

# Bangladesh, Where the Judiciary Can Be an Obstacle to Justice

*By Syful Islam\**

In early 2010, the Bangladesh daily newspaper Amar Desh published a report that showed judges' decisions tended to favor the ruling political party.

The article, written by reporter Oliullah Noman, detailed how a series of judgments showed opposition politicians were either denied bail previously granted by the High Court or were deprived of their right to be lawfully questioned by police.

After the article appeared, editor Mahmudur Rahman and Noman were charged with contempt of court. And at their court hearing, then-Chief Justice Mohammad Fazlul Karim made it clear truth was no defense. "We are not here to check [if the story is] true or false. We will look at whether the image of the judiciary has been damaged or not by the contents of the report," he said.

Rahman and Noman were convicted for committing "contempt of court" and were sentenced to six months and one month in prison, respectively.

In another case, Asaf-ud-Daula, a former government officer and founder editor of *The Bangladesh Today* newspaper, faced a "contempt of court" charge for making "derogatory remarks" about judges in a presentation at Bangladesh's National Press Club.

He raised questions about the court's neutrality and said that many lawyers try to find neutral courts when bringing cases to the High Court.

In August 2010, Asaf-ud-Daula decided to offer an unconditional apology and was exonerated, with the agreement that he would not make any derogatory comment about the court in the future.

## A New Meaning for "Contempt of Court"

The Contempt of Courts Act from 1926 is so vague and ill-defined that it has been broadly interpreted to prosecute journalists critical to the courts.

Even though the 85-year-old law was supposed to be partially replaced in 2008 by the Contempt of Courts Ordinance during the non-party caretaker government of that year, the elected Bangladesh Awami League (*AL—Evsjvž`k Avlqvgx jxM*) Government has not made arrangements to enact the ordinance

by Parliament. That means the new ordinance has no legal standing and allows the court itself to define contempt and punish people who criticize the court or the judges.

Former British colonies India and Pakistan also inherited the Contempt of Court Act of 1926, but both have eliminated it from their legal systems.

The situation is particularly worrying considering a Transparency International survey published at the end of 2010, which found that the perception of corruption in the judiciary increased by 40.3 percent since 2007 (then, a survey had found 47.7 percent of perceived corruption in judicial institutions). According to the perception of 6,000 people surveyed between 2009 and 2010, the judiciary is the most corrupt among the 13 service sectors in the country, followed by law enforcement agencies.

Shahdeen Malik, an eminent jurist in Bangladesh, says lawful criticism of any judgment of the Supreme Court (*SC–Ainjibi Samiti*) is allowed as long as it refers to a specific misdeed or judge. “But you can’t make wholesale criticism of the entire judicial system. When you say the judiciary is corrupt, it will lose people’s faith, which will ultimately go against the interest of the state,” he said.

He added that no lawyers have been convicted on contempt charges, because they know the extent to which they can criticize judges or the judiciary. “Since most of the people don’t know it, they criticize the judiciary as a whole and can face contempt,” he said.

However, Mizanur Rahman Khan, associate editor of *Daily Prothom Alo*, said that because there are no clear rules about how far citizens can go when talking about the judicial activities, violations can very easily be found.

Kamal Hossain, a lawyer and the principal architect of Bangladesh’s 1972 Constitution, agrees that the act needs to be amended and says the Law Commission is working on it.

“Alongside independence of the judiciary, people’s freedom of expression also has to be ensured,” he said. “Law has to be enacted to protect the whistle-blowers that would play a vital role in reducing corruption and upholding the civil rights in society.”

### Questionable Judicial Appointments

But in a country where politicization of the judiciary rules, such goals don’t seem to be anywhere on the list of priorities of either the government or the court.

In Bangladesh, the law allows the government to make the Supreme Court appointments. Ruhul Quddus Babu was among 17 new judges appointed in April 2010. He was one of nine people accused in the 1988 murder of a leader of the student wing of the political party Bangladesh Jamaat-e-Islami.

The charges against all nine accused were dropped shortly before his appointment was announced, causing a strong opposition by the Supreme Court Bar Association (SCBA). Then-Chief Justice Mohammad Fazlul Karim refused to administer the oath to Ruhul Quddus Babu.

He also refused to administer the oath to another of the 17 appointed judges: Mohammad Khasruzzaman. Khasruzzaman had been accused of kicking the door of Chief Justice Syed Jr. Mudassir Husain's office in a series of acts of vandalism that took place in the Supreme Court in 2006.

The chief justice's decision was highly praised by many and only criticized by members of the ruling party, who denounced it as a "constitutional stalemate."

He was due to retire in September 2010, and President Zillur Rahman replaced him with Khairul Haque, superseding two senior appellate division judges.

The leader of the SCBA, Khandker Mahbub Hossain, denounced the unprecedented appointment of the new chief justice and attributed the move to the government's intention to control the next caretaker government, which will conduct the national elections in 2013, which are normally overseen by the last retired judge of the Supreme Court.

