

The Daily Star

FOUNDER EDITOR  
LATE S. M. ALI

DHAKA TUESDAY FEBRUARY 18, 2020, FALGUN 5, 1426 BS

## Wasting ICU equipment

*Why has such gross negligence gone unpunished?*

IT is a blatant display of utter neglect. When many hospitals in the country lack rudimentary lifesaving devices, that a hospital in the country would allow costly equipment in its inventory to fall into disrepair and eventually become obsolete before being put to use, is shocking. And even more so if that happens to be a specialised hospital set up for the treatment of cancer. It is outrageous, but true, that the National Institute of Cancer Research and Hospital (NICRH) has been negligent in the maintenance of very expensive hospital equipment, including ICU ventilators. And in this respect, five senior doctors and officials of NICRH have been found in dereliction of their duty, in a report forwarded to the High Court (HC) following its ruling. It taxes one's credulity to learn that this equipment had been procured 12 years back and none of the several project directors found the time to have them installed.

But there are other even more outrageous aspects of this episode. Were it not for the fact that the matter was exposed in a report in January this year in this newspaper, and the suo moto rule of the High Court on the government that very day, one wonders whether the matter would have come to light at all? One also wonders about the chain of oversight and supervision in the entire system of the health ministry's administration. Are we to believe that nobody from the ministry or the DG Health's office had visited the hospital even once in the last 12 years? The situation exposes a serious systemic void bordering on criminality.

We thank the HC, without whose role some of the issues of public interest, including this one, would have continued to be neglected and public funds would have continued to be frittered away with impunity. We are glad that the HC has sought further information regarding the steps taken against the officials and set February 23 as the date to pass further orders on the issue. Squandering public money deserves the severest of punishments.

## 17-year-old ban yet to be fully applied

*Why are unfit vehicles invisible only to the authorities?*

BANNED three-wheelers with two-stroke engines continue to ply the streets of Dhaka, as seen in a photograph published by this newspaper yesterday. In the photo, taken in the city's Lalbagh area, three-wheelers that have no fitness certificates can be seen, with one of them running on the street with passengers in it. The three-wheelers in question have no turn signals and no number plates, with just a few numbers painted on them by their owners. Yet, they continue to operate in broad daylight.

How is this possible? What happened to the much-touted drives to free Dhaka's streets from all unfit vehicles? And how did the owners and drivers of these vehicles become so emboldened as to operate them so openly? The most likely explanation, of course, is that they are plying the streets in exchange for bribes.

The decision to ban three-wheelers with two-stroke engines was taken in 2003—nearly two decades ago now—based mainly on environmental considerations, as exhaust from these vehicles reduces air quality. According to a study published in the *Journal of the Air & Waste Management Association*, samples collected from 2000 to 2004 showed how removing these vehicles reduced fine particulate matter and black carbon concentrations from city roads. Now, with so much talk going on about Dhaka's poor air quality, it is shocking to see drivers of three-wheelers with two-stroke engines ignoring the ban without any fear, and without the authorities stepping in and removing them from the streets.

The authorities need to strictly enforce the ban on vehicles with two-stroke engines. And the only way to make that happen is for the authorities to actually launch and continue with drives to remove unfit vehicles from the roads. These drives cannot be sporadic, but must be continuous.

## LETTERS TO THE EDITOR

letters@thedailystar.net

### Why should there be rigid timings for Boi Mela?

Yesterday I visited the book fair around noon and all I could see were closed stalls and the security dismissing people, saying that the fair won't start until 3 pm. What is this new rule? People from all over the country spend their valuable time and money to visit the book fair, only to be dismissed in this way.

Why let the fair continue if people for whom it is held are deprived of it? So many people are missing out on the event due to this ridiculous rule. Also, where was it stated in the first place that no one will be allowed entry before 3 pm? People deserve to be reimbursed the commute fare they are spending on their way in, especially when they're being sent back in this manner. It's a matter of concern for the general public and we demand an explanation for this rule!

Nawazeesh M. Ali, Sent via email



PHOTO: STAR



MS SIDDIQUI

NOVEL Coronavirus was first identified in Wuhan, the capital of China's Hubei province, in early December 2019. The World Health Organisation (WHO) declared the virus a Public Health Emergency of International Concern (PHEIC) on January 30. However, the virus has not yet been declared a "pandemic"—a term used to describe an infectious disease which has spread globally—and the WHO has not recommended any trade or travel restrictions.

However, a number of countries have issued warnings against travelling to Hubei and elsewhere in China, as well as restrictions on entry of travellers from China. Some international commercial airlines have suspended flights to and from China and some vessels are also not calling at Chinese ports.

The Chinese government has imposed restrictions on movement within China in response to the outbreak. Manufacturing industries are on an extended holiday that began during Chinese New Year. The shutdown of Chinese manufacturing is likely to have an impact on the global supply chain, along with a consequential impact on construction projects and other downstream industries.

The final consequence of this is a slowdown of the "global factory" due to the coronavirus outbreak, through both the domestic markets of China and their involvement in the global supply chain. Chinese goods make up more than 26 percent of Bangladesh's total imports, which includes raw materials, finished products, machinery and consumer products worth around USD14 billion per annum. The consumer market in Bangladesh is also dependent on Chinese supply.

