LAW *campaign*

Victims and witness protection: In search of a legal regime in Bangladesh

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IN Bangladesh where organised crime seems to more and more threaten national security the issues of protection of criminal procedure participants from criminal trespass are of particular importance. Finding of truth with regard to criminal case becomes problematic due to the fact that witnesses and victims fearing violence

over them and their relatives as well as direct or implied threats avoid participation in investigation and consideration of cases.

What is witness intimidation?

Witness intimidation -- which includes threats against the victims of crimes -- strikes at the root of the criminal justice system by denying critical evidence to police investigators and prosecutors and by undermining the confidence of whole communities in the government's ability to protect and represent them.

Overt intimidation, implicit intimidation, and misperceived intimidation may operate separately or in tandem. Furthermore, each instance of actual intimidation or violence against witnesses by gangs or drug-selling groups promotes the community-wide perception that any cooperation with the criminal justice system is dangerous.

Some traditional approaches to witness protection used in the developed countries: There are some traditional approaches to witness protection used in developed countries that may also be applied in our country.

- Requesting high bail to put and keep intimidators behind bars,
- Prosecuting intimidators vigorously,
- Making a conscientious effort to manage witnesses,
- Enhancing basic victim/witness program services.
- Relocating Intimidated Witnesses
- Preventing Intimidation in Courtrooms and Jails;
- Reducing Community-wide Intimidation:
- Developing or Improving Comprehensive Witness Security Programme

The nature and extent of witness intimidation: Key points

- Because in most jurisdictions the problem of witness intimidation has only recently begun to have a major impact on the investigation and prosecution of crime, there appear to be no steps taken by the Government that address the issue.
- All the Prosecutors, police officers, judges agree it to, and victim advocates that witness intimidation is widespread, increasing, and having a serious impact on the prosecution of crime across the entire country.
- There are two principal types of witness intimidation:
- overt intimidation, when someone does something explicitly to intimidate a witness, often in connection with a single case; and
- implicit intimidation, when there is a real but unexpressed threat of harm, as when a history of gang violence creates a community-wide atmosphere of fear.
- Sometimes witnesses feel intimidated even when they are in no actual danger.
- In addition to fear, a witness may be deterred from testifying because of strong community ties, a deep-seated distrust of law enforcement, or a personal history of criminal behaviour.
- Intimidation takes many forms: it may involve physical violence, explicit threats of physical violence, implicit threats, property damage, and intimidation in the courtroom or from the jail.
- Most explicit intimidation is said to occur only when there is a previous connection between the defendant and the victim and they live relatively close to each other.
- Intimidation is most likely to occur between arrest and trial -- especially as the trial date approaches -- but it also occurs frequently during the trial itself.

Gang-inspired fear: A particularly pervasive problem

Both case-specific and community-wide fear of retaliation are often fed by the fear that incarcerated gang members will return quickly to the community after serving brief sentences or will be able, from behind bars, to arrange for friends or family members to threaten potential witnesses. Because connections between incarcerated gang members and neighbourhood gangs are often uninterrupted, most witnesses no longer feel that imprisonment of the defendant pending trial, or even after conviction, can ensure their safety in the community.

Fear is not the only reason witnesses do not testify

It is argued that fear is only one of several factors that may deter witnesses from testifying; strong community ties and a deep seated distrust of the criminal justice system can also be formidable barriers to cooperation. Many of the communities in which gangs operate are worlds unto themselves -- places where people live, attend school, and work all within a radius of only a few blocks beyond which they rarely venture. As a result, victims and witnesses are often the children of a defendant's friends or relatives, members of the same locality as the defendant, or classmates or neighbours. Furthermore, community residents may regard many of the crimes for which witnesses are sought as private "business matters" among gang members or drug dealers, rather than as offences against the community which should inspire willing civic participation in the process of law enforcement. To many, the police are "outsiders" who do not understand or care about their problems.

At the same time, many of the key witnesses are often unwilling to testify not necessarily because they fear retaliation but because they want to avoid any contact with the criminal justice system if there are (real or imagined) outstanding warrants against them, if they think they might be arrested for having broken the conditions, of if they have developed a lifelong dislike for and mistrust of police officers and prosecutors.

How serious is witness intimidation in Bangladesh?

It is very difficult to ascertain the precise extent of witness intimidation because no scientific research has been conducted on the problem yet. But it is agreed that witness intimidation is widespread, that it is increasing, and that it seriously affects the prosecution of violent crimes.

