Star LAW *analysis*

Office of Attorney General: Executive or judicial?

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THERE is an ongoing debate across the world revolving around the nature of Attorney General's job. Is it of executive or of judicial nature? Is it predominately executive with some judicial attributes or the vice versa? The answer is crucial because when the nature becomes more 'executive' than 'judicial', there remains a danger of politicisation of the post leading to lesser independent judiciary. In this article I shall try to identify the nature of the Attorney General's office in Bangladesh vis-à-vis its counterparts in other parts of the world. First, let us visit the history of this office.

The rudiments of Attorney General can be traced back to thirteen-century England. In many cases interest of the Crown was involved but it was unthinkable for the King to physically appear before the court to present his case. So he preferred to appoint a representative who would talk on his behalf in the courts for 20 pounds a year.

The job was pretty straightforward, well-defined, and more importantly free of any smack of politics. But gradually the office started receiving more importance, and continued to evolve to a position where its business multiplied -- both in nature and volume. Gradually all other States found their versions of Attorney General or the like.

Today the Attorney General for England and Wales probably holds the most multifaceted legal profession around the globe. He is utterly a political appointee and must be a member of either house of the Parliament. He has to represent his constituency in the parliament, account to the Parliament for his doings, defend public interest in the apex court, supervise criminal prosecution, represent the Crown in the court and advise government functionaries. No wonder Sir Francis Bacon, once Attorney General himself, termed it "the painfullest task in the realm".

Though a political insider, the Attorney General of England is generally expected to differentiate between 'politics' and 'law' so as to enable him exercise his judgment independently. But the role of present Attorney General, Lord Goldsmith, QC has been questioned as not being judicious but politically motivated. His endorsement of the decision by the Director of the Serious Fraud Office to prematurely close an investigation into corruption in arms sales to Saudi Arabia and particularly his advice on the legality of the Iraq war raised serious debate to the point that some even argue the necessity of constitutional amendment to appoint somebody outside politics as Attorney General. Though not everybody is equally supportive of this reform proposal, they do agree on the point that the Attorney General should be reasonably independent in performing his duties to serve State interest.

Now let us have some insights into the Attorney General's office of the USA. The U.S. Attorney General is basically a member of the President's Cabinet though divested of the title 'Secretary'. As the head of the U.S. Department of Justice, he is the chief law enforcement officer of the U.S. Government in the sense that under his authority the whole prosecution service operates. He is also responsible for ensuring public safety against foreign and domestic threats and providing federal leadership in preventing and controlling crime.

It is exceedingly clear from what have been said above that the job the U.S. Attorney General dispenses tilts to executive nature. He is necessarily a political appointee and like other Secretaries of the government he has governmental agenda to pursue. Still, while appearing before the Supreme Court in exceptionally important cases, he is supposed to represent the United States, not the government. It becomes clearer when we see that he takes the post under the oath to uphold the nation's laws and the Constitution. But from a practical perspective, we can easily anticipate that for a cabinet member it is not unlikely to be more inclined to uphold government interest than State interest. This is more so in the case of present Attorney General's office under the Bush administration.

Though the current Attorney General Alberto Gonzales indicated in his testimony before the Senate during confirmation hearing that he would be the Attorney General for the entire nation, not the President, he subsequently proved himself to be just another 'Bushie'. During his tenure the Bush administration fired eight prosecutors at the beginning of the last December and another bunch of seven earlier that year. The unofficial reason for such unprecedented sacking is their lack of keenness to secure government interest sufficiently vis-à-vis state interest and to facilitate the introduction of more allegiant prosecutors.

Though not unlawful, this extraordinary power was seldom used by the predecessors of Mr. Bush so that the functional independence of the prosecution service could be maintained. The Congressional Research Service confirms that only two U.S. attorneys have been forced out in the middle of a presidential term for reasons not related to misconduct. No wonder this mass dismissal of government attorneys triggered controversy and brought to the fore an age-old question -- what is the predominant nature of the U.S. Attorney General's office: executive or judicial?

Though has been an issue of debate for long in many countries, the idea of independent Attorney General's office sees its successful implementation in Brazil. There, the Attorney General heads the federal prosecution office which happens to be an autonomous agency. Magistrates working under his authority are also independent in discharging their responsibility to investigate and prosecute offences. Unlike his counterparts in other states, Brazilian Attorney General does not have the responsibility to advise and represent the government in the court. Another official called Solicitor General looks after this job. And law enforcement is the responsibility of the Minister of Justice.

