some very pertinent and insightful but critical comments on the present political and administrative situation in the country focusing on the failures of the executive branch.

Given our political culture and past experience, such comments are not likely to be taken well either by the government or by the party-line bound members of the parliament.

But what the Supreme Court said is far beyond a typical judiciary versus government tiff. In our view, it deals with some of the core values of our Liberation War and the fundamental structures of our Constitution that make Bangladesh a "Republic" in the real sense. The points made by the SC touch on what makes democracy functional and strongly criticise the deviations that threaten our achievements through decades of mass movement and the sacrifice of millions of lives in 1971.

Take the issue of "Check and Balance" as seen within the basic framework of our Constitution and which the SC found to be nonexistent in the present dispensation. Also, the observation that presently there is "no watchdog mechanism" at work.

Like every democratic constitution—and even some not-so-democratic ones—ours is based on a basic system of separation of powers between the various organs of the State: the legislative, the executive and the judiciary. To put it simplistically the first branch makes laws, the second runs the country on the basis of those laws and the third interprets whether the laws framed and the way the executive branch is implementing those laws fall within the scope of the constitution.

Of the three the executive branch, namely the government, is the most dynamic and active. It has to administer the country, collect taxes and provide the basic services to the people and do everything to protect their fundamental rights and provide opportunities for their prosperity. Its functions are highly complex and widespread, thus requiring constant

supervision and monitoring. Often a government tends to exceed its remit which necessitates all sorts of restraint provided by the other two organs.

In a parliamentary form of government, by the very design of things, there is a very close relationship between the legislative and the executive organs. It is only by holding a majority in the legislative branch that a government can be formed, and as such these two branches work in tandem as seen by the regular holding of parliamentary sessions—at least every two months in our case—in which, theoretically, all major plans, projects and actions of the government are scrutinised, a process by which a government is both praised or criticised. In a constitution that does not have Article 70 like ours and where an MP is permitted to vote according to his or her conscience, a parliament can vote out a government if it loses its majority support.

Through the passing of the annual budget after threadbare consideration; its ministry based Standing Committees; examination of the Auditor-General's report; discussion on various bills; the question and answer sessions of the prime minister and other ministers; and, most importantly, open debates on the floor of parliament, the legislative branch is mandated to supervise

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the executive and keep its actions accountable.

Alas, we know it does not happen like that, and it is this fact that the SC is pointing out.

Instead of keeping the executive accountable, the legislature, in our case, appears to think that its sole task is to praise the government and criticise whosoever dares to criticise the government. The vital



discussion on the annual budget has seldom asked why cost overruns and project delays are norms rather than exceptions. Why have scandals in Sonali and Basic banks, or the Bangladesh Bank reserve swindle, or the persistent phenomenon of bank default which seems to be growing every year, never found effective attention in the parliament from our "peoples' representatives" as if it all happened in some other land, not in ours?

If we recall Lord Acton's famous saying that "Power corrupts, and absolute power corrupts absolutely," then we can clearly see the justification of some other observations of the Supreme Court such as "rampant corruption" and "plague-like greed for power."

One particular comment of the Supreme Court which our lawmakers are not likely to take kindly to is that our "parliament is dysfunctional." It is quite possible that all hell may break loose with our MPs accusing the SC of insulting the parliament and trying to undermine people's representatives and thereby democracy itself and the like.

Yet, this particular comment, as distinct from all others, should lead to a very serious introspection by our parliamentarians because it directly deals with their activities.

Struggle for an effective parliament dates back to our Pakistan days. It took Pakistan nine years to make its first constitution in 1956, and then it took two years to abrogate

it through General Ayub's martial law. The first truly free and fair national election in Pakistan was held in 1970, 23 years after its birth, in which Bangabandhu won a majority. Parliament was not allowed to sit as scheduled and the rest is history.

After 1971, we had our first parliament in 1973 but our experiment with democracy was destroyed with the brutal murder of the founder of our state, Bangabandhu.

It was only in 1991, with the fall of the autocratic rule of General Ershad and the restoration of democracy that we relaunched our parliamentary experiment which, we can proudly say, has been in place for the last 26 years.

However, the sad truth is that we have not been able to establish a robust tradition of contested democracy as we should have had. Much of that time was consumed by boycotts by the opposition that would start with occasional "walkouts" then months of "boycott" and finally "resignation" from the House altogether. Our relentless writings that parliament is the "House of the People" and not of the government and that boycotting it or resigning from it means betraying the very voters that elected them, fell on deaf ears of both the parties that dominated our politics and shared power since 1991—namely the AL and the BNP.

The net result was that without an effective opposition—in fact none whatsoever most of

the time—no tradition of debate, accountability or monitoring the government or playing any sort of "watchdog" role developed.

The parliamentary opposition mostly played the "opposition for opposition's sake" game and always appeared to prefer street agitation to a robust accountability process within the House.

So the Sangsad, instead of becoming the centre point of institutionalising democracy, became the centre point of reckless and meaningless opposition-bashing on the one hand and sycophancy on the other, and never the "watchdog" that it was meant to be.

Normally, many of these points raised by the SC would have been forcefully presented by the media. That situation, I am sad to say, no longer exists. In these circumstances the Supreme Court's full verdict stands as the most authentic and comprehensive *tour d'horizon* of the present situation. It may be hard to accept, but honest judgements usually are. We hope that instead of a knee-jerk reaction, the present ruling leadership will see the merit of the criticisms made and do their own homework so that all the vital organs of our constitution can work together and establish a functional state under law in this beautiful and extremely challenged country of ours.

