"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH ● dslawdesk@yahoo.co.uk

LAW OPINION

THE HAZARDS OF (EXTENSIVE) TRIAL BY BUREAUCRATS

Md. Rizwanul Islam

THE recent apparently appalling arrest of Dhaka Tribune journalist, Mr Ariful Islam has been the talk of the town. There is yet to be a judicial or some other form of independent assessment of what actually transpired. However, the palpable urgency and heavy-handed manner in which the public servants seem to have acted for dealing with an offence which is by no means a grave one along with the chain of events would unmistakably convey a presumption of ulterior motives. This incident vividly demonstrates some of the demons of the Mobile Court Act, 2009 (MCA). One can only hope that the publicity the incident has garnered may give an impetus to a much-needed overhaul of this law which is hardly attuned with the values of a democratic society.

PHOTO: COLLECTED

In essence, the executive magistrates are bureaucrats and *not* judges. This is a core policy reason that they are supposed to be vested with the jurisdiction to try those matters which are rather straightforward and do not need the exercise of a judicial mind. However, the MCA in its current shape includes around hundred offences which may be tried by mobile courts which are operated by judicial executive magistrates. And while operating mobile courts, they are not only exercising some judicial powers but are also the informants and witnesses, and this can seriously tilt the balance against the accused.

Arguably, even the Preamble of the Act has envisaged that the power of the mobile court would be 'limited' to impose 'limited punishment'. Section 7 of the MCA also seeks to limit the power of the court by providing that if an accused person does not accept her/his guilt, the mobile court would not be competent to sentence her/him and would refer the matter to a court of competent jurisdiction for trial. However, rather strikingly, the law does not provide a safeguard that an accused person be advised that her/his acceptance of guilt would lead to a conviction and a non-acceptance would give her/him an option to undergo a full-blown trial in the court of law. In a country like ours where bureaucrats are the epitomes of power, it is possible that even some people would feel coerced to accept the guilt of committing imaginary crimes lest greater trouble befalls on them. Again, any conviction by the mobile court, no matter how simple the punishment may be, is still a conviction. Convictions would remain as a stigma in a society like ours, where public memory of people's misdeeds are seemingly much stronger than public memory of people's great achievements.

It has to be acknowledged that applied in strictly pressing situations involving straightforward matters, with well-defined rules for the application of the MCA, it can play an important role in reducing the backlog of cases in our criminal courts. As long as the mobile courts do engage in routine matters such as visit examination halls during public examinations, inspect retail stores in broad daylight, or swiftly acts to prevent impending child marriage, the potential for abuse of the MCA is minimal. Breaking in people's door at night to recover a small number of narcotics should never be the function of mobile courts. After all, skies would not have fallen if the recovery push awaited the light of the morning sun. This is where not only the scope of the jurisdiction of the mobile court but also in what circumstances the jurisdiction can be exercised should be spelt out in clearer terms.

The public's simple perception of justice and a seemingly insatiable appetite for swift justice, even if that is raw justice, seem to have created a mirage that mobile courts are meeting out justice. And in many cases, mobile courts are possibly doing just that. However, members of the public can only see the well-circulated media reports of the operation of the mobile courts, but not how the operation actually went and the kind of evidence this 'self-sufficient' mobile court actually relied upon. Indeed, if we note that in *Mohammad Shahjahan Khan* v *Executive Magistrate, Munshigonj and Ors*, the High Court Division (HCD) has asked the Cabinet Secretary that a circular stating that 'while exercising powers under the Mobile Court Act, 2009 and the relevant laws they (executive magistrates) must not exceed their lawful authority', [LEX/BDHC/0236/2015] it is patent that the HCD either felt that there was a pattern of gross abuse of powers or the potential for it. And from a public policy point of view, there seems to be no appreciable reason for the MCA to be run by judicial magistrates who are trained in law and are not the under control of bureaucrats. It seems disingenuous to claim that justice or public policy dictates that mobile court be run by executive magistrates. The oft-cited number of judicial magistrates in itself is simply unacceptable as it can be addressed readily by appointing more judicial magistrates.

Assuming that Mr Islam was not a journalist affiliated with a national newspaper, but still cantankerous or unlucky enough to have incensed bureaucrats, one can easily imagine that the incident could have remained beyond the gaze of the public. Indeed, the travails of Mr Islam speaks loud how much easier a prey a commoner could have been. Had that been the case, he would not have been lucky enough to be granted bail so soon. To put it bluntly, the administration of justice in the hands of bureaucrats, some of whom are termed as 'district administrators' (literal translation of the Bengali equivalent which is in common currency), is a perilous venture, and it should be vested in them in the rarest of rare cases when there are compelling public reasons necessitating immediate action. And it is not befitting the vision of the founding father of the Republic who viewed bureaucrats as *public servants*.

