LAW *opinion*

How to have experienced judges in the Supreme Court

HASANAT ALAMGIR

Article 96 (1) of our constitution says- subject to the other provisions of this article, a Judge shall hold office until he attains the age of [sixty-five] years. The Jatiya Sangsad has just amended this section of the constitution, and raised the retirement age of the Supreme Court judges by 2 years.

If we summarise the arguments of the treasury bench from whatever we have learnt from the media reports, we will find that apparently a growing need of competent and experienced judges in higher judiciary has motivated to focus on this age issue. The government wants to make sure that the higher court has sufficient number of skilled and efficient judges. Supreme Court Judges indeed perform very vital duties, like, explaining the constitution, guiding issues related to human rights, and revising cases against the lower court verdicts. In fact, the Judges themselves have been trying to raise their retiring ages for a while. The bureaucrats of the executive branch have been trying hard to raise their retirement age to 60 years from 57 years for about 2 decades, and no government ever cared about it. Each government opted to contract out bureaucrats they like and trust, rather than extend the overall retirement age for all of them.

We have been observing the superior court judges after retiring at 65 have been engaging themselves in numerous quasi and pseudo-judicial employments (e.g., Press Council, Election Commission, Court of Settlement, Administrative Appellate Tribunal, Law Commission, Judicial Administration Training Institute, etc.). By giving them an opportunity of working in the judiciary for 2 more years, the nation will be benefited from their valuable expertise. If the need is real, and the judges demand it, then the government's compliance is definitely admirable. Unfortunately, the mistrust among the public and the political parties about government's covert motive is so high in our country that it is hard to believe that a government does anything without any concealed cause.

Now, why is the need of experienced judges become so acute in our higher judiciary? The Law Minister has cited specific examples that twenty five Supreme Court judges - 19 of High Court and 6 of Appellate Division are set to retire in next four years. He is concerned that judges having less than 10 years of experience in the Appellate Division and High Court will work at important benches. What has led to this likelihood that there will be so many untried judges in the higher judiciary in near future? How can we make sure that we have adequate number of qualified sitting judges in our higher judiciary?

Political malice and whim has played a key role in creating such a situation. The previous government appointed 40 additional judges, nine of whom were confirmed during its tenure. That left confirmation of 31 others, who could not complete their 2 years probation period, in the hands of the later government. This government being suspicious of those appointee's previous political perhaps 0identity and ideology, and eager to recruit judges allied closely to its own political philosophy declined to confirm services of 15 of the judges. It is known from different sources that the then Chief Justices recommended confirmation for most of these judges. If these judges were absorbed, they would have gained already 3-4 years of experience by this time.

The current government has also given new appointments to 26 additional judges. If this government can run its full tenure, these judges will possibly be absorbed; but from the third year of its term, any new recruits will have analogous destiny like those 15 judges, if a different government takes over in next election. A vacuum will recur, and we will again be scared of having an acute shortage of learned judges.

It can be rationally anticipated that a judge should work no less than 15 years at the High Court Division before going up to the Appellate Division, and a continuous work experience of at least 18-20 years can train one best for qualifying to be the Chief Justice -- the judicial head of a country of 140 million people. It is observed in the higher judiciary, that most of the new recruits start in their early or mid 50s. If a judge is recruited when he is 52 years, if everything goes well, he will be confirmed at 54, and if he is expected to serve there for 12/13 years, he will have almost no possibility to get to the Appellate Division. We have recently observed a fairly good number of judges hold the position of the Chief Justice for about or less than 1 year. Before they have an opportunity to understand the duties and responsibilities of the position, formulate agendas and means for the development of the judicial system, and in so doing offer good leadership, it becomes time for them to retire. A practice to appoint judges at an earlier age (e.g., late 40s) can ensure that we get seasoned judges at the High Court Division, Appellate Division, and that we benefit by a Chief Justice, who can serve longer and better.

The inexperience quandary is more widespread when the new recruits happen to be practising lawyers. The jobs of a lawyer and a judge are indeed very different in respect to duties, responsibilities, public relations, and compensation (salary and benefits). When a District Judge is elevated to the higher judiciary, he brings with him extensive working experiences in various capacities (Assistant Judge, Sub Judge, and Additional District Judge) in the lower judiciary. He, also, has the least possibility of allegiance to any political structure. Whereas, for a lawyer, it takes time to get used to act and behave like a judge overnight.

Regrettably, it is because of their non-alignment to formed political philosophies, the proportion of District Judge to lawyers is getting smaller in every batch of appointments at our higher judiciary. If we analyse the two recent recruitment, government's uninterest to choose District Judges become obvious.

In August of 2003, the government appointed five additional judges at the Supreme Court. In this lot, only one was a career district judge. The rest belonged to the Bar.

