Executive-Judiciary Relations in Bangladesh

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Abstract: One of the important problems confronting the modern state is to identify the way(s) to balance the relations between different branches of government. Everywhere the executive has become interventionist, assuming responsibilities for functions traditionally considered to be the preserve of other branches. This intrusion is more noticeable in lawmaking than in the judicial process. It is not uncommon to find a legislature, especially in Westminster systems, accepting the domination of the executive government as natural. But the judiciary does not always accept attempts by the executive to intrude into its domain cap-in-hand. Experience shows that the judiciary not only seeks to provide some kind of deterrent against the arbitrary exercise of power by the executive; it may also issue directives *suo moto*, requiring the executive to undertake things that it does not want to do. The extent to which the tendency of the executive to dominate the judiciary and the attempt by the latter to assert its independence clashes with each other is difficult to ascertain.

Key words: Bangladesh, executive, judiciary, relations

This article examines the nature of relations between the executive and judicial branches of government in Bangladesh, identifying specifically the extent to which the two look on each other as adversaries or allies. It provides a few cases of conflict between the two, exploring the reasons that have caused them and examining the way(s) these conflicts have been resolved. The article

also seeks to identify the implications of the conflict between the two branches for the consolidation of the nascent democratic system. One thing to be mentioned here is that the judiciary can help the executive undertake measures that it finds difficult to adopt, at least politically, if not legally. On the other hand, strong judicial activism may clash with the intention/ability of the executive to become proactive. In other words, the rise in judicial activism may become an important source of irritation for the executive, leading to conflicts between the two. What is needed is some kind of balance between judicial activism and executive assertiveness, a task that appears to be very difficult to achieve.

The Judiciary in Constitutional Framework

The judiciary formally enjoys an important position. Article 22 of the constitution of Bangladesh, the supreme law of the land, provides for the separation of the judiciary from the executive; while Article 94(4) grants complete freedom to the judges in the performance of their functions. One of the important functions of the judiciary is to interpret the niceties of relations between different branches of government. What gives the judiciary the most strength is its power to review the activities of other branches. Article 102(1) of the constitution confers powers on the High Court Division (HCD) of the supreme court to enforce fundamental rights; while Article 102(2) confers power of judicial review in non-fundamental rights' matters.[1] The judiciary has the power to declare ultra vires laws passed by the parliament or actions taken by the executive if these are inconsistent with the constitution. The power of judicial review is strongly entrenched in the constitution. It cannot be taken away or abridged by ordinary legislation; nor can it be curtailed even by amendment of the constitution.[2] One of the important objectives underlying the provision for judicial review (in the constitution) is to help establish balance among the different branches of government. It is intended to ensure that one branch does not intrude into the domain of the other. In particular, it provides a deterrent against the encroachment of fundamental rights of the citizen by any other person or authority. Without judicial review, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality.

However, there are several limits to judicial review in Bangladesh. The constitution restricts the jurisdiction of the court in declaring void the laws made to give effect to some of the fundamental principles of state policy, even though they may conflict with the fundamental rights guaranteed in it.[3] The framers of the constitution were certainly aware of the conflicts that took place between the Indian supreme court and the Indian federal parliament over the right of the former to enforce fundamental rights and the legitimate authority of the latter to enact measures to give effect to some of the fundamental principles of state policy.[4] They thus sought to ensure that these issues did not emerge in Bangladesh. The

constitution denies fundamental rights to certain categories of people such as members of a discipline force, which cannot be challenged in the court; it also restricts the right of the court to declare void any legislation intended for the detention, prosecution or punishment of any person who is a prisoner of war or who has committed genocide or crimes against humanity.[5]

The constitution grants some special privileges to the parliament and its members; these remain outside the scope of judicial review. Article 81(3) of the constitution provides: "Every money bill shall, when it is presented to the president for his assent, bear a certificate under the hand of the speaker that it is a money bill and such certificate shall be conclusive for all purposes and shall not be questioned in any court."[6] The parliament can also frame rules to govern its operations, which cannot be challenged in any court. Nor can the privileges granted to MPs by the constitution be challenged. Article 78(3) of the constitution provides that:

1. The validity of the proceedings in parliament shall not be questioned in any court.
2. A member or officer of parliament in whom powers are vested for the regulation of procedure, the conduct of business or the maintenance of order in parliament, shall not in relation to the exercise by him of any such powers be subject to the jurisdiction of any court.
3. A member of parliament shall not be liable to proceedings in any court in respect of anything said, or any vote given by him, in parliament or in any committee thereof.
4. A person shall not be liable to proceedings in any court in respect of the publication by or under the authority of parliament of any report, paper, vote or proceeding.[7]

The HCD has ruled that the immunity under Article 78(3) of the constitution is wide, absolute and unqualified, and such immunity enjoyed by an MP cannot be curtailed in any manner and no court including the supreme court can take any legal proceeding against an MP for anything he says in the parliament during the course of business of the parliament.[8] Members of most other parliaments also enjoy similar types of privileges. The Indian supreme court has explained the logic underlying the provision for granting immunity to MPs (in action in parliament) in the following way:

> It is of the essence of Parliament any system of government that people's representatives should be free to express themselves without fear of legal consequences. What they say is rules of Parliament, the good sense of the members and the control of proceedings by speaker. The courts have no say in the matter and should really have none.[9]

The judiciary in Bangladesh also remains disadvantaged vis-à-vis the parliament in another respect. Unlike India where the constitution (Articles 121 and

221) requires that no discussion take place with respect to the conduct of any judge of the supreme court or of a high court in the discharge of his duties, the Bangladesh constitution remains silent on this issue. Notwithstanding this lapse, it has been observed over the years that the MPs generally do not discuss issues that are considered subjudice.

