Law and Our Rights

"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

Contempt of Court and Protection of Journalists' Sources

by A. H. Monjurul Kabir

THE recent contempt cases, filed against five national dailies, have brought the significant issues of freedom of expression and of media freedom in the forefront of public discussion. Sixteen editors and publishers of national dailies in a joint statement on 16 November expressed their concern over issuance of rule and show cause notices by a Division Bench of the High Court Division of the Supreme Court Particularly, the High Court Division's order issued against the daily Manab Jamin on 15 November to disclose its source of information of a story relating alleged corruption in the judiciary within two days has worried the news professionals and media activists. They observe that the press can not effectively perform its central function to disseminate information of public importance, if people in possession of information which they conscientiously believe should be brought into the public domain are at risk of being identified and penalized for disclosing it to the press.

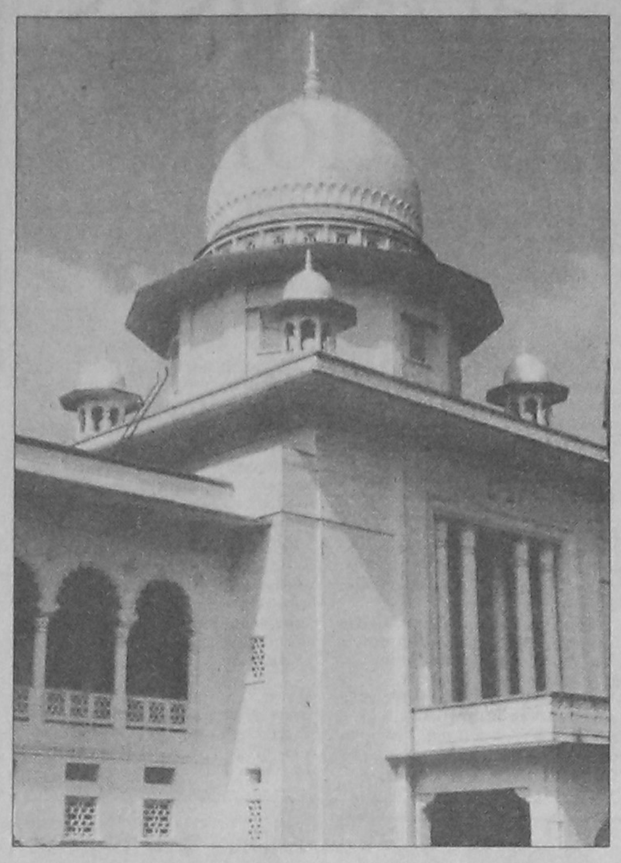
On 16 September 2000, the daily Manab Jamin published a front-page story titled "Ek Rajokio Kelengkarir Khosora (Notes of a Royal Scandal)". After about two months of the said publication, Attorney General Mahmudul Islam brought the matter into the notice of the Chief Justice. The Chief Justice referred the matter to a Division Bench of the High Court Division comprising Justice Syed Amirul Islam and Justice AKM Shafiuddin Ahmed. On this basis the court issued a rule of contempt of court against the Manab Jamin on 8 October. The Attorney General also moved against four other dailies i.e., Sangbad, Ittefaq, Janakantha, and Jugantar for publishing comments of a former judge of the High Court Division Justice Naimuddin Ahmed, currently a member of Law Commission. His comments, made in a public function, were based on the alleged judicial corruption. Surprisingly the court did not issue any notice against him. Following the petition of the Attorney General, rule and show-cause notices were issued against the other four dailies by the same Division Bench, in some cases, as suo moto action of the court. The editors, the publishers and concerned reporters of the five dailies were ordered to be present before the court within a week. At the same time the court also ordered the Manab Jamin to produce cassette, transcription, source of the cassette and relevant documents before the court. Last Wednesday (15 November) the court again ordered the Manab Jamin to disclose its source of information.Barrister Rokonuddin Mahmud, lawyer for the Manab Jamin told the court that his client would produce all relevant documents before the court but denied to divulge the source of confidential information.

Contempt of Court by the Fourth Estate?

Freedom of expression and the free flow of information, including free and open debate regarding matters of public interest, even when this involves criticisms of individuals, are of crucial importance in any democratic society. They are key to personal development, dignity and fulfilment of every individual, as well as for the progress and welfare of society, and the enjoyment and other human rights and fundamental freedoms. The role of news media, branded as the fourth estate, is extremely important to the process creating an enabling environment of openness. As rightly pointed out in the statement of sixteen editors and publishers of national dailies, "... a free and independent press ensures citizen's constitutional rights of freedom of speech and freedom of expression. It is also a precondition for promotion and protection of the whole range of people's fundamental rights. Also without a free and independent press, people's right to know can not be ensured."

