LAW *opinion*

Ethical dilemma of lawyers

Leading to image crisis

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WHAT is public perception of lawyers? Do they think lawyers really are indispensable in the establishment of justice? Or are they there only to compound things so as to push truth far away from being revealed? If you are a layperson you may straightaway find these questions pretty interesting. But if you happen to be a lawyer these questions may make you think for a while and soon you will realise that lawyers are largely, if not the most, 'misunderstood' professionals.

In terms of number of jokes dedicated to a particular profession, lawyers enjoy an unrivaled status. You will find jokes on lawyers coming from every likely and even unlikely direction. And these are not necessarily on lawyers' acumen or intelligence. Again, there are far too many terms to suggest the greedy nature of lawyers. Few of them are like -- bloodsuckers, ambulance-chasers, hired guns, chameleons, etc.

And can you remember how many times you have heard, 'lawyers are liars'? Indeed, popular image of lawyers is always hanging on a fine line. Only section of people to acclaim lawyers' actions got to be persons benefitted by them in the shape of winning a suit or coming out clean-handed from some criminal allegation.

Image crisis of lawyers is not local, national or regional in nature rather it has a universal character. And this crisis is not even a newer phenomenon. Beginning from the very inception of the profession, lawyers' role has always been under rigorous scrutiny and they are invariably seen with suspicion. Vladimir Lenin once said, "One must rule the advokat (advocate) with an iron hand and keep him in a state of siege, for this intellectual scum often plays dirty."

There is a popular belief that lawyers manipulate their legal knowledge to the advantage of their clients so that they are handsomely paid. Here money matters the most not the cause you are fighting for. As a result your position on law swings with the change of the party you are representing, e.g. from plaintiff to defendant or the vice versa. This allegation of manoeuvrability of position is true inasmuch as serving the client's best interest is not merely approved by standard professional codes of conduct for lawyers but it is a mandatory duty.

Now let's discuss some regular ethical issues. A frequently asked question is -- why lawyers opt to defend someone who is guilty? Defence lawyers will pose a counter question -- is s/he guilty just because the lawyer concerned got the impression from him/her to be so or the accused confessed his/her guilt? There indeed is a clear line between what you believe to be true and what you know to be true. It is a question of belief versus knowledge.

A lawyer should not, pursuant to his/her ethical norms, allow his/her personal beliefs come in his/her way to dispense professional duty to clients.

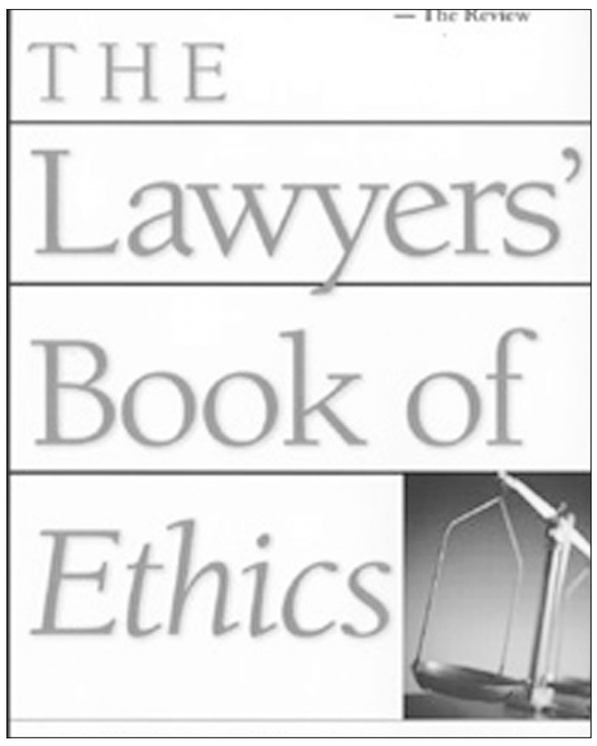
Para 9, Chapter II of the Bangladesh Bar Council Canons of Professional Conduct and Etiquette runs like, "It is the right of an Advocate to undertake the defence of a person accused of crime, regardless of his personal opinion as distinguished from knowledge as to the guilt of the accused…". You might have firm belief that the person asking for your legal help is responsible for the most heinous crimes but that does not mean that you should not take the case. Legally you are free to represent to the court even a person like militant Abdur Rahman or Bangla Bhai. And if you choose to do so, you must (not should) take full advantage of the technicalities laws have to offer. Para 12, Chapter II of the same Canons of Professional Conduct reads thus, "No fear of judicial disfavour or public unpopularity should restrain him (lawyer) from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defence that is authorized by the law of the land, and he may expect his advocate to assert every such remedy or defence".

