"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH ● dslawdesk@yahoo.co.uk

OUR JUDICIAL STYLE

LAW OPINION

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"STYLE is the image of a character"-- Edward Gibbon once intuitively put it. In judicial context, I mean it to refer the judicial process, the judges and their articulation and their way of presenting the facts and issues in a given case. Judicial style in Bangladesh is a less talked subject. It is so much less talked that one wonders whether we have got a judicial style at all. As a matter of fact, judicial style involves questions of public importance. For example, in the recent past, we have debated about the desirability of writing a judgment after a judge retires. The issue broadly was one of judicial style.

In the first place, the length and prolixity of judgments in Bangladesh should invite our attention. The people have interests, and arguably a right, in getting judgments which would be precise and lucid. I propose to call it 'linguistic justice' that better serves the purpose of knowing the law. The judges do supply fresh blood to the skeleton of legislative enactments through the device of statutory interpretation. In so doing, they should mean something for the justice seekers. Sadly, our judgments are full of complex sentences. They are often precarious, and at times, compromise one of the requirements of rule of law—certainty. They make the readers walk along the crisscross chariot of judicial opinions in a desperate search for the treasure trove—the ratio decidendi, that is, the reason of arriving at the decision concerned. Therefore, we need to consider what should and can be done about it.

It seems there is a steady and unnecessary increase of voluminous judicial opinions over the years. I feel sorry for the lawyers that they are to get the printed copies and preserve them for the future legal battle to prepare their submissions. At times, the reader may lose the logical flow and coherence of a judgment. *Abdul Quader Mollah case* (2013) offers a good illustration, where the Appellate Division spared 790 pages for three opinions. Having gone through this case, I got the impression that it could have been written in 200 pages without compromising the quality of the judgment. I also share the same feeling about the much-talked *13th Amendment case* (2011) and *16th Amendment case* (2017)

comprising judgments of 747 pages and 799 pages respectively. The readers, needless to say, feel comfortable with the richness of interpretation that a judge has to offer. They hardly care about the length of the judgment.

An issue related to this point is the practice of judicial dissenting. The dissenting opinions in our case law are fewer. Most judges tend to concur. I am not sure—why. Is it because they simply agree with their judicial colleagues, or they want to pass their burden onto others, or they love to submit themselves to the personality and/or collegial influence of the leading judge, or do workloads compel them to concur?

Even in constitutional judgments of great importance, there are either no dissents or separate opinions. In the *8th Amendment case* (1989) each of the majority wrote own opinion, which increased the strength of collective reasoning. In contrast, the *16th Amendment case* offers us an artificial sense of unanimity in the garb of separate opinions. Unanimous decision is sometimes preferred as the court may want to send a clear message to the justice seekers. The bad side of this idea is that it buries and blurs the differences and masks the complexities of the litigation. Therefore, the idea requires further expounding from researchers and jurists. Dissenting opinions help develop a strong communicative function of law, though they remain devoid of legal bites for the time being. They also remove the doubt of political influence that might have practised upon the judges. Moreover, dissenting opinions strengthen the merit of judicial culture and heritage. Justice ATM Afzal's powerful dissenting opinion in the *8th Amendment case* (1989) still holds relevance to consider whether the HCD benches need to be convened in different parts of the country without offending the unitary nature of the State. We will have to encounter this question today or tomorrow. The dissenting opinions of Abdul Wahhab Miah J. in the *13th Amendment case* and *Mollah* and Justice M. Imman Ali's dissent in the *13th Amendment case* are mighty deliberations. The separate opinion of Moazzam Husain J. in *Jamat-e-Islami Registration* (2013) is also illuminating. Therefore, I should say that a collegiality of shared burden is required to expedite and enrich the process of judgment writing.

Another important point to look at is what our judges are reading and referring to. For, this issue is aligned with the philosophical differences between "law as will" and "law as the reason". In the *16th Amendment case*, SK Sinha CJ has referred a plethora of foreign academic sources in asserting judiciary's power over the parliament. This reflects that judicial attitude towards academic works has changed a lot. However, academic-judicial cooperation is still a less explored area in our country, use of which may augment competitive nature of our judgments internationally. Let us remind that no academic was called as amicus curiae in the *16th Amendment case*, where lawyerly wisdom prevailed.

