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Independence of judiciary: CA debates and later developments

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The judiciary of a modern state is assigned with the responsibility of ensuring the rule of law, human rights, and administration of justice. In developing democracies like Bangladesh, its higher tier (e.g. the Supreme Court) is often confronted with an additional challenge of strengthening constitutional order that is threatened by autocracy, intolerant political culture, and derogation from human rights norms.

The framers of the 1972 Constitution of Bangladesh were evidently aware of this immense importance of the judiciary. The constitution was based almost entirely on the bill prepared by the Constitution Drafting Committee headed by Dr Kamal Hossain. This committee published a brief report while submitting the bill, for its approval, to the Constituent Assembly (CA) of Bangladesh in 1972. In that report, among other things, it highlighted the significance of the independence of judiciary and its separation from the executive in ensuring rule of law, democracy, and human rights.

During the Constituent Assembly debates on that bill, Syed Nazrul Islam, an influential member of the CA, described independence of judiciary as the most important component of democracy. Mansur Ali, another equally important member of the CA, noted that provisions had been made in the constitution so that the judges would be able to function without fear and greed.

The importance of the judiciary in particular in human rights issues was underscored when concerns were raised by Suranjit Sengupta, Manebendra Larma, and some other CA members about the constitutional provisions that authorise the parliament to make law imposing "reasonable" restrictions on the enjoyment of fundamental rights. Kamal Hossain argued that the intention was not to make ways for imposition of "unreasonable" restrictions, and in such cases, the judiciary would intervene to declare such laws as invalid and inconsistent with the constitution. He also observed that the Higher Judiciary was given full independence and authority to make any appropriate order to enforce fundamental rights.

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The 1972 constitution itself ensures the authority and independence of the judiciary in a number of ways:

a) Independence of the judiciary is addressed as one of the fundamental principles of state policy in Bangladesh Constitution, and in accordance with its Article 8(2), this principle could be applied in interpretations of the constitution on relevant issues and in making laws for furthering the independence and authority of the judiciary.

b) The constitution itself made a number of provisions to curtail the influence of the executive over the lower judiciary (subordinate courts). Article 115 provides that the president will make appointments of the district judges "on the recommendation of the Supreme Court" and of other trial court judges in accordance with rules made by him "after consultation with the PSC and the Supreme Court." Article 116 provides that the control including the power of posting, promotion, grant of leave and discipline of the lower judiciary judges, shall be vested in the Supreme Court. During the CA debates, Kamal Hossain recalled, "We have seen in the past how the executive exerted its influence on the judiciary just because it was under the executive. At the time of Ayub, one district judge issued an injunction against the government; consequently, he was transferred to Sandwip (a remote island). In order to stop it, we made provisions in (Articles) 114 and 115."

Later in 2007, in response to the High Court directives in the Masdar Hossain Case, four sets of legislation were made which, among other things, established an independent recruitment procedure and a separate pay commission for the lower judiciary judges, and enhanced institutionalisation of the authority of the Supreme Court in regard to regulating and controlling their service conditions.

c) As for the higher judiciary, Article 94(4) of the constitution guarantees the functional independence, Article 102 confers the authority to oversee and evaluate the action of the executive or evaluate the constitutionality of any law, and Article 112 makes it obligatory for all executive and judicial authorities to act in aid of the Supreme Court. Further, special provisions for appointment and removal of the Supreme Court judges were made to ensure that they would work without fear, greed, and influence. The CA, however, declined to accept a proposal by Suranjit to make recruitment in the higher judiciary only from the trial court judges, as according to him, the provisions for appointments from the High Court lawyers could be utilised by the incumbent governments in politicising the judiciary.

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Despite the promising beginnings and high hopes expressed in the CA debates, the subsequent journey of the judiciary was hindered by a number of regressive measures over the last 50 years. Among these, the provisions for consulting the Supreme Court in framing rules for entry-level recruitment in the lower judiciary and in the appointment of district judges were deleted, and the President (in effect, the Prime Minister) was given the control of the subordinate courts, subject only to consultation with the Supreme Court.

The Higher Judiciary itself was not spared from adverse measures. The scope of exercising its authority for enforcing fundamental rights was curtailed by subsequent constitutional amendments, which paved the way for making black laws, anti-human rights amendments, and proclaiming emergency provisions, although the framers of the constitution boasted of the absence of such provisions in the 1972 constitution.

The ruling governments also undertook a number of measures to exert more control on the Higher Judiciary by taking advantage of the absence, inadequacy or ambiguity of constitutional provisions on matters such as qualifications for High Court judges, confirmation of those judges, formation of benches in the High Court, appointment of the Chief Justice. etc. Consequently, we have seen various allegations of appointment of partisan and less competent judges, a developing practice in the higher judiciary of expressing embarrassment to hear politically sensitive petitions against the government, and its reluctance to question the constitutionality of laws that are misused by the government to shun human rights activism.

Over the years, misusing the constitutional mandate of "controlling" the lower judiciary, successive governments have compromised the independence of lower judiciary as well. This is more evident in the increasing instances of disallowing filing of cases against ruling party political cadres, refusing to grant bail to dissenting voices, and failing to ensure speedy disposal of those cases.