Intimidation -- whether of an individual or a community -- may involve the following tactics:

Explicit threats of physical violence: High incidence of threats of physical violence against victims, witnesses, and their families is present in the society. Threats are much more common than actual violence but that threats were often just as effective in deterring cooperation because in gang- and drug-dominated communities these threats are credible. Threats against a victim's or witness's mother, children, wife, or partner were cited as being particularly effective forms of intimidation.

Indirect intimidation: A third common form of intimidation, reported in almost every jurisdiction, involves indirect intimidation, such as gangembers standing outside a victim's or witness's house, nuisance phone calls, and vague verbal warnings by the defendant or his or her associates.

Property damage: Only slightly less common than the three types of intimidation described above is intimidation involving the destruction of property: drive-by shootings into a witness's house, fire-bombing, burning of houses, hurling bricks through the window of home, and other types of violence.

Courtroom intimidation: Another common form of intimidation occurs when friends or relatives of the defendant direct threatening looks or gestures at a witness in the courtroom or courthouse during a preliminary hearing or a trial. Court-packing by gang members is a particularly effective form of intimidation. Gang members may demonstrate solidarity with the defendant -- and make clear their readiness and ability to harm the witness -- by wearing black (symbolising death), staring intently at the witness, or using threatening hand signals. If judges and prosecutors do not understand the meaning of certain gestures or other nonverbal threats, they may fail to address these explicit attempts to intimidate the witness. In other cases, the judge may be aware of what gang members are doing but feel that ejecting these individuals from the courtroom would violate their right to freedom of expression or the judiciary's duty to provide an open trial.

Other forms of intimidation: Less common forms of intimidation include economic threats (in domestic violence or fraud cases) and threats concerning the custody of children, deportation, or the withholding of drugs from an addicted victim or witness or from addicted members of his or her family.

Some reasons for recent increase in intimidation:

- a profound lack of respect for authority,
- the expectation that their own lives will be brief or will be lived out in prison,
- a sense of powerlessness and social inadequacy that can lead to the formation of gangs or neighbourhood crews,
- the ready availability of very powerful firearms,
- a willingness to use those firearms for almost no reason or in retaliation for the most minimal slight to their extraordinarily fragile egos, and
- lastly, and ironically, the increased penalties being imposed on those convicted of violent crime, which can raise the stakes of a prosecution."

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Factors of intimidation

Anyone is a potential victim of intimidation; there are some factors that increase the chance that a witness will be intimidated:

- The initial crime was violent;
- The defendant has a personal connection to the witness;
- The defendant lives near the witness; and
- The witness is especially vulnerable
- Residents of gang-dominated neighbourhoods often fall into more than one of these categories, greatly increasing their exposure to intimidation.

Incarcerated witnesses and juvenile witnesses are also especially vulnerable to intimidation.

Witnesses who are in jail or prison are easily identified by offenders (who may themselves be either inside or outside the facility), and because they cannot hide, they are easy prey to other inmates, including the defendants in the case at hand or defendants' associates or family members. Juveniles are another especially vulnerable group because they are often less able or less willing to take precautions against being located by would-be intimidators, and because they are more susceptible to family or peer pressure not to testify. Juveniles may endanger themselves by contacting old friends and visiting old neighbourhoods.

Despite the diversity of individuals associated with witness intimidation, most explicit intimidation occurs only when there is a previous relationship or other connection between the defendant and the victim and they live relatively close to each other.

Laws relating to witness protection in Bangladesh

The Criminal Procedure Code 1898 of Bangladesh is absolutely silent about the protection of victims and witness in Bangladesh. Besides no law relating to the protection of witnesses yet been enacted till today. In spite of the increasing rate of crimes in the country the legislators did not adopt any measures to protect the victims witnesses.

It is necessary that we should take appropriate steps to this matter. Besides that building of effective system of witnesses and victims protection is impossible without respective organisational, resource, information and other types of this activity support. Organisations of state protection of criminal proceeding participants include conceptual matters of administrative nature, resource and information support of state protection; if the matters remain unresolved it will be impossible to bring the above into practice.

These issues relate to formation and support of activity of special sub-units called upon to realisation of security resources; organisation of interaction of these sub-units and inquiry, investigation, public prosecution and court authorities; functioning of social and legal system of protection of criminal proceedings participants; set up of special funds for assistance to victims of unlawful acts and other problems of administrative level.