A close look at the war trial cases (decided by the ICT-BD and the AD) also reveals that the judges have referred to a wide body of external literature apart from the case law and statutes. In one sense, it is good, but, in another sense, it may give rise to controversy if the external sources are not properly contextualised within the framework of facts and controversies of a given case. Justice AHM Shamsuddin Chowdhury's judgments in the *7th Amendment* (2010) and *Mollah* (2013) accentuate this qualm. Moreover, the increasing trend of the judges in citing foreign authorities requires a second thought. We need to read the pains of millions of Ram-Rahim-Johns instead of worshipping Marbury-Madisons and Donoghue-Stevensons. However, we should have a close sight of legal and judicial developments in other South Asian jurisdictions to sharpen our own ability to shape a native jurisprudence. Added to this, the number of case law to be cited in a given litigation and the present utility of the cases cited are also relevant factors in controlling the length of judgments and mastering judicial competence.

Last but not the least, we should not overlook the pattern of our law reporting and reference. It is good that the Supreme Court has started publishing judgments online. But the website of the Court is frustratingly poor and inadequately data-based. It is almost impossible for independent researchers (i.e. who do not already know about the case they are searching for) to navigate the website for judgments. The digitisation project of the Supreme Court has not been able to challenge the monopoly of the private publishers. Judicial opinions are public property. As such, the concept of people's sovereignty demands that they should not be the subject of the commercial monopoly of private bodies.

For the cause of free thinking and legitimate judicial decision-making, the issues raised here are to be explored. The work of a judge is also an art. It is not an innovation, it is a creation. It should not only contain information of what was going through a judge's mind while he or she was trying a case, rather it also should be stylistically attractive to guide a comparative lawyer or a student of law or even a non-law folk to understand the reasons of the decision.

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LAW INTERVIEW

TEN YEARS OF SEPARATION OF JUDICIARY

and the state of judicial independence

*Md. Masder Hossain served the subordinate judiciary for long 35 years and retired as District and Sessions Judge in 2017. He was one of the petitioners in the leading case of Secretary, Ministry of Finance v. Md. Masder Hossain and others (1999), in which the Supreme Court of Bangladesh required the Government to implement the long awaited separation of the judiciary. The spirit of this constitutional case was finally accomplished on November 1, 2007 when the lower criminal judiciary was separated from the executive. Ten years after the separation of the judiciary, **Emraan Azad** and **Psymhe Wadud** from Law Desk talk to Md. Masder Hossain on subordinate judiciary's separation and independence issue.*

Law Desk (LD): How did you get involved in *Masder Hossain Case*? What was the context?

Md. Masder Hossain (MMH): I started my career as an Assistant Judge (then Munsif) in Shonatola Upazilla of Bogra. At that time we were delegated with the powers and functions of First Class Magistracy. Even though we are a separate organ of the State and are delegated with one of the most significant responsibilities of the State, we were grossly neglected. In this backdrop, a group of like-minded judicial officers from North Bengal drafted a resolution and sent the same to the Bangladesh Judicial Services Association (BJSA) with an aim to bring about a change in the status-quo. This was basically the context. After a period of time, I assumed the post of Secretary General of BJSA and tried to convince the judges across the country to come forward. In the meantime another important thing happened. The pay scale for the Administration Cadre was increased in 1989 (vide an Official Gazette Notification of 12.07.1989).

However, the pay scale for the judicial officers remained unchanged. Similarly in 1991, the pay scale for the Additional District Judges was decreased in comparison to that of other officers of the identical rank. Thus, the judicial officers were discriminated in respect of their pay scale. One of the judges posted in Khulna, as an expression of protest, stopped drawing his salary for consecutive 18 months. He was the first person moving the High Court Division (HCD) with a writ petition. Upon recurrent applications sent to the Secretary of the Ministry of Public Administration, a committee was formed in order to revisit the discrimination alleged by us. That committee submitted a recommendation and thereupon, on 8 January 1994, the pay scale for several judicial posts was reassessed. However on 28 February 1994, vide another Gazette Notification, the pay scale for only the judicial officers was again changed and brought back to its previous position (by annulling the notification of 1994). A financial advantage once given cannot be taken away without any gross illegality, involved therein. And hence the third Gazette Notification was against rules and laws.

We again tried to draw the attention of the Ministries of Law, Finance and Public Administration. They didn't pay any heed to our demands and we embarked upon a new journey of protesting in a peaceful way. We wore black badges and declared an hour long *Kolom Biroti* (not performing official duties out of protest) for two consecutive days. Unfortunately our black gowns and black badges complemented each other so well that we failed to draw mass attention. Moreover, the media as well wasn't as vigilant as we see it today. It was BJSA which finally decided to file a writ petition.

LD: Do you think that the control and management of the subordinate courts vested upon the President under Article 116 of the Constitution contradicts with independence of the judiciary?

