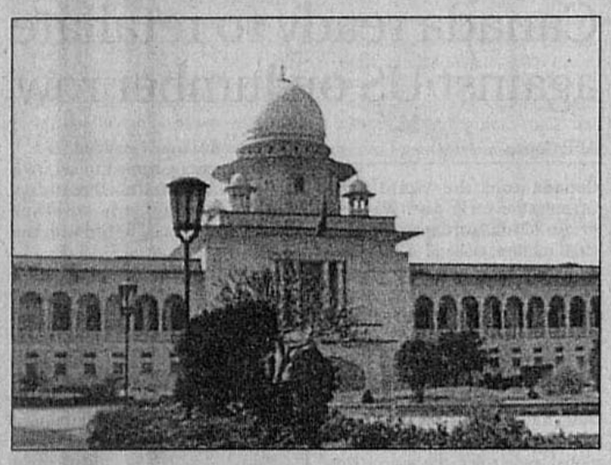
LAW *opinion*

Appointment of Additional Judges: Some issues....

M HARUNUR RASHID

THE Constitution of Bangladesh has been based upon the basic principle of rule of law. The framers of the constitution introduced certain checks and counter checks with the intention that no organ of the State gets absolute powers. The function and power of every organ of the State are subject to certain limitations laid down in the constitution. The



disputes arising between one organ and another are to be resolved by some independent Tribunal namely judiciary.

Even in case of the disputes between individuals, the judiciary maintains the balance between their rights and the society. In this way it has been the balancing the wheel of our Constitution. The quality of excellence of the government is determined on the basis of the efficiency of its judicial system. This judicial function can only performed by an authoritative, independent and impartial judiciary.

Justice Bhagwati in one of his judgement observed "The principle of independence of the judiciary is not an abstract conception but a living faith which must derive its inspiration from the constitutional charter and its nourishment and sustenance from the constitutional values."

Independence of judiciary in a country like ours is solely depends on a legal culture to be particularly borne in mind by the political community who run executive organ of the state. The legal community must not confuse and mix up independence of judiciary and separation of judiciary together. These are, of course complementary to each other but one can be established except the other and without the separation of judiciary there can be independence of judiciary.

In our constitutional scheme there are certain things which these days are considered as threat to independence of judiciary and amongst other things, the appointment of Additional Judges in the Supreme Court is a kind of threat to independence of judiciary to people's perception at large.

We all know that article 98 of our constitution has empowered the President to appoint additional Judges and for a number of reasons the practice of appointment of Additional Judges in the Supreme Court needs a serious consideration. Appointment of a judge for such a short duration appears to be peculiar in our part of the world.

Such practice is not prevailing in the United Kingdom. Even in India they do not have judges either in the sub-ordinate judiciary or in the Supreme Court whose tenure is so short. We do have sub-ordinate courts in the lower judiciary but they are manned by judges belonging to regular judicial service, which is one of the two constitutional service and their tenure is same as others in the service of the Republic.

To my little understanding there are certain drawbacks in the truest sense in continuing the existing system of appointing Additional Judges in the Supreme Court of Bangladesh. I would like to highlight some of them here to substantiate my way of thinking about the matter.

Firstly, an Additional Judge would not be in a position to perform his duties as independently as a permanent judge, on account of the fact that an Additional Judge is subject to fresh test of fitness and suitability, physical, intellectual and moral. The conduct of an Additional Judge would remain subject to scrutiny by the high dignitaries in connection with his reappointment or appointment afresh when his tenure specified under article 98 in just to expire.

It is obvious that he would not be in a position to deal with the matters placed before him without fear of incurring the displeasure of any one of them. Very often the order passed by an Additional Judge against the State or the Government, who are the biggest litigants in every civil courts are sure to displease the policy makers of the Government in one way or the other.

There is no doubt that an Additional Judge takes the oath of office to deal with the matters without fear or favour, and affection or ill will. But after all he, too is a human being. It was due to this reason only the constitutions of many democratic countries did not lay down any provision for appointing Additional Judges.

The author is a joint district judge.

RIGHTS *investigation*

Guantánamo detentions enter fourth year

THE international community must redouble its efforts to persuade the USA to end the human rights scandal at the Guantánamo Bay prison camp, Amnesty International said on the eve of the third anniversary of detentions at the US naval base in Cuba.

"Over the past three years, Guantánamo has become an icon of lawlessness", Amnesty International said. "In its more than 1,000 days of executive detentions, it has become a symbol of a government's attempt to put itself above the law. The example it sets is dangerous to us all."