Besides the constitutional restrictions as stated above the judiciary, as a former chief justice argues, has formulated several precepts of its own for its own guidance and self-regulation in its anxiety not to overstep the legitimate boundaries of judicial interference. The important ones are:

1. The court will refrain from pronouncing upon abstract, contingent, or hypothetical issues.
2. The court will not pronounce upon the constitutionality of a statue or of an official action at the instance of one who has availed himself of the benefits and then turn back to challenge its legality.
3. The applicant must exhaust all statutory remedies available to him before he can maintain a writ petition.
4. If the decision of a case can rest on an independent and separate ground, the court will not decide questions of a constitutional nature.[10]

The judiciary lacks any authority to enforce its decisions; this responsibility lies with the executive government. If the executive does not look with favor on any decision or action of the judiciary, the latter remains helpless. Herein lies one of the main limitations of judicial review. What the judiciary can at most do is to issue contempt of court proceedings against the executive authority for failing to carry out its orders. The law of contempt is an important protection for the judiciary; it is concerned with words and actions that interfere with the administration of justice or that constitute a disregard for the authority of a court.[11]

Change and Continuity in Executive-Judiciary Relations in Bangladesh

Since independence in 1971, the system of government in Bangladesh has undergone several changes. With each change, shifts in the nature of relations between different branches of government have become inevitable. For example, immediately after independence, Bangladesh began with a parliamentary system patterned after the Westminster model. The constitution, which came into effect on December 16, 1972, provided for the separation of powers. Each of the three branches of government—executive, legislature, and judiciary—was independent of the others; each had its own sphere of action delineated in the constitution. However, since the constitution provided for a cabinet government, with the executive owing its origin and remaining collectively responsible to the parliament, no complete separation was possible. Notwithstanding this overlap between the executive and the legislature, which can be noticed in every parliamentary sys-

tem, the judiciary remained independent, at least up to a certain extent, of the executive branch of the government. The constitution empowered the president to appoint the chief justice (CJ); it, however, required him to appoint judges to the higher judiciary as well as to subordinate judiciary in consultation with the CJ. No judge could also be removed arbitrarily. Any motion for the removal of a Supreme Court judge was required to be approved by two-thirds majority of votes in the Parliament. The judges were given freedom of action.

But the parliamentary system was short-lived; before it could have a trial, the basic structure of the constitution was seriously altered. The Bangladesh Awami League (BAL), which led the liberation war in 1971 and exercised state power in the early years of independence, enacted the constitution (Fourth Amendment) bill in 1975, providing for the introduction of a one-party presidential system. The Fourth Amendment changed the balance of power mostly to the advantage of the "authoritarian" executive headed by a president. It, in effect, made the legislature and the judiciary subordinate to the president. Following the Fourth Amendment, the judiciary became an appendage of the executive, to be specific, the president. The amendment empowered the president to appoint and remove the judges at his own discretion. Provisions for consultation with the CJ while appointing judges to the higher judiciary were withdrawn. The amendment also empowered the president to discipline judges of the subordinate courts. The power granted to the president was extraordinary in nature; he could even refuse assent to bills passed by the parliament. The power of the judiciary to review the actions of other branches and/or to enforce fundamental rights was also withdrawn.

After the overthrow of the BAL government in August 1975 in a military coup, formal relations between different branches of government had undergone some changes. Although the power of the president to appoint judges without any consultation with the CJ remained in force, the judiciary regained some of the powers, including the power of judicial review, it lost (to the executive) in early 1975. The power of the president to remove the judges at his discretion was withdrawn. A martial proclamation issued in 1978 required the president to consult the supreme court when taking any disciplinary actions against the judges of the subordinate court. Experience, however, shows that although the government consults the supreme court when disciplining persons employed in the judicial service, magistrates exercising judicial functions often remain outside of the control of the supreme court. The proclamation was subsequently rescinded.

More important, the responsibility for taking decisions on the removal of judges of the HCD and Appellate Division (AD) of the supreme court was entrusted with a Supreme Judicial Council (SJC), headed by the chief justice and the two senior-most judges of the Supreme Court. This system still exists. Justice Mustafa Kamal, a former CJ of Bangladesh, has explained the significance of the new arrangement in the following way: "The substituted provisions are perhaps better than the original ones, in that the grounds of removal are on a more sophisticated plane and in

that a judge who holds a high constitutional office has now been saved from the ignominy of holding an office removable by the chief executive and has also been saved from the ignominy of a public exposure in a popular forum."[12]