Another set of recruitment in April last year only two were District Judges. It is evident that only 20% places at the higher judiciary are occupied by internal judicial service promotions.

The discrimination against the district judges in promoting to the Supreme Court frustrates the judicial cadre service holders as their career potentials shrink terrifically. Their agony multiplies as whenever the senior members of the lower judiciary can make it to the higher judiciary, they almost reach their retiring ages by then. Thus, from the High Court Division, unsurprisingly, they can never go up the ladder to the Appellate Division, forget about ever contending for the position of the Chief Justice. It is imperative that the top judge of the country should have a solid understanding and a firm grasp over the functionalities and intricacies of the lower judiciary including the magistracy. A veteran District Judge is plainly barred to go high under the existing system.

Political considerations and discriminations of the government are prevailing in appointment and confirmation of judges to the highest judiciary, as the process is not transparent and not clearly prescribed by law. Getting over with political whim and malice, appointing judges at a younger age, confirming efficient judges (with Chief Justice's recommendation), and raising the ratio of district judges in recruitment can help in ensuring transparency, and create trust in higher judiciary recruitment.

Hasanat Alamgir is a Doctoral Candidate at the University of British Columbia, Vancouver.

HUMAN RIGHTS *analysis*

Israel's killing of hamas leaders

MAYUR PATEL

THE April 18th killing in Gaza of Hamas leader Abdel Aziz Rantisi, following on the heels of the killing of his predecessor, Sheik Yassin, provoked an international outcry about Israel's policy of targeted killing. Such tactics have been widely condemned as unlawful under international law. In contrast, the United States, while occasionally uncomfortable with Israel's policy, has acknowledged that Israel has a right to self- defence that could be used in some circumstances to target leaders of terrorist groups much as the United States has asserted its own right to target Osama Bin Laden. From a legal standpoint, there are three critical issues that determine the validity of this policy: the law of self-defense; international humanitarian law; and the principle of proportionality. A good faith analysis can lead to differing conclusions on the legality of Israel's policy.

Self-defense

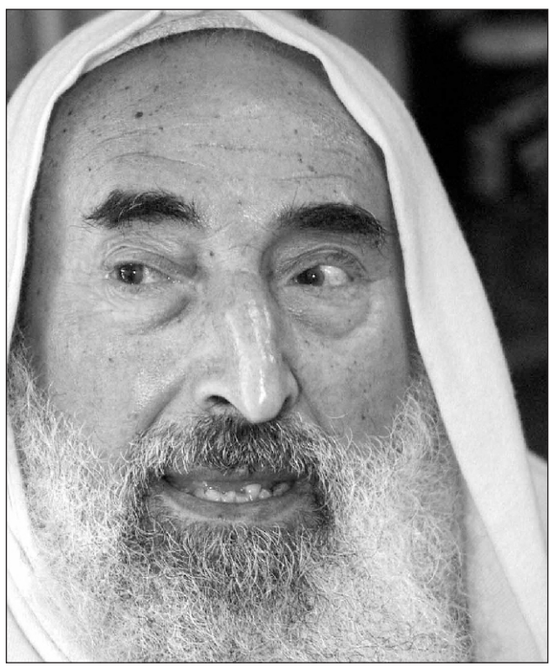
A key determinant in assessing Israeli policy is whether it is for the purpose of self-defense or whether it is a reprisal. The concept of self-defense in international law has two primary sources. First, there is an explicit reference to self-defense in Article 51 of the U.N. Charter, which states: Nothing in the Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Those who argue in favor of Israel's right to self-defense in this situation hold that Hamas's numerous suicide bombings against Israel constitute an armed attack, much as the United States has argued that the use of civilian airliners to destroy the World Trade Center constituted an armed attack. Furthermore, they note that Hamas has openly declared its intention to strike Israel again. Israel faces an ongoing threat and the Security Council has not yet acted. Consequently, they argue that Article 51 provides Israel with a right to employ military force against Hamas's leaders.

Those who dispute Article 51's applicability generally do not dispute that the number of Israeli casualties is substantial. However, the issue for them is that an armed attack within the meaning of Article 51 is an armed attack

from a state. Hamas is not a state. It cannot even be argued to constitute a de-facto state. According to this view, Hamas's attacks are more akin to the acts of a violent gang, which must be dealt with as a law enforcement problem. Consequently, Article 51 would be inapplicable and the targeted killings would be unlawful reprisals or extrajudicial acts of homicide.



The other legal source of self-defence is customary international law. In particular, many scholars cite the Caroline doctrine, which sets forth the standard for anticipatory self-defense in customary international law.

The Caroline doctrine arises from an incident in the 1840s where British soldiers crossed into the United States to destroy a ship ferrying arms to insurgents in Canada. Both the United Kingdom and the United States agreed that anticipatory action was allowed only when the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation. After World War II, the Nuremberg Tribunal reaffirmed the Caroline doctrine.