Full judicial review of detention, and access to lawyers and independent human rights monitors, are basic safeguards against torture and ill-treatment, arbitrary detention, and "disappearance". Evidence that Guantá namo detainees have been tortured and ill-treated continues to mount, with FBI agents now added to the list of those making such allegations. Yesterday, the military announced that it will carry out an internal investigation into these latest allegations.

"Another internal review is not enough," Amnesty International said. "A comprehensive independent commission of inquiry into all aspects of the USA's 'war on terror' detention and interrogation policies and practices is long overdue. No agency should be exempt from scrutiny and no individual exempt from prosecution if the evidence supports it."

The administration of President George W. Bush has sanctioned detention conditions and interrogation techniques in Guantá namo that violate international standards. Previous military reviews and inquiries, let alone the administration itself, have yet to denounce such treatment.

Interrogation techniques authorised for use in Guantánamo have included stress positions, isolation, hooding, sensory deprivation, and the use of dogs. Among the abuses reported by FBI agents are the cruel and prolonged use of shackling, and the use of loud music and strobe lights. They have also reported witnessing the use of dogs to intimidate detainees in Guantánamo. Yet military officials, including those involved in earlier investigations, have previously given assurances that no dogs have been used in this way in the naval base. A full independent commission of inquiry, as called for by Amnesty International since last May, is clearly required.

President Bush has made it a mantra of his time in office that the USA is committed to the rule of law and the "non-negotiable demands of human dignity." The USA's own National Security Strategy and National Strategy for Combating Terrorism stress that respect for such standards must be central to the pursuit of security. The administration's policy in Guantá namo is now the most notorious symbol of its failure to live up to its promises.

"The administration's words alone, that it will remain wedded to human rights and the rule of law even as it wages its 'war on terror', are no longer to be believed", Amnesty International said. "It must show such commitment by its actions and change course fully in line with international law and standards."

Six months after the US Supreme Court ruled that the federal courts have jurisdiction to hear appeals from the detainees, the administration is trying to keep any review of the lawfulness of individual detentions as far from a judicial process as possible. It has argued in federal court that administrative review by so-called Combatant Status Review Tribunals -- panels of military officers that may rely on secret or coerced evidence to label as "enemy combatants" detainees who have no access to legal counsel -- is more than enough due process.

More than 500 detainees of many nationalities remain detained without charge or trial in Guantánamo. Four have been charged for trial by military commission, trials which would violate international law and standards. Commission proceedings have been suspended since November following a ruling by a federal judge. The administration has appealed the ruling, intent on continuing with the military commissions, bodies which entirely lack independence from the executive.

"Along with the individual detainees and their families, the rule of law is falling victim to this disdain for the judiciary", Amnesty International said. "The example being set by Guantánamo is of a world where basic human rights are negotiable, and where arbitrary detention and selective second-class justice become acceptable in the name of security."

Amnesty International reiterates its call for the Guantánamo detainees to be brought to fair trial or released -- with proposed trials by military commission terminated once and for all. All allegations of torture or ill-treatment in Guantá namo or elsewhere must be independently investigated, and anyone responsible for torture or ill-treatment brought to justice. All secret and incommunicado detention must be ended immediately, as must secret transfers of detainees between countries.

Source: Amnesty International.

LAW *alter views*

The Concept of Jus Cogens in International Law

KAMRUL HOSSAIN

JUS Cogens is the technical term given to those norms of general international law, that are argued as hierarchically superior, the literal meaning of which is compelling law. These are, in fact, a set of rules, which are peremptory in nature, and no derogation from them under any circumstances is, therefore allowed. The doctrine of international jus cogens is developed under a strong influence of natural law concepts, which demonstrates that states cannot be absolutely free in establishing their contractual relations. They were obliged to respect certain fundamental principles deeply rooted in the international community. The power of states to make treaties runs out when it confronts a super-customary norm of jus cogens. In other words jus cogens are rules, which correspond to the fundamental norm of international public policy, and in no way can they be altered unless a subsequent norm of the same standard is established. That means the position of the rules of jus cogens is hierarchically superior compare to any other ordinary rules of international law. In fact, there are rules, which are pre-conditions for effective international activity for example, *pacta sunt servanda*. To abrogate that rule is not possible: a treaty providing that pacta sunt servanda is mere reaffirmation; a treaty denying it is an absurdity. The point is that the very activity of treaty-making assumes the general rule. Rules contrary to the notion of jus cogens could, therefore, be regarded as void, as those rules oppose to the fundamental norms of international public policy. Clearly defined contents of the rules of jus cogens are not yet likely to be decided though; existence of such norm is now universally recognised and well established.

