LAW *opinion*

Independence of judiciary: What next?

BARRISTER TUREEN AFROZ

INDEPENDENCE of judiciary is no doubt a cornerstone of democratic practice all over the world. In Bangladesh, demand for judicial independence in practice has been a much-debated issue among policy reformers, democratic philosophers and legal academics for a long time. Many a people have raised this issue at various national levels and demanded a positive change to ensure independence of judiciary at the earliest.

Article 35(3) of our Constitution guarantees a fundamental right to every criminally accused person in Bangladesh (whether citizen or not) to have a 'speedy and public trial' by not only an 'independent judiciary' but also an 'impartial judiciary'. The question then arises, whether the terms 'Impartiality' and 'Independence' have similar meaning. Can we substitute one for another?

The landmark decision of Secretary, Ministry of Finance v Masdar Hossain (1999) 52 DLR (AD) 82 was determined on the issue of how far the Constitution of Bangladesh has actually secured the separation of judiciary from the executive organs of the State and whether the Parliament and the Executive have followed the Constitutional path. In essence, the case was decided on the issue of how far the independence of judiciary is guaranteed by our Constitution and whether the provisions of the Constitution have been followed in practice. The court identified 5 (five) conditions of judicial independence:

1. Security of tenure;
2. Security of salary;
3. Institutional independence of subordinate judiciary;
4. Judicial appointments by separate Judicial Service Commission; and
5. Administrative independence and financial autonomy of judiciary.

However, in delivering judgement, the court in Masdar Hossain case did also try to differentiate between the terms 'independence' and 'impartiality' and said obiter that they would subscribe to the view of the Supreme Court of Canada in Walter Valente v Her Majesty the Queen (1985) 2 RCS 673.

Walter Valente held that "the concepts of 'independence' and 'impartiality', although obviously related, are separate distinct values or requirements. 'Impartiality' refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. 'Independence' reflects or embodies the traditional constitutional value of judicial independence and connotes not only a state of mind but also a status or relationship to others … particularly to the executive branch of government …"

Judiciary at a glance

Let us look at our judiciary. The people at the bench are not alien. They are individuals whom we expect to practise impartiality in administering justice without being pressurised by any restriction, influence, inducement, threat or influence. We cannot appoint somebody as a judge today and expect that from tomorrow morning s/he would be impartial in her/his belief, thought, conscience and practice, unless s/he has learnt to value those virtues at some earlier stage of her/his life and profession.

The vast majority of our judges and judicial officers are appointed from either the members of legal profession with long professional standing or the law graduates by way of public service examination intake. Now let us find out how much integrity of character or independence of judgement is possessed and practised by an average member of our legal profession or an average law graduate of our country. Do they get any systematic training during their process of making to build up a state of mind or attitude whereby they become committed to uphold the moral and ethical values and thus, the rule of law? Or in other words, how much concern, if at all, are our legal professional bodies and the legal education system to produce a lawyer or a law graduate who would never fail to appreciate the ethics in law?

Unfortunately, the existing legal education institutes of our country do not teach its graduates the ethics or professional responsibility. There is no conceptual framework that to be a good lawyer a student needs to learn and develop good ethics and as such, there is no subject called legal ethics in the official curriculum of any of the law degree of our country.

One can always argue that the legal education institutes do not produce professionals but academics. If that is so, then the total responsibility shifts on the professional bodies (such as the Bangladesh Bar Council, Bar Associations, the Judicial Administration Training Institute etc.) to ensure that their members, before joining their respective profession, go through a proper system of training where they are carefully introduced to the issues of legal ethics and professional responsibility.

Training of the advocates

Under the current policy of the Bangladesh Bar Council, every person shall, before being admitted as an Advocate, pass a written examination, viva-voce and a vocational training course of approx. 7 weeks. The syllabus for the written examination for enrolment does include a topic, "Rules of Professional Etiquette" which is examined by assessing a candidate's knowledge on Bangladesh Bar Council Canons of Professional Conduct and Etiquette.