Unfortunately, judiciary, the ultimate guarantor of rights, continue to use the offence of contempt of court to gag often substantial critique. Even in England, where the last successful prosecution for scandalising the court was brought in 1931, as David Pannick in his masterpiece 'Judges' asserts, "there can be little doubt the bringing of such prosecutions had an inhibiting effect on newspaper and magazine reporting of judicial affairs generally...the continued existence of the offence, and the memory of successful prosecutions, inhibits journalists, who wrongly suspect that they have a legal obligation to speak respectfully and cautiously when discussing the judiciary."

Another aspect of contempt that deserves special mention is that which operates to protect the fairness of trials and to maintain the authority of the courts. Although there is a public interest in doing this, the rules thereby imposed also impede and ultimately conflict with another public interest, namely freedom of discussion. Freedom of discussion is an important public interest for as Lord Simon stated in *A-G v Times Newspapers Ltd.*, "People can not adequately influence



the decisions, which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions."

The continuing growth of media and its crucial role in consolidating democracy calls for greater scrutiny of somewhat restrictive nature of contempt laws. This is not to say that the media should interfere an ongoing trial and thereby may cause a potential harm to the fairness of trials. As Lord Denning MR once said in his celebrated 'Road to Justice', "... the press plays a vital part in the administration of justice. It is the watchdog to see that every trial is conducted fairly, openly and above broad ...But the watchdog may sometimes break loose have to be punished for misbehaviour."

Journalists' Right to Professional Secrecy

The increasing legal recognition of the confidential relationship between journalists and their sources of information derives from a recognition of the role of the press in ensuring freedom of expression and information, and, in particular, as a public watchdog. There is also a growing acknowledgement that protecting confidentiality between journalists and their sources is crucial to the effective exercise of freedom of expression and information, and many jurisdictions provide it with some form of legal recognition. Judge Balogun of the High Court of Lagos State of Nigeria in Oyegbemi v. Attorney General of the Federation & Ors (1982) stated, "... no person or authority (not even a court of law) in Nigeria may require any individual, editor, reporter or other publisher of a newspaper to disclose his source of information of any matter published by that individual or other person or publisher, and the individual or editor, reporter or publisher of a newspaper can not be guilty of contempt of court for refusing to disclose the source of information contained in the newspaper publication, unless it is established to the satisfaction of the court that disclosure is necessary in the interest of justice, national security, public safety, public order, public morality, welfare of persons or for the purpose of prevention of disorder or crime."

Article 74 (3) of the Mozambique Constitution, which states that "freedom of the press shall include ...

Protection of professional independence and confidentiality. Article 30 (1) of the Mozambique Press Law states, "Journalist shall enjoy the right to professional secrecy concerning the origins of the information they publish or transmit, and their silence may not lead to any form of punishment."

In January 1992, the Supreme Court of Norway in Edderkopp case issued a decision upholding the right of journalists to protect their sources, especially concerning matters of public interest and even if they published their information in a book rather than a newspaper or other periodical publication

The French law on protection of sources and confidential information was substantially revised by the Act of 4 January 1993 on criminal procedure reform. The Act added Article 109(2), which now provides, "Any journalist who appears as a witness concerning information gathered by him in the course of his journalistic activity is free not to disclose its source.

The Sapporo District Court of Japan, sustained by the appellate courts, held that Article 281 of the Code of Civil Procedure protects journalist's privilege as a witness to refuse to divulge information about a source as "an occupational secret" unless the information is necessary for a fair trial.

The Court of Appeal (England and Wales) declined to order disclosure of the sources of a libellous article in *Private Eye* which alleged that the publishing magnate Robert Maxwell had financed trips abroad by the leader of the labour party in order to be recommended for a peerage. Section 10 of the Contempt of Court Act 1981 prohibits courts of England and Wales from ordering media personnel to disclose confidential sources except when disclosure is "necessary in the interests of justice or national security or for the prevention of disorder or crime"

Protecting Whistle Blowers

In fact those who express their opinions, or impart ideas and information through the medium of a newspaper or any other medium for the dissemination of information enjoy by customary law and convention a degree of confidentiality. The question is how else a disseminator of information to operate if those who supply him with such information are not assured of protection from identification and/or disclosure. Individuals who release information on wrongdoing whistleblowers must be protected from any legal, administrative or employment related sanctions for the sake of democracy and rule of law.

