



Media trial revisited

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BOTH the freedom of press and right to fair trial are fundamental rights guaranteed in Bangladesh constitution. Right to fair trial is absolute one whereas freedom of expression is subject to reasonable restrictions. Though media activism plays supporting role to achieve fair trial, at times biased and unregulated media interference to the pending cases may create substantial risk to the proper of administration of justice.

History of media trial

Freedom of press and fair trial are basic and fundamental which the state is supposed to refrain from interfering. However, in practice these two set of rights very often come into conflict. The dilemma that exists between these rights came into light quite some time ago- as early as 1440 when printing with movable type was invented. Since then with the expansion of mass communication through printing and other means, the

impervious to any internal or external factors, while the jurors who are not trained legal personnel are likely to be influenced by media coverage of the pending cases. Nevertheless, Justice Frankfurter observed that the influence of prejudicial material may be less on a judge than a jury; however, it would be mistake to exclude judges those sitting without jury [Pennekamp v Florida [1946] 328 US 331,350]. In UK & USA cases are mostly triable by the jury. In common law system, the juries are chosen from common men who determine the question of fact while the judges decide the application of law. Though jury system was in vogue in Indian sub-continent, India (following KM Nanavati v State of Maharashtra 1960) and Bangladesh abolished the system as jury tends to be susceptible to huge publicity and peer influence.

Though in Bangladesh the jury system is not in vogue now, magistrates are the presiding judges in the criminal courts of first instances. Their young age, lack of proper training, human susceptibility to sensation may be the reason that they are prone to be consciously or subcon-

sciously influenced by the excessive news coverage on pending cases. Even though the press should restrain itself reasonably but possibility remains there to be indirectly influenced by the newspaper reports. Pressure groups sometimes create a situation in which even a trained judge may find it difficult to remain impartial. It may be pointed out that in Bangladesh, Judicial Magistrates preside over the criminal courts of first instance. They are appointed from young law graduates through a competitive public exam. Age bar is 32 years.

Role of media

In many instances the media appears to have created a widespread perception of the guilt of the person arrested even before the trial concludes. This is how media trial invades the unfettered fair trial right of the accused. Sometimes, the journalists fail to take necessary caution in exposing the juveniles, wounded, victims. At times the media publishes series of facts which are under investigation. Though in principle the media is not bound to disclose journalistic sources, such divulge of inquiry issue may hinder the outcome of the case. For example, the photographs or video footage of someone whose identification is likely to be subject of evidence in court can create substantial risk of serious prejudice to the administration of justice. In exceptional cases, publications which refer to character, previous convictions, confessions may also impede administration of justice. There are other aspects such as judging the guilt or innocence of the accused or discrediting the witnesses etc. which creates hindrance to the fair trial. Media interview of potential witnesses or accused may be admonished from legal point of view. Such media interference at least inadvertently misses the gap between the suspect, accused and convict.

New trends in media trial

Amidst heated tension between these rights, police directed media trial has also assumed intriguing dimensions in Bangladesh. Exposing an accused before the media under the aegis of law enforcing agency does in no way comply with the notions of law and ethics. Such tactics is quite denial to the few core rights of the accused as guaranteed in the constitution. It may be fairly questioned: have 'they' lost faith in the judiciary? Such disturbing facet of media trial under the auspices of state agency should be estopped immediately. It may be suggested that an independent commission may be formed to assess the issue. Further, compensation may be given to the victims of such menace. It may be mentioned here that couple of writs on the issue are now pending for hearing before the High Court Division of the Supreme Court.

Like other three organs of state namely, executive, legislature and judiciary, the media has assumed the characteristic of fourth estate in a democracy. In a nascent democratic polity like ours where not all organs often unable to take firm shape, media requires greater responsibility and freedom. It is suggested that media should not readily take the role of courts. It is the delicate duty of the judiciary alone to pronounce the innocence or guilt of the accused. A clear distinction between media trial and media activism should always maintain. Notwithstanding, investigative journalism to spearhead fair trial is always welcome.

THE AUTHORS ARE JOINT DISTRICT & SESSIONS JUDGE & BARRISTER-AT-LAW RESPECTIVELY.



free press and fair trial conflict developed tension and difficulties in the administration of justice. This primitive idea has started its formal journey in UK and USA in the late 20th and early 21st century which drew attention of contemporary scholars. Subsequently, the modern form of pre-trial media perception on guilt or innocence of the accused developed. The phrase 'trial by media' gained formal currency in western countries during the proliferation of television news coverage in the 1960s.