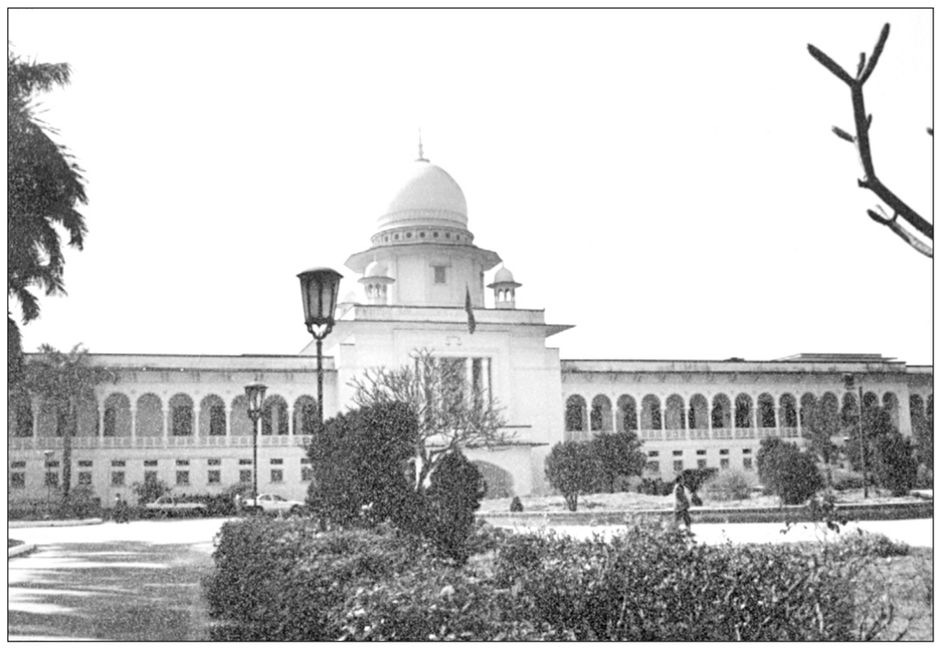
It is also worth mentioning that though the candidates answer a question on legal ethics in the written examination, there is no way to know whether they have written the right answer or not, once the result is published. Therefore, there is a danger that the candidates might fail to realise the importance of being professionally ethical, once they enter the profession.

Within a span of 7 weeks, the students of BVC have approximately 80-84 classes and unfortunately, only 3 classes (each with approx. one hour duration) are allocated to have a discussion on the topic of Professional Ethics. The discussion is of general type and there is no specific syllabus available for those sessions. It is very disappointing to note that this is the first time (and perhaps the only time) the newly entrant Advocates get a chance to have a discussion on the most sensitive issue of their profession and that does not get proper weightage in their training mechanism.

The necessary link is that every practising Advocate of today is a potential Judge of tomorrow. The increasing un-professionalism among today's lawyers is indeed a matter of great concern for all of us. Therefore, to secure impartiality at the bench, we need to maintain a pool of lawyers who are professionally and ethically duty-bound, who are responsible and accountable not only to their clients but also to the court, colleagues, members of the public and above all, to their own noble profession.

Training of the judges

Let us now turn to the training mechanism of the Judicial Officers of this country. With the advent of new ordinance, it is expected that there will be a new Judicial Service Commission, which would be responsible for the appointment of the Judicial Officers. Like before, most probably the minimum required qualification would be a law graduate. As I have already pointed out that the issues of professional ethics are not introduced in the law courses of this country, this has to be covered up during the training period of the newly appointed Assistant-Judges and other post-appointment professional training schemes.



As per Judicial Administration Training Institute Act 1995, the Government of Bangladesh has set up a Judicial Administration Training Institute (JATI) to arrange for training of persons appointed in the judicial service, lawyers and some other professionals connected with the judicial system in order to increase their professional efficiency.

Under its current training policy, the Judicial Administration Training Institute (JATI) runs a 60 Day Basic Course for newly appointed Assistant Judges, 21 Day Courses (and sometimes, 3 day short courses) for Senior Assistant Judges, Joint District Judges and District Judges. It is again unfortunate that the curriculum for the "Basic Course" does not have any module on ethics or professional responsibility. However, the curriculum for Judicial Administration Training Course for the District and Session Judges do have a module on "Judicial Ethics and Code of Conduct of Judicial Officers".