The culture of secrecy, in fact, breads and encourages corruption. Newspaper reports on corruption and malpractice directly assist state organs to establish their accountability and transparency before people. As eloquently claimed in the statement of editors and publishers, "By bringing to the notice of our highest state and judicial body, we think we have assisted them in investigating the events and taking precipitous action so that our judiciary is cleansed of any tendency that hamper or damage its prestige and dignity." Frequent issuance of rule and notices for contempt of court against newspapers for upholding people right to know may be counter productive to the fragile state of democracy in Bangladesh.

Law Report Analysis

Md Joynal Abedin and others vs The State

Hopes of a Judge!

by Dr Shahdeen Malik

When does a judge express hopes? And hopes for what?

Needless to say, usually a Judge does not express his hopes in a judgement, nor is he expected to do so. Nevertheless, occasions do arise when a judge is led to expressions of hopes. What are those occasions? A good example is the recent judgement in the case of Md Joynal Abedin and others vs The State.

This was a gruesome case. Saiful Alam, a rickshaw puller in Chittagong fell in love with Kushum. He brought her to his village home in Gaibandha and married her in April 1995. About a month later, on the morning of 24.5.1996, Kushum's dead body was found hanging from a tree, not far from Saiful's house. Police came in the next day and brought down the dead body from the tree. The inquest by the police on the spot identified a number of injuries on the dead body, including inflammation of vagina, signs of blood and semen.

The dead body was sent for post-mortem. The relevant portion of the post-mortem report records: "....vagina and vulva are swollen, oedematous and congested." Surely, such evidence of injuries and marks, coupled with proper application of expert knowledge and skill would have led to inferences of rape committed on the murdered victim.

The husband (Saiful) confessed that his wife was gang raped by five persons in front of him.

However, what did Dr Md Rafiqul Islam, the Resident Medical Officer of Gaibandha Sadar Hopsital who headed a board of three doctors for post-mortem depose in his cross-examination during the trial? "I found no injuries on the thigh of the victim. No marks of rape was found." (!)

Now, on the one hand, you have the inquest report by the police who examined the dead body soon after it was found, indicating marks of rape and the husband's confession that his wife was raped in front of him by a gang of five. On the other hand, you suddenly find the chief government medical officer of district, in spite of his own report that "vagina and vulva are swollen, oedematous and congested," depose in the witness box that "no marks of rape was found."

The criminal justice system relies heavily on reports of doctors for crimes affecting human body (murder, injury, rape, etc). Usually, without a doctor's report indicating causes of death in cases of murder, nature of injury for physical harms, and rape, it is very difficult for the prosecution to even begin to establish its case. If a person did not die of injuries but of disease, obviously there would not be a case of murder. If there were no marks of rape, a charge of rape can rarely be initiated. But in a case such as this, what do you do if you are a judge and find the examining doctor so blatant?

"This kind of post-mortem examination is most unsatisfactory and perverse to say the least, if not anything else. In the long run, the course of justice suffers, because of this kind of negligent conduct on the part of the experts performing their professional duties" the judge could only observe.

Obviously, most criminal cases affecting body can be frustrated by medical evidence such as this one. And when you have an instance where it is clear that the medical evidence of the doctor could have been 'procured' ("if not anything else" in the language of the judgement), there is not much the judiciary can do, except make observations as the judge did in this case.

Now to the shenanigans of the prosecution. Saiful, the husband, had confessed that soon after his marriage the five other accused in this case had proposed to have sex with his wife. Later they threatened him. On the night of the murder, they knocked on his door, dragged his wife from the house when he opened the door and took him and his wife to an adjoining field. He confessed that the five accused raped his wife in front of him, hit her, and then hung her in the tree. He did not protest, nor told anyone the next day and not even took any step to bring the dead body down from the tree. The police had brought the dead body down in the afternoon of the 25.5 1996; the murder was committed on the night of 23rd-24th.

In a criminal case like this, prosecution witness is the primary method through which the State (police) proves its case against the accused. In this case there were a total of 19 witnesses, 8 of whom were police personnel (the police who went to the spot, brought the dead body down, performed inquest on the site, prepared list of 'alamat,' recorded FIR, etc). The other 11 witnesses produced by the police were supposed to prove or support the police case, i.e., the five accused in this case raped and killed Kushum.

"... but those 11 witnesses proved nothing even indirectly or distantly, to substantiate the allegations of the prosecution.

