REVIEWING *the views*

Cognisance power of executive magistrates: Some issues

PROFESSOR RAFIQUL ISLAM

OF the major initiatives of the immediately passed caretaker government was the promulgation of the ordinances that separated the judiciary from the executive. It abolished executive magistrates' authority to take cognisance of offences for trial. The ordinances ceased to remain effective on 25 February 2009 for want of parliamentary approval. The incumbent government introduced a bill on the separation of judiciary in parliament on 2 March 2009 in a bid to continue the separation. Instead of endorsing the bill in its present form, parliament sent it for scrutiny by the parliamentary standing committee on law, justice, and parliamentary affairs. This committee has submitted its report to parliament on 18 March 2009 with recommendations for amending the bill to confer on the government sweeping discretion to authorise executive magistrates to take cognisance of offences for trial in any circumstances. Empowering executive magistrates only to take cognisance without any authority to hold trial may not appear to be a pressing matter. But the cognisance of an offence entails the recognition and acceptance of that offence to be sent for trial, which is a judicial, not administrative, act. Moreover, the discretionary nature of executive governmental power to be exercised in any circumstances is not necessarily amenable to the rule of law and due process. These two factors conglomerate to potentially impinge on the constitutionally entrenched independent judiciary and the separation of power.

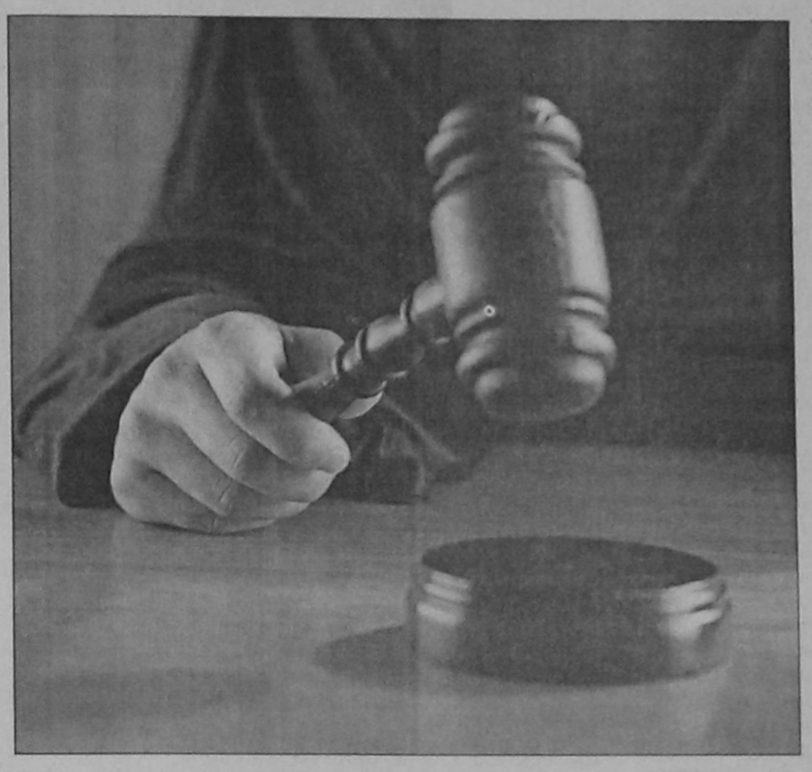
It is argued here that the recommendation is manifestly unconstitutional as it contradicts the provisions for an independent judiciary and the separation of power, the two pillars of the basic structure of the Constitution and the directives of the apex court in the landmark Masdar Hossain case. If adopted, it would render a part of the lower judiciary subservient to the executive government. It would make the delineated borderline between the powers and functions of executive and judicial magistrates a fluid one, allowing the former to encroach into the latter. There is no need to confer the competence of one on the other. The sole objective of the bill before parliament is to ensure the continuation of the separation of judiciary and not for the executive government to extract a right that is not only unavailable in, but also prohibited by, the Constitution. The prevailing unqualified government discretion in empowering executive magistrates over the constitutional imperative of the separation of power would militate against the creation of a fully independent judiciary. Parliament should therefore reject the recommendation on the basis of a politico-legal appraisal.

The Constitution explicitly provides for an impartial and independent judiciary as one of its cornerstones (Art. 22). In reality though, the judiciary has been subservient to all-powerful and largely unaccountable successive executive governments, which made only rhetorical promises to separate the judiciary to appease popular demand for an independent judiciary. This cherished separation implemented by an unelected government and diluted by an elected government would be a monumental error of judgement for short-term political expediency with long-term political fall-out. Politically it is an ill-conceived and ill-thought-out policy in panic, usually expected of a politically besieged government unlike the present government with strong popular support and mandate. The main blemish would be the suspicion that the executive government has too much to sacrifice in allowing the judiciary to be fully independent. As such, it overtly supports the separation of judiciary but is covertly unwilling to relinquish its domineering influence on parts of the judiciary.