The provision for disciplining the judges through the SJC, however, has some defects. Akkas has identified the following drawbacks. First, the initiation of disciplinary proceedings against a supreme court judge depends on the executive, and therefore, the political will of the executive may be very crucial in disciplining judges. Second, there is no specific system for making complaints against a judge. Under the current system, the process of making complaints against a judge is not easily accessible and it might be called inappropriate. Third, the SJC enjoys ample power to discipline, but its composition is not compatible with the concept of judicial accountability. Under this system, complaints against judges are to be made and investigated by a peer group, which is empowered to regulate its procedure. The discipline of judges is largely controlled by the judiciary itself and this system might fail to gain public confidence in the disciplinary system.[13]

Parliament amended the constitution in August 1991, reintroducing the parliamentary system. Following the amendment made on the basis of consensus, the prime minister has emerged as the central figure in the whole structure of government. The president, who was almost an omnipotent actor, has become a figurehead since the amendment of the constitution in 1991. He is now required to do almost everything in accordance with the advice of the prime minister. The exceptions are the appointment of the prime minister and the chief justice; the president has freedom in these two respects. Although several measures have been taken over the past few years to strengthen parliament, the formal relations between the judiciary and the executive have remained almost unchanged. No attempt has yet been made to restore the original constitutional provision requiring the president to consult the CJ when appointing judges to the supreme court. Nor has any attempt been made to upgrade the status of the subordinate judiciary. The president is no longer required to consult the CJ while making appointments to the subordinate judiciary as was the practice in the early years of independence. Nor has the constitutional provision for the separation of the judiciary been given any legal effect. The higher judiciary has also become more politicized now than before; the tendency of the executive to tinker with its working has increased considerably since the restoration of the parliamentary system in 1991. Why the executive government behaves the way it does will be explained in a subsequent section.

Executive-Judiciary Conflict: Illustrative Cases

The executive and the judiciary confront each other on a regular basis. Many decisions of the government are challenged in the court almost as a routine matter. It is neither possible nor is it absolutely necessary to document all of the cases of conflict between the two. For the sake of convenience, this article will mostly

focus on those cases of conflict that have strong "political" implications—cases that have caused stress and strain in the relations between political executives and the higher judiciary. Experience shows that conflicts have mostly centered on three important issues: appointment of judges, disposal of cases, and the alleged intervention of the court in political and policy matters. This section documents a few cases of conflict, identifying the reasons that have caused them and exploring the ways these have been resolved, and the next section will attempt to explain the dominant behavior of the judiciary and the executive.

Appointment of Judges

As observed earlier, the formal responsibility for the appointment of judges to the apex court rests with the president/government. The constitution does not require the president to consult the CJ when appointing judges to the supreme court. But it has become conventional to have a consultation with the CJ. Deviations from this convention and/or failure to honor CJ's opinion have caused conflict between the two branches of government more than once since the transition from authoritarianism to democracy in 1991. The first conflict of this nature took place during the BNP rule in 1994 when the (then) CJ, while addressing a conference of lawyers, seriously objected to the appointment of nine additional judges to HCD by the president without consulting him. He expressed his anger by observing that the CJ was "Mr. Nobody" in the making of such appointments. The conference immediately passed a resolution, urging the CJ not to administer oath of office to the newly appointed additional judges. The CJ agreed to defer the swearing-in ceremony for two days so that the lawyers could turn to the president and the prime minister (PM), exploring alternative ways of resolving the conflict.

Meanwhile, the opposition members initiated an unscheduled debate in the parliament, accusing the government of violating the convention of seeking the opinion of the CJ when appointing judges to the HCD. They also alleged that the government was taking a partisan approach toward the appointment of judges. The press also vehemently criticized the mode of appointment. A team of senior lawyers met the president and the PM, requesting that the convention of consultation with the CJ be honored. The government initially remained opposed to the idea of making any change in the list of newly appointed judges, arguing that consultation with the CJ was not mandatory. But it finally agreed to change the list. After consultation with the CJ, the government dropped the names of two judges from the original list and included two new names. The conflict was thus resolved.

Conflicts over the appointment of judges to the supreme court also took place during BAL's second stint in power (1996–2001). In January 2001, the president appointed two judges in the Appellate Division (AD), superseding two of their senior colleagues. Earlier, the CJ recommended the names of four judges for appointment to two vacant positions in the AD. While making the recommenda-

tion, the CJ was learnt to have observed that all were equally competent and their seniority should be respected. But the government did not pay any heed to the opinion of the CJ. The CJ also made several attempts to ensure that the senior-most judge was appointed to the AD but failed.[14] One of the important reasons influencing the decision of the government not to appoint the senior-most judge of the HCD—Justice K. M. Hasan—to the AD was his previous links with the BNP. Hasan served as an ambassador during the rule of General Ziaur Rahman—the founder of BNP. He was alleged to have links with the youth front of the BNP. It was further observed that he was a close relative of one of the convicts in the Bangabandhu murder case.

The decision of the government to supersede two senior judges while making appointments to the AD caused a serious uproar among lawyers belonging to or sympathetic to the (then) opposition BNP. Initially they tried to convince the CJ of the necessity of deferring the swearing-in ceremony, failing which they created serious obstacles to the normal functioning of the court for several hours. This antagonized the lawyers sympathetic to the government; they organized counter programs as a means to show their support to the government policy. Sensing the seriousness of the situation, a group of senior lawyers, led by the late Barrister Syed Ishtiaque Ahmed, took an initiative to resolve the impasse. The group met lawyers from both rival groups and an agreed-on formula that the two superseded judges be appointed to the AD was devised to steam off the heat. Thereafter, the group decided to meet the president, the CJ and the PM. While the president and the CJ reportedly agreed to the proposal of the Ishtiaque Committee for appointing the two superseded judges—Justice K. M. Hasan and Justice J. R. Mudassar Hossain—to the AD, the PM did not agree to it. As a result, no headway could be achieved in resolving the problem. The two judges, earlier appointed to the AD, were sworn-in according to the convenience of the CJ.