In brief, lawyers' ethics require them to differentiate their personal identity from professional identity. Obviously professional identity receives overwhelming upper hand here. Is it not similar to ask a lawyer to behave like a mechanical identity having legal knowledge? Or, is it humanly possible to devote yourself to a cause in which you have no faith? Quite a paradox!

Now let us consider the second proposition. What will happen if somebody comes to you, confesses his/her guilt and wants you to rescue him/her from being put behind bars? Here again two sub-propositions may emerge. Does s/he want to plead guilty or s/he prefers to play innocent? If somebody wants to confess guilt before the court and wants you only to try to mitigate the punishment, that's good. But it's not good if s/he confesses guilt to you but wants to plead 'not guilty' and seeks your expertise to that end. As far as the Canons of Professional Conduct goes it is absolutely OK with pleading not guilty in such type of situation and leave the prosecution with all the responsibilities to prove the case. But is it OK with our natural sense of justice? Even more paradoxical, isn't it?

As a lawyer Mahatma Gandhi had a unique way of dealing with this issue. He used to insist his clients to disclose the truth to him and asked them to do the same before the court. If they were guilty, he assured them to try his best to keep the punishment as low as possible. Such 'proactive' practice seemed to defy standard professional conducts as he was not ready to make any distinction between personal belief and knowledge. And to our utter surprise that method reportedly used to work!

But if you like to do the same to your clients, it would be rather a



violation of the code of conduct meant for lawyers. Your duty is to fight in every legally recognised way to save your client, not to bring out the truth! After all, if all were so faithful to the truth, we would have done with the lawyering profession altogether.

Take another proposition. A single law can be interpreted in various ways. But which interpretation you are going to advance to the court? That one you think reasonable? Or, the one that would favour your client? Of course the latter one. Here lies another paradox. Client's interest overshadows all others' including your own conscience as a human being. But who is that much ingenuous to equate human conscience with lawyers' conscience? You don't agree? Definitely you are not a lawyer. Or, do you have any aspiration to become a lawyer with those old-fashioned ideas in head? You better give it up.

But how can be this dilemma-ridden position of lawyers possibly rationalised? Eminent practitioner Barrister Quincy Whitaker offers a solution, "You are not the jury. You are the mouthpiece for your client. You are saying what he would say had he completed a law degree and been trained at the Bar. I don't think you can rationalise it in any other way. It's not about justice and doing the right thing because sometimes you feel your client is probably guilty and ought to get a long sentence for it. But it's wrong, if not impossible to do your job on any other basis than 'I am a representative of what my client says'." Stated simply, it would be wrong to depict lawyers as defenders of justice.

The source of the problem partly lies in our adversarial system which rather prompts the lawyers to intensify disputes. That's how lawyers' personal interest can be secured most. Adversarial legal system is not really concerned about establishment of justice. It tries to give the parties a fair chance to confront each other before the court and s/he comes out on top who wins the legal battle. This peculiarity of the system allows the lawyers to play a crucial role in the final outcome of the case. Such overwhelming dependence on the lawyers' skill makes them desperate to win the case even at the expense of their concern for right and wrong.

This eventually makes the system largely pro-rich because only the well off people can afford the lawyers known to be most skilful in exploiting legal technicalities. In a system where justice is not the first thirst, lawyers are bound to be more eager in protecting their clients' interest than anything else.