The Constitution contains explicit provisions for the full independence of the lower judiciary. Article 109 authorises the High Court Division to administer, control, and supervise all subordinate courts. Articles 115 and 116 mandate the President to establish subordinate courts and appoint their judges and magistrates in consultation with the SC and pursuant to appropriate rules. Article 116A affords independent competence to all subordinate court judges and magistrates in the exercise of their judicial functions. These constitutional provisions establish an orderly system of judicial hierarchy in which subordinate courts and their judges and magistrates performing judicial functions remain accountable to the Supreme Court (SC) and not to the executive. The authority to take cognisance of an offence involves the judicial determination of that offence to trigger its trial. The ambit of the recommended discretionary governmental power in any circumstances lacks precision and specificity, breeding wide-ranging caveats and loopholes for the executive to arbitrarily interfere in the administration of justice in the lower judiciary. Executive magistrates come from administrative cadre and are under the direct control of the executive, with no accountability whatsoever to the judiciary. They serve, more often than not, the administrative governing interests of the ruling executive, rather than serving the cause of justice. The highly politicised public prosecution system, in collusion with the executive magistracy, keeps the rule of law and judicial impartiality at bay in many instances.

None of the Bangladeshi law admits involuntary confession in judicial proceedings. Yet the maintenance of law and order is littered with incidents where the law enforcing agencies arbitrarily arrested innocent citizens for political end or getting bribes. The empowering magistrates ordered remands indiscriminately for extracting confession by employing third-degree methods. Successive past governments treated their political opponents like personal enemies and utilised executive magistrates as a handy tool to keep political opponents under control. There was a covert alliance between executive magistrates and the governments in power, which was mutually beneficial for them both in that the former bagged personal gains in terms of favour, privileges, and promotions, whilst the latter advanced their political agenda. The miscarriage of justice was a pervasive feature of this unholy alliance, in which nobody was accountable to anybody for anything pertaining to custodial violence for decades.

The lackluster commitment of the executive for judicial independence is also evident in the judicial service secretariat ordinance 2008 of the caretaker government for the establishment of an independent judicial secretariat headed by the Chief Justice (CJ). It sought to retain the control of the law ministry over the new secretariat and required the CJ to go through the law ministry to contact the President and the Prime Minister on matters concerning the functioning of the secretariat. This would prevent the CJ from communicating directly with the President and Prime Minister pertaining to matters falling squarely within the purview of Articles 109 and 116 of the Constitution, so fundamentally linked to the independence of the judiciary. The Election Commission (EC) decided on 27 November 2008 to deploy executive magistrates to try punishable electoral offences during the general election on 29 December 2008 and sought the SC's opinion on the matter. Executive magistrates have no power under the separation of the judiciary ordinance 2007 to try electoral offences. Nonetheless, both home and establishment ministries agreed on 7 December 2008 to implement the EC plan to engage executive magistrates. The general administrative committee of the SC headed by the CJ disapproved the EC plan on 18 December 2008 and ruled that only the experienced judicial (not executive) magistrates should be engaged in administering justice in cases of electoral offences. It further observed that the jurisdictions of judicial and executive magistrates were clearly delineated and there was no need to entrust the one with the authority of the other, particularly when there were enough judicial magistrates to obviate the need for executive magistrates to deal with breaches of electoral laws. Notwithstanding these SC directives, the establishment ministry appointed 319 executive magistrates on 22 December 2008 mandating them to try electoral offences and to run mobile courts in defiance of the mobile court ordinance 2007. This ordinance empowers executive magistrates to impose only fines, not imprisonment. They cannot deal with poll offences merely because these offences involve both fines and imprisonment. But the law ministry circumvented this restriction on 16 November 2008 by including the representation of the people order in the schedule of the mobile court ordinance empowering them to hold trials of electoral offences.



Constitutional provisions entail precise legal obligations for parliament not to enact, and the SC not to endorse, any law that is inconsistent with, or repugnant to, the Constitution the supreme law of the land (Art. 7). Authorities in Bangladesh, including parliament and the executive government, have no intrinsic law-making power, which comes only from a single source the Constitution. Legally, parliament is a non-sovereign law-making body in that it is a creation of, and operates within, the Constitution. It is entrusted to enact law for good governance pursuant to the constitutional authorisation. Parliament is not touchstone so that anything it touches or makes becomes inviolable law. Any enactment, for it to be the law, must survive the test of Article 7 of the Constitution. Article 7 expressly warns all law-making authorities not to make any laws, regulations, and/or amendments that are inconsistent with, or repugnant to, the Constitution. A failure to be consistent with the supreme law of the land renders those laws, regulations, and/or amendments invalid to the extent of their inconsistency or repugnancy.

The constitutional status of the SC concerning its power to review the constitutional consistency of any laws, regulations, and/or amendments is premised on the fundamental structure of the Constitution. This status of review power is not amenable to any subordinate law. Even parliament has no original power to alter the basic structure of the Constitution. In Anwar Hossain Chowdhury v Bangladesh BLD (SPI) I, vol. IX(A) 1989, the SC held that the amending power of parliament is not original or inherent but derived from the Constitution. An independent judiciary is deeply rooted in the basic structure of the Constitution, which parliament cannot amend beyond the constitutional limit. The law-making power of parliament, however widely and passionately interpreted, must be understood and exercised within, not outside, the limits of the Constitution. Once this power is exercised beyond its constitutional authorisation and limit, it suffers from a legitimacy crisis. Parliament cannot exercise its power in a manner that undermines the very basic structure of the Constitution. Should parliament endorse its committee's recommendation, its judicial review by the SC under Article 7 is in order and indeed imperative.

Historically, adherence to the due process of law and justice in the performance of executive functions is almost non-existent in Bangladesh. There is a great deal of executive interest at stake in the separation of the judiciary. The recent lobby by executive magistrates to regain their lost cognisance power and its conditional endorsement by the parliamentary committee are not surprising. Rather they represent a synergy of vested interests and tend to give rise to a morbid feeling that the historic lack of motivation to a judicial mind in performing executive functions remains unabated and unamenable to the rule of law and due process. The executive government is yet to appreciate the ethos and spirit of good governance propelled by the constitutional rule of law, and live and operate within the bounds of law. It was this rampant domination of the judiciary by the executive that led Masdar Hossain, a lower court judge, to lodge a writ petition with the SC, seeking an order for the separation of the judiciary from the executive as required in Article 22 of the Constitution. Through this case, the judiciary was instrumental in forcing the executive to formally proclaim the separation of the judiciary.

The apex judiciary is duty bound to uphold its vow to preserve, protect, and defend the Constitution and, in this role, to protect the basic structure of the Constitution. The biggest weapon that the SC has in its arsenal is the respect that it can command among the citizens and the creation of a popular feeling that it is working to uphold the laws of the Republic. The stake is very high in this post-separation period, when the permeating executive control and unwillingness to relinquish its influence on the judiciary is still being felt. Should this trend persist, there appears to be no palatable alternative other than further judicial tenacity and activism in contriving ways to ensure full independence of the judiciary for its dignified existence as the guardian of the Constitution.

The writer is Director of the Law PhD Program, Macquarie University, Sydney, Australia.

Star LAW *review*

Trial of war criminals: What needs to be done?

BARRISTER HARUN UR RASHID

CRIME, although committed against a person, is an offence against law and order of a State and that is why it constitutes a crime against a State and State prosecutors (public prosecutors) pursue a criminal case.

War crimes, genocide and crimes against humanity are offences against humankind because it denigrates human dignity. That is why every country has an obligation under international law to try individuals who allegedly perpetrated such crimes, irrespective of the fact whether such crimes were committed in that State or not.

A person who allegedly commits a crime can always be charged until that person is alive. Unlike civil litigation or disputes, length of time does not affect crime. In other words, it does not have statutory limitation. That is why those who allegedly committed genocide, crimes against humanity or war crimes (grave breaches of the 1949 Geneva Conventions) during the Nazi Germany more than 60 years ago are being arrested and tried. In Cambodia, Khmer Rouge leaders who alleged committed crimes against humanity and turned the country into 'killing fields' during 1975-79 are being put on trial after 30 years by a Tribunal with the backing of the UN.

On 3rd December, 1973, a resolution of the General Assembly (Resolution number 3074) was adopted underscoring the obligations of member-States of the UN in the detention, arrest, extradition and punishment of war crimes and crimes against humanity. Bangladesh is a member of the UN and it is a duty of Bangladesh to hold trials for such crimes.

SYED ZAKIR HOSSAIN

Given the above background, on 29th January 2009, Bangladesh Parliament adopted a resolution to try war criminals. On 25th March, the government decided to try war criminals under the 1973 International Crimes (Tribunals) Act and investigation as claimed by the government had already begun.

Scope of the 1973 Act

The International Crimes (Tribunals) Act 1973 has been protected by an amendment of the Constitution of Bangladesh (Article 47A) so that the Supreme Court could not term the Act unconstitutional for being counter to any of the fundamental rights.

Section 3 of the Act has defined the crimes against humanity, anti-peace crimes, genocide, war crimes, breaches of rules of the Geneva Conventions of 1949 during armed conflicts, any crime under international law. It also embraces crimes such as murder, torture, ousting any civilian from Bangladesh territory, considering him a slave or with any other objective, looting personal or public property and damage to towns and villages in the absence of military necessity.

Furthermore an attempt to commit, instigate, and conspire to commit and conniving in not preventing such crimes will be considered as crimes under the Act.

The law contains provisions of constituting tribunals, (each tribunal consisting of a chairperson and not less two and not more than four), appointment of chief prosecutor and prosecutors, establishment of an Agency for the purpose of investigation into such crimes, punishment and giving legal aid to accused. The law also recognises the right of the accused to appeal against the verdict of the Tribunal to the Appellate Division of the Supreme Court.

The law makes it clear that the proceedings of the Tribunal shall be in public (Section 10 of the Act). This is for the sake of transparency, fairness and justice. Justice must not only be done but seen to be done.

Does the 1973 Act need review?

The Act was enacted in 1973. In the 90s, Bangladesh has become party to many international human rights conventions/treaties. Some legal experts argue that taking into acccount of the provisions of the 1966 International Covenant on Civil and Political Rights, in particular Articles 9 (arrest and speedy trial), and Articles 14 and 15 (the right of the accused), Sections 11 (power of the Tribunal), Section 17 (right of the accused) and Section 21 (right of appeal) may be revisited so as to ensure that they conform with provisions of international human rights conventions/treaties.

The Act lays down the rules of evidence for the Tribunal which are much more relaxed and not bound by technical rules of evidence than those in the Evidence Act of 1872. This is perhaps because of the fact that occurrences of commission of war crimes take place during armed conflict or in an abnormal situation where evidentiary materials are found to be thin.

It is argued the aforesaid provisions of the Act need to be reviewed in the light of the provisions of the UN human rights conventions/treaties to which Bangladesh is a party.

Fact-Finding Committee

It is suggested that Investigating Agency or Fact-Finding Committee is to be set up whose task will be to gather all materials, documents in support of the evidence to be submitted to the Tribunal. The materials may be collected from within the country or abroad. In this connection, the UN can assist the Fact-Finding committee on what kind of evidentiary materials are required for the trial.

In overseas during the Liberation War, international community was involved in reporting and monitoring the situation and there are many materials abroad such as possessing materials of evidentiary values resting in broadcast in radios, human rights organisations, university centres of genocide and human rights (for example Tutgers University and Yale University in the USA) and individuals.

In the case of current on-going Camobodian war crime trial, some crucial evidentiary documents that once thought missing were reportedly discovered by the Yale University Genocide Research Centre. Bangladesh must explore such possibilities to gather and collate as much materials as possible from abroad for trial.

International community and the proposed trial

War crimes trial has international dimension. It has been a sensitive issue for many authoritarian developing countries because some of their heads of State or Governments adopt systematic and widespread state-sponsored oppreesive and repressive measures against civilian population and political opponents and therefore they think they could be indicted by the Hague-based UN International Criminal Court.

It is obvious that there are strong reservations of many countries for holding trials for such crimes. For example, about 30 countries that abstained from voting in the UN General Assembly when the Cambodian trial was put to vote. All African and Arab countries object to the issue of warrant of arrest on 4th March to the Sudanese President by the International Criminal Court on charges of crimes against humanity in Darfur region of Sudan.

White paper

The government may seriously consider preparing a White Paper on the reasons for holding trials for such horrible and senseless crimes committed during the Liberation War of 1971.

A copy of the White Paper may be distributed to all foreign resident diplomatic missions in Dhaka. Furthermore, the government may embark on diplomatic efforts through our missions overseas to explain the need and the popular demand for this trial to cross section of public including civil society and media abroad, eliminating possible mis-perception that the trial is a policy of revenge and retaliation.

To demonstrate the commitment to trial of war crimes, it is appropriate that Bangladesh ratifies the Statute of International Criminal Court of 1998 (Bangladesh signed it) and the ratification will show to the international community Bangladesh's firm resolve that war crimes must not and cannot escape unpunished.

Crimes against humanity, war crimes and genocide are the gravest crimes in international law and are condemned by all UN members. The effective punishment is an important element in the prevention and recurrence of such odious crimes and for protection of the inherent dignity of human person.

The writer is former Bangladesh Ambassador to the UN, Geneva.