The BNP-led alliance government, which was voted in to power in October 2001, expanded the AD and appointed both Justice Hasan and Justice Hossain to the AD. In June 2003 Justice Hasan was appointed CJ, superseding two of his senior colleagues in the AD, although they were junior to him in the HCD when they were promoted to the AD. The Bar Council, dominated by lawyers sympathetic to the policies and programs of the BAL, seriously objected to the government policy of superseding the seniors when appointing the CJ. The law minister of the alliance government, however, observed that it was done to correct a gross injustice made by the previous BAL government. The BNP-led alliance government has refused to confirm the appointment of most of the additional judges appointed during the last days of the BAL rule. Even the recommendations of the CJ in this respect have been honored in the breach. The pro-BAL lawyers have seriously objected to the policy of the government not to confirm the appointment of additional judges. They have also organized different programs as a means to register their protest.[15] These lawyers have also protested the

appointment of several additional judges by the alliance government, arguing that before confirming the services of the judges appointed earlier, it would be immoral to appoint new judges. Some of the additional judges, who have failed to be confirmed in their jobs, have filed writ petitions in the HCD recently; the HCD has asked the government to explain why its decision will not be declared unlawful. The issue still remains unresolved.

Disposal of Cases

It is generally acknowledged that the process of decision making in the court is probably more cumbersome and time-consuming than in the other branches of government. Different factors account for the slow decision making in the judiciary. Delay in the disposal of cases is, however, not always looked on as a natural phenomenon; nor do people always welcome a quick disposal of cases. In fact, the alleged quick as well as delayed disposal of cases caused some major crises during the BAL rule in the 1990s. In particular, the inability of the HCD to dispose of the Bangabandhu murder case (BB murder case) within the time frame that the BAL thought was necessary made it extremely antagonistic toward the judiciary. It is to be mentioned at the outset that Bangabandhu Sheikh Mujibur Rahman—the architect of Bangladesh independence—was assassinated along with most of his immediate family members and relatives in August in a military coup. Those who organized the coup promulgated the Indemnity Ordinance of 1975, imposing a legal ban on the trial of the killers. The Zia government made the ordinance part of the constitution in 1979. The BAL demanded the repeal of the ordinance for twenty-one years, albeit without any success. However, after the June 1996 elections when the BAL was voted to power, the government, led by Bangabandhu's eldest daughter, Sheikh Hasina, withdrew the ban and arrangements were made to try the alleged killers. A lower court awarded death sentences to fifteen persons accused in the BB murder case in November 1998. According to the constitution, the death sentences needed to be confirmed by the HCD.

The BB murder case was initially referred to an ordinary bench of the HCD in January 2000; the bench advised that the case be referred to a death bench. Accordingly, the CJ referred the case to a death bench on February 6, 2000. But it refused to take up the case, arguing that it would maintain the serial of death references, which implied that it would take a long time to hear the case. The CJ then referred the case to another bench, which also refused to take up the case observing that it was overburdened with cases. The CJ immediately constituted a new death reference bench on March 30, 2000 and referred twenty death cases including the BB murder case, to it. The senior judge of the new bench, however, felt embarrassed to hear the case and sent it back to the CJ on April 10, 2000. The CJ sent the case to the first death-reference bench on April 20, 2000. But the

judges of the bench felt embarrassed to hear the case and sent it back to the CJ on April 24, 2000. The CJ instantly created a new death reference bench and referred the case to it. The new bench finally heard the case.

The delay in the disposal of the BB murder case, caused mostly by the refusal of different HCD benches to hear it for one reason or another, generated serious controversy. The ruling BAL considered it as a delaying tactic—a conspiracy intended to nullify the case. As a means to protest its anger against the court and the judges, the BAL organized a massive stick procession in Dhaka in the middle of April 2000, probably to show its "might" and held a meeting at the historic *Palatan Maidan*. While addressing the meeting some senior ministers were seen to be extremely critical of what they called a "dilly-dallying" tactic in the hearing of the BB murder case. The acting president of BAL categorically observed in the meeting: "We don't want a judge who suffers from indecision and does not remain responsible to his conscience." The home minister had gone one step further by issuing an ultimatum that the verdict on the killing must be given by December 31, 2000.