Though there have been no coronavirus cases detected in Bangladesh so far, the country's economy is now likely to face an adverse impact because it maintains close trade relations with China. Readymade garments (RMG) is a major sector of manufacturing and export for Bangladesh, and more than 50 percent of the raw materials used for this industry are brought from China. Due to the virus outbreak in China, disruptions in the supply chain could continue for several more months, leading to a financial loss worth BDT 14-15 billion for the garments accessories sector alone. The failure of delivery from Chinese exporters may compel buyers in other countries to claim compensations for a breach of contract with regard to timely delivery, and on the other hand, the overseas buyers of RMG from Bangladesh may also claim compensation from exporters in Bangladesh.

However, the contracting parties may be excused from this breach of contract by using the "force majeure" (FM) clause. Force majeure events are unexpected circumstances outside of a contracting party's reasonable control that, having arisen, prevent it from performing its contractual obligations. Usually, international sales contracts do not explicitly mention this clause. Affected parties should consider whether

their contracts make provisions for force majeure clauses and whether the outbreak falls within the protection offered by the relevant clause.

Force majeure clauses can be relied upon only if all reasonable steps have been taken by a party to mitigate the effect of the event, so it is unclear whether Bangladesh can be excused by invoking this clause. The shortage of component materials may have an impact on pricing now and in future months, the scarcity of such parts may well drive prices upwards if demand remains stable. As a result, contracts should be reviewed to ensure that protection against price rises is also included, or whether they need to agree to new terms or "flex" other parts of their supply chains to ensure adequate provision of stocks at a commercially sensible price.

On the basis of the emergency declared by the WHO, force majeure provisions are likely to be increasingly relied upon and invoked by an affected party. The China Council for the Promotion of International Trade (CCPIT) announced



PHOTO: STAR/FILE

that it would be offering "force majeure certificates" to businesses in China affected by the outbreak of the coronavirus in Wuhan.

Whether a Chinese exporter can successfully invoke FM, and/or rely on the CCPIT certificates to do so, will depend on the governing law of the contract and the terms of the relevant clause. The CCPIT has already issued its first force majeure certificate to a manufacturing company in Zhejiang province to help stem the firm's losses, arising from its inability to meet its contractual obligations with Peugeot's African plant, which potentially exposed it to a damages claim.

Release from performance as a result of force majeure is not recognised as a standalone principle in some countries, such as the UK. It is therefore a matter for parties to deal with expressly in their contracts and the protection afforded by the clause will depend on the precise drafting. In the event of a dispute as to the

scope of the clause, the English courts will apply the usual principles of contractual interpretation.

According to global law firm Gibson, Dunn and Crutcher, "The usual rules of contractual interpretation under English law apply to the interpretation of force majeure clauses. The court must ascertain the objective meaning of the language which the parties have chosen to express their agreement, and consider not only the wording of the particular force majeure clause but must also consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. Market practice may also be relevant to the exercise of interpretation, provided that it is clearly evidenced. In practice, however, market practice may be difficult to prove and a recent English case has confirmed that evidence of market practice after a contract is concluded will not result in terms being implied into a contract."

The crisis along shipping lines are likely to be more acute, since the business is highly regulated by laws and protocols. The shipping industry is likely to be impacted in a number of ways—they are facing disruptions in voyages to and from China, but also from delays in other countries as a result of quarantine and port checks due to cases, or suspected cases, of the coronavirus amongst crew and passengers on board vessels. Delivery of cargo may be delayed, or cargo may need to be discharged at alternative or interim ports, with expensive consequences and significant logistical and insurance implications.

International law firm Morrison and Foerster LLP recently provided an overview of force majeure clauses under Chinese law and English law, noting that in relation to Chinese law, "Useful guidance in evaluating the applicability of force majeure to the coronavirus outbreak is a notice of the Supreme

People's Court (SPC) issued in 2003 in relation to the SARS epidemic, which confirmed that force majeure would apply where the SARS epidemic or government measures adopted to combat it rendered a contract unable to be performed. It is not unreasonable to expect similar SPC guidance in response to the current outbreak, but even without that formal guidance, force majeure may be a useful doctrine for defaulting parties in appropriate circumstances."

As for the Hong Kong law, the authors examined the importance of the doctrine of frustration in circumstances where a contract does not contain a force majeure clause and, in relation to force majeure itself—"Whether the coronavirus outbreak qualifies as a force majeure event ultimately will depend on the construction of the contractual clause at issue. Some clauses may make it reasonably clear if they specifically identify "disease", "epidemic", or "quarantine" as force majeure events. Other clauses may include more general events such as "acts of God", "acts of

government", "strikes", or "circumstances beyond the parties' control". The current outbreak could be a combination of more than one factor, the disease/epidemic itself and the government/public actions that ensue. Affected parties should carefully review the force majeure clauses in their contracts to determine whether they may apply."

