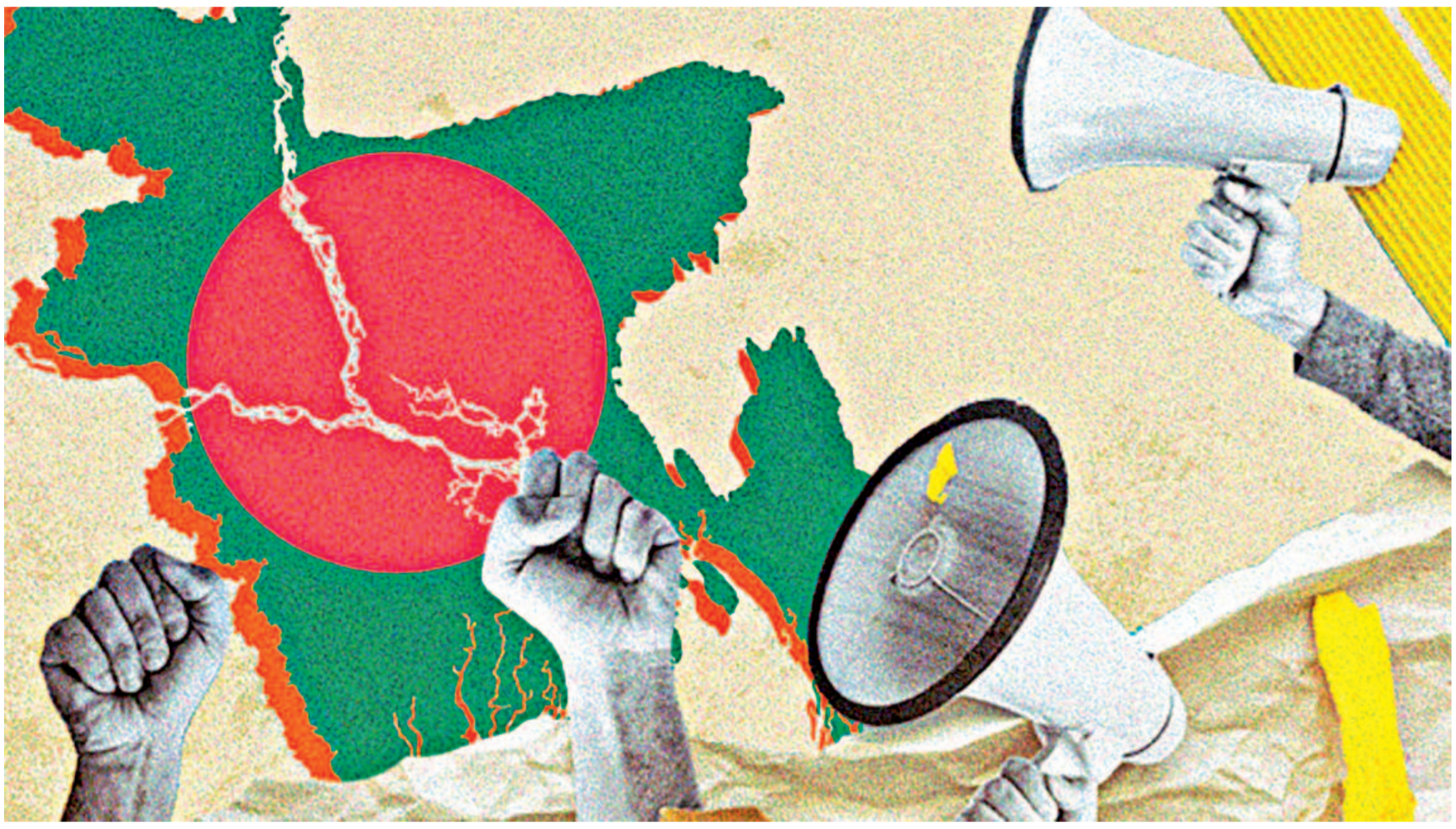

LAW OPINION

The State and its Human Rights obligations

The state is obligated to ensure rule of law and as a member of the judiciary a solemn responsibility rests on all of us to dispense justice impartially and in a free and fair manner which we are all pledge-bound to do as the repository of public trust.

JUSTICE MD. MOZIBUR RAHMAN MIAH

My understanding of the term 'Human Rights' is that they are inalienable birthrights of a human wherever he/she is born in the world and that the state is obligated to ensure, protect, and respect such rights. Human rights include, amongst others, rights to life, liberty and dignity of any individual. Sometimes, we get confused about the literal meaning and distinction between "human rights" and "fundamental rights", although they have similar import. In fact, the idea of basic human rights coined in the universal declaration of human rights declared back in 1948 by the UN, subsequently percolated into the domestic legal systems as fundamental rights or as the bill of rights enshrined in specific Constitutions. In part III of our Constitution our fundamental rights have been enshrined and Article 44 endowed on citizens the right to enforce such rights through taking recourse to Article 102 of our Constitution.