However, when the verdict was delivered in November 2000, the BAL refused to accept it. The two-judge bench gave a split verdict, with one judge upholding the lower court verdict of death sentence to fifteen former army officers, while the other judge acquitted five accused officers. After the announcement of the verdict, many ruling party supporters resorted to violence, with some smashing cars and public transports. Some protesters also hurled bombs at the residence of the brother of the judge who acquitted the accused persons. The home minister, as in the past, was extremely critical of the verdict. He observed: "We wanted justice, but the expectation of the people was not reflected through the judgement." The Awami League Central Working Committee (ALCWC) was also extremely critical of the verdict. It passed a resolution, criticizing the verdict in the following manner: "People had expectation that the High Court will unanimously uphold the judgement of the trial court against the self-confessed killers of Bangabandhu. . . . It is unintelligible to the nation how the self-confessed killers whose offence is unpardonable got acquitted after the trial court punished them with [the] death sentence." The CJ referred the case to a single-member bench, which confirmed the death sentence of twelve accused former army officers and acquitted three others on April 30, 2001. The AL appeared to have accepted the verdict. But the task of punishing the offenders still remains a problem.

If delays in the disposal of cases may cause controversy, neither does a quick disposal of cases satisfy the main political actors. In particular, the government and/or ruling party often object to a quick disposal of cases as a threat to the consolidation of rule of law. This syndrome was more noticeable during the BAL rule than under any other regime in the past. The BAL government was extremely critical of the quick disposal of a number of cases by the higher judiciary. It could not approve of bails given by the HCD to many people whom it had accused of

committing wrongdoing. It particularly objected to the granting of bail at midnight to an accused in a 'sedition' case without giving any notice to the state or the attorney general (AG). Even the PM expressed her anguish more than once at the alleged indiscriminate granting of bails by the HCD.

As an example, reference can be made to a statement made by the PM in August 1998 that twelve hundred people were granted bail in two days. The PM also reportedly told the press that although the CJ was informed of the matter, he did not take any action except changing the bench. The president of the Supreme Court Bar Association filed a contempt of court petition against the PM. In response, the supreme court asked the AG to submit a written statement from the PM clarifying her position on her reported comments. The PM complied with the court request. In her statement the PM observed that she had referred to the number (twelve hundred) in reply to questions raised by the newsmen. The court, on scrutiny, however, found that the number of cases disposed of was not twelve hundred but only one hundred fifty-five. While appreciating the quick response of the PM the supreme court, however, observed that she should have been more careful before making such statements. The learned AD of the supreme court observed:

> But after all, she is the prime minister of the country and was making comment[s] on the performance of a superior court before the press. She should have taken more care and caution before giving out any fact or figure and not merely rely upon newspaper report which, arguably is, not often the whole or holy truth. If upon obtaining correct figures . . . that bail was being granted in too many cases and [she] express[ed] her opinion accordingly, we would have nothing to say because as the chief executive, she was entitled to have her own views in the matter [with] regard to the law and order situation which is the concern of the executive.

The supreme court further observed that it expected more circumspection, understanding, discretion, and judgement on the part of the PM in making offhand remarks in respect to constitutional functionaries which have been alleged to be contumacious.

Like the PM, the home minister—Nasim—also raised serous controversy by questioning the alleged tendency of the court to grant bail to notorious criminals. In one of his speeches to Parliament, Nasim made a scathing attack on the higher judiciary by observing that: "Sitting on high pedestals to ensure justice in the society, they (judges) are patronizing terrorism."[16] He was reported to have further said that the bail system was inefficient and the HCD had often let criminals go free. The minister also observed that given such a scenario, improvement in the law and order situation could not be thought of. The speech by the home minister was seen as a rebuke to a statement made earlier by the CJ at a meeting of Transparency International Bangladesh (TIB) that law and order disruption enjoyed the patronage of the higher quarters. Following the minister's statement in Parliament, one advocate of the SC filed a contempt petition against Nasim, accusing him of tarnishing the image of the judiciary. The HCD, in its verdict, observed:

> Statements are very much objectionable, highly contemptuous and glaring examples of interference with the administration of justice and judicial functions of the judges of the highest court. Had these statements been made outside the Parliament, the situation would have been otherwise and it would have been considered in a different way. But in the instant case the statements have been made by an MP in the Parliament and during the business transaction of the Parliament. This is the crux of the whole problem in the instant case.[17]

The HCD, however, advised caution by the minister when it observed: "Before parting with the case, we may observe in the language of our AD that the court expected more circumspection, understanding, discretion and judgement on the part of an MP who is the home minister of the government because of the high office he holds in making statements in Parliament regarding the judicial functions of the constitutional judges of the highest court of the country."[18]

Interventionist Role of the Court

The alleged intervention by the court in the policy domain of the executive also may cause conflict between the two branches of government. As an example, reference can be made to the conflict caused by the embargo placed by the HCD on the government decision to demolish several slums in the capital city. The government, as part of its strategy of what it called "improving law and order in the capital city," made a decision to forcibly evict slum dwellers from different parts of the city, arguing that the slums provided a safe heaven for criminals. A supplementary objective of the decision was to recover government lands occupied by the squatters. As soon as the decision made, three NGOs and two aggrieved slum dwellers challenged it in the court. The HCD, on August 11, 1999, stayed the demolition and eviction operation untill August 12 and later extended the embargo until August 19. Those filing writ petitions considered the demolition of slums as "state violence" and believed that the real purpose behind the eviction was to sell the government land to the well-off people.

