PARLIAMENT *scan*

Giving cognizance power to executive magistrates: Some conflicting issues

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THE introduction and passing of the Criminal Procedure Code (Amendment) Bills into parliament which were promulgated as Ordinances by the Caretaker Government separating judiciary from the clutches of the executive are now under political conundrum. The Judicial Service Association as well as the lawyers' community in general expects that the two Ordinances be passed as laws by the parliament without any amendment as this would be in line with the directives in Masder Hossain case. On the other hand, the parliamentary standing committee on law, succumbing to the mounting pressure from the admin cadre, has decided to recommend that the parliament vests authority in the government to empower executive magistrates to take cognizance in 'extraordinary circumstances' or 'in all circumstances' and then to send the same for trial to judicial magistrates. The Committee has also suggested that this power of cognizance will be given to executive magistrates for maintaining law and order situation and this has nothing to do with the trial and giving punishment. This logic sounds easy but the consequence will lead to a very sordid picture in ensuring rule of law in the country. The strength of this easy logic of mere cognizance power is being cemented by another argument that the provisions in Article 22 of the Constitution on the basis of which separation has been done are not judicially enforceable.

Cognizance power and separation of judiciary

If cognizance power is given to executive magistrates under section 190 of the CrPC, it will certainly go against the spirit of separation of judiciary and directives given by the apex court in Masder Hossain case. Giving cognizance power to executive magistrates will give rise to a very simple question: will it be an executive and/or administrative power or judicial power? It has been repeatedly held by our apex court in line with consistent decisions in Indian Sub-continent that taking cognizance is a judicial power and any misuse or abuse of such power is to be corrected thorough judicial process. Usually this is done by filing an application in the High Court Division under section 561A of the CrPC. However, an executive power cannot be questioned by 561A application. Thus if cognizance power is given to executive magistrates, how will the apex court exercise its supervisory power? So the accommodation of powers between judicial and executive magistrates will be difficult. Let me give an example. An executive magistrate refuses to take cognizance of a petition or FIR. What will be the remedy for the petitioner or informant? Where will he file application against the decision of the executive magistrate, given that an executive magistrate is not under the jurisdiction of judicial authorities? As taking cognizance is a judicial proceeding, a revisional application to an upper judicial organ is always possible but if that power is exercised by an executive magistrate, this will not be possible and the ultimate result will lead to a power clash between two authorities.

Secondly, the legislators must remember that CrPC is a general law and the provisions of general laws are always subject to the provisions of special laws. Cognizance powers including power of trial are often given to executive or administrative authorities by special laws like the Mobile Court Ordinance, 2007, the Pure Food Ordinance, 1959, the Animals Slaughter and Meat Control Act, 1957, the Prevention of Smoking Act etc. The parliament may give cognizance power to executive magistrates by special laws like the Special Powers Act if needed in special circumstances but giving a blanket power to take cognizance in a general law like the CrPC will mean dependent dispensation of judicial functions like before.

Thirdly, as cognizance power is a judicial power, and the same would be exercised by an executive magistrate, he must be armed with subsequent powers associated with it as laid down in section 200 of the CrPC which will ultimately come into conflict with the historic verdict in Masder Hossain case as there will no longer remain a separate judiciary. This is because the Appellate Division held in Masder Hossain case that "judicial service is fundamentally and structurally distinct and separate service from the civil executive and administrative services of the Republic with which the judicial service cannot be placed on par on any account and that it cannot be amalgamated, abolished, replaced, mixed up and tied together with the civil executive and administrative services." (para 76).

Article 22 of the Constitution and separation of judiciary

A vaunting chorus is in the air that since Article 22 is not judicially enforceable, the separation of judiciary as implemented by the two Ordinances amending CrPC by the Caretaker Government is invalid. Those who join this chorus should bear in mind that the Appellate Division while delivering its judgment nowhere mentioned that it was giving directions to government to implement Article 22 although Justice Latifur Rahman referred to this Article in paragraph 78 of the judgment. The decisions and directions given in Masder Hossain case are based on interpretation of Articles 115, 116, 116A of the Constitution which are mandatory in nature. Further, like Article 22 there are 18 Articles in the Constitution which are not judicially enforceable. They are not judicially enforceable as such but the Constitution itself makes it clear that these directives shall be applied in making laws by the Government and parliament and they shall act as guide to the interpretation of the constitution and laws of the country. Fundamental principles enunciated in the constitution like Article 22 are not empty rhetoric; they are political commitments to the nation and the elected governments are oath bound to implement them on priority basis.