Overall, the invasive control of the executive over the entire judiciary has adversely affected administration of justice, accountability of the authorities, and consolidation of democracy.

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In this context, it has become imperative to revive the high hopes of 1972 regarding the impact and independence of the judiciary (and implementation of other principles such as representative democracy, socialist economic order, and secularism). It is undeniable that the independence of judiciary still remains a constant struggle in many parts of the world. In the sub-continent, countries such as India, which has a stronger and longer democracy, are still learning from the inadequacies in ensuring judicial independence.

Bangladesh lacks more in legal framework as well as in practice in establishing such independence. In order to establish a strong, independent and pro-people judiciary, we need to recollect and realise the aspirations and directives of the CA on the judiciary. We also need to look out for the best practices around the world. Over the years, a number of such good practices has developed, which includes independent appointment procedure of the higher judiciary judges, collective authority of senior judges in establishing benches, developing and complying with a strict code of conduct, etc.

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Constitutional Law of Bangladesh

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which led the Supreme Court to declare it "illegal and unconstitutional" in 2010, followed by the 15th amendment annulling this amendment and the caretaker government system in 2011.

The 15th amendment has inserted two new provisions, articles 7(a) and 7(b), to prohibit the usurpation of governmental power through extra-constitutional means, abrogation or suspension of the Constitution, and amending the basic structure provisions of the Constitution.

The wisdom behind these prohibitions may not be gainsaid if looked through the lenses of the history of violent and unconstitutional military takeovers that stultified the normal operation of constitutionalism. Are these provisions alone capable of preventing potential future unconstitutional takeover? Admittedly, good government affairs may well be matters for the public and civilian domains. A minimum standard of political behaviour as a precondition of good government is a legitimate expectation of the people. Civilian politicians, in government and opposition alike, must be obliged to represent the shared hope and aspiration of the people and serve the best interest of Bangladesh, not the political parties to which they belong. Political party governments and their parliaments are not free from the accusations of tempering with the Constitution through amendments to serve their party interest and to stay in power. The opposition political parties have abandoned their constitutional responsibilities and electoral mandates by boycotting elections and parliaments to pursue their political agendas. It is unfathomable how the political ideology, idea, policy, and affiliation of some politicians change overnight to join the political party in power (turncoat politicians). This practice is an abusive exercise of freedom of association as it is often intended to achieve selfish personal gains. These political practices disrupt and impair any predictable political and stable constitutional order. If the political process and practice fail to provide a stable democratic institution through which the people are free to elect governments at regular intervals, the possibility of unconstitutional access to power may be difficult to avert. The blanket prohibition under the 15th amendment not only outlaws unconstitutional access to power, but is also a wakeup call for political parties and politicians to act constitutionally and not to use the Constitution as a political ploy to maximise their vested interests.

In a parliamentary democracy, parliament's oversight of the executive and judiciary requiring their powers to be exercised within the constitutional limits and accountable to the people remains to be realised. Parliament has become the law-making organ of the executive, which is also reluctant to relinquish its control over the judiciary. This control persists notwithstanding the explicit constitutional requirement for the separation of the judiciary from the executive and the Supreme Court's mandatory (Arts 102, 112) directives in Masdar Hossain case in 2000-2001. The 12 directives to the executive for the separation remain unheeded. It is this de facto political leverage, public unaccountability, and legal exoneration of vast empire of executive domain of powers encompassing parliament and the judiciary that have hamstrung the normal functioning of the constitutional separation of powers with appropriate checks and balances between the three main government organs. The two structural pillars of the Constitution, the parliamentary democracy and separation of power with checks and balances between the three principal organs, are yet to be fully materialised.

Despite ongoing parliamentary democratic orientations since 1991, there have been instances of dilution of this character of the Constitution. Any perception that parliament is a sovereign law-making body and a touchstone as if anything it touches becomes law regardless of unconstitutionality is misconceived and reverses the supremacy of the Constitution embodied to ensure the hierarchy of constitutional law in all spheres of the Republic. The parliamentary law-making authority, however passionately and widely construed, must remain within the constitutional bound and legislation; beyond this bound, it suffers from legitimacy crisis, exemplified by the invalidation of the 5th and 7th (martial law regimes), 8th (decentralisation of the Judiciary), 13th (caretaker government) and 16th (under review on the removal of Supreme Court judges) amendments by the Supreme Court under its judicial review power.

Confrontational politics, parliamentary opposition from government coalitions, opposition MPs as ministers, lacklustre ministerial responsibility, floor crossing ban for party-elected MPs, parliamentary committees dominated by government MPs, questionable electoral process, and political corruptions are some of the practices that militate against responsible good governance in parliamentary democracy. The co-existence of non-justiciable "secularism" with justiciable "state religion" in the Constitution is arguably polarised where the former may have to give way to the latter should a conflict arise between their priority in enforcement. This is in marked contrast to the "secularism" in the 1972 Constitution that Bangabandhu endorsed and campaigned as indispensable for communal harmony in Bangladesh. The progressive development of constitutional law during 1972-2022 calls for reforms of parliamentary practices and political standards which are imperative for the Constitution to navigate its journey beyond 50 years.

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