In recognition of this facet of the problem a number of countries are trying to incorporate different alternative dispute resolution mechanisms. But so far it did not prove all that easy to make 'hard-core legal wranglers' adapt to far too 'soft' things like conciliation or mediation. In a survey of lawyers' attitudes in response to Ontario's Mandatory Mediation Programme, one Ottawa lawyer remarked: "We're trained as pit bulls and pit bulls don't just naturally sit down and have a chat with a fellow pit bull, the instinct is to fight …".

However, is there any possible way of lawyers' image reconstruction? I'm afraid not. It would be easier for us to face the undeniable reality if we recognise the fact that it is not lawyers but the nature of their job that makes them controversial. And with the existing legal system intact there is no escape for lawyers from criticism even though they might comply with their professional conduct norms to perfection. So, learn to endure what you cannot cure.

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FACT *file*

Nepal: Bhutanese refugees spark tension

A US offer to resettle 60,000 Bhutanese refugees has given hope to many of the 106,000 refugees living in Nepal for more than 16 years, but has also heightened tensions in the camps, Human Rights Watch said in a report released today. Refugees who insist on repatriation as the only acceptable solution have been threatening and intimidating those who voice support for resettlement in the US.

The Bhutanese refugee crisis began in 1991 when Bhutan began to expel ethnic Nepalis, a policy that resulted in the expulsion of one-sixth of the country's population. But since the announcement of the US offer in October 2006, groups of refugees who insist that the only acceptable solution is return to Bhutan have threatened refugees favorable to resettlement. "Refugees fundamentally have the right to return to a country that expelled them," said Bill Frelick, refugee policy director at Human Rights Watch. "But all refugees also have the right to make essential choices about their lives without threats and intimidation."

The report, "Last Hope: The Need for Durable Solutions for Bhutanese Refugees in Nepal and India," discusses the possible solutions to this protracted refugee situation and the choices the refugees now face. It describes conditions of the ethnic Nepali refugees who have languished in exile in Nepal and India, and also documents continuing discrimination against the ethnic Nepalis still living in Bhutan, who live in fear that they too could be stripped of their citizenship and expelled from the country.

"While repatriation would be the best option for most refugees, it can only be viable if Bhutan upholds its duty to guarantee the returnees' human rights," said Frelick. "Until then, repatriation to Bhutan cannot be promoted as a durable solution for the Bhutanese refugees in Nepal."

So far, Bhutan has not allowed a single refugee to return. Consequently, the refugees have endured years in cramped camps with no prospects for solutions. The report documents life in the camps and domestic violence and other social problems that have come after protracted periods in closed camps. "We don't want to be dependent on others," a Bhutanese refugee told Human Rights Watch. "Half our lives have been spent as refugees. We don't want that tag on our children's forehead. We want them to be proud citizens."

Since the announcement of the US resettlement offer, tensions in the camps have been building. Partly, this is because of rumors and misinformation about the nature of the offer itself. It is also due to intimidation by groups militantly opposed to resettlement who insist that the only acceptable solution is return to Bhutan. "People feel insecure," said a young man. "If others hear you are looking for other options than repatriation, they will condemn you as not favoring repatriation, or diluting the prospects for repatriation. Others will accuse you of having no love for the country."

The report discusses the possible solutions to this protracted refugee situation and the choices the refugees now face. "To be effective, the US resettlement offer cannot operate in isolation," said Frelick. "The Bhutanese refugees need genuine choices."

This requires a three-pronged strategy. First, resettlement should be a real option for as many refugees as want it. This means that other countries should join in a coordinated effort to maximise the number of resettlement places. Bhutanese refugees living outside the camps in Nepal and India should also be eligible. Nepal should cooperate on the resettlement option, in particular, by issuing exit permits without delay to refugees accepted for resettlement.

Second, Nepal should grant citizenship to those refugees who express a preference for local integration over resettlement or repatriation. Finally, the United States, India and other countries should redouble their efforts to persuade Bhutan to allow refugees who want to repatriate to do so under conditions that are compatible with human rights law. "The possibility that many refugees may now choose other options should make it much easier for Bhutan to accept repatriation," said Frelick. "Resettlement countries should press Bhutan for a genuinely comprehensive solution to this protracted refugee situation."