.....The investigating officer, Md Abdul Jalil Sheikh (PW 19), the officer-in-charge of Sundarganj Police Station, simply produced certain persons in Court as witnesses without appreciating the worth of their evidence and naturally they proved nothing in support of the allegations of the prosecution," the Judge concluded.

All these witnesses produced by the prosecution told the court, to simplify, that they did not see anything, hear anything, know anything. Needless to say, when prosecution witnesses did not see, hear or know (directly) anything about the crime, how do you expect to convict anyone for the crime? If you don't have any witness, generally, you don't have any case to prosecute. At worst, you have a mechanism whereby you allow the accused to go scot-free, as it happened in this case, though the trial judge had earlier convicted the five accused on the basis of the confession of the co-accused (Saiful), which he should not have done. The law says that you cannot convict someone based solely on the confession of a co-accused, without other evidence.

Such turn of events could not but lead the Judge to observe that

"Even a raw probationer police official would know that no conviction can be based on the evidence of any of these 18 witnesses examined by the prosecution. This is very preposterous situation highlighting a total failure on the part of the investigating officer in conducting the investigation in spite of the early disclosures made in the confessional statement on 28-5-1996, rather, the investigating officer submitted the charge-sheet in hot haste on 17-8-1996 based on apparently no evidence as appearing from the testimonies of the witnesses in Court."

A High Court Judge rarely makes such strong observations.

It would not be too far-fetched to suggest that it is one of those many cases in which the State (doctors, police, etc), it seems, connived to ensure that the accused, except the husband who had confessed, were not convicted.

In the end, needless to say, the five accused were acquitted by the High Court Division and Saiful, based on his confession, was sentenced to life imprisonment.

Now, to the hopes of the Judge. Faced with such prosecution efforts (!) the Judge held:

"Let a copy of this judgement be also forwarded to the Principal Secretary to the Hon'ble Prime Minister of Bangladesh, so that her goodself can understand and appreciate the circumstances that even after commission of most vile, cruel, pathetic and heinous offence known to civilisation, the offenders could not be punished, with a solemn hope that necessary serious steps shall urgently be taken to improve the efficiency of the investigating agencies to make it really effective and their investigation meaningful....."

The obvious question that comes to mind after reading this judgement, delivered on the 25th June, 2000 by the Division Bench comprising of Mr Justice Md Ruhul Amin and Mr Justic ABM Khairul Haque, is that will her goodself understand and appreciate the circumstances? Incidentally, these two Hon'ble Judges are now hearing another death reference case popularly known as the Bangabandhu Murder Case.

In terms of the working of our criminal justice system, the problems are not confined to issues of alarming increase in the number of most horrendous crimes and the impunity from law of the criminals who are well connected. Even in the very few instances where prosecutions are initiated, the number of convictions are outrageously low. The reasons, as indicated in this judgement, are not far to find.

It would be preposterous on my part to assume that those who are in power (in both political and bureaucratic offices) are not aware of the utterly depressing scenario in terms of the failure of their offices to convict criminals. Obviously, they choose not to do anything about proper prosecution. Instead, energy and attentions have been marshalled in search of scapegoats blaming the judiciary and enacting draconian laws. In such a state of affairs in the criminal justice system, one can only hope, along with the Judges, that some day they would understand and appreciate the urgency of ensuring even a half-decent criminal justice system, otherwise, to quote from the judgement:

"....these Institutions of the State shall be a symbol of mockery instead of symbol of justice, and the rule of law and the dispensation of criminal justice shall remain a far cry."

On this last score we can readily disagree with the Judges and say that these institutions (prosecuting agencies of the government) are already symbols of mockery, at the least, if not sites of even more horrendous crimes than the crimes themselves. It is not crimes themselves but injustices that most often lead to civil unrest or rebellion.

Lastly, let me also remind also her 'goodself' of Article 112 of our Constitution: "Action in Aid of Supreme Court. All authorities, executive and judicial, in the Republic shall act in aid of the Supreme Court."100

Eliminating the Worst Forms of Child Labour

ILO Convention 182 Comes into Force

TODAY (19 November 2000), the ILO Convention against the Worst Forms of Child Labour (No. 182) comes into force. Twelve months ago exactly on this day, the ILO officially registered the second ratification of the C. 182 by Malawi.