It should be noted that after the advent of the U.N Charter, the Caroline doctrine is not universally accepted; many reputable scholars have argued that Article 51 of the UN Charter supercedes it. Even conceding its validity, though, reasonable individuals can come to differing conclusions on its applicability in various situations.

For example, most would agree that missiles being fueled for launch are an imminent threat under the Caroline Doctrine. Few would concede, however, that mere discussions on the construction of such weapons constitute a threat under this standard. However, reasonable people could come to differing conclusions about whether the actual shipment and emplacement of such weapons, for example during the Cuban Missile Crisis, gives rise to a right of self-defense. In that instance, the United States chose not to justify its interdiction of Soviet missiles bound for Cuba as a measure of anticipatory self-defense.

In the present situation, some of the recently targeted individuals such as Rantissi and Sheik Yassin were not killed while in the process of carrying out an attack. However, they were presumed to be in a position to order future attacks. The more one agrees with Israel's assessment that the targeted individuals were "ticking bombs," the more one would believe that a right under the Caroline doctrine arises. One could also argue that since Hamas has already carried out attacks, the Caroline doctrine is inapplicable in a strict sense, even though it remains relevant to show that customary international law recognises a right of self-defense.

International humanitarian law

Another legal issue about Israel's policy is whether it comports with international humanitarian law, which comprises the rules that govern the conduct of armed conflict. Under this one question that needs to be resolved is whether those targeted are combatants. The Geneva Conventions on the Law of War, particularly common Article 3, prohibit the intentional killing of civilians. Common Article 3 prohibits:

"(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;"

and "(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

Other international human rights instruments, such as the International Covenant on Civil and Political Rights, state that arbitrary execution is unlawful. Individuals who belong to the military wing of Hamas, such as Rantissi, are likely to be considered combatants. Individuals like Sheik Yassin, who was a quadriplegic and supposedly a spiritual rather than military leader, may be subject to more debate on their status as a combatants. Targeted killings also implicate the Regulations annexed to the Hague Convention of 1907, which are widely viewed as customary international law. It is believed that most targeted individuals have been killed in helicopter strikes. The Hague Regulations prohibit the killing or wounding treacherously of individuals belonging to a hostile nation or army. Killing or targeting particular individuals during an armed conflict is not illegal in itself under international law, nor is it accurately described as assassination, if the individuals are members of a hostile force. For example, the United States' targeted attack on Admiral Yamamoto during the Second World War was widely considered to be legitimate. The key issue in deciding legality in such cases is whether or not perfidy or treacherous means were employed.

The employment of treachery is what distinguishes assassination from a traditional killing. Killing individuals by a helicopter strike is generally an accepted tactic of warfare .More stealthy means, however, could be considered as acts of treachery. Some would also argue that persons at mosques or in prayer have no means of defence and thus are impermissible targets. The question becomes murkier, though, if such individuals are inciting followers or giving orders at those facilities for hostile acts against an enemy.

Proportionality

The last key issue regarding Israel's policy is whether it violates the basic international law principle of proportionality. Proportionality holds that any given action by a state must be substantially proportional to the given threat or wrong. Israel's policy of targeted killing has resulted in the deaths of multiple civilians. Were those deaths avoidable if different tactics were utilised? Proportionality analysis depends upon the circumstances and the situation. Many have suggested that Israel had a less violent option at its disposal: an arrest. As the occupying power, Israel could potentially deploy troops or police to arrest these individuals.

Proportionality is an important rule that could distinguish Israel's policy from the American attack on terrorists in Yemen last year via a predator drone. An arrest may be infeasible in the middle of a lawless dessert in Yemen. Civilians are also unlikely to be wounded in such an attack; thus the attack is likely to be proportional under the circumstances.

Whether Israel's policy is proportional is not an open and shut case. Deploying soldiers or police to apprehend suspects in hostile urban areas is a dangerous affair. Whether more lives are put at danger through an attempted arrest or a helicopter strike is debatable; hence the proportionality of Israel's policy is unclear.

Concluding Remarks

Israel's policy of targeted killings raises serious questions of international law, but the answers are not obvious. Although observers view the policy as contravening international law, there is a substantial amount of uncertainty regarding the application of the relevant law to the situation at hand. Thus, good faith analysis could lead to starkly different conclusions on the legality of any such policy.

Source : American Society for International Law (ASIL), New York.

HUMAN RIGHTS *monitor*

AMNESTY INTERNATIONAL'S REPORT ON BANGLADESH' 2004

Human rights violations continues

AMNESTY INTERNATIONAL

Dozens of people died in violence during and after local elections in the first quarter of the year. Several opposition politicians were assassinated. Corruption and poor governance remained key factors blocking economic prosperity. The government reportedly pressured judges to dismiss criminal charges against ruling Bangladesh Nationalist Party supporters. Most sessions of parliament were boycotted by the main opposition party, the Awami League.

