LAW REVIEW

An overview of the new Contempt of Court Act

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THE term contempt of court is indicative of a judicial order that imposes sanction, fine or even jail to the person who tends to interfere with the administration of justice. A person may be found guilty as such when his action amounts to lower the authority of the court of law. It is the most powerful legal tool in the hands of the presiding officer of a court to dispel the person who directly or indirectly disrupts the course of justice. A contempt of court may emanate from a failure to obey the lawful directions of a court, showing disrespect to the judges/ judiciary, scathing reporting /comment on pending cases, publication of article, broadcasting on court proceedings which likely to impede fair trial. The common law judges enjoy wide power of imposing sanction to contemnor than their counterparts in civil law regime.

A New Statute: Of late, a new Contempt of Court 2013 has set in motion repealing the age old Act of 1926. The passing of the present law was long overdue. It was argued by many scholars that the abysmally subtle statute was enacted only to serve the colonial rulers. On a cursory look, the present legislation also appears to have traveled beyond the basic notions of jurisprudence. Interesting to note, though most of the Bangladeshi laws are enacted in view and shadow of Indian laws, present law appears to be quite peculiar.

The present statute contains at total 20 sections. Section 2 defines few legal terms. It divides contempt into either civil or criminal [S. 2(6)]. It also defines two types of contempt elaborately [S. 2(8)]. It declared that no publication is contempt if it is done in good faith [S. 4(1)]. The highest punishment to be imposed for contempt of court is six months' simple imprisonment or fine or both [S.13].

Regarding the freedom of media, the statute states that true and accurate reporting of court proceeding is not contempt [S. 5]. Specific provision for the protection of freedom of press under certain circumstances appears to be praiseworthy.

Freedom of press is an explicit fundamental right in which a reasonable restriction may be imposed (Article 39). It includes the right to publish information about pending cases. As such, there is heated debate between freedom of press and the right of the accused to fair trial which itself is an unfettered fundamental right (Article 35). 'Our press often does not restrain itself in reporting crimes and trial of the offences, much to the anguish to person suspected'. It is recognized in most democracies that, publications which refer to character, previous convictions, and confessions could be result to contempt. Publishing photographs may hinder proper identification in Test Identification Parade. There are other aspects such as judging the guilt or innocence of the accused or discrediting the witnesses etc. which would be contempt. Media interview of potential witnesses or accused may sometimes be subject of contempt. Though such statutory attempt is better than the worst, detailed provisions containing protection of the victim, witnesses should have been enacted. Though traditional view is that unlike jury system the judges are impervious to the media reports about the pending cases, such avenue still requires to be addressed in the statute as excessive media coverage may affect the fair trial. Media has every right to make fair report on judiciary that is encumbered with backlog of pending cases, inordinate delay, lethargic prosecution, numerous adjournments etc. which will rather act a catalyst to ensure speedy justice. The media should never parallel trial, rather it complement the judiciary. In

this way, the distinction between media activism and aggressive journalism should be clearly maintained. It is also observed that Press Council Code and the Broadcasting Code are silent on guidelines on reporting court procedure.

An intriguing feature of the statute is that any bona fide comment/ statement directed towards the presiding judge of the subordinate court is not contempt of court [S 6]. Such provision fails to appreciate the fact that subordinate judiciary, being courts of first instance, at times may come under attack from disgruntle persons. A court, how high or small it is, has inherent power to take step for the contemnor for the administration of justice. Such provision may obliquely encourage the unhappy litigants to challenge the authority of the lower court. Mind it, it is not possible for the presiding judge to appease both contesting parties in the same verdict. Under the constitutional scheme subordinate judiciary is part and parcel of the judiciary. Therefore, any contemptuous attack (oral, action, broadcast) directed at the courts of lowest grade will amount to injury to the whole judiciary. And, parliament can in no way take away such inherent power of the court. For example, notwithstanding the presence of Contempt Court Act 1981, the common law contempt power of English Court is in vogue. It appears that Section 9 obliquely excludes the courts' power of imposing punitive action in any action amounting to contempt other than statutory contempt.