A caretaker government is a typical Bangladeshi system tasked with ensuring free and fair elections, and is integrated by members of the civil society organizations, former secretaries and governors, eminent lawyers and newspaper editors.

Despite criticism from the opposition and the SCBA, Haque hasn't made public statements about it.

### Taking Stock and the Toothless Tiger

Politically motivated judge appointments have increased during the past few regimes, says Asif Nazrul, a professor of law at the University of Dhaka.

"Among the 45 Supreme Court judges recruited by the previous Bangladesh Nationalist Party (BNP)-led alliance government, more than one-third were allegedly affiliated with the ruling alliance," he said. According to Nazrul, at least one-third of the 17 judges

appointed by the current government have been involved in Bangladesh Awami League's political activities.

Article 95 of the Bangladesh Constitution does not specify the qualifications needed for appointment of judges in the appellate and high court divisions of the Supreme Court. It only says a person can't be qualified for appointment as a judge unless he or she is a citizen of Bangladesh and has practiced law in the Supreme Court for at least 10 years, has held judicial office in the country for at least 10 years, or has other such qualifications as may be "prescribed by law" for appointment as a judge of the Supreme Court.

An amended constitutional provision, made in 1977 by the late President Ziaur Rahman, stipulates that Parliament shall enact a law for specifying qualifications for judges' appointments.

None of the successive regimes have done so. This is ostensibly to keep control over the judicial appointments. Interestingly, the Ministry of Law, Justice, and Parliamentary Affairs decides, in the name of the president, the number of judges that need to be appointed. Some South Asian countries like India and Pakistan already have given this mandate to their legislative bodies.

It is a frequent debate in Bangladesh whether the politically appointed judges really favor their appointing authorities or political masters when it comes to justice.

While no formal research has been conducted to determine the impact of politics on judicial decisions, a national committee, headed by Minister of Law Quamrul Islam, started meeting in February 2009 to review politically-motivated cases.

Hundreds of cases were deemed "politically motivated" in 2010, and charges or convictions were dropped—or soon will be dropped—letting many leaders of the ruling party off the hook. Of 10,489 cases reviewed by the committee, 6,788 were dropped.

"Yes, the court is being influenced by the ruling party. The court very speedily tries the cases where politicians have the chance to get bail. The political appointment of judges is definitely a big barrier to combating corruption in Bangladesh," said Mizanur Rahman Khan, the associate editor of the newspaper Daily Prothom Alo.

Besides dropping cases against party leaders and keeping hundreds of cases stuck in court, in 2010 the government moved to amend the Anti-Corruption Commission Act to require the organization to obtain permission from the government to file corruption cases that involve government officials.

Anti-Corruption Commission (ACC) Chairman Golam Rahman has repeatedly called the commission a “toothless tiger”.

“The court is creating barriers to resolving the corruption cases. The current judicial system stands in the way of efforts to wipe out corruption,” he said, talking to reporters in his office in Dhaka.

Can the Judiciary Offer Hope for Democracy? Occasionally, there are glimmers of hope.

In 2007, Faisal Mahmud Fayzee, a Supreme Court judge appointed in 2001, was forced to resign following newspaper reports on forgery in the tabulation sheet of his academic results at Chittagong University. The court authorities withdrew him from judicial functions in the face of a boycott of his bench by lawyers.

However, for the most part, it seems that lawyers can only hope the judiciary will be different one day. Kamal Hossain explains that senior lawyers have long opposed the appointment of politically-motivated people as judges.

“The question was raised in 2005, when a move was underway to appoint judges who do not have necessary degrees. Since then, we have been talking about the appointment of judges considering their expertise and neutrality,” he said.

Senior Barrister Rafiq-ul-Huq agrees that the appointment of judges on political considerations has been a long practice. “We have been opposing the culture over the years, and I am still hopeful that it will be stopped some day,” he said.

Professor Asif Nazrul sees adverse effects in the appointment of partisan and less competent judges to the Supreme Court, on the quality of administration of justice, and on its independence.

These judges often succumb to political pressure and corruption, he said.

“Although the higher judiciary is still respected and honored by the people, there are growing allegations of unfair practice in disposing of bail petitions, delay in disposing of cases, politically biased decisions and erosion of moral values in supervising the lower judiciary,” he added.

Iftekharruzaman, executive director of Transparency International in Bangladesh, said the judiciary should gradually make itself open to criticism and fair comments by the media and civil society members, for the sake of its own credibility and public trust. “As the institution of last resort for democracy, the judiciary should lead by setting example for others.”

In December 2010, the court issued arrest warrants against Iftekharuzzaman and two more TI representatives in Bangladesh, accusing them of tarnishing the “image, honor and reputation of the judiciary” with a survey that placed judicial institutions as the most corrupt service. The warrants were dismissed hours later on a technicality (their addresses were not properly listed in the complaint).

Haque then appointed a five-member panel of judges to investigate the alleged corruption in the judiciary, which a few days later announced the report was “baseless and publicity oriented”.

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