Torture

The government failed to implement safeguards against torture. Victims included suspected criminals, children and people detained on politically motivated grounds. At least 13 people died in police custody. The police reportedly denied allegations that their deaths were the result of torture.

Following his release from police custody on 5 January, senior journalist Enamul Haque Chowdhury said that he was beaten, tortured with electric shocks, and threatened with death at gunpoint. Arrested on 13 December 2002, he was accused of misquoting the Home Minister in a news agency

report. No official investigation was initiated into his allegations of torture.

Abdul Gaffar, 45, a day labourer from Ekbarpur village in Mougachhi area of Rajshahi, died on 6 May in police custody. He had reportedly been beaten with batons and rifle butts to compel him to reveal the whereabouts of a suspect. A three-member police committee, formed following protests by villagers, failed to hold responsible any of the officers involved in his death.

Police brutality

Police continued to use excessive force during opposition or trade union demonstrations. Hundreds of protesters were injured, some critically. No officers were known to have been brought to justice for these attacks.

On 10 October officers attacked and beat unemployed and student nurses from 38 government nursing institutions who were protesting against changes in their terms and conditions of employment. When demonstrators tried to enter the Directorate of Nursing Services, police officers beat them. Over 50 nurses were reportedly injured, most of them women, and 23 were admitted to hospital, three of them in a critical condition.

Death penalty

Courts sentenced to death more than 130 men and women. Most death sentences were passed by Speedy Trial Tribunals, which were required to conclude trials within 135 days, increasing the risk of convictions based on flawed evidence. Two men were hanged on 10 July.

Arbitrary detention

Following repeated High Court orders and international appeals, some prominent political detainees were released in January. They included human rights defenders Shahriar Kabir, Professor Muntasir Mamun and Saleem Samad, as well as Awami League leaders Bahauddin Nasim, Saber Hossain Chowdhury and Tofael Ahmed. However, they continued to suffer harassment and threats of detention.

In June, warrants of arrests were issued against Mahfuz Anam, editor and publisher of the Daily Star newspaper; Matiur Rahman, editor of the Daily Prothom Alo newspaper; and Abdul Jalil, Secretary General of the Awami League. A senior government official had brought a criminal defamation case against them after publication of a letter in which Abdul Jalil criticised the nomination of the official to an executive post in an international organisation. They were not detained but the arrest warrants remained pending.

Violence against women

Reports of rape were widespread, including of young children. There were frequent reports of women being beaten by their husbands, sometimes with fatal results. The perpetrators were often husbands whose demands for dowry had not been met. Scores of women were victims of acid attacks, usually by rejected partners or people settling scores with the victims' families. Some 20,000 women and children were reportedly trafficked to other countries, usually after abduction from rural areas. Women's rights groups blamed the low rate of convictions for violence against women on a lack of government institutions to support the victims and a lack of trained police officers to investigate the cases. On 26 August, nine women from tribal communities in the Chittagong Hill Tracts were reported to have been sexually assaulted by Bengali settlers who attacked Jumma villages and set fire to hundreds of homes. One of them was reportedly gang-raped. Army connivance in the attacks was suspected. Attempts by the tribal people to file a complaint with the police against the attacks were not successful, while police filed a complaint on behalf of Bengali settlers against 4,000 tribal people, accusing them of attacking the settlers.

Attacks against Hindus

In an apparently planned arson attack on a Hindu family in Banskhali Upazila near Chittagong around midnight on 19 November, 11 members of the family were burned to death. The government called it an act of banditry, but evidence suggested it was a motivated attack against the family because of their identity as Hindus. Police filed a case but despite repeated demands from civil society groups, no independent inquiry was set up.

Attacks against Ahmadis

From October onwards, Islamist groups embarked on a campaign of hate speech against members of the Ahmadiyya community and marched on their places of worship in Dhaka and other parts of the country, calling on the government to declare them non-Muslim. The government deployed security personnel to protect Ahmadis against attacks but took no action against those using hate speech. On 31 October, Shah Alam, the Imam of the Ahmadi mosque in the village of Raghanathpur Bank in Jessore District, was beaten to death in front of his family. Some 90 men led by a local Islamist leader attacked him because he refused their demand to recant his Ahmadiyya faith. No one was charged in connection with the killing even though the assailants' identities were known.

Impunity

Immunity from prosecution was granted to officials and army personnel associated with human rights violations during the anti-crime "Operation Clean Heart" from 17 October 2002 to 9 January 2003. At least 40 men died, reportedly as a result of torture, after being detained by soldiers.

This is edited version of Amnesty International's report on Bangladesh covering events from January - December 2003.