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FOR YOUR INFORMATION

International Day of Action for Rivers

MARCH 14 is observed annually as the International Day of Action for Rivers. This observance was initiated in 1998 by International Rivers, an ecological organisation located in California, USA. The participants of the first International Meeting of People Affected by Dams adopted this initiative in March 1997.

International Day of Action for Rivers aims to raise public awareness of destructive water development projects, health and sustainable management of the watersheds. This year's Day of Action for Rivers theme focuses on "Women, Water, and Climate Change". Last year, 100 women from 32 countries who are leading efforts to protect and defend rivers gathered at the first ever Women and Rivers Congress. The Congress aimed to celebrate the fundamental role women play in defending and stewarding freshwater resources, and to initiate collective action challenging the gender inequities women face in safeguarding rivers and river ecosystems.

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

PEOPLE'S VOICE

Law reports should be free

Nafiz Ahmed

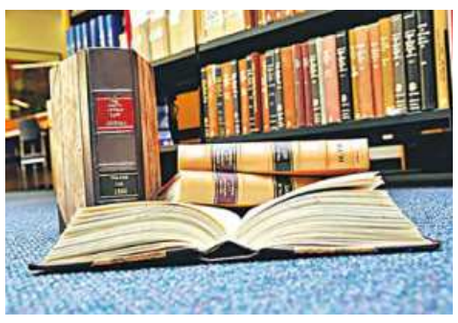
THE principle "*ignorantia juris non excusat*" is embedded in almost all the major legal systems, which roughly translates to "ignorance of the law is no excuse." Simply put, the citizens of the state must be aware of all the laws of the state and in case of breach of a law, can never put forward the defense that they were not aware of the law. Since an obligation is put on the citizens of a nation because of this principle, certain rights are also granted to successfully and conveniently fulfill this obligation. For example, it is a duty of the states to make the laws accessible to their citizens.

In Bangladesh, such right is granted through the adoption of the Bangladesh Laws (Revision and Declaration) Act 1973 (BLRDA 1973) and the Right to Information Act 2009 (RTIA 2009). The BLRDA 1973, through its section 6, requires the government to publish all the Acts of the Parliament, Ordinances and President's Orders and section 6A requires these to be published on a website. Section 6 of the RTIA 2009 requires an "authority" to annually publish its decisions, activities and proposed activities in a manner that can easily be accessed by the citizens. For the purpose of the RTIA 2009, an "authority" includes all constitutional bodies.

Article 111 of the Constitution gives a binding effect to the decisions of the Supreme Court (SC) of Bangladesh. It makes the law declared by the Appellate Division (AD) of the SC binding on the High Court Division (HCD) of the SC and the subordinate courts and the law declared by the HCD binding upon the subordinate courts. So, the judgments of the SC serve as binding laws in the national courts. Under article 111 of the Constitution, only the *ratio decidendi* is binding law, not the *obiter dictum* [as confirmed by the AD in the *Moudud Ahmed and Ors.* v *The State and Ors.* (2016) case reported in 36 BLD (AD) 33]. In the said case it was observed by the AD that "*Ratio decidendi* is the principle found out upon a reading of the judgment as a whole in the light of issues raised before the court and not particular words or sentences of the judgment" and to put it simply, *obiter dictum* is the observation made by the court in a judgment which is not necessary for determining the case. Although not binding, *obiter dictum* is worthy of respect and carries a significant weight in court.

Court proceedings of countries following common law legal tradition are heavily dependent upon precedents set by the superior courts as they all follow the maxim *stare decisis et non quieta movere*, meaning to abide by the precedents and not to disturb settled points. This is incredibly important in maintaining stability in adjudication and providing a safe standard for experts advising the lay persons. The citizens must, therefore, regulate their activities in line with these binding precedents.

But how do we get access to these precedents? Law reports publish these judgments in their monthly, quarterly, half-yearly and annual publications. If you are unfamiliar with law reports, they are the fancily bound massive books you see in law firms and lawyers' chambers. There are several law reports in Bangladesh and getting your hands on all the reports will cost you millions. It will be unreasonable to expect that the public in general will have access to these law reports as not even all lawyers have access to these. Only the wealthiest law firms can afford to buy all the law reports available in the market. This renders the obligation of citizens to know all laws next to impossible. Additionally, it is safe to say that only the wealthiest of the citizens can afford to consult a well-resourced law firm. So, citizens with low income, who cannot employ a well-resourced law firm to represent them are deprived of proper representation. It is also important to know that not all judgments get reported as the editors of these law reports decide which judgments will be published. Thus, they hold the power to deprive the citizens of knowing all relevant *ratio decidendi*, or worse, withhold wide dissemination of those which are not palatable to them thus limiting our access to relevant laws.