Their successful solution in many respects predetermines success of public defence of subjects of procedural criminal relations as a whole. Without implementation of the said provisions, without a due basis for protective activity with regard to participants of criminal proceedings there is no point to speak about effective operation of the system of their protection.

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Star LAW *analysis*

Martial law and military intervention: role of the judiciary

BARRISTER MD. ABDUL HALIM

ON 29th August a Division Bench of the High Court Division comprising Mr. Justice ABM Khairul Hoq and Justice ATM Fazley Kabir gave verdict declaring the 5th Amendment to the Constitution of Bangladesh illegal and unconstitutional. The judgment is first of its kind in juridical history of Bangladesh. It has also declared illegal and void the martial law proclamations, including the Martial Law Regulation 7 of 1977 that deals with abandoned property, and all actions done under the martial law between August 1975 and April 1979. The court held that usurpation of the state power through martial law proclamation, particularly by Khondoker Mostaque Ahmed, Justice Abu Sadat Mohammad Sayem and Major General Ziaur Rahman was unconstitutional and those who have proclaimed martial law so far liable to sedition charges. The court in its 22-point rulings held specifically that "the violation of the Constitution was a grave legal wrong and remains so for all time to come. It cannot be legitimised." The Court also observed that due to the necessity of the state, "such a legal wrong can be condoned in certain circumstances" invoking the Doctrine of Necessity.

Martial law in constitutional jurisprudence

In constitutional jurisprudence martial law means the kind of law which is generally promulgated and administered by and through military authorities in an effort to maintain public order in times of insurrection, riot or war when the civil government is unable to function or is inadequate to the preservation of peace, tranquillity and enforcement of law and by which the civil authority is either partially or wholly suspended or subjected to the military power. And as soon as peace is restored, the military authority goes back to its barrack handing over power to the civil government. This type of martial law is known as martial law in proper sense. The French institution of 'State of Siege' provides the glaring example of martial law in proper sense. Under article 36 of the French Constitution the Council of Ministers may declare martial law (State of Siege) but only the parliament may authorise its extension beyond 12 days. However, martial law that we are concerned here is not martial law as it is understood in the proper sense of the term. It is military intervention into politics or extra-constitutional martial law which we are concerned with here.

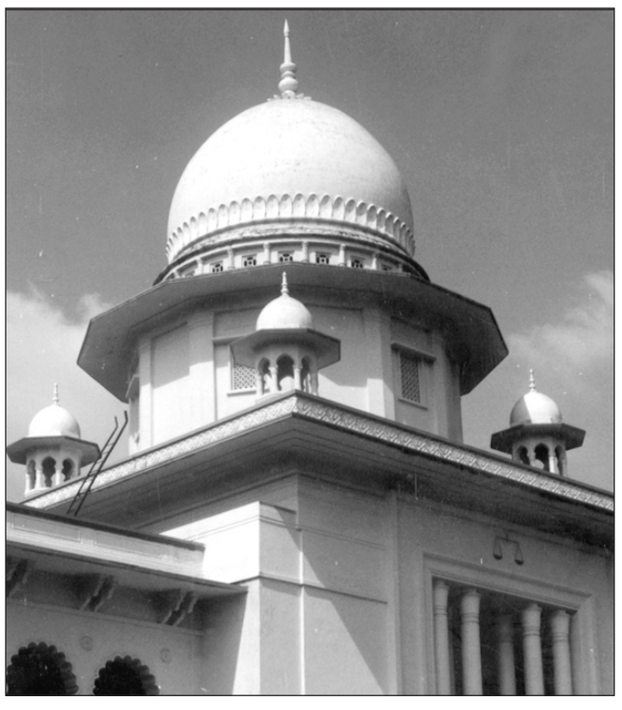
Martial law in the sense of military intervention into politics

The displacement of civil governments by the military force has been a common feature in most countries which have gained independence from colonial rule in the second half of the twentieth century. Wherever the social and political condition deteriorates and an ambitious general is at hand, the country goes through a period of military rule. This military rule suddenly comes with the declaration of martial law and such declaration is not generally a wilful declaration of the executive who has constitutional authority to do so; rather it is declared either by the military coup leader himself ousting or killing the existing governing leaders or by the head of the state under gun-point.