In our country, the Bangladesh Law Officers Order 1972 regulates the appointment, control and dismissal of the Attorney General. According to this Order, the President of Bangladesh has the authority to appoint the Attorney General and his deputies, and their tenure is left entirely at the mercy of the President. As a result, they are susceptible to dismissal at any time and there is no requirement of assigning any reason. In our democracy the President is virtually bound to do whatever the Prime Minister wants him to do. This way, the post of Attorney General has been, both theoretically and practically, divested of any measure of independence whatsoever.

So, we naturally don't get surprised to see the change in the role of our Attorney General's office in relation to different cases with the change of political government. Famous Masdar Hossain case can provide us with an example of Attorney General's prudence giving way to governmental convenience. At the stage of High Court Division the government didn't contest the case. Instead, the then Attorney General Mahmudul Islam expressed opinion favourable to the writ petitioners. He also informed the Court that he had written to the government expressing his view in favour of the cause of the petitioners. But after the pronouncement of judgment by the HCD, government seemed to shake off its reluctance and decided to fight the case hard. Mr. Mahmudul Islam acted accordingly giving up all his concurrence with the petitioners.

Now let us examine the position of our Attorney General in the context of the functions he disposes. In Bangladesh the Attorney General is not a political appointee nor does he performs duties of executive nature which his counterparts in other nations often do. Political aspects of law and order are generally dealt with by the Ministry of Law and Ministry of Home Affairs. He does not even have any supervisory authority over the prosecution department of the country. The Solicitor's Office under the Law and Justice Wing of the Ministry of Law, Justice and Parliamentary Affairs is responsible for appointment, payment of salaries, discipline and other ancillary issues of all government law-officers. According to the Law Ministry's official website, the Solicitor's Office is even vested with the onus of processing the appointment of the Attorney General and other Attorneys in the Supreme Court.

Our Attorney General's duty to advise the President and other government offices is not explicitly mentioned in the law on Attorney General. But to our knowledge, there have been some occasions where the Attorney General was called upon by the government for advice. And Law Ministry's official website does say that advising the government in legal issues happens to be one of his entrustments. But practically advising the different functionaries of the government is predominantly done by the Law and Justice Wing of Ministry of Law, Justice and Parliamentary Affairs. And the Wing does so fully in conformity with the Rules of Business of 1996.

Our Attorney General has no stake to play in State's law making process and unlike the Indian Attorney General he has no right to participate in the proceedings of the Parliament. All the duties our Attorney General has to perform are virtually confined to the Supreme Court premises. So, by no means his job can be labeled as executive in nature. If we tend to maintain that this crucial post in the administration of justice is of executive nature, dire consequence awaits us as it will help politics get into the process, symptoms of which are already visible. Sense of justice should be devoid of any subjective consideration in maintaining its own course. After all, what is justice and what is not is not to be told by the government.

All these lead us to the infallible conclusion that the Attorney General of Bangladesh should represent the interest of the State, not of the government. So, concrete insulation must be supplied to this office so that political invasion can do no damage to its independence which is the crux of its role as a defender of justice.

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HUMAN RIGHTS *advocacy*

Create Darfur recovery fund

United Nations Security Council members should act decisively to protect civilians in Darfur by establishing a mandatory Darfur Recovery Fund with Sudanese oil revenues, Human Rights Watch said today. In a letter to Security Council members, Human Rights Watch also called for targeted sanctions on top Sudanese leaders. The Sudanese government continues to reject the full deployment of a proposed African Union-United Nations protection force to Darfur, and to resist all efforts to improve civilian protection for some 2.5 million displaced Darfurians who continue to be attacked, raped, and killed. "Given Sudan's blatant failure to protect civilians in Darfur, the Security Council should designate Sudanese oil revenues to create a fund to assist those suffering most from Khartoum's abusive policies," said Peter Takirambudde, Africa director at Human Rights Watch. "Such limits on Sudan's oil revenues have the best chance of stopping the violence and compelling Khartoum to accept the full African Union-United Nations force." Theycalled for the Security Council to create a mandatory Darfur Recovery Fund into which all revenues from Sudanese oil exports would be paid. The fund would be a new measure, under Chapter VII of the United Nations Charter. It would permit both the Sudanese government and private firms to continue to export oil and Sudan's existing customers could continue to buy it but all proceeds from such exports and all royalties and similar payments owed to the Sudanese government would be paid directly to the fund. The proposed fund would be administered by an independent UN-designated financial institution that would serve as an escrow agent.