Despite the solemn assertions of rights and entitlements in the Constitution, we have all been privy to the terms "extra-judicial killings" and "enforced disappearance". Needless to mention, these diabolical offences are wanton violation of human rights. While the harrowing accounts of extra judicial killings and enforced disappearance have been a reality for decades but barely have we seen any visible actions regarding meting out exemplary punishment to those who are behind such heinous crimes. In this particular field, different human rights organisations have been found vociferous all along for the brutality unleashed to the defenseless citizens especially by different law-enforcing agencies but they eventually could not be successful in bringing the accountable to book and ensuring justice to the victims. However, our right defenders' deliberate engagement bloster collective anger against the state which in turn bring attention to the international community.

A country is considered civilised when the rule of law prevails therein, lest anarchy and lawlessness grips the country and oppression of the downtrodden becomes the order of the day. Further, the state is obligated to ensure rule of law and as a member of the judiciary a solemn responsibility rests on all of us to dispense justice impartially and in a free and fair manner which we are all pledge-bound to do as the repository of public trust.

At the same time, we have to bear in mind that, judiciary is not beyond reproach and we are also under constant public gaze; therefore we should remain vigilant and cautious while adjudicating any legal proceedings placed before us.

Now, I revert to the legal protection ensured by the state in case of violation of human rights in our country. We have a statute titled "The National Human Rights Commission Act 2009" having as many as thirty-two sections therein. In section 12 of the Act, the functions of the commission have been delineated which is merely investigative in nature and then to hand in its suggestion and recommendation to the government to preserve and protect human rights and to sensitise the people over that. From the nature and function entrusted upon the commission, it appears to me, that the said commission is nothing but a toothless tiger having no authority to compel the violators to face the music. Indeed, such inherent limitations stave-off the commission from doing anything substantive against serious human rights violations. Then again, ever since the said statute came into being, we found that individuals who were at helm of the commission, were mostly retired bureaucrats or those whose political ideology aligned with that of the party in power as if it were but a rehabilitation center for them. It has barely been given any authority to investigate any wrongdoing against the law enforcing agencies or top government high-ups. Now, time has come to bring changes in the Act for making it fully functional as an effective human rights defender for the oppressed section of people.

The writer is judge, High Court Division, Supreme Court of Bangladesh.

LAW VISION

Can office of ombudsman investigate enforced disappearances?

ARAFAT IBNUL BASHAR

Article 77 of the Constitution of Bangladesh provides for the establishment of the office of Ombudsman. The provision confers on an Ombudsman the power to investigate any action taken by a Ministry, a public officer, or a statutory public authority. The Ombudsman Act, 1980 was enacted to establish this office and define its powers and functions. However, the office of the Ombudsman has not been established even after 50 years of the existence of the Constitution, potentially undermining the constitutional spirit.

The concept of the Ombudsman can be traced to the Qin dynasty in China in 221 BC, while the modern iteration of the notion can be found in Sweden in 1713. In present times, the office of the Ombudsman has become a regular feature of modern states, having the power to initiate investigations with or without any formal complaint against government officials, judges and other judicial officials, local governments, and even military administration in some jurisdictions. Ombudsman and its different forms have worked as a "safety valve" against the arbitrary exercise of power and made executive as well as judiciary more accountable, without curbing their powers.

The Interim Government of Bangladesh recently signed the International Convention for the Protection of All Persons from Enforced Disappearances (ICPED) and has vowed to implement it. The current legal regime of Bangladesh is not equipped to tackle and properly remedy instances of enforced

disappearances. Under the Convention, the State has been burdened with the responsibility to prevent crime and combat impunity for such crimes. The state will discharge such responsibility through its various institutions.

However, in Bangladesh, the conundrum is that the law enforcing agencies are themselves under the accusation of either committing the crime, supporting it, or concealing it. As such, it becomes quite tricky to confer the task of investigating the complaints of enforced disappearance to any law enforcement agencies. Instead, the responsibility may be assigned to an independent body like Ombudsman, who, in theory, will be free to perform his duties according to the law.

Section 6 of the Ombudsman Act, 1980 allows an Ombudsman to investigate any action taken by a Ministry, a statutory public authority, or a public officer if a complaint is made to him by a person who claims to have sustained injustice in consequence of such action. Investigation can also be made based on any information provided that such information is received from any person or source, otherwise than on a complaint.