Under the RTIA 2009, the SC is also an "authority" as it is a constitutional body established under article 94 of the Constitution. Therefore, the people of Bangladesh seem to possess the right to know all decisions taken by it under section 6 of the RTIA. Some judgments are published on the SC's website, but they are extremely limited. Expecting the citizens to buy the law reports in order to be aware of the SC judgments is unfair, to say the least. The judgments are drafted in electronic copies in the SC so it can easily be published on their website. One cannot help but wonder, in a digital era, how the citizens of Bangladesh are being denied free access to these laws which should ideally be one click away! This endeavour should fit right in with the government's promise to create a digital Bangladesh with a digital judiciary.

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LAW ANALYSIS

Main features of the Deposit Protection Bill 2020

REPEALING the Bank Deposit Insurance Ordinance 1984 with certain modifications, the Bank Deposit Insurance Act, 2000 was enacted. Recently in February, 2020, a new law titled as the "Deposit Protection Bill" has been proposed in order to repeal as well as reenact the 2000 Act and to bring modifications thereto.

According to section 3 of the proposed law, Bangladesh Bank (BB) shall reserve a fund called Deposit Insurance Trust Fund (DITF) and the money of this fund shall be invested in any sector sanctioned by the BB. The following type of money shall be deposited to the fund - (a) money received from insured banks as well as financial institutions; (b) income received from the bank wound up under section 7; (c) money received from the investment of money from the fund; and (d) money received from other sources. According to sub-section 3 of section 3, the fund shall not be spent out except for payment of debt to the depositor creditor of the bank wound up under section 7 and for maintenance of this fund. Sub-section 4 provides that nothing of the Income Tax Ordinance shall be applicable to the income of this fund. Section 3 of the newly proposed law is identical to that of the previous Act of 2000 except for sub-section 5 thereto. Sub-section 5 says that no criminal proceeding shall be started against any authorised person for acts done in good faith under this law or any rules made thereunder.

Section 4 says that notwithstanding anything contained in any other law, all scheduled banks and financial institutions shall be considered to be insured from the date of the commencement of this law. And moreover, all scheduled banks and financial institutions established after the enactment of this law, shall be insured with the fund under this law.

There is a change sought to be brought through the proposed law in terms of premium of the insured banks and financial institutions. Section 5 of the Act of 2000 provided that every insured bank shall pay fund premium every year from that part of its deposit at the rate of 7 paisa per-cent which shall be determined by the BB from time to time. Section 5 of the proposed law says that every insured bank and financial institution shall pay fund premium on such part of the deposited amount and at such rate as may be determined by the BB from time to time. Both the laws provided that BB may with the authority from the government change the rate of the premium.

Sub-sections 2, 3 and 4 of section 5 are almost identical to those of the previous Act. They say that the insured banks and financial institutions shall pay their premium from their expenditure; premium shall be paid in the time and manner as specified by the BB; if any insured bank fails to pay premium, the BB shall be able to order that premium be paid from the account of such insured bank and financial institution reserved by BB (by deducing an amount equal to that of the payable premium).

Section 6 of the proposed law provides that if an insured bank or financial institution fails to pay premium, then BB may order deduction of an amount from the account maintained by BB of such insured bank or financial institution equal to the premium, as premium. It further says that if an insured bank or financial institution fails to pay premium for two consecutive times, BB may order such bank or institution not to accept deposits for such time as may be in the notification of the official gazette, upon providing them the chance to be heard. The previous Act envisioned this consequence in case the insured bank failed to pay premium more than once. Section 6 of the proposed law further says that in case of failure of paying premium for two or more times, the Trustee Board may advise BB to take initiatives for the winding up of the respective institution.

Section 7 speaks about the liability of the fund. If any order of winding up of an insured bank or financial institution is given, every depositor of such bank shall be paid an amount equal to his deposit by the BB, which shall in no case be more than one lakh taka. Sub-section 2 says that even if a depositor maintains more than one account and the sum of such account(s) is more than one lakh taka, he shall not be paid up from the fund exceeding one lakh taka or exceeding such amount as may be determined by the BB upon prior approval of the Government. There is a subtle difference between section 7 of the newly proposed law and that of the previous Act. The Act of 2000 provided that in all cases, the upper limit of payable amount shall be one lakh taka. However, the draft law says that with the prior approval of the Government, BB may also determine the payable amount differently. Section 7 also states that such paid up amount shall be adjusted with the amount paid to the depositor from its fund by the liquidator against the net asset of the bank. Sub-section 3 of section 7 says that the liquidator of any wound-up insured bank or financial institution, shall submit and send list of depositors in the form specified by the BB within 90 days after receiving office. Sub-section 4 says that as per provision of sub-section 3 after receiving the list of depositors the trustee board shall take initiatives to pay the payable amount to the depositors from the fund.

Section 8 provides that for the maintenance and management of the fund, there shall be a Trustee Board and the Board of Directors of the BB shall be the Trustee Board of the fund.

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