The government did not look on the decision of the court with favor. A day before the hearing was scheduled to be held on August 19, thousands of slum dwellers, some of them armed with sticks, entered the supreme court premises and started building make-shift houses, apparently on the instruction of the ruling party—BAL. The scheduled hearing could not take place as the judges felt embarrassed because of the occupation of court premises by squatters. The CJ asked another bench to hear the case, which extended the order of stay until August 23. Before the hearing could take place in the new bench, several slum families took possession of the sidewalk of the house of Dr. Kamal Hossain—the petitioners counsel. A law officer of the supreme court informed the higher authorities of the police about the squatters' intrusion both in the court premises and Hossain's residence. But the police declined to take any action on the plea of a HCD order stay-

ing the slum eviction by the government. Even the home minister was found to be not interested in taking any action against those who intruded into the supreme court premises. The government probably instigated such intrusion as part of its strategy to influence the decision of the court. The HCD, in its judgment on August 23, recognized the right of the government to evict the slum dwellers. But it advised the government to evict them in phases and to arrange for their rehabilitation on the basis of a master plan respecting their basic rights. The court also asked the government to remove the squatters from the supreme court premises and the sidewalk adjacent to the residence of Hossain. The government immediately complied with the court order and the conflict was resolved.

The cases, as referred to above, are illustrative, not exhaustive; these are intended to identify the main reasons that often cause conflict between the executive and the judiciary. What is evident is that the higher judiciary, which enjoyed strong public confidence even during the autocratic years, is now being looked on with suspect, at least to a certain extent, by politicians. The extent to which it has resulted from problems emanating from the judiciary itself or from the alleged attempt by the executive branch to politicize it, and/or a combination of both remains unclear.

Explaining Executive-Judiciary Behavior

We have provided a few cases of conflict taking place between the two branches of government since the restoration of democracy in 1991. The cases reveal that the judiciary remains more disadvantaged now than before. The executive has a tendency to behave in more deviant ways now than even during the autocratic years when the fundamental rights of the citizen remained suspended. Reasons accounting for the imbalanced relations between the executive and the judiciary are many, perhaps the most important being the absence of any mandatory requirement for consultation with the higher judiciary. As observed earlier, the constitution does not require the government/president to consult the CJ when appointing judges to the supreme court or the lower judiciary; whatever convention was established in consulting the CJ in the past has effectively been ignored by the successive democratic governments in recent years. This appears to be paradoxical. As long as this structural constraint remains in force, the judiciary is likely to remain disadvantaged.

Another reason that accounts for the weakness of the judiciary is the division of the bar along party-political lines. One of the important sources of strength of the judiciary is a strong bar willing to play a major proactive role in ensuring the independence of the judiciary. In fact, as the 1994 case shows, a united bar not only could provide a strong source of support to the CJ; it also succeeded, through its actions, in creating a favorable public opinion for consulting the CJ when appointing judges to the higher judiciary. But over the past few years, the gov-

ernment has conveniently ignored many recommendations of the CJ. Whatever arguments has the bar advanced in favor of consulting the CJ mostly remain ineffective. Part of the reason is the growing politicization of the bar. Rather than working as a strong pressure group to promote the interests of the judiciary, the main factions in the bar now tend to behave like front organizations of the main parties. It was thus noticed that the activities of the BNP loyalist were vehemently criticized by lawyers supportive of the BAL policies. Similarly, the decision by the present BNP-led alliance government not to confirm the appointment of many additional judges, notwithstanding the recommendations of the CJ, has been seriously criticized by the lawyers having a pro-BAL bias but commended by BNP loyalists. Party political considerations figure prominently in elections to the Supreme Court Bar Association, the Bangladesh Bar Council, and bar associations in different districts.

Besides structural constraints that limit the effectiveness of the judiciary, there are also factors that may explain the deviant behavior of the executive. The BAL, for example, has an inherent belief that the higher judiciary has an anti-BAL bias. The party was overthrown from power in 1975 and remained in a political wilderness for twenty-one years until it was voted into power. It assumes, perhaps erroneously, that the parties that had exercised state power during this period nominated as judges to the higher judiciary those who were supportive of their ideologies. The BAL may thus think that the supreme court will remain hostile to it. The extraordinary delay in disposing of the BB murder case, to a great extent, confirmed the apprehension of the BAL.

Secondly, the BAL does not look on the higher judiciary with much favor for its willingness to toe the line followed by the military rulers. In other words, the inability or lack of willingness of the judiciary to challenge the military rule has created suspicion among many Awami Leaguers about the ability of the judiciary to promote the rule of law. It is to be mentioned here that the supreme court recognized the supremacy of martial law over the constitution, thereby giving a seal of approval of military rule.

There were some other important reasons that probably made the BAL hostile to the higher judiciary. In particular, it considered the higher judiciary a major hindrance to achieving many party/political goals. For example, a HCD bench termed the BAL government detention of three BNP leaders including a minister in 1997 illegal, and asked the government to pay a fine of Tk one lakh to each of them for their illegal detention under the Special Power Act (SPA). Many BAL leaders and workers considered it extremely humiliating. The BAL also did not look on the HCD verdict with favor, declaring the continuous boycott of Parliament by the BAL and other opposition parties in 1994 illegal, and for directing the lawmakers to refund the salary and allowances they received during the time of their boycott.[19] The decision by the AD to censor the BAL president and (former) PM Sheikh Hasina more than once also caused concern among the Awami Leaguers.