However, the provision does not allow the Ombudsman to investigate any civil or criminal proceedings before any Court. The provision could be amended to include investigation of law enforcement agencies, disciplined force, ministers, judicial officers, etc. as well as mandating that an Ombudsman can request a court to allow him to conduct an investigation in case there are grounds to assume that proper investigation might not be carried out by the law enforcement agency. Besides, Article 12 of the ICPED states that an alleged victim of enforced disappearance has the right to report the facts to the competent authorities, who will examine the allegation promptly and impartially and, if necessary, undertake without delay a thorough and impartial investigation. In our present context, an Ombudsman would be more suited to conduct this investigation than a law enforcement agency.

Besides, section 15 of the Ombudsman Act, 1980 authorises the Government to exempt any public officer or class of public officers from the operation of this Act. This provision can defeat the object and aim of the legislation, making the Ombudsman a toothless tiger. Again, section 9 of the Act authorises the Ombudsman to make recommendations, and there is nothing substantive to equip an Ombudsman to compel relevant authority to implement any recommendations.

With proper amendments in the Ombudsman Act, the office of the Ombudsman could well be prepared as an alternative redress mechanism to fulfill the obligations under the ICPED. In the past, the office of Tax Ombudsman had been established in our country through a separate legislation, though it was abolished within a few years. In the current context, the office of the Ombudsman could be a much-needed mechanism to address the grievances of the people. In fact, such experimentation could be done to accommodate the office of the Ombudsman to deal with other issues of concern in the country such as banking or financial fraud, political harassment, etc.

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LAW ADVOCACY

Judges' appointment in Bangladesh

RAGIB SHAHRIAR RAFI

The appointment of judges is a cornerstone of judicial independence and the rule of law. Article 95(2)(c) notes that judges of the supreme court shall have "such qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court". Despite this mandate, no legislation has been enacted to detail these qualifications, leaving the appointment process vulnerable to subjective interpretation. This ambiguity undermines the spirit of constitutionalism, as it fails to provide clear criteria for ensuring the competence and integrity of judicial appointees. The absence of a statutory framework also opens the door to potential political interference, as successive governments have leveraged this loophole to appoint individuals aligned with their ideological preferences rather than prioritising merit or judicial independence.

Historically, the lack of legislative action on this matter can be attributed to political reluctance, as enacting such laws would curtail the discretionary power of the executive in judicial appointments. The judicial appointment process, therefore, stands at odds with the principles of separation of powers and checks and balances as enshrined in the Constitution. Over the decades, various legal experts and civil society organisations have highlighted the need for a comprehensive judicial appointment law. Attempts to initiate discourse on this issue have been met with resistance, largely due to the entrenched political interests that benefit from

By enacting a Judicial Appointments Act and establishing an independent appointment commission, Bangladesh can ensure that its judiciary remains a bulwark of justice and democracy, free from undue political influence.

maintaining the status quo. The judiciary's credibility has often been questioned, with accusations of bias and inefficiency stemming from the perceived politicisation of appointments.

To address this pressing issue, Bangladesh can draw inspiration from other jurisdictions. For instance, the Judicial Appointments Commission in the United Kingdom serves as an independent body that ensures transparency and meritocracy in judicial appointments. A similar model can be proposed for Bangladesh, wherein a bipartisan commission comprising representatives from the judiciary, legal fraternity, and civil society is tasked with recommending candidates based on predefined qualifications and standards. In addition, it is imperative to draft and enact a Judicial Appointments Act, clearly specifying the qualifications, experience, and ethical standards required for judicial appointees. Such legislation should include mechanisms for public scrutiny, periodic review, and accountability to ensure that the process remains fair and transparent.

From a policy perspective, a multi-stakeholder dialogue involving the judiciary, legislature, legal experts, and civil society organisations is necessary to build consensus on the contours of a Judicial Appointments Act. This dialogue should aim to strike a balance between ensuring judicial independence and maintaining executive accountability. Furthermore, the enactment of such a law must be accompanied by institutional reforms to bolster the judiciary's independence. For example, ensuring financial autonomy for the judiciary and enhancing the training and professional development of judges can significantly improve judicial performance and public confidence in the system. Political will is indispensable in this regard. Political parties must transcend partisan interests and prioritise the long-term stability and credibility of the judiciary as a foundational pillar of democracy.

The absence of legislation under Article 95(2)(c) of the Constitution of Bangladesh is a critical gap that undermines the principles of transparency, meritocracy, and judicial independence. Addressing this issue requires a combination of legislative action, institutional reforms, and political commitment. By enacting a Judicial Appointments Act and establishing an independent appointment commission, Bangladesh can ensure that its judiciary remains a bulwark of justice and democracy, free from undue political influence.

The writer is Student of Law, Jagannath University.