Recognition of the Norm

During the early nineteenth century, recognition of such norm was established, as Oppenheim stated that a number of "universally recognised principles" of international law existed, which rendered any conflicting treaty void, and the peremptory effect of such principles was itself an "unanimously recognised customary rule of International Law". For example, he stated that a treaty supporting piracy is void, being contrary to the "universally recognised principles" of international law. Moreover, the concept of jus cogens twice found favour in a judicial context: first, in the decision of the French-Mexican Claims Commission in the 1928 Pablo Nájera Case; and then by Judge Schücking of the Permanent Court of International Justice in the 1934 Oscar Chinn Case. Subsequently, in a number of separate and dissenting opinions, judges of the International Court of Justice made similar references to jus cogens. For example, in Bosnian case in 1993 judge Lauterpacht expressed his opinion on the possibility that the Security Council had violated the genocide prohibition and therewith allegedly jus cogens when imposing an arms embargo on both Serbia and Bosnia. Through the resolution 713 (1991) of the Security Council by which arms embargo was imposed, state's inherent right of self-defence had been disregarded on one hand, and on the other hand the Security Council had been unable to take measures necessary to maintain peace and security in Bosnia. The consequences of what had necessarily led to ethnic cleansing, genocide and large-scale human sufferings. Therefore, the argument of alleged violation of jus cogens has some potential weight. In the Vienna Convention on the Law of Treaties has given the recognition of the norms of jus cogens in Article 53, where it states:

"A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

That means a treaty is no longer an international legal document if, at the time of its conclusion, it conflicts with the

norms of jus cogens, which are peremptory in nature. The article clarifies the criteria of a norm to be determined as jus cogens as according to the following four conditions:

1. status as a norm of general international law;
2. acceptance by the international community of states as a whole;
3. immunity from derogation; and
4. modifiable only by a new norm having the same status.

Hannikainen, however, demonstrated that if a norm of general international law protects an overriding interest or value of the international community of states, and if any derogation would jeopardise seriously that interest or value, the peremptory character of the norm may be presumed, but only if the application of the criteria of peremptory norms produces no noteworthy negative evidence.

Recognition of the rules of jus cogens is again confirmed in 1986 at the Vienna Convention on the Law of Treaties between States and International Organisations or Between International Organisations. The importance of rules of jus cogens is also confirmed by the trend to apply it beyond the law of the treaties, in particular in the law of state responsibility. The International Law Commission (ILC) proposed the notion of international crimes resulting from the breach by a state of an international obligation "essential for the protection of fundamental interests of the international community", which is, in fact, closely linked to the doctrine of international jus cogens. In the Nicaragua Case, the International Court of Justice clearly affirmed jus cogens as an accepted doctrine in international law. The ICJ relied on the prohibition on the use of force as being "a conspicuous example of a rule of international law having the character of jus cogens."

Status of Jus Cogens

A peremptory norm may, it would appear, be derived from a custom or a treaty, but not, it is submitted, from any other source. This statement is, however, self-contradictory. Indeed, there are serious problem associated with the assertions that norm of jus cogens could be the result of one or any of the traditional primary sources of international law, namely treaties, customs or general principles of laws, or perhaps from the natural law. According to Michale Byers, treaties can at best only be contributing factors in the development of jus cogens rules. He found two reasons, firstly a treaty cannot bind its parties not to modify its terms, nor to relieve themselves of their obligations under it, through a subsequent treaty to which all the parties to the first treaty have consented. Secondly, all existing, generally accepted jus cogens rules apply universally and none of the treaties, which have codified these rules, have been universally ratified. No treaty, which has not been universally ratified, not even the Charter of the Charter of the United Nations, can establish a rule of general international law, for treaties can only create obligations as between their parties.

