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LAW VISION

Rohingya crisis: An effective playmaker in the reserved bench

M Jashim Ali Chowdhury

ROHINGYA refugees are hitting Bangladesh hard. International support for a strong measure against the recalcitrant Myanmar seems a far cry. While we have tried almost every possible leeway within traditional executive driven diplomacy, this piece argues that the parliament's potential in the ongoing crisis is being unwisely subdued. A very old-fashioned perception of parliament-foreign affairs interplay unfortunately accounts for this.

Regarding control over foreign affairs, legislatures are generally categorised into two classes. The US Congress styled legislatures work within separation of powers and checks and balances. They usually hold greater control over foreign affairs, international treaty making and conduct of war and international hostilities. On the other hand, the UK styled Westminster parliaments carry a general sense of deference to the executive in relation to foreign policy, international treaty making and conduct of security policies, war and hostilities.

Even though the US Congress enjoys a constitutional power sharing in declaration of war and ratification of international treaties, the president's primacy over the foreign affairs and diplomacy is delicate, plenary and exclusive [*United States* v *Curtiss-Wright Export Corp* 299 US 304 (1936)]. Hence, Congress's powers are exercised in a way that leaves the modes and modalities of foreign affairs to the best judgment of the president. Congressional committees on foreign affairs, however, continue to play a very significant role in investigating, studying, deliberating, questioning and informing any policy or issue of foreign relations. The 'policy making' Congress of the US however stands in clear contrast with the 'policy influencing' parliament at Westminster. Some therefore argue that the US Congress cannot be a benchmark for evaluating the foreign affairs powers of Westminster parliaments across the British Commonwealth.

The UK styled Westminster parliaments rest on an assumption that legislature should leave the executive prerogative of conducting foreign affairs unscathed. Yet, the Westminster parliaments' input in formal declaration of war and hostilities and ratification and incorporation of international treaties is regular. The UK parliament's rigorous entanglement with the Brexit process is marking an advanced level of policy influence in foreign affairs. When the UK Supreme Court mandated the parliamentary involvement in the EU withdrawal process in 2017 [*R (Gina Miller)* v *Brexit Secretary*], it was little predicted that parliament would go as far as blocking the Brexit itself for more than three years. Parliament's consecutive refusal to endorse Theresa May's negotiated deal and Boris Johson's No-deal has been justified on its institutional claim to scrutinize the executive [*R (Cherry-Miller)* v *Prime Minister* 2019]. An unintended by-product of the parliament driven Brexit process might therefore be the evolution of parliament-foreign affairs interplay beyond the current understanding of ours. In the meantime, parliamentary committees across the Commonwealth are showcasing significant policy influence through debates, special studies, inquires, reports and supply of 'expert knowledge' to the Parliament.

Compared to these, the parliament of Bangladesh stands totally silenced in the area of foreign affairs, without any understandable sense of rationality of course. Parliament has a formal power to declare war under article 63 of the constitution. Though we have no occasion of war so far, arguments for prior-parliamentary approval for armed forces deployment in the UN Peacekeeping Operations was unhelpfully suppressed in *M Saleem Ullah* v *Bangladesh* 47 DLR (1995) 218. Again, parliament's authority in cases of internal insurgency or belligerency is limited to the approval of the government's pre-declared state of emergency under Article 141A. Parliament's power over international treaties is also vague and nobody knows for what purpose a treaty would be tabled in parliament under Article 145A of the constitution. Even this toothless provision is historically honored in breach.

Successive governments have shown a very unacceptable tendency of totally ignoring parliament in the realm of foreign affairs. Rohingya crisis is not an exception. Parliament has not tried the tool of secret sitting so far (Rule 181 of the Rules of Procedure). The bilateral repatriation agreement with Myanmar government was not placed for parliamentary deliberation. Had it been done, much of the concerns of our policy think tanks and international agencies about the viability of such a bilateral approach to the problem could be aired early and government would have been benefitted from the collective wisdom of parliament and its democratic deliberation. Parliament driven studies, inquires, public hearings, inter-parliamentary gatherings and information sharing with the legislative leaders of influential super powers and regional stakeholders would have meaningfully supplemented and benefitted the civil servant driven diplomacy we have attempted so far.