Again, many countries' Constitutions do not provide any provision for martial law but the military comes to power declaring martial law by force in an extra-constitutional way. From legal point of view this type of martial law is void ab initio and nothing to do with constitutional martial law.

Doctrine of efficacy

This doctrine is also called the doctrine of revolutionary legality which is based on the positivist theory of the efficacy of the change or revolution (coup d'etat) expounded by Hans Kelsen. In his book "General Theory of Law and State" Kelsen, under the heading of "the Principles of Legitimacy", has given a logical explanation on the elements and effects of a revolution. According to Kelsen, a revolution means a successful revolution and a successful revolution must have the following two elements: (i) The overthrow of existing order and its replacement by a new order; (ii) The new order begins to be efficacious because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new



order.

If these two facts are associated with the new order, then the order is considered as valid order and a law creating factor. So the success of a revolution or, in other words, the efficacy of the change would establish its legality. This Kelsen's theory of efficacy was first applied in State v. Dosso case by the Pakistan Supreme Court. Pakistan, after nine years of its independence, had been able to adopt and implement its first republican constitution in 1956. Then the Governor-General Iskander Mirza was elected as the first President under the constitution. After the constitution was adopted, there was naturally a sense of relief in the political circle who expected full implementation of the constitution after the first general election to be held in 1959. But such expectations proved unreal as governments after governments came and went resulting in an extreme political chaos and instability both at the centre and in the provinces.

President Iskander Mirza did not play the democratic role of an impartial balance under the constitution; rather being directly involved in party politics, he became the master-architect of these chaos and instability. For his power-expectation and undemocratic and conspiratorial activities it was decided by the politicians that Iskander Mirza would not be elected as the president in the next election. When the country was preparing for the general election to be held in February, 1959, Mirza finding himself unable to rally support among the politicians for his re-election, by a proclamation on the night of 7th October, 1958 abrogated the constitution of 1956, dismissed the Central and Provincial governments; dissolved the central and provincial legislatures and declared martial law throughout the country.

In doing this Mirza was supported by the Commander-in-Chief of the Pakistan Army, General Mohammad Ayub Khan who was also appointed as the Chief Martial Law Administrator. Following the proclamation of martial law the Law (Continuance in Force) Order was promulgated.

The legality of Mirza's Proclamation of martial law and the military government came up for consideration in State v. Dosso case. The Pakistan Supreme Court took resort to the positivist theory of Hans Kelsen and declared the martial law and military government of Pakistan valid on the basis of the doctrine of efficacy as explained by Kelsen. The substance of the judgment was that since the constitution was abrogated and its government came to power by imposing martial law and since there was no protest among the people, the coup was a successful one, the martial law and military government were legally valid. Munir C.J. maintained that victorious revolution or successful coup d'etat was an internationally recognised legal method of changing a constitution, and the revolution having become successful in Pakistan it satisfied the efficacy of the change and became a basic law-creating fact.

The judgment delivered in Dosso's case had to face severe criticisms on the one hand and on the other hand, it had a great impact, for it gave recognition to an unconstitutional government which became a pattern of 'change' in the Commonwealth countries and later on, this decision has been refereed to with approval in courts of many countries like Nigeria, Rhodesia, Ghana, Uganda etc. In Uganda v. Commissioner of Prisoners Exparte Matuvo the Ugandan High Court following the decision of Dosso's case held that the constitution of 1966 of Uganda which was made by military government was a product of a revolution and it would be regarded as valid and the supreme law of Uganda. Similar verdict was given in R V. Ndholvu by the Rhodesian High Court and also in Awoornor Williams v. Gbedmah by the Supreme Court of Ghana.

The overruling of the doctrine of efficacy

In Asma Jilani v. The Government of Punjab the same Supreme Court of Pakistan overruled the decision of Dosso's case and held that the martial law proclaimed by Yahya Khan was illegal and that his assumption of power on 25th March, 1969 was wholly unconstitutional and could not be recognised as valid. As to the doctrine of efficacy the court said : "The principle laid down in Dosso's case is wholly unsustainable and cannot be treated as good law either on the principle of *stare decisis* or even otherwise."

Likewise in the case of E.K. Sallah v. Attorney General the Supreme Court of Ghana, after the constitution of 1969 came into effect, was called upon to determine the legal implications of the military coup d'etat on the pre-existing legal system. The court held that the suspension of the constitution of 1960 by military coup had no effect of destroying the legal order.

Continued ....

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