Section 10 tends to exonerate the delinquent government officials who may be accused of contempt court. Such provision may offer a relief to the person discharging their governmental duty. However, certain judicial checks in form of contempt of court may be essential to deter the administrative excesses.

Section 11 denies the court's inherent power to compel the physical appearance of the contemnor at the first instance. Section 13(2) made specific guidelines to the court to exonerate the convict contemnor who seeks apology before the court. Such insertion appears to be redundant given that the High Court Division alone is empowered to deal with the issue. Further, it goes against the basic tenet of law that the moment a court passes an order, it cannot pass any further order afterwards save any clerical correction etc. After passing an order the court becomes functus officio. Furthermore, the intention of seeking apology by the convict may be questioned in the premise that after trial the convict essentially offers amends not from his heart, rather he is compelled to say apology from his lips only. It may be mentioned here that apex court did not exonerate a former Inspector General of Police who was not vigilant enough to offer his unconditional apology at the earliest opportunity.

A court possesses the inherent ability to punish one who interferes, in any way, with the proper functioning of the court system. 'In applying the law of contempt of court a balance should be made between the freedom of expression and the need to maintain the authority of the court' [*Moinul Hosein* v *Sheikh Hasian Wazed* (2001)53 DLR 138]. A Division Bench (of the High Court Division) comprising Justice Dr Quazi Reza-ul Hoque and Justice ABM Altaf Hossain issued a rule on the authorities concerned asking them to explain why the insertion of eight sections of the Contempt of Court Act, 2013 should not be declared ultra vires of the Constitution. We are eager to see how the superior court ultimately disposes of the issue.

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LAW CAMPAIGN

Law Commission's proposal of making medical negligence law

S. M. MASUM BILLAH

WHAT can be nobler than engaging in medical profession? A doctor appears as the sole savior in times of ailments and other physical and psychological disorder. However, it is also true that at times we face negligence on the part of the doctor, which imprints a bad impression in the corpus of this righteous profession. The question, therefore, often haunts us: should the doctors be made accountable for their malpractice or negligence? If so, to what extent? Because, the other side of the coin is that if there is a likelihood of degradation of the patient, the doctor may not be willing to give treatment for the fear of a compulsive legal sanction. Overall, the profession is a very delicate and sensitive one. Doctors receive blame frequently, than bouquet of flower. However, it cannot be denied that amidst the present hospito-patho-culture, capital runs faster than the right to life. State's indifference in addressing the alleged malpractices in the medical centers has added an extra salt to the menu. The widespread practice is that there remains a governing law to oversee the matter. Therefore, necessity of a medical negligence law can hardly be overemphasized. Recently, Bangladesh Law Commission under the Chairmanship of Professor Shah Alam has come up with a proposal to make legislation on the point in order to address the widespread allegations of medical negligence in the country. The move deserves appreciation and attention.

Law Commission's proposal is based on a single basic premise: to raise the standard of health service for the people without obviating the interest of the professionals and concerned authorities. In making a medical negligence law, the first challenge is to legally define and determine the nature of medical negligence. Much depends upon how does the law view 'negligence' itself. Normally, negligence is defined as 'failure to exercise reasonable care and skill' in a particular situation. Pending a draft, the Commission has succinctly presented some basic tenets of negligence: i) the alleged commission or omission must have a causal relation in order to be qualified as negligence, ii) in determining 'negligence' it is to be seen whether in a given situation a person of general prudence would have taken a particular step in that situation and iii) even the state of negligence is to be determined in the light of overall consideration i.e. hospital facilities, assistants' and staffs' activities and behavior etc.

There is a debate as to who would determine the issue of negligence, because the judicial court lacks proper expertise to judge medical matters. On the other hand, if another doctor/body of doctors are relied upon to adjudge the incident of 'negligence' that may very much attract the 'principles against biasness'. The Commission after consulting the established case laws of some other jurisdictions (UK, Australia) has observed that the expert's opinion (on whether negligence has occurred) must come under serious judicial scrutiny in any event. A striking balance between the expert's opinion and that of the court may solve the conundrum.