Media influence on judges

In most liberal democracies including Bangladesh, conflict arises between the right of the press to comment on pending trials and the right of an accused to a fair trial. A question may arise whether the judge can be influenced by the excessive media coverage on issue pending before the court. It is generally recognised that a judge is beyond being influenced by what the media says. A common view is that a trained judge should be

Confirming anonymity, most of the young judges conceded to the author that undue media publications may hinder the proper adjudication in many instances. For example, a magistrate may refuse to grant bail to the accused due to adverse media coverage. Justice Frankfurter observed that 'in securing freedom of speech, the constitution hardly meant to create the right to influence the judges or juries'. Reports of inadmissible evidence and sensational commentaries can in no

YOUR ADVOCATE



This week Your Advocate is Barrister Omar Khan Joy, Advocate, Supreme Court of Bangladesh. He is the head of the chambers of a renowned law firm, namely, 'Legal Counsel', which has expertise mainly in commercial law, corporate law, family law, employment and labor law, land law, banking law, constitutional law, criminal law, IPR and in conducting litigations before courts of different hierarchies.

Query

My mother and three of her sisters got "ABCD" property from their brothers through a court's decree in Jessore. In the decree, my mother's name has been mentioned as "Salma X". A mutation of the "ABCD" property was done in the name of all four of them. In the mutation paper, my mother's name has been mentioned as "Salma X".

Later, a mutual partition deed of "ABCD" property was initiated among all four of them, where my mother received "D" property and my three aunts "A", "B" and "C" respectively. In the partition deed, my mother's name—"Salma X"—and a reference number of her voter ID card has been mentioned. Afterwards, "D" property was mutated in her name "Salma X".

It should be noted that my mother's name has been mentioned as "Salma Y" in her voter ID card. Here "Y" is the last name of my father. Simply to say, she has been using the title of my father as her last name. "Salma Y" is now being used in her all banking transactions and other documents.

My mother is a voter of Dhaka and her voter ID card was prepared mentioning her permanent address in Dhaka. It should be noted that the court's decree was initiated before the government prepared voter ID cards for its citizens. Mutual partition deed was initiated after the voter ID card had been issued by the government. However, my mother's address in Dhaka has been shown in the court's decree, mutual partition deed and the subsequent mutation papers.

Now, my mother is planning to make a gift (Danpatra) to three of her sons. As I know, it is mandatory to submit the voter ID card while preparing any transfer, therefore, will it create any problem to initiate the gift (Danpatra) of the "D" property to three of us using her name "Salma Y" instead of "Salma X".

If it creates any problem, then what sort of steps we need to take. Pls advise.

Response

Thank you very much for your query. From your question, we understand that your mother along with your aunts has acquired a property and subsequently a partition deed was executed amongst her co-sharers. In the partition deed, your mother's name has appeared as "Salma X" (maiden name) -- and a reference number of her voter ID card has been mentioned. Afterwards, the property was mutated in her name "Salma X".

However, your mother's name has been mentioned as "Salma Y" (marriage name) in her voter ID card which was prepared after execution of the partition deed and after mutation. Here she has been using the title of your father as her last name. "Salma Y" is now being used in her all banking transactions and other documents.

It should be borne in mind that the difference in name cannot be considered as mistake or error as subsequently she used her marriage name instead of maiden name. Hence, it is not a big problem. Your mother should make a formal application to the concerned Assistant Commissioner of Land (Tahsil Office) with full details of the correction/addition she wishes to make along with stating the reason thereto. Here, with her existing name she can add another name that is Salma Y. For example, in every document your mother's name should be written as 'Salma X alias Salma Y' instead of only 'Salma X'. Once she will insert it in Mutation papers there will be no impediment to transfer the land to you by way of Declaration of Heba. However, in Deed of Declaration of Heba your mother's name has to be written as Salma X alias Salma Y. Please also note that any Deed of Declaration of Heba has to be mandatorily registered since 2005. After registration you shall mutate your respective names.

FOR DETAILED QUERY CONTACT: OMAR@LEGALCOUNSELBD.COM.

LAW EVENT