Concluding remark

Separation of judiciary from the clutches of the executive has been a long cry for the interest of rule of law and democracy since the British regime. The British administration introduced this mixed system and they did not separate the judiciary thinking that separation might go against their colonial interest. However, the ghost of that colonial regime still haunts us although we are very critical of that colonial regime. In our independent history every government and every political party has had avowed manifestos and commitment to separate judiciary from the clutches of the executive; alas! Every political government betrayed this nation for reasons best known to them. It was such a long and tormenting struggle that the Supreme Court itself had to give directions to the Government to separate judiciary although it should have been done by virtue of political will of the party in power.

Why the people in admin cadre covet this judicial power given that they have no required qualification in law? Do we approach a person for medical treatment who does not have MBBS degree? It is clear these admin cadre people want to use this power just with a view to harassing ordinary people in the name of justice. If the political government echoes such unrealistic demand of the admin cadre officers under pressure, what political will the parliament and the majority party is holding now? If the present government with such a massive political support does not pass the law to separate judiciary in a proper manner, it will leave another blackest chapter in the history of this unfortunate nation. Let it not happen.

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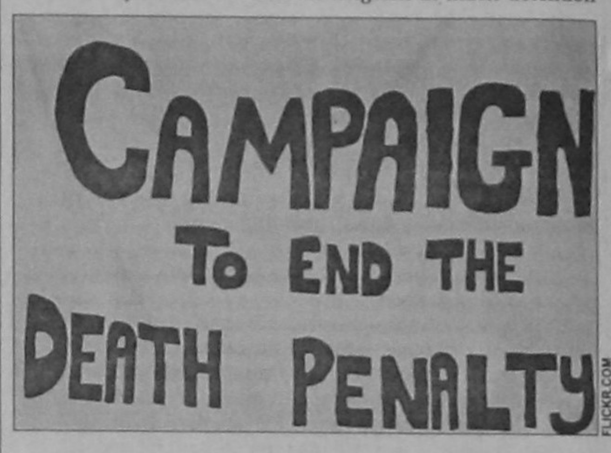
LAW *news*

The death penalty in 2008

MORE people were executed in Asia than in any other part of the world in 2008. China carried out more executions than the rest of the world put together. By contrast, in Europe, only one country continues to use the death penalty: Belarus. "The death penalty is the ultimate cruel, inhuman and degrading punishment. Beheadings, electrocutions, hangings, lethal injections, shootings and stonings have no place in the 21st century," said Irene Khan, Secretary General of Amnesty International as Amnesty International issued revealed its figures on the use of the death penalty last year.

The report, Death Sentences and Executions in 2008, provides a world overview on the death penalty. Between January and December 2008, at least 2,390 people were executed in 25 countries around the world, with at least 8,864 sentenced to death in 52 states.

The report addresses the discriminatory manner with which the death penalty was often applied in 2008. A disproportionate number of sentences were handed down to the poor, minorities and members of racial, ethnic and religious communities in countries such as Iran, Sudan, Saudi Arabia and USA. The risk of executing the innocent continues, as highlighted by the four inmates released from death row in the USA on grounds of innocence. Many death row inmates languish in harsh detention



conditions and face psychological hardship. For example, inmates in Japan are typically notified of their hanging only on the morning of their execution and their families are informed only after the execution has taken place.

"Capital punishment is not just an act, but a legalized process of physical and psychological terror that culminates in people being killed by the state. It must be brought to an end," said Irene Khan. Progress was undermined, however, in 2008 by countries like St Kitts and Nevis, which carried out the first execution in the Americas outside the USA since 2003, and Liberia, where the death penalty was introduced for the crimes of robbery, terrorism and hijacking. Only two officially recorded executions were carried out in Sub-Saharan Africa in 2008, but at least 362 people were sentenced to death.

"The good news is that executions are only carried out by a small number of countries, which shows that we are moving closer to a death-penalty free world," said Irene Khan. "By contrast, the bad news is that hundreds of people continue to be sentenced to death and suffer in the many countries that have not yet formally abolished the death penalty."

Source: Amnesty International.

RIGHTS *investigation*

Thailand: Insurgents target leading Muslim woman activist

THE killing of a prominent Muslim women's rights activist by alleged separatist insurgents is a major setback to ending violence in Thailand's southern border provinces, Human Rights Watch said in a press release.

On March 12, 2009, an eyewitness saw an insurgent fatally shoot Laila Paaitae Daoh, a prominent Muslim women's rights activist and peace advocate, in broad daylight in Krongpenang district, Yala province. She was rushed to Yala Hospital Center, but died of her wounds the next day. Laila and her family had long received threats and had been targets of insurgent attacks. Alleged insurgents killed her eldest son in 2004 and her husband and second son in 2006.

The killing of Laila followed the March 7 shooting and burning of two Buddhist civilians in Pattani province. In addition to daily shootings and bombings, insurgents have allegedly committed at least five beheadings of civilians and security personnel since the beginning of this year.