Consequently, Bangladeshi exporters may evaluate their sales contracts and also the possible impacts of failure to export RMG on time, and figure out whether they can claim compensation from Chinese sources of raw materials. The Export Promotion Bureau and BGMEA should study the issue, evaluating the laws and practices related to force majeure of buyers' countries. This will be a new experience for buyers and sellers of Bangladesh and act as a good reference for trade law practitioners.

MS Siddiqui is a legal economist. He can be reached at mssiddiqui2035@gmail.com

## Tainted politicians, elections and judiciary



PALLAB BHATTACHARYA

THE Indian Supreme Court's order on February 13—making it mandatory for political parties to put on public domains like Facebook and Twitter the criminal cases that have been lodged against their candidates contesting elections, and to justify the giving of nominations to them once again—has moved the spotlight onto a major area of concern in the country's electoral democracy: the growing criminalisation of politics.

In a recent report, rights group Association of Democratic Reforms pointed out how nearly half of the 542 Lok Sabha lawmakers elected last year have declared criminal cases against them, as shown in their mandatory affidavits. It noted a sharp increase—within the decade since 2009—in elected parliamentarians with cases against them for serious criminal acts, including murder and rape. In their latest report on the Delhi assembly polls held on February 8, it found that 37 of the 70 legislators are facing serious criminal cases.

The apex court, in its February 13 order, noted that in 2004, 24 percent of the members of parliament had criminal cases against them, and that figure went up to 30 per cent in 2009, 34 per cent in 2014 and 43 per cent in 2019. What the latest court order has done is to provide a legal compulsion after the Election Commission had earlier proposed that political parties must go public with an explanation for fielding candidates with criminal cases against them. What is significant about the February 13 order is that it also sought to make the

parties accountable for choosing people with criminal antecedents as their candidates, and not untainted people. The significance of the order lies in the fact that parties often resort to citing the "winability" factor of a candidate as its justification for choosing him or her for the poll.

The criminalisation of politics has, for long, remained a matter of worry. The Election Commission and the judiciary have, from time to time, taken steps to deal with this problem. The Supreme Court in 2013 scrapped a loophole in the Representation of People Act (RPA), which gave a convicted lawmaker the power to remain in office on the grounds that appeals have been filed within three months of conviction, and held that the lawmaker shall be disqualified from the date of conviction. Secondly, not too long ago, the Supreme Court ordered the setting up of special courts to speed up the trial of lawmakers and legislators. The total number of lawmakers in the bicameral parliament and the state assemblies is pegged at 4,896.

While the leaders of various parties have, by and large, welcomed the apex court's February 13 order to make public the details of criminal cases against their candidates, they are not happy with the direction to justify the choice of such candidates. CPI(M) General Secretary Sitaram Yechury was quoted as saying that courts "cannot dictate on the internal affairs of a party." Senior Congress leader and lawyer Ashwani Kumar told The Indian Express that "credentials about leadership are to be established or negated in the people's court and not by judicial diktats" and "whether legislative lassitude and executive lethargy on such issues can justify the court's binding policy prescriptions on matters quintessentially political is highly disputable."

Another difficulty that may be encountered with regard to the court order is that there are times when criminal cases are filed against politicians with a political motive. A solution to this difficulty may be overcome by speedy trial, even though this is often wishful thinking, given the pace of the judicial process.

Will the Supreme Court's February 13 order have a deterrent effect? Former

*What is significant about the February 13 order is that it also sought to make the parties accountable for choosing people with criminal antecedents as their candidates, and not untainted people.*

Chief Election Commissioner SY Quraishi pointed to the fact that the number of lawmakers with criminal cases went up in last year's Lok Sabha elections. The question that arises is: if the law cannot put a blanket ban on candidates with criminal cases contesting elections, why should political parties refrain from putting them up as their nominees?

There is a view that putting details about criminal cases against candidates on the parties' official websites and social

media platforms only have the effect of "naming and shaming" them and may not be enough to tackle this problem. It is felt that only parliament can enact legislation to ensure that people with criminal antecedents, particularly with cases of heinous crimes against them, are not to be allowed to enter the electoral fray and enter public life. But can this happen if there are already lawmakers with criminal cases against them? There is also the question of whether such a ban is feasible, especially when criminal charges are at times levelled against political rivals with political motives.

In fact, it has already been suggested by some that the judiciary seeking an explanation from parties for its choice of candidates with criminal antecedents, however well-intentioned it is, runs the risk of over-stepping its jurisdiction. It has also been argued that it is the voters who, through their "well-informed" assessment, will decide on whether to elect a person with criminal antecedents. One answer to this line of argument is that, shouldn't the judiciary act when the legislature fails or the Election Commission is not empowered enough to take tough calls? In any case, it is the higher judiciary that is the arbitrator whenever the decisions of the Commission or laws passed by elected legislatures are challenged, even though it is true that the legislature has the power to get around any judicial verdict through suitable legislations.

One may go on endlessly debating the number of ways to curb or stop criminalisation of politics. But the problem will remain intractable as long as the culture of impunity, under which parties field tainted candidates in election after election, continues. That culture must end irreversibly.

Pallab Bhattacharya is a special correspondent for The Daily Star. He writes from New Delhi, India.