Source: Human Rights Watch.

REVIEWING *the views*

Did British Airways go wrong?

A lawyer's point of view

SHAMSUDDIN CHOUDHURY

BRITISH Airway's (BA) refusal to carry Sheikh Hasina to Dhaka, despite extant ticket and valid travel documents, and her consequential response to sue the airliner, has quite expectedly, generated general curiosity on the law that governs the carriage of passengers by airliners. Purpose of the present venture is to familiarise inquisitive readers with the relevant laws.

The governing law: It is the law of contract that primarily governs the relationship between a passenger and the carrier, because when a carrier sells a ticket to a potential passenger, a contractual relationship gets animated whereby both the carrier and the passenger bind themselves to adhere to the terms of the contract. Other areas of law, such as the Warsaw Convention and the Protocols that followed, the Law of Tort ,Carrier's Liability legislations of various countries, certain provisions of the private international law, otherwise known as the conflicts of law and the law of agency also play their respective roles.

Contractual terms: Every contract, irrespective of its nature, extent and purpose, contains certain terms, which are known as Conditions, and Warranties, depending on the relative importance of the term concerned. When a term of a contract is breached, whether the term is a warranty or a condition, the innocent party earns a right to be repaired for the damage he suffers as a consequence of the other party's breachful action or omission. The nature of relief, however, depends on whether the term is a Condition or a Warranty. Quantum of damage depends on the extent of the damage suffered and, can indeed, surge far beyond the amount payable under the head of general damages, if existence of special circumstances exacerbates the loss or the damage, warranting payment of special damages.

Carrier's obligation in a contract of carriage: It goes without saying that in a contract for the carriage of passengers, the carrier's core obligation is to carry the passenger to it's proposed destination. Generally speaking, a carrier would be liable to the passenger in the event of its failure or declination to perform its part of the obligation to carry the passenger as agreed.

That said, however, it should not escape one's thought that a situation may emerge which would legally exonerate departure from the above stated obligation. Justification on this count may stem from what, in legal jargon, are called 'Exclusion Clauses', which may be express or implied.

Circumstances beyond the Carrier's control, legally known as 'Force Majeure' situation, may also extinguish a carrier from liability.

Under the doctrine of 'Freedom of Contract', a carrier has a wide leverage to stipulate variety of exclusion clauses, subject, however, to the rule against exorbitant terms. Carriers can, hence, include and enforce wide spectrum of exclusion clauses in the contract of carriage expressly or by relying on such implied exclusion clauses, as the courts would accord recognition to.

Some exclusion clauses, limiting the extent of liability, emanate from the Warsaw Convention and the followant Protocols. An international or a bilateral Convention or Treaty does not ipso facto become part of a country's law or part of a contract. They may, nevertheless, acquire judicial recognition as part of implied terms if generally followed by a trade for a reasonable length of time. The provisions of the Warsaw Convention, however, are almost invariably incorporated in the form of express terms in their contracts of carriage by almost all airliners.

Carrier's liability legislations are relatively recent entrant into the horizon . Aimed to obstruct entry of undesirable passengers, primarily on immigration consideration, some developed countries enforce the provisions of these legislations by imposing heavy penalties on the carrier. Almost all airliners have, therefore, responded by explicitly stipulating corresponding terms in their contract of carriage of passengers.

Exclusion clause relied on by BA in Sheikh Hasina's case: In an immediate response, the British Airways wrote to a close relative of Sheikh Hasina stating, 'This action was necessary as on 18th April 2007 we received a written notification from the CIVIL AVIATION (my emphasis) Authority of Bangladesh that Sheikh Hasina had been barred from entering Bangladesh. Our right to refuse carriage is contained within our General Conditions of Carriage for passengers and baggage. Section 7, Paragraph 16, states that we may decide to refuse to carry you if the IMMIGRATION (my emphasis) authority for the country you are travelling to has told us (either verbally or in writing) that it has decided not to allow you to enter that country, even if you have, valid travel documents.'