While the attitude of the BAL to the judiciary can be easily discerned, the change in policy by the present BNP government remains shrouded with mystery. The readiness of the BNP to compromise, which was somewhat visible during its first stint in power in the early 1990s, is now virtually absent. As observed earlier, many AL appointees to the HCD have lost their jobs; instead, the BNP is now busy with making fresh appointments to the higher judiciary. It can be seen as a tit-for-tat strategy, aimed at showing its might.

In short, the two main parties, which have exercised state power since 1991, have politicised every segment of the society in their bid to rise to and survive in power. Rarely can one find an institution where party politics is not evident. The judiciary, which remained outside the influence of party politics for a long time, has apparently become a cockpit for bitter partisan struggle, especially since the beginning of a new democratic era in 1991. In fact, party considerations appear to have dominated the process of appointment to the higher judiciary since the enactment of the constitution (Thirteenth Amendment) bill in 1996. The act provides for the appointment of the immediate past CJ or his predecessor, and/or a judge of the AD, as the head of the caretaker government to assume responsibility for administering the country during the interim between the dissolution of parliament and the commencement of the next one. The president of the Supreme Court Bar Association once termed the Constitution (Thirteenth Amendment) as a curse on the higher judiciary.[20] It is now probable that the government of the day may apply political considerations in the appointment of judges to the higher judiciary with the objective of influencing the subsequent electoral process. The Constitution (Fourteenth Amendment) Act of 2004 providing for, among others, raising the retirement age of the supreme court judges from sixty-five years to sixty-seven years is intended to serve some important political purposes. It is alleged that since the government does not want the incumbent CJ to head the next caretaker government, it has raised the retirement age of the judges so that the incumbent can continue until after the next election is held. The government probably wants the last retired CJ—Justice K. M. Hassan—to head the next NCG as he was alleged to have strong links with the BNP.

This is not to argue that the judges who owe their appointment/elevation to a particular political party or government will always toe the line prescribed by it. They may still be able to behave in a neutral, nonpartisan way for the main reason that once appointed, no judge can be removed arbitrarily; the appointing authority lacks any power to remove the judges at its will. Nor can one always argue with certainty that using political criterion in the selection of judges is necessarily bad. In fact, a reformist government, if confronted with a conservative court system, may use political criteria to appoint judges who would be supportive of its policies. What is needed is to have some kind of balance between judicial independence and accountability; the way it can be achieved is explored in the next section.

Judicial Independence and Judicial Accountability

The issue of judicial accountability remained dormant for a considerable period of time. As long as the judiciary remained outside the party political grip, the accountability of the judiciary was considered to be a settled fact. No one had ever expressed doubt about the ability of judges to provide justice. Nor, however, is there any serious allegation of partisanship on the part of the majority of judges now. Yet the issue of the accountability of the judiciary has assumed special significance in recent years. The demand for the accountability of the judiciary has been made from within the judiciary itself as well as from the executive branch of the government. Former PM Sheikh Hasina raised the issue of the accountability of the judges more than once while in power between 1996 and 2001. While exchanging views with editors of different national dailies and weeklies in August 1999 Hasina observed: "As elected representatives today have a system of accountability, why should not the other organs of democracy have the same."[21] She categorically observed that judges, lawyers, barristers—everybody should have accountability.[22] Sheikh Hasina also raised this issue a few months earlier when she observed: "If the executive and the legislative branches are accountable and function transparently, it is to be expected that the judiciary, as one of the three organs of the state, should also be doing so."[23] She further observed: "I know that my comment could generate articles in the press and I may even be summoned by the court. But I feel strongly about this and I feel I should create public opinion on this subject."[24]

The former PM's sentiment was echoed, at least up to a certain extent, by some of the judges of the supreme court. One former judge, who was later made a member of the Law Commission, while speaking in a seminar in October 1999, observed: "I unequivocally acknowledge that because of erosion of values, the judiciary is facing the question of transparency and accountability." He further observed: "There are complaints of motivated judgement in about 30 percent of the cases. It is blamed that these judgements are made by nonjudicial influences. If the people start to believe that judges give motivated judgements, then everything is gone."[25] Another judge—Justice Latifur Rahman—also expressed his sentiment in a similar way when he said: "When the credibility of all institutions appears to have eroded, we cannot ignore the reality that the image of the judiciary is also tarnished to a substantial extent in Bangladesh."[26]

What influenced the former PM to strongly advocate for judicial accountability is unknown. Nor did she identify the way(s) such accountability could be ensured. What, however, can be argued with relative certainty is that the former PM probably found the judiciary a serious obstacle to the realization of some of her political and policy goals; she probably wanted to appeal to the "wider" public as a means to exerting pressure on the judiciary to toe the line established by her government. It is to be observed here at the outset that if transparency is con-

sidered to be one of the most important elements of accountability, the judiciary can probably be seen as more accountable than the other branches of government. Decision making in the executive and legislative branches often takes place outside the public purview. To be specific, neither the public nor the media have access to meetings of Parliamentary committees, nor are cabinet meetings open to the public. Secrecy characterizes the process of decision making in both the executive and legislative branches, at least up to a certain extent. On the other hand, judges are under an obligation to give full reasons for their judicial decisions and to state them publicly.[27] Moreover, judicial proceedings are usually conducted in open court where the public and the media have free access. Except in exceptional circumstances, judges are obliged to perform judicial functions in full review of the public.[28]