The Commission has lucidly explained why a

separate medical negligence law is inevitable. The prevailing penal law is either trivial or vexatious. The law of torts, being a product of common law, swims in a grey area in Bangladesh, as a result, in absence of a specific legislation, strong case law jurisprudence has not been molded. The consumer law proves to be inert, though the same has tremendously helped to tune some innovative justicing in case of medical negligence in our neighboring country India. The main criticism of invoking consumer law in health rights sector is that it has the tendency to regard Medicare as merely a product. The necessity of enacting a separate medical negligence law, according to Law Commission, is further necessitated by the fact that the Bangladesh Medical and dental Council's power is very confined. They lack power to address the 'negligence' issue.

Furthermore, The Code of Medical Ethics, 1991 touches the matter in a triviality. In suggesting the enactment of the new law, the Commission has not forgotten to strengthen the power of the BMDC and Director General of Health Department within the law's purview. Following recommendations are noteworthy:

i)Medical negligence is to be properly defined with its nature and uniqueness. To determine such matter a committee composed of doctors, experts and citizen representatives may be formed.

ii)The relation between doctors and the pathologies and diagnostic centers needs to be revisited.

iii)Proper management of the privately and government owned hospitals would reduce the case of negligence.

iv)Special type of civil courts to redress the negligence issue by way of awarding compensation and alternative dispute resolution may be constituted.

v)An avenue to go to BMDC may be opened as a prior step of resorting to court. In that case, the constitution, powers and functions of BMDC may be remodeled and reformulated.

vi)The hospitals or medical centers will have to take vicarious liability for the works of doctors, assistants and all other staffs.

vii)The government is to fulfill its constitutional and human rights obligation to ensure the right to health of the people by recruiting more doctors, supplying modern technological appliances etc.

viii)Medical ethics should be studied with more importance in the medical curricula.

The proposal of Law Commission is driven by the urge of the day. Government is under an obligation to regard its recommendation with high esteem. Otherwise, such Commission's elegance becomes confined within the paperwork. There should also be a pragmatic role to be played by the doctor community. In standard countries like USA, UK, Germany, Australia and India, medical negligence litigation is credited with bringing about safer practices in the health care provisions. All health professionals involved in this service should become increasingly aware about their legal obligations towards their patients and clients. If necessary, further talk may take place within the legal, citizens and doctors fraternity in order to make a legal regime on medical negligence.

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WRITING FOR EQUALITY

Religion and culture cannot justify discrimination against gays and lesbians

PLEDGING that "we must right these wrongs," Secretary-General Ban Ki-moon on 15 April 2013 denounced discrimination against lesbian, gay, bisexual and transgender (LGBT) people, and declared that religion, culture and tradition can never be a justification for denying them their basic rights."Governments have a legal duty to protect everyone," he said in a video message to the Oslo Conference on Human Rights, Sexual Orientation and Gender Identity, voicing outrage at the assault, imprisonment and murder of. LGBTs. “Some will oppose change. They may invoke culture, tradition or religion to defend the status quo. "Such arguments have been used to try to justify slavery, child marriage, rape in marriage and female genital mutilation. I respect culture, tradition and religion but they can never justify the denial of basic rights."

Mr. Ban, who has frequently condemned violence and discrimination based on gender identity and sexual orientation, said the world should be outraged when people suffer discrimination because of who they love or how they look.

"This is one of the great, neglected human rights challenges of our time. We must right these wrongs," he said, warning that far too many governments still refuse to acknowledge the injustice of homophobic violence and discrimination.

"My promise to the lesbian, gay, bisexual and transgender members of the human family is this: I am with you. I promise that as Secretary-General of the United Nations, I will denounce attacks against you, and I will keep pressing leaders for progress."

The conference is jointly sponsored by Norway and South Africa and is one in a series of regional seminars scheduled to take place in France, Brazil and Nepal in March and April, and another is planned for Africa. The main purpose of these seminars is to gain better understanding of the specific human rights challenges for sexual minorities in each region, and to discuss how these challenges may best be overcome.

The seminars stem from a report issued by the Office of the High Commissioner for Human Rights addressing the responsibility of states to end violence and discriminatory laws and practices based on sexual orientation and gender identity.

Source: UN.Org.