The fund would distribute the proceeds to the government of South Sudan in accordance with the Comprehensive Peace Agreement of January 9, 2005; to the oil exporting firms for oil production and delivery costs; and to the Sudanese government for those substantiated expenditures on social services that are currently paid for with oil export revenues. The balance of the proceeds would go to victim compensation and recovery projects in Sudan, with the goals of facilitating the safe return of displaced persons, assistance in reconstructing homes, and replanting fields and other humanitarian needs in Darfur and elsewhere in Sudan.

To ensure transparency, all Darfur Recovery Fund receipts and disbursements would be subject to regular independent audits, as would the assistance and recovery projects carried out with fund assistance, as recommended by the US General Accounting Office report for future UN-authorized trust fund programs. Domestic oil sales (about 15 percent of Sudan's production) would not be affected by or subject to the fund. Human Rights Watch said that the Security Council should also specify the actions required by the government of Sudan for rescinding the mandatory fund procedure. These conditions should include:

Consent by the Sudanese government to the full deployment of an effective and robust African Union-United Nations protection force in Darfur with a mandate to take all necessary measures to protect civilians; Ending of further financial and logistical support to the government-backed "Janjaweed" militias and cooperation with African Union and the United Nations on a genuine plan for their disarmament; An immediate end to attacks on civilians by Sudanese armed forces and government-backed militias; Cooperation with the International Criminal Court in its investigations of crimes in Darfur and on any requests for extradition of Sudanese citizens; and Full and unimpeded access to and within Darfur for Sudanese and international humanitarian workers, human rights organizations and media. When the Security Council finds that these conditions have been met, the Darfur Recovery Fund would be terminated and any remaining proceeds distributed to qualifying recipients in accordance with the fund's procedures.

Human Rights Watch has long called on Security Council members to impose individual sanctions (travel bans and asset freezes) on key Sudanese and militia leaders for their role in serious violations of international human rights and humanitarian law.

"In addition to setting up the Darfur Recovery Fund, the Security Council should impose targeted sanctions on those senior Sudanese officials already identified by the UN as human rights abusers," said Takirambudde.

Source: Human Rights Watch.

LAW *vision*

Justice delayed, justice denied

SYED MUJTABA QUADER

THE quickness in the dispensation of justice, and the degree of empathy society has for the disadvantaged, are two of the most important measures of the state of advancement of a nation. On both counts we Bangladeshis fall far behind. No money or investment is required to attain this -- all that is required is the cultivation of a state of mind. With the growth of multifaceted NGOs and the presence of a vociferous civil rights community the disadvantaged may find some solace in recent times.

But, the dispensation of quick justice seems to have taken a back seat in a pseudo-democratic environment where political parties take advantage of the ignorance of the common people and the greed of the privileged ones. The more that one can use the judicial system for one's own selfish ends, the more successful he is. The legal system seems to have become a tool for the clever, the wily and the unscrupulous to the detriment of the entire nation. Individuals vie with each other to climb the mountains of achievement through the dishonest manipulation of the judicial system but they cannot see that the whole mountain is sinking in an abyss of wrong and evil.

After all, justice is the defining periphery for the value system of a people. By definition, if there is no value system there can be no justice, and conversely, if there is no justice there can be no value system. Moreover, if justice cannot be delivered over an extended period of time, then it can be said that there is no justice during that period of time. 'Justice delayed is justice denied' the famous quotation from British Prime Minister William Gladstone is well understood by schemers who have learnt that delaying justice is the way to defeating justice. Their mode of operation is quite clear -- delay justice and you have control over the authority that be. And by extension, you have power over the whole system and the nation.

In recent times, delaying justice has become the most important tool for unscrupulous people to be outside the system and eventually to manipulate the system from this vantage point. Going to court is the easiest way to win time and thereby have control over the situation. 'Not to decide is to decide' and if indecision can be forced upon the rightful adversary through the workings of the court, the decision will always favour the wrongdoer. The principal cause for the deflowering of our value system is the inability of our intellectuals and the legal system to recognise this.

How many land grabbers do we know today who have gobbled up land of hapless villagers just by registering a case in the local court? How many dishonest businessmen do we know who have stopped banks from foreclosing on mortgaged property by starting a court case? How many builders do we know who build huge buildings openly disregarding established building codes only by virtue of a court case. How many tenants do we know who go on occupying other people's property by just registering a court case? How many families around the country remain perpetually enmeshed in torment and anguish on account of a few square yards of inherited property because of one single court case? The list goes on and on.

Delay in deliverance of justice is eating away the fabric of the whole society. According to a study, 186 million people of the country are embroiled in some court case. This is more than the population of the country because some people are involved in multiple court cases. According to the same study the average time taken for a court case to be resolved in Bangladesh is 9.5 years. Some court cases have been known to go on for 50 years. In many cases the initial need for instituting a court case gets extinguished by the time a verdict is given by the court. And it goes without saying that the winner in these cases is the wrongdoer.