In contrast, rarely can one find members of the executive and legislative branches explaining their actions. Whatever arrangements there are for holding them accountable suffer from many serious deficiencies. For example, question time, which is often considered to be providing the mainstay of parliamentary scrutiny, suffers from many deficiencies. The dominance of the government over Parliament has, in effect, made the notion of parliamentary supremacy a charade. On the other hand, as observed above, the judiciary outdistances the other branches of government in terms of transparency. This is, however, not to argue that the judiciary does not have any problems. In fact, the public image of the judiciary has declined considerably over the past few years. A Transparency International Bangladesh (TIB) survey carried out a few years ago found that the judiciary, particularly the subordinate judiciary, was no less corrupt than the other organizations of the government. Part of the reason stems from the repeated attempts by political executives to politicize the judiciary. The judiciary still remains in chains. What is needed most is to allow the judiciary to have independence, a task that remains difficult to achieve.

Judicial independence, as Akkas argues, implies two things: the independence of the individual judges to perform their functions without any intervention by hierarchical superiors or from outside; and the independence of the judiciary as a whole. Judged from both standpoints, judicial independence can be seen as a misnomer. Since the government has considerable control over the process of appointment and promotion of the judges, it can use this power to influence the behaviour of individual judges. Similarly, despite the constitutional mandate, the judiciary still remains an appendage of the executive branch. Until the judiciary is granted independence, the notion of judicial accountability may remain elusive. As observed earlier, the task of separating the judiciary from the executive remains problematic. The successive ruling parties—BAL and BNP—notwithstanding their public and political commitment to separate the two, have not had any success in this respect. Whatever attempts were made by the nonparty caretaker government (NCG) of Latifur Rahman to implement the 12-point directive of the supreme court to separate the judiciary could not be implemented.

Conclusion

This article has examined some selected aspects of relations between the executive government and the judiciary in Bangladesh. The general conclusion that emerges is that although the relation between the two is not always characterized by outright hostility and conflict, neither is it based on trust and mutual support. In fact, the executive has become more defiant in recent years. As observed in an earlier section, the responsibility for implementing decisions of the court mainly rests on the executive government. Until recently, the executive (or the legislature) generally did not defy the directives of the court; in fact, compliance with court orders could easily be noticed even during the years of authoritarian rule. But the situation has changed considerably in recent years, with the executive adopting tactics to delay the implementation of the judgement of the court. In fact, non-implementation of many major judgements has almost become a regular feature in Bangladesh. Although it is difficult to document all cases of non-implementation, there are at least some that deserve to be mentioned here.

In particular, three important judgements that have strong potential to contribute to democratic consolidation but are yet to be implemented are the supreme court directives to separate the executive from the judiciary, to hold elections to local government bodies at the district and *upazila* (sub-district) levels and to place restrictions on the power of the police to arrest anyone at any time without warrant. The directives to democratize local councils and to separate the judiciary were given in 1992 and 1999. Since the directives were issued, the government has sought and received time extensions on several occasions to implement them. To be precise, the court has granted twenty-three extensions of time over the past twelve years to democratize the local councils, although initially the government was given six months to hold elections to the *upazila parishad* and *zila* (district) *parishad*. Additionally, the court granted the government twenty extensions of time since it directed in December 1999 that the judiciary be separated from the executive. Recently, the court has asked the government to produce several documents to satisfy the requirement that some progress has been made toward the separation. But the government does not always comply with the court directives in this respect.

The pathological consequences of such defiance are many. For example, by not holding elections to the *upazila parishad* and the *zila parishad*, the leaders of government not only have been brazenly violating the constitution and openly flouting the supreme court directives; they have also been defying their own oath of office to "preserve, protect and defend the constitution" and ignoring their own election pledges.[29] It has also discouraged the development of local government institutions and prevented the emergence of a new cadre of leadership from the grassroots.[30] National government officials now run the local administration instead of locally elected public representatives as envisioned in the constitution. As a result, the scope for public participation in government activities, a precondition for democ-

ratic governance at the local level, remains virtually restricted. The reluctance to separate the judiciary from the executive can be seen as a threat to the establishment of rule of law considered to be the quintessence of democratic rule.

Probably an important reason that discourages the government to implement the directives of court in respect to the separation of the judiciary is the risk of losing grip on the subordinate judiciary. It has been noticed over the years that the two main parties, while in power, have often used the subordinate judiciary to achieve some party political interests such as harassing political opponents or securing other political benefits for themselves. The reluctance to democratize local councils also stems from the fear of losing control over the locality. Experience shows that the central government has traditionally depended more on the bureaucracy to extend its control to the locality. As the outcome of elections cannot be predicted beforehand, the successive governments have found the soft option of using the local bureaucracy, to be specific, central government bureaucrats working in the locality, to achieve party political purposes. Another obstacle to the democratization of local councils is the resistance of members of parliament who consider locally elected councillors as a threat to their dominance in the locality. In other words, the resistance of centripetal forces discourages the devolution of authority to local councils and to their democratization. There is no sustained pressure from the below for democratization or devolution. As a consequence, the sway of the executive over other branches remains almost unchallenged.

NOTES

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