The first ratification of the Convention was by the Seychelles on 28 September 1999. Since then many countries have followed suit in ratifying the Convention the number of ratifying States now stands at 41. This is indeed a very good record of ratification for an ILO Convention and shows the will of the ILO's member States to take immediate and effective measures to secure prohibition and elimination of the worst forms of child labour as a matter of urgency.

The ILO Convention 1982 (the Worst Forms of Child Labour Convention, 1999) is the result of a global consensus reached at the 87th Session of the International Labour Conference (ILC) held in Geneva in June 1999, where it was unanimously adopted. No! For each of the countries, the Convention comes into force 12 months after the formal registration for ratification.

However,when the Convention comes into force on 19 November 2000, it has implications for both the ratifying and non-ratifying Member States of the ILO:

For countries which have ratified

- When the new child labour Convention is ratified and comes into force for a country, the country should do as its provisions say, in both law and practice. This may require legal reforms, improved enforcement of existing laws, and direct assistance to children and their families.
- The Government is to report to the ILO every two years, on the measures it has taken for implementing the provisions of the Convention.
- The Government will be held accountable for any allegation of non-observance raised by employers, workers or another country that has ratified the Convention.

For countries which have not yet ratified

- The Worst Forms of Child Labour Convention is among the ILO's core Conventions (there are 8 of those). This means that countries that have not yet ratified them still need to send Annual Reports to the ILO on their related law and practice. In this context, a global report on child labour will be discussed at the International Labour Conference in 2002.

It is also possible for the ILO's Governing Body to ask for reports on unratified Conventions to have a general survey made.

Definition

The ILO estimates that, around the world, at least 250 million children between the ages of five and 14 work for a living. Almost half, some 120 million, work full time, every day, all year round. As many as 70 per cent toil in dangerous environments. Of the 250 million children, some 50-60 million are between five and 11 years old and work, by definition, in hazardous circumstances. Convention 182 defines the 'worst forms of child labour' as children under the age of 18 who are:

- forced to work in conditions where they are entirely at the mercy of the employer, guardian, household head or parent;
- trafficked, no matter whether it is for sexual exploitation, and any other labour exploitation;
- sexually exploited in prostitution or pornography;
- engaged in illicit activities, such as drug production or trafficking;
- engaged in work which threatens their life, health or morals. This can be different in different countries and the national authorities need to specify which kind of hazardous work falls under this.

Why ratification is important for Bangladesh

By ratifying the Convention, the Government of Bangladesh will give a firm sign of its commitment to work towards the immediate eradication of the worst forms of child labour. The Tripartite Consultative Council, a national level tripartite body (represented by government, workers and employers) chaired by the honourable Minister for Labour and Employment, has already expressed its support for Bangladesh's ratification of the Convention. The matter now remains to be brought-forward to the Parliament and will then be submitted to the President for his signature. This is already a great achievement. It will allow the country to develop a time bound plan of action for this and, from there, progress can be monitored. This will, in turn, motivate the international community to continue to come forward with assistance to achieve this.

Ratification is the first step, but, naturally it is implementation that will be the acid test. Once ratified, the next step will be to organize a broad consultation on the worst forms of child labour in Bangladesh. From the Government's side, there may be a need to adjust the national legal provisions in order to remove inconsistencies or gaps. A national consensus will need to define which hazardous child labour exists in Bangladesh. Then a time bound plan of action could be set up, as well as a national mechanism that will monitor the progress made in effectively removing the worst forms of child labour. From civil society, particular attention should be paid to social mobilization, and to innovative methods of monitoring children in hidden forms of work (e.g. domestic work, and in some forms of prostitution). A national watchdog commission could go a long way in empowering child victims, and bridging the present communication gap between them and the formal channels of public authority. *Source: ILO Dhaka Office*

Announcement

Make Your Voice Heard

1.Law Desk wishes to maximize readers' participation in making 'Law and Our rights Page' more people friendly and informative. This desk is particularly interested to build a strong rapport with judges, lawyers, academics, professionals, law students, and human rights activists from across the country. Your thoughts, ideas, and experiences on legal profession, education, and activism can make a significant difference.

2.Law Desk wants to unmask the violation of legal and human rights against you, your family, and your community. Raise your voice and concerns against such violations.

3. Law Desk is interested to disseminate information on academic research, professional studies, and various publications (e.g., books, journals, reports, monographs, newsletters etc.) on legal and human rights issues.

4.You can eye on important human rights and legal events of your locality. Law Desk is willing to focus on the problems faced by the courts of different levels, local bar associations, law colleges, and law faculties.

Send your articles, findings, day to day experiences, reports with relevant pictures to:

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