Mahfuz Anam is Editor and Publisher of *The Daily Star*.

LEST WE FORGET

A judge of the highest standing

DR KAMAL HOSSAIN

WE can recall with respect that Justice AB Mahmud Husain was the second chief justice of Bangladesh, immediately after the constitution of the Supreme Court. Thereafter, following the adoption of the Constitution and after the Supreme Court formally assumed the role of the guardian of the Constitution, Justice AB Mahmud Husain presided over the Supreme Court as chief justice from November 18, 1975 to January 31, 1978.

He had earned respect from all quarters as the assistant government pleader from 1952 to 1956 in the High Court of East Pakistan. He was also the advocate general of East Pakistan in 1964. He was then elevated to the High Court Division on January 18, 1972. He was widely respected as a civil lawyer of high standing.

As a chief justice, the majority of his judgments were delivered on matters of constitutional law. He had always stressed on the importance of the rule of law, social values, and doing justice to the common people. In a reception ceremony after his

appointment as the chief justice of Bangladesh, Mahmud Husain made a wise utterance saying, "The rule of law could find full expression only in society conscious of human values. For this, love for the juniors, respect for the elders and fellow feelings for the equals were needed".

He always sought to serve the public interest and was sensitive to the sufferings of the unprivileged members of the society. He helped to secure justice for all through his numerous insightful and well-reasoned judgments. As a judge he had delivered many judgments making important pronouncements on the points of law. In one of his landmark pronouncements, Bangladesh Small Industries Corporation, Dacca v. Mahbub Hossein Chowdhury 29 DLR (SC) 41, he decided that the employees of a statutory corporation are neither in the service of the Republic nor are to be treated under the general principle of master and servant, but their service has a public character regulated by statutory provisions, and they cannot be dismissed from service without giving them an opportunity to be heard. In another seminal judgment, M/S E.P. Lamps Ltd. Dacca v. Pakistan and others 27



Justice AB Mahmud Husain

DLR (AD) 147, he decided that objection to the abatement of the appeal for non-service of a notice on the government, though was served on the attorney general, is a technical one and must fail.

He always sought to ensure the rights of

Justice Mahmud Husain was mindful of the role of lawyers in doing justice to the people and success of the judiciary. In this regard, he said that the cooperation of the lawyers' community is essential for the success of the judiciary which is the custodian of the rule of law.

of depriving the people from their homeland nor can we deprive anyone from their natural resources, far less from enjoying the water of the natural resources."

During his tenure as chief justice, he had emphasised on the need for establishing the rule of law and a legal aid system. In this regard, he observed, "In an overwhelmingly poor country like ours, the value of the efficiency of the rule of law will prove futile without an appropriate legal aid system".

Justice Mahmud Husain was mindful of the role of lawyers in doing justice to the people and success of the judiciary. In this regard, he said that the cooperation of the lawyers' community is essential for the success of the judiciary which is the custodian of the rule of law. The judiciary can discharge its duties properly only with the cooperation of dedicated and honest lawyers. He also used to remind lawyers of their professional duties towards society and the service of justice.

According to him, "lawyers should lead people towards attaining, establishing, and doing justice".

Dr Kamal Hossain is Senior Advocate, Supreme Court of Bangladesh, an eminent jurist and one of the architects of the Constitution of Bangladesh.

A WORD A DAY

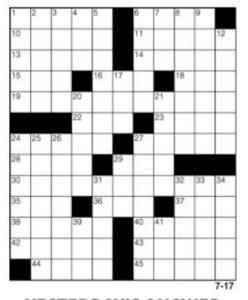


ELISION
noun

An omission of a passage in a book, speech, or film

CROSSWORD BY THOMAS JOSEPH

- ACROSS**
- 1 Benjamin of "Law & Order"
 - 6 Pub pints
 - 10 Scoundrel
 - 11 Takes a break
 - 13 Friendly seniorita
 - 14 Open, as a pill bottle
 - 15 Kilmer of "The Doors"
 - 16 Feeding-time protector
 - 18 Gorilla, for one
 - 19 # 1 hit for the Osmonds
 - 22 In the past
 - 23 Woodwind part
 - 24 Mecca folks
 - 27 Docking spots
- DOWN**
- 28 Not wild
 - 29 Amusement
 - 30 # 1 hit for Mariah Carey and Boyz II Men
 - 35 Neither follower
 - 36 Flow out
 - 37 Poem of praise
 - 38 Musical set in Argentina
 - 40 Singer Ronstadt
 - 42 Home design
 - 43 Title holder
 - 44 Tampa Bay team
 - 45 Flies high
 - 1 Cheering word
 - 2 Caesar, for one
 - 3 Like gymnasts
- 4 Pull gently**
- 5 Brewing pouches
 - 6 Antilles resort
 - 7 Writer Deighton
 - 8 Manhunt target
 - 9 Desk accessory
 - 12 Goes 80
 - 17 Wedding words
 - 20 Newborns
 - 21 Use block letters
 - 24 Made amends
 - 25 Went too long
 - 26 Uncle Sam's home
 - 27 Hopi homes
 - 29 Pres. Day mo.
 - 31 Puts on
 - 32 Disco's Summer
 - 33 Venomous snake
 - 34 Decade parts
 - 39 Plaything
 - 41 -- Jim



YESTERDAY'S ANSWER

MEMO ABLE
CAROM MEETS
AKRON IDAHO
LEADING PAN
LIT BEADING
STAYUP ONES
ASTOR
CHER URSULA
HEADING NIN
ARS READING
NOTRE NITES
TIEON INERT
CREE CODS

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