"Laila's brutal murder is part of ongoing efforts by insurgents to intimidate and attack Muslims who oppose insurgency or have supported Thai authorities," said Brad Adams, Asia director at Human Rights Watch. "Her death is a serious loss for those trying to find a peaceful solution to the conflict in the south."

Insurgents in government-declared "red zones" in the southern border provinces have in recent years used violence and terror to try to keep other Muslims under their control. In Mu 1 village of Tambon Purong, Krongpenang district, Yala province, where Laila lived, villagers were warned not to work with Thai authorities and not to accept food or other assistance from the government.

Despite these pressures, Laila promoted coexistence between ethnic Malay Muslims and Buddhist Thais. Her eldest son was a village chief, while her husband and second son worked as volunteers with local authorities. She and her family actively advocated the belief that justice and well-being for ethnic Malay Muslims could be sought peacefully through human rights and judicial mechanisms instead of armed struggle. Laila was also instrumental in activities of the Women and Peace Group and Luk Riang, a prominent child rights group, in the southern border provinces.

For years, Laila and her family had received death threats from insurgents, who accused the family of being munafig (hypocrites) or Muslims who have sided with the occupying forces of infidels. Since Laila's death, her sister has received repeated phone calls from anonymous men, who said in the local Malay dialect: "Die. Die. Die." These calls continued through March 17.

"The killings of Paaitae Daoh family members were undoubtedly meant as punishment and as a warning to other Muslims," said Adams. "In this way, the insurgents spread fear throughout the southern Muslim community."

The Pejuang Kemerdekaan Patani (Patani Liberation Fighters) insurgents, separatists in the loose network of BRN-Coordinate (National Revolution Front-Coordinate), maintain a presence in more than 200 Muslim villages despite having suffered major losses from counterinsurgency operations. The insurgents make use of abuses by government security forces and heavy-handed tactics to recruit and radicalize supporters. The Pejuang Kemerdekaan Patani insurgents have been implicated in thousands of deadly attacks over the past five years. Most of their victims have been civilians.

Human Rights Watch said that human rights groups in the southern border provinces have also been targeted by Thai security forces. The latest such incident took place on February 8, when about 20 soldiers and police in Pattani province raided the office of the Working Group for Peace and Justice (WGPJ), a nongovernmental human rights organization. After taking photos of documents and materials found in the office, the officers spent a long time inspecting data in the organization's computers, which contained details about victims and witnesses, and other sensitive information.

Since the outbreak of violence in the southern border provinces in January 2004, a number of human rights defenders have been harassed, arrested, tortured, "disappeared," and murdered, allegedly by the security forces. None of these cases has been successfully investigated to bring the perpetrators to justice.

"Thai authorities in the south should stop harassing human rights groups," said Adams. "Raids on activists' offices undercut Prime Minister Abhisit's commitment to make justice and human rights integral to resolving the conflict."

Human Rights Watch has repeatedly condemned violations of the laws of war by both sides in the southern border provinces. A fundamental principle of the laws of war is the distinction between civilians and military objectives. The insurgents claim that the civilians attacked were part of the Buddhist Thai state, which is participating in the hostilities. But the laws of war allow no such defense or justification for attacks on civilians. The laws of war explicitly prohibit tactics used by the insurgents such as reprisal attacks against civilians, summary execution of civilians or captured combatants, mutilation or other mistreatment of the dead, and attacks directed at civilian facilities.

Source: Human Rights Watch.

RIGHTS *monitor*

Israel: white phosphorus use evidence of war crimes

ISRAEL'S repeated firing of white phosphorus shells over densely populated areas of Gaza during its recent military campaign was indiscriminate and is evidence of war crimes, Human Rights Watch said in a report released on 25 March.

The 71-page report, "Rain of Fire: Israel's Unlawful Use of White Phosphorus in Gaza," provides witness accounts of the devastating effects that white phosphorus munitions had on civilians and civilian property in Gaza.

Human Rights Watch researchers in Gaza immediately after hostilities ended found spent shells, canister liners, and dozens of burnt felt wedges containing white phosphorus on city streets, apartment roofs, residential courtyards, and at a United Nations school.

The report also presents ballistics evidence, photographs, and satellite imagery, as well as documents from the Israeli military and government.

Militaries use white phosphorus primarily to obscure their operations on the ground by creating thick smoke. It can also be used as an incendiary weapon.

"In Gaza, the Israeli military didn't just use white phosphorus in open areas as a screen for its troops," said Fred Abrahams, senior emergencies researcher at Human Rights Watch and co-author of the report. "It fired white phosphorus repeatedly over densely populated areas, even when its troops weren't in the area and safer smoke shells were available. As a result, civilians needlessly suffered and died."

The report documents a pattern or policy of white phosphorus use that Human Rights Watch says must have required the approval of senior military officers.

Source: Human Rights Watch.