Nobody can deny that there is a need for the development of an ethical framework in our entire legal and judicial arena. For the long time benefit of the society, in general and the legal and judicial professions, in particular, there is no other alternative but raising the conscience of our legal and judicial professionals with regard to ethics, professional responsibility and accountability. 'Impartial Judiciary' is not a fancy dream but a constitutionally guaranteed fundamental right of every person of this country. Though, in reality, it is a long way to go, we can nevertheless initiate our journey by:

1. introducing subject like "Legal Ethics and Professional Responsibility" in various Law Degrees of Bangladesh because teaching law to students without a moral framework denies them the opportunity to develop healthy personalities (as adopted in all most all LL.B degrees of Australia);

2. giving more importance to the topic of 'ethics and professional responsibility' in the Bar Council Enrolment Examination (as adopted in the enrolment examination of legal practitioners of the Supreme Court of New South Wales) ;

3. arranging regular seminars and workshops on ethical issues by different Bar Associations; members of the Bar as well as the Bench can participate in those seminars (as arranged by the Bar of England and Wales);

4. making regular publications on popularising the ethical values among professionals;

5. giving more importance to the topic of 'ethics and professional responsibility' in the Judicial Service Examination;

6. giving utmost priority to the issues of ethics in the Judicial Training Schemes of the country.

Concluding remarks

We have to keep in mind that in an adversarial system, like that of ours, Judges are expected to play the role of an "impartial" umpire. Moreover, only an 'impartial judiciary' can guarantee a proper administration of justice to meet the ends of Article 35(3) of our Constitution.

By ensuring judicial independence from the executive organ of the government, we are, no doubt, in a position of installing a better democratic system in our society, but there still remains a grey area as to how efficient this system would work if the players and the operators of this system are not motivated enough to make it work. Therefore, if 'impartial judiciary' from the executive organ is the first step, let securing 'impartial judiciary' be the next one.

Barrister Tureen Afroz is an Advocate of the Supreme Court .

COURT *corridor*

Milosevic trial sets precedent:

US granted right to censor evidence

PAUL MITCHELL

EARLIER this month the US government demanded and received the right to censor testimony at the International Criminal Tribunal for the former Yugoslavia (ICTY).

A press release issued before Democratic Presidential candidate Wesley Clark gave evidence at the trial of former Yugoslav President Slobodan Milosevic said Clark's testimony would be given in closed session. The press release also said the normally simultaneous broadcast of the testimony would "be delayed for a period of 48 hours to enable the US government to review the transcript and make representations as to whether evidence given in open session should be redacted in order to protect the national interests of the US."

Milosevic faces 66 counts of war crimes and genocide allegedly committed in Croatia, Bosnia and Kosovo in the 1990s. Clark was commander of the 78-day NATO bombing campaign against Yugoslavia in 1999 that destroyed much of Serbia's industrial infrastructure and left thousands of civilians dead.

There have been several attempts to prosecute Clark himself for war crimes committed during the NATO bombing. In that year a group of Canadian lawyers and academics asked the ICTY to investigate and indict Clark and others for war crimes in Yugoslavia saying that there was "overwhelming evidence that the attack was unlawful and that the conduct of the attack [was] on civilian objects." Former US Attorney General Ramsey Clark has also accused Clark and other leaders of war crimes and crimes against humanity and in September 2000 a Belgrade court found Wesley Clark and other Western leaders guilty.

However, the ICTY has refused to indict any US or NATO military or political leaders as it deals out victors' justice on behalf of the western powers.