In *Kazi Mukhlesur Rahman* v *Bangladesh* 26 DLR (1974) 44, a boundary delimitation treaty was tested against the constitutional requirement of power sharing with parliament. Keeping the budgetary and military implications of the Rohingya crisis, such a burden sharing appears quite in line with the spirit of *Kazi Mukhlesur Rahman*. Parliament would have to allocate budgets for the Rohingya refugees, respond to possible internal or regional economic or security emergencies or even endorse a war or international hostility. Parliamentary involvement in the Rohingya policy formulation process therefore is not a matter of executive courtesy. It is rather a matter of special urgency where the bureaucrat driven diplomacy is apparently failing in every aspect. Unfortunately, our government is eyeing to win a very tough international match by leaving the nation's most effective playmaker in the reserved bench.

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COURT CORRIDOR

Twelve years of Judicial Magistracy

Akramul Hoque Samim

AS per Article 22 of the Constitution and the twelve-point directive of the *Masder Hossain case*, the responsibility of judicial magistracy was entrusted upon the Judiciary on November 1, 2007 with a view to ensuring its separation from the Executive. On the occasion of the twelve-year anniversary of this separation, it is, therefore, pertinent to look back on the expectations and realities of judicial magistracy.

Before the entrustment of the supervisory power of magistracy to the judiciary happened in 2007, the total number of authorised magistrate courts were 655 (Source: The Daily Star, 22 October, 2007). However, the judiciary had to start its journey with only 218 magistrates (The Daily Star, 1 November, 2007). At the end of 2007, the number of ongoing cases before the magistrate courts were 6,18,671. This means that the judicial magistracy started its journey with nearly six lacs pending cases with only 218 magistrates against the previous 655. As a result, judicial magistracy faced adversities from the very beginning.

As of June 30, 2019, there are 13,33,117 civil and 17,55,174 criminal cases pending before the lower courts of Bangladesh. The number of cases before the judicial magistrates' courts is 6,64,063 and in metropolitan areas, it is 2,72,340. It is clear from these numbers that the number of criminal cases is much higher in the courts of magistrates that that of civil cases. One must also remember that the magistrates take cognizance of such cases before forwarding them to the court which has the jurisdiction to hear them. Therefore, it is obvious that the workload at the courts of magistrates is rather high. The role of magistrates in the protection of law and order is undeniable. However, there are not enough magistrates for performing these tasks.

At the end of 2007, the ratio of magistrates to cases was at 1:945. As of 2019, the number of magistrates authorised to perform judicial functions is 620 and in metropolitan areas, the number is 66. However, although the number of authorised positions is 686, the number of magistrates appointed is often lower. As of June 2019, the ratio of magistrates to cases is 1:1365, which may be even higher in practice if the actual number of working magistrates is accounted for.

Although the number of magistrates is clearly limited, an overview of the statistics of their work can provide a picture of their efficacy. In the past 12 years, about 88,47,168 cases have been lodged in the courts of magistrates. The rate of disposal of cases is 96.58%. The rate of disposal in 2019 (as of June 30) is 95.99%. It must be mentioned that alongside the cases, the courts of magistrates have other functions such as taking cognizance, hearing bail petitions, CS/FR, Naraji petitions, etc.

From the statistics, it appears that the number of posts of magistrates increased in the last twelve years is only 31; number of new Upazillas formed between 2011 and 2018 is 45. Naturally, propositions are made for the creation of new posts, which are almost never heeded. According to news reports, there are talks about the creation of 346 new posts of judicial magistrates. The realisation of this process will hopefully result in expedited justice and thereby in satisfaction of the litigants.

Moreover, although many laws call for separate fora, the added responsibility if often placed on the pre-existing courts of magistrates. For example, there are provisions of separate courts under Environmental Court Act 2010, Safe Food Act 2013, etc. In mnay of these cases, the responsibilities are placed on the senior judicial magistrates instead. If special magistrates were to be appointed for these courts, the disposal rate would definitely improve and the quality of work could also be easily ensured as well.

Therefore, the achievements and shortcomings of the judicial magistracy must be evaluated keeping in mind the constraints discussed above. At the end of the day, the judiciary has an accountability to the public.

THE WRITER WORKS FOR BANGLADESH JUDICIAL SERVICE.

FOR YOUR INFORMATION

Education and inclusion should be human rights priorities

ON November 1, the newly elected General Assembly President, Tijjani Muhammad-Bande recalled the responsibility of the States to actualise their vision of a better world. He further added, "we can only ensure peace and development if human rights are upheld".

He encouraged everyone to view Sustainable Development Goals from a human rights perspective. He connected SDG 4 (ensuring inclusive and equitable quality education and promote lifelong learning opportunities for all) to articles in the Convention on the Rights of the Child, the International Covenant on Economic, Social, and Cultural Rights, and the seminal Universal Declaration of Human Rights. The President urged for "a rights-based approach towards implementation" of the goal.