It follows that Article 16 of Section 7, was the only exclusion clause the BA purported to resort to. The question that immediately surfaces is whether the BA could legally have recourse to the said Section.

Reproduced verbatim, Section 7, reads, 'We may decide to refuse to carry you or your baggage if one or more of the following has happened or we reasonably believe may happen.'

Paragraph 16 of Section 7, then stipulates,' If the IMMIGRATION (my own emphasis) authority for the country you are travelling to, or for a country in which you have a stop over, has told us that (either orally or in writing) that it has decided not to allow you to enter that country, even if you have, or appear to have, valid travel documents.'

So, what Article 16 of Section7, in its plain language, requires is that the BA has to be told by the IMMIGRATION authority of the country of destination that the passenger concerned would not be allowed in. In other words the said Section designates and contemplates the IMMIGRATION authority only, none else.

It does not, therefore, require much efforts to be swayed to the irrefutable synthesis that the criteria of Section 7, Paragraph 16, can only be met if the direction stemmed from the IMMIGRATION authority of the country in question. That obviously, was not the case when Sheikh Hasina was refused boarding. By their own admission, the BA received notification, not from the IMMIGRATION authority, the authority specifically envisaged by the said Section, but by a wholly different functionary of the state, namely the CIVIL AVIATION Authority.

Ordinary natural meaning' rule: Since an important right of a person has been infringed, the language should be strictly construed, that is to say that IMMIGRATION authority should be deemed to mean and connote the IMMIGRATION authority only. Cannons of interpretation, as a general rule, leans in favour of the rights of the people.

Besides, since there is no ambiguity or dichotomy in the rather lucid languages used in Section7, Paragraph 16, they deserve to be interpreted in accordance with the 'Ordinary Natural Meaning' principle of the rules of interpretation, in which event the purported justification advanced by the BA is bound to fall apart.

Unenforcibility of the Civil Aviation message: It is a matter of common knowledge that the supremacy of law is still the order of the day in Bangladesh , with the only exception of a few constitutional provisions that have been put in abeyance, for the time being , by the proclamation of emergency.

It is also well known that any decision taken by the government beyond statutory or constitutional sanction, can be set aside by the Hon'ble High Court under it's WRIT (Judicial Review) jurisdiction.

The British Airways cannot, as a regular voyager to Bangladesh, be reckoned to be oblivious of the conspicuous fact that, like in the UK, the government in Bangladesh can not do anything bereft of constitutional or statutory sanction, and that no statutory or constitutional provision exists in the Republic to empower the government to thwart the entry of a citizen and, hence, the message conveyed through the civil aviation letter was not enforceable in Bangladesh.

Section 7 paragraph 16, not applicable to a passenger travelling to her own country: Even an unaided reading of Section 7, Article 16, should swing most lawyers to the extricable irresistible and invincible conclusion that it, assumes and presupposes a situation where the passenger concerned proposes to travel to a country where she is subject to immigration control, i.e., a country other than the country of her own nationality. That is so because no country in the world can impose immigration control on its own citizens or refuse them entry, either under the municipal law or under the customary international law. In other words provisions of the said Section can not be meant to have envisaged a situation where a passenger is destined to travel to her own country, where she has an inalienable right of entry.

Did section 7, paragraph 16, form part of the bargain?: That a purported term, not brought to the notice of the other side to the bargain at the time the same was concluded or beforehand, cannot be regarded as incorporated in the contract, remains a well settled principle throughout the Common Law jurisdictions. If it is accepted that for the said reason Sec 7, Article 16, could not be treated to have formed part of the bargain, then the BA's Sec 7 Article 16-based claim would dwindle at the very inception.

Question of forum: Question of jurisdiction is governed by the principles of Private International Law, otherwise known as the Conflict of Laws. Since the breach took place in the UK, we should not encounter any hurdle in choosing the UK as the proper forum.

Before parting, an interesting piece of information for the readers. Way back to mid nineties, I appeared for the British Airways in a case in Bangladesh in which the British Airways eventually arrived at an out of court settlement where a passenger was refused boarding on the mistaken belief that his US Green Card was a forgery.

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