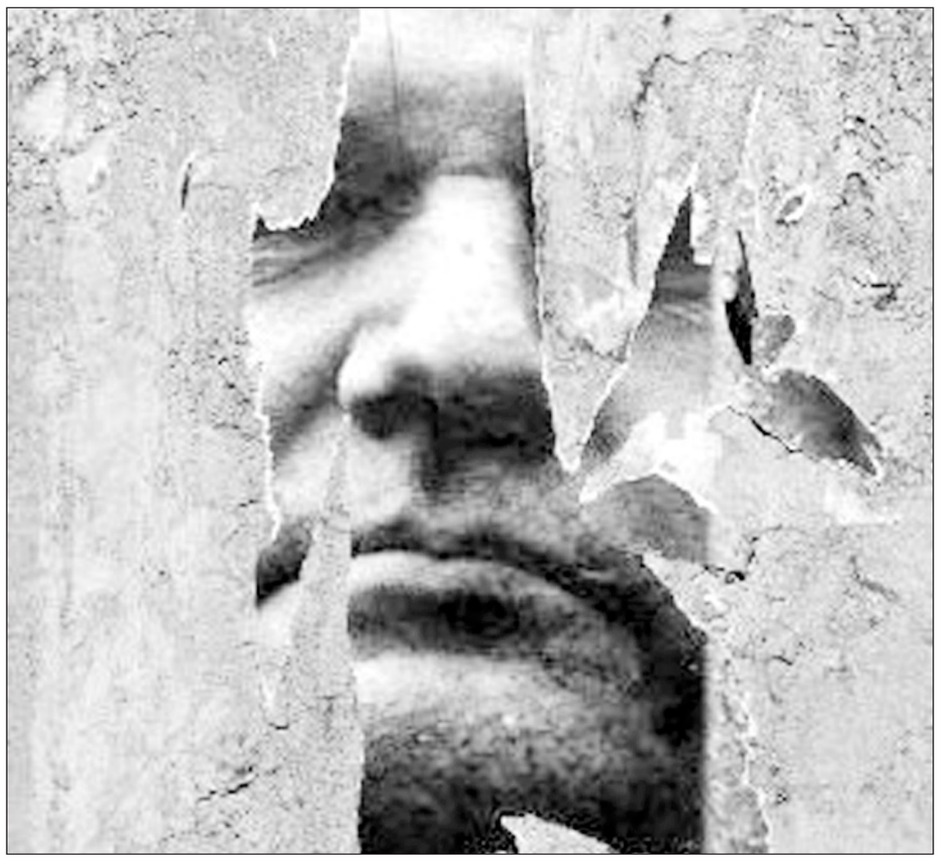
Clark has admitted the illegal basis on which NATO fought a war of aggression in Kosovo. In his book Fighting Modern War, Clark says the war "was coercive diplomacy, the use of armed forces to impose the political will of the NATO nations on the Federal Republic of Yugoslavia, or more specifically, on Serbia."

The Bush administration is keen to see Milosevic found guilty and so wanted Clark to testify. But its primary concern is to protect US officials from ever facing trial for war crimes and to prevent any act of military aggression on its part being judged illegal. To this end it has refused to ratify the International Criminal Court and bribed and bullied governments to promise that they will never prosecute US officials or military personnel.

At the ICTY testimony involving US citizens has been carefully controlled. The Washington Post prevented a former reporter Jonathan Randall from appearing at the trial of Radoslav Brdjanin, a Bosnian Serb accused of genocide and persecution. The testimony given at Milosevic's trial by William Walker, the former head of the Kosovo Verification Mission, was restricted to the alleged massacre at Racak that provided the pretext for the NATO bombing of Serbia.

The Bush administration is also concerned that Milosevic has based his self-defence on pointing the finger at his accusers and charging them with war crimes. This, and the prosecution's inability to produce a "smoking gun" to prove Milosevic's guilt, has weakened the court's credibility. Charges of genocide have been dropped against all but one of those accused at the ICTY. With most of the convictions based on individual crimes against humanity, the premise that Milosevic organised a systematic ethnic cleansing campaign has been undermined.

The appearance of Clark at the ICTY was therefore fraught with dangers. He has played a key role in the US drive to establish its world hegemony. Before he became NATO Supreme Allied Commander, he was Director for Strategic Plans and Policy for the Joint Chiefs of Staff with responsibilities for worldwide US military strategic planning. In this capacity he was part of the team negotiating the Dayton Accord ending the five-year war in Bosnia. This is where Clark first met Milosevic who was granted a key role under the accord in policing and enforcing the agreed peace formula.



From 1996 to 1997 Clark served as Commander-in-Chief of the US Southern Command in Panama where he was responsible for the direction of military activities in Latin America and the Caribbean.

US officials have downplayed the extent to which they censored Clark's testimony saying, "Nothing was redacted, only one thing related to the US government ... He gave very specific testimony about Milosevic's intentions. Nothing about Milosevic has been cut."

In one respect this is true. A close reading of the transcript shows that the prosecution were determined to focus on Milosevic's role and prevent any revelations about US or NATO "intentions" emerging and any discussion of the NATO action. Judge Richard May went along with this, preventing Milosevic from pursuing any areas that fell outside Clark's carefully restricted and vetted testimony.

Beginning his cross-examination Milosevic pointed out the unprecedented nature of the court's acquiescence in the face of US pressure saying, "I don't quite understand the position of this witness ... representatives of the government of his country may be able to review the transcript, to approve some of it, to redact some of it possibly, and only then to release it to the public. I am not aware of any legal court in the world delegating its authority of this kind to any government. This would be the first time for any such thing to happen."