The lower judiciary is the most affected. Court cases linger for years and years and litigants cannot go to a higher authority when the lower court itself seems delinquent in its responsibility to delve out justice. It is important to note here that, although legal cases are almost always taken to the High Court by the losers for getting better judicial dispensation, getting out of the lower court itself may become an almost Herculean task, win or loose. There are quite a few ways that these delays take place. The first is by a combination of skilful lawyers and insensitive judges finding many causes for deferring hearing of the cases month after month for no rational reason at all excepting insensitivity and lethargy in carrying out their work. Sometimes dates are given two months away for no relevant reason at all. No methods exist for the litigant to appeal to a higher authority to seek redress from these whimsical actions of delay which over an extended period of time tantamount to the denial of justice.

The second is by lawyers who take the cases from court to court on flimsy technical grounds in a labyrinthine exercise of slippery judicial process that never finds traction anywhere. The third is allegedly by collusion between opposing lawyers who find much financial benefit in letting the case drag on and on for years. The fourth is by judges delaying the process as much as possible for reasons best known to them but that breed suspicion in litigants' and others' mind. The fifth is by court officials in charge of court documents and procedures who subscribe to all forms of stratagems to prolong cases for financial benefit. This list may go on and on. In all these cases who benefits the most is the person who is in the wrong, be it the litigant, the lawyer, the court official or the judge.

Although edicts have been promulgated in the past by various governments to speed up the workings of the lower court, in practice, these have been mostly unsuccessful because of other technical legalities that supercede these edicts. Avenues for appeal to a higher authority against the inactions of the lower courts have been conspicuously neglected in these edicts.

In this confusion and chaos the only leverage that a litigant can reasonably apply is to be able to choose and change lawyers at will depending on how much benefit a litigant perceives to be receiving from the person who is supposed to represent him and his interests in the court. It is a fundamental fact that a litigant goes to court with the intention of asserting his lawful rights, in other words, to win the case. If there was no possibility of winning a case the litigant could not be expected to go to court at all -- the litigant would have to yield and submit to the stronger adversary outside of court. The only exception as explained above is the self-confessed and unashamed wrongdoer who goes to court with the only intention of delaying resolution of the issue and thereby benefiting from the delay.

So, in order to win the case, the litigant is pre-disposed to selecting the best person in his understanding to represent him to win the case. This right of the litigant to choose and select a lawyer of his liking is fundamental to the disposal of justice in the present system. Market forces are supposed to play their role in fostering excellence in the legal profession. Instead, even this fundamental right of the litigant is being infringed upon in our present day judicial practice. The Bar Council has made it a rule that a lawyer once empowered to handle a case cannot be changed without a formal written release from the lawyer. Courts do not accept changes in legal representation without clearance from earlier representatives.

Obtaining exception to this requirement is lengthy and cumbersome. This involves making an application to the Bar Council and obtaining a ruling in this regard. This is almost impossible to do for common litigants with no knowledge of the law. The argument may be that this aspect of the practice prevents litigants from not paying fees to lawyers. Although, this may be true on paper, lawyers are known to use this ploy to keep clients tied up to themselves for years on end for benefit only to themselves with no caring at all to the actual cause of delivering justice.

No issue can be more paramount in the judicial system than to deliver justice to litigants. Petty attempts of lawyers and their associations to protect their own interests ahead of the interests of the litigant are repugnant in the least. This kind of anti-competitive practice breeds incompetence in the legal profession and thereby ultimately harms the litigants' and the public's interests. If it came to that, lawyers could always take delinquent litigants to task through the courts themselves. In actuality the complexity of this issue is reportedly compounded by the lawyers themselves allegedly by not presenting exact rates and prices for their services beforehand to inexperienced litigants. Market forces are disregarded by not allowing lawyers to advertise in any form thereby keeping litigants at the mercy of lawyers who are wary of competition from younger practitioners.

Attempts are lately being made by the present caretaker government to separate the judiciary from the executive branch. How successful this will be will depend to a large extent on the good will and cooperation of the Bar Council and the Bar Associations in initiating reforms in their rules and ranks to reflect the requirements of modern times and the needs of the litigants in the interest of law, justice and good governance.

Finally, we need to remember the famous quotation from the English philosopher Edmund Burke who said, 'All that is necessary for the triumph of evil is for good men to do nothing'. If we do not do anything to protect the right-doer and punish the wrong-doer then we cannot blame anyone if the knife is pointed in our own direction tomorrow.

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