As for the assertion that jus cogens rules to be considered as customary international law, still further ambiguity takes place. Because customs are binding only in case of established opinio juris that a state believes to be bound by the said practice as being creative of customary rule, and persistent objection of any customary principle creates an exception to have the binding nature of that rule for the parties objected. There are also other ways to supersede customary rules, for example, through the development of rules of special customary international law and the conclusion of treaties. Whereas in case of the rules of jus cogens, these are bound regardless of the consent of the parties concerned, regardless of states' own individual opinion to be bound as because these rules are so fundamental that states cannot escape responsibility under these rules. Modification of the rules of jus cogens is only possible when new peremptory norm of equal weight emerges. As for the binding character of jus cogens, acceptance by the large majority of states of such norm would amount to universal legal obligation for the international community as a whole. These are superior rules and bear the common values for the international community as a whole. Michael Byers, however, tends to show that jus cogens rules are derived from the "process of customary international law", which according to him is itself a part of international constitutional order. He argues that opinio juris, or something like opinio juris, appears to be at the root of the non-derogable character of jus cogens rules because states, quite simply, do not believe that it is possible to contract out of jus cogens rules, or persistently to object to them. They regard those rules as being so important to the international society of states, and to how that society has come to define itself, that they can conceive of no exception to them. Article 53 of the Vienna Convention, however, contains no reference to any element of practice. One could then hardly conceive jus cogens as a strengthened form of custom. David Kennedy termed jus cogens as super-customary norm.

In fact, two views are predominating as regards to the basis of the concept of jus cogens either as a direct source under international law or as based on the one of the existing sources of international law. Some argue, accepting of the concept of jus cogens means recognition of a wholly new source of law capable of generally binding rules. This idea was developed during the Vienna Conference on the Law of the Treaties as jus cogens was interpreted to mean that majority could bring into existence peremptory norms and the norm binds the international community of states as a whole regardless of the individual consent of the states. That results in a new source of law on the basis of the argument that community as a whole may create rules, which will bind all its members notwithstanding their possible individual dissent. Others argue that the existing sources have been modified to allow majority rule-making in the context of higher law. However, negotiating history of the Vienna Convention does not support the view that the notion of jus cogens emerges as a new source of general international law. Rather, there was a clear tendency to regard jus cogens as the product of the existing sources. For example, France argued that if the draft article on jus cogens was interpreted to mean that a majority could bring into existence peremptory norms that would be valid erga omnes, then the result would be to create an international source of law, for what it rejected such possibility on the ground that such new source of law would be subject to no "control and lacking all responsibility". Moreover, complexity remain in the interpretation of the wording of Article 53, that "acceptance and recognised by the international community of States as a whole". M.K. Yasseen, who was the Chairman of the Drafting Committee of the Vienna Conference of the Law of Treaties, states "there is no question of requiring a rule to be accepted and recognised as peremptory by all States. It would be enough if a very large majority did so; that would mean that, if one state in isolation refused to accept the peremptory character of a rule, or if that state was supported by a very small number of states, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected." He also stated that no individual state should have the right of veto. ILC's commentary to the article 19 of the Draft Articles on State Responsibility, which requires that an international crime should be recognised as such by the international community "as a whole", points out the meaning of the terms "as a whole" as follows:

"this certainly does not mean the requirement of unanimous recognition by all the members of the community, which would give each state an inconceivable right of veto. What it is intended to ensure is that a given international wrongful act shall be recognised as an "international crime", not only by some particular group of states, even if it constitutes a majority, but by all the essential components of the international community."

The same view was expressed at the Vienna Conference by the representative of the United States that, the recognition of the peremptory character of a norm "would require, as a minimum, absence of dissent by any important element of the international community." The representative of Australia stressed that "rules could only be regarded as having the status of jus cogens if there was the substantial concurrence of states belonging to all principal legal systems".

Debate continues, not as regards to the existence of the notion of jus cogens, but on two other issues. Firstly, as regards the status of jus cogens, either as a new source of international law or as under the any other existing sources of international law; secondly, as regards the process of law making under the norm of jus cogens. Although in reality, in the present international legal order there is no special source for creating constitutional or fundamental principles, but we all know that international law itself is under the constant process of development, "development towards greater coherence."

Conclusion

The existence of the concept of jus cogens is, nonetheless, not denied by the states at the Vienna Conference on the Law of Treaties. Rather, it was argued that the essence of the concept is that, it must operate as regards all states without exception and indeed states at the Vienna Convention reached an agreement on a constitutional principle that peremptory norms bind all members of the international community notwithstanding their possible dissent. It was also argued that the principal criterion of peremptory rules was considered to be the fact that they serve the interest of the international community, not the needs of individual states. Some argue by relying on the domestic law analogy that good customs, morals and public policy were not necessarily defined in municipal law, and yet no insoluble difficulties had ever arisen in applying them in specific cases. Moreover, since the adoption of the Vienna Convention on Law of the Treaties, the norm of jus cogens has gained a wide support among the commentators and writers. Therefore, it could be argued that the objecting states are bound by the concept so far as Article 53 of the Vienna Convention is declaratory of an already existing international law concerning jus cogens. In fact, the principle of consent is a further structural principle of international law, distinct from jus cogens.

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