Judge May quickly prevented Milosevic from elaborating stating, "We are not going to argue this point. We have made our order. The reason that the government have any rights in the matter at all is this, that in order to provide information to this court, it is occasionallyand I stress occasionallynecessary for governments to do so, and they are allowed to do so under our rules on certain terms, and these are one of the terms which has been followed in this case."

When Milosevic tried to question Clark about his book Fighting Modern War with the words, "General Clark, in your book you say that the NATO military action against Yugoslavia in the spring of 1999 could not be called a war," May again intervened:

"I don't think we are going to have that debate. That's precisely what I have been talking about. You're not allowed a free-ranging discussion about the NATO action."

May also prevented Milosevic asking Clark, "Is it true that in an interview that you gave to the New Yorker on the 17 November you said that the war you waged was technically illegal?" and declaring that Clark had "given no evidence about the legality of the war."

That the US government was allowed to censor evidence at an international court set up by the United Nations in a Western democracy and presided over by a British judge speaks volumes about the nature of international justice. It also indicates the type of justice Saddam Hussein will face should he ever come to trial in US-occupied Iraq.

If Milosevic had been given free rein to question his accusers such as Clark, he could have provided ample evidence, not only of the years in which the US enjoyed close relations with his regime but of how Washington set out to provoke a war in order to seize control of the Balkan region, using the pretext of human rights abuses by Serbia. The parallels with Iraq are obvious. The only difference in the case of Saddam Hussein is that the record of US support for his regime is longer and the pretext used for war is more flimsy and discredited.

Source: World Socialist Web Site.

FACT *file*

Children sentenced to death in Philippines

Larina Perpinan was sentenced to death in 1998, along with 10 others, for the kidnap for ransom of an elderly woman, who was later released unharmed. Larina Perpinan is reported to have been 17 years old when she was arrested. She says she barely saw her lawyer before the trial and lied to the judge about her name, age and address for fear of getting into trouble at home. When she finally proved that she was 17 at the time of the crime, the judge had already passed the death sentence and reportedly refused to reverse the decision. Larina, who was pregnant at the time of her arrest, later gave birth to a baby boy in prison.

Saturani Panggayong, sentenced to death for a crime committed when he was only 15 years old. Saturani Panggayong was sentenced to death in May 2001 for murder with robbery, a crime allegedly committed when he was only 15 years old. He says that when he was first interrogated there was no lawyer present and he did not understand much of the proceedings. He says that during his trial, he was not asked to testify.

At least seven child offenders are currently under sentence of death in the Philippines. The six men and one woman, now in their twenties, have had their death sentences hanging over them for years.

According to Philippine law, these seven young offenders should not have been sentenced to death. However, there is no requirement in the law to establish whether or not a suspect is a child - below the age of 18. This means that children are sometimes detained as adults.

All the seven child offenders have been detained with adults since they were first arrested. Some of them have reported being beaten or subjected to torture or ill-treatment on arrest, sometimes to force them to confess. The six young men were, until recently, locked in their cells for more than 23 hours a day.

A bill on abolition of the death penalty is currently before the Philippine Congress.

The first conviction under Anti-Terror law

John Allen Muhammad became the first person convicted under a unique Virginia anti-terrorism law enacted after Sept. 11, all but guaranteeing the statute will be put to the test on appeal. Defence lawyers will almost certainly argue that the law is too vague to have been used to convict Muhammad in the sniper slaying of a man at a gas station.

The anti-terrorism law, passed by Virginia lawmakers last year, makes a killing punishable by execution if the crime was intended to intimidate the public or influence the government. Prosecutors argued that Muhammad and his alleged accomplice, Lee Boyd Malvo, tried to intimidate the public in the Washington area in order to extort $10 million from the government.

They portrayed Muhammad as the `captain' of a two-man killing team. The case will automatically be reviewed by the Virginia Supreme Court if he is sentenced to death, and an appeal is likely even if he gets life imprisonment. ``The fact that it's the first case under this new and untested law guarantees the appellate court will look hard at the application of this statute,'' said Anne Coughlin, a University of Virginia law professor.

Virginia Attorney General Jerry W. Kilgore, a Republican who drafted the legislation, said he believes the law was applied correctly to Muhammad. But whether prosecutors proved he was the mastermind of a terrorist act, with enough control over Malvo to command the killings, is questionable, some lawyers said.

``The question has always been whether (the law) includes the type of psychological relationship that may have existed here between Muhammad and Malvo,'' said Richard Bonnie, a criminal law professor at the University of Virginia.

Source: Amnesty International & Guardian.