MMH: To understand the issue of control, Articles 116 and 109 have to be read together. Under Article 109, superintendence and control of all subordinate courts and tribunals vest in the HCD. However, Article 116 determines the area of 'control' and goes on to say that the power of posting, promotion and grant of leave and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President. In my opinion, this provision, as it stands, doesn't contradict with the idea of independence. We have to remember that the appointing authority is the President and not the Chief Justice. The one who appoints, should be vested with the power to do other things ancillary to the appointment. Asking the Supreme Court to decide on its own is not wise at all. The President is not the head of the Government in power. He holds de jure importance as the head of all three organs of the State. The power is not exercised by the President alone. Consultation with the Supreme Court is mandatory under Article 116. Since there is a provision of such consultation, I don't find it contradictory with independence of the judiciary.

LD: How do you assess the significance of 'consultation with the Supreme Court' as mentioned in Article 116?

MMH: As I have already said that consultation is mandatory. So, it has constitutional significance. In this context, however, the Supreme Court should not be equated with the Chief Justice. What I mean is that consultation must be taken place with the Supreme Court. Now the question is 'how'. Upon taking decision regarding posting, promotion, grant of leave and discipline, the President sends a note through the Law Ministry to the Supreme Court asking for its opinion thereon. The Supreme Court through the General Administration (GA) Committee sends its opinion either negating or affirming the decision or opinion to any other effect. The final decision however is taken by the appointing authority, i.e. the President.

LD: Does the judiciary, while working independently, have any accountability?

MMH: There is a misconception that independence is equal to going beyond accountability. The judges themselves are not above law. Neither are they there without accountability nor is this what we advocated for, when we talk about independence. There are a number of institutional checks for doing justice by changing decisions of the judges. The concept of accountability of the judges is different. A person, aggrieved by the decision of a judge sitting in the lower tier, can go for an appeal or revision of the same. This too is one sort of accountability. The judges sitting at different tiers of the judiciary have accountability to themselves and also to the common people asking for justice. If illegality, gross negligence or bias is found by the higher tier, necessary order shall follow. The matter shall be recorded in the Annual Confidential Report (ACR) and the judges with bad or undesirable ACRs may rarely be considered for promotion. Within this existing framework, the idea of complete absence of accountability is a myth and the same is not at all desirable.

LD: After a decade of separation of the judiciary, how do you see the state of judicial independence in the post *Masder Hossain* context?

MMH: Article 22 of our Constitution can be traced back to the 21-Point Programme objectives incorporated in the election manifesto of the United Front in 1954. Among the 21-point demands, separation of the judiciary from the executive was the 15th. However, the State only ensured the insertion of that objective in the Constitution but did nothing to implement the same. In the words of Justice Md. Hasan Amin who decided *Masder Hossain Case* in the HCD, the judges are not employees; they exercise the sovereign judicial power of the State. We are separated without certainty of tenure and other conditions in their strictest sense. And this indeed is not enough. The concepts of independence and impartiality of the judiciary are interdependent. None can sustain without the other. Impartiality is a state of mind and independence of the judiciary is both a state of mind and a particular status. The Government in power has indeed worked in favour of judicial service through the creation of posts and increase of pay scales. Still one judge in the subordinate court shares his *Ejlash* (court room) with three other judges. Independence doesn't only mean separation. It implies the ability to adjudicate disputes without any interference or fear, it implies certainty of tenure and economic independence.

LD: Thank you for your time.

MMH: You are welcome.

RIGHTS CORNER

Universal Children's Day 2017 celebrated

TO celebrate each year on November 20th, the United Nations Universal Children's Day was established by resolution 836(IX) of 14 December in 1954. It was made an international day of observance with an aim to promote international togetherness, awareness among children worldwide, and improving children's welfare.

November 20th is an important date for two reasons: (a) it is the date in 1959 when the UN General Assembly adopted the Declaration of the Rights of the Child; (b) it is also the date in 1989 when the UN General assembly adopted the Convention on the Rights of the Child.

According to UN, "The Convention, which is the most widely ratified international human rights treaty, sets out a number of children's rights including the right to life, to health, to education and to play, as well as the right to family life, to be protected from violence, to not be discriminated, and to have their views heard."

This year of the theme of this Day was 'It's a #KidsTakeOver'. To celebrate this year's Universal Children's Day, UNICEF hosted children from around the world taking over key roles in media, politics, business, sport and entertainment to voice their support for millions of their peers who are unschooled, unprotected and uprooted on 20th November.

The Day has been observed as a day of activity devoted to promoting the ideals and objectives of the child rights charter and the welfare of the children of the world.

Universal Children's Day offers each of us an inspirational entry-point to advocate, promote and celebrate children's rights, translating into dialogues and actions that will build a better world for Children. On the basis of the Convention on the Rights of the Child and joint effort by all the countries and regions, as the UN urged, let us promote and celebrate children's right on the Universal Children's Day, and continuously build up a friendly environment for children in the world through dialogue and actions.

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