He further added that inclusion must be a priority in the attainment of SDGs and cited the plights of the displaced people, people with disabilities and indigenous persons among other disadvantaged groups. Recalling that the Convention on the Rights of the Child will reach its 30th anniversary on the 20th of this month, he stressed on the importance of upholding rights of children.

Mr. Muhammad-Bande further stated that most of the violent conflicts today have "had their origins in violations of, or disregard for, human rights," pressing that it is "incumbent upon each Member State… to uphold equal dignity and human rights for everyone, everywhere." "There is no alternative to protecting the rights of the people we serve," he concluded.

Coly Seck, Human Rights Council President made a presentation overviewing the themes the Council had prioritised and focused on the important role of each country.

COMPILED BY LAW DESK (SOURCE: UN.ORG).

REVIEWING THE VIEW

The legality of Shakib's ban

Ali Mashraf

THE International Cricket Council (ICC) on October 29, 2019, banned Shakib Al Hasan from all levels of cricket for two years. In its seven-page decision published on its website, the ICC revealed all the information regarding the facts of the case, the investigation procedure, the charges against Shakib, and the sanction imposed on him.

The charges against Shakib are that he committed three separate breaches of Article 2.4.4 of the ICC Anti-Corruption Code, which obliges cricketers to report full details of any approaches or invitations to engage in corrupt conduct to the Anti-Corruption Unit (ACU) of ICC. During the investigation, Shakib admitted that he was approached thrice by an Indian bookie, Mr. Deepak Aggarwal via WhatsApp messages. Two of these incidents took place on January 19 and 23, 2018, while representing Bangladesh in the tri-nation series against Sri Lanka and Zimbabwe, whereas the last incident took place on April 26, 2018, while representing Sunrisers Hyderabad during the Indian Premier League (IPL).

The ICC also held that failure to provide them with such information despite being fully aware of his duties under the Code and the procedures to be followed were the aggravating factors, while his prompt and voluntary admission of the offence, his cooperation during the entire investigation and his prior disciplinary record were the mitigating factors. Thereafter, as per Article 6.2, which prescribes a minimum ban of six months and a maximum ban of five years for breach of Article 2.4.4, the ICC punished Shakib with a ban

from all forms of cricketing for two years, of which 12 months is suspended. It also reiterated the fact that neither party can appeal against this agreed sanction to the Court of Arbitration for Sport (CAS) under Article 7.2.

Critics have argued that given this Code came into effect on February 9, 2018, as per its Article 11.3, its substantive provisions will not be applied retrospectively to matters pending before the effective date. Therefore, the sanction cannot be imposed on Shakib. However, we need to delve deeper into this provision to understand what it really says. Article 11.3 says that for matters that had taken place before the Code came into effect but were brought to the Council after its effective date, firstly, the previous (2014) Code would deal with the substantive provisions, subject to any applicability of the principle of lex mitior and secondly, the current Code would deal with the procedures to be followed.

The Latin term *lex mitior* states that where there has been a change in the sanction provided under a criminal legislation, a person found guilty of an offence is to benefit from the repealing legislation, which either decriminalises the offence or provides lighter punishment. But, a plain reading of Articles 2.4.4 and 6.2 of the 2014 Code makes it clear that this act of suppressing information and not reporting to the ACSU (now ACU) is an offence and the quantum of punishment for such offence is exactly similar to that of the current Code. As such, the legality/maintainability of the sanction imposed cannot be questioned.

Given the extensive awareness measures taken by ICC to curb corruption in cricket, it was Shakib's responsibility to report the incidents and cooperate with ACU to bring Mr. Aggarwal to book. Nevertheless, one can argue whether the minimum punishment of six months would have sufficed in this regard. But there are previous instances of cricketers being banned for longer terms due to suppressing such information. Hence, taking into account Shakib's experience and stature, the sanction may have been imposed to reiterate ICC's zero tolerance regarding corrupt practices.

It needs to be mentioned that Shakib reported an earlier incident of such an approach to the concerned authorities back in 2008/09. Moreover, veteran cricketer Tamim Iqbal was also approached by Mr. Aggarwal in January 2018, which he immediately reported to ACU and BCB's anti-corruption unit. However, neither did any criminal proceeding commence against Mr. Aggarwal, and nor did ICC take any action against him. Therefore, the ICC too has to take effective measures against such marked offenders to send the message to the players that reporting such incidents will lead to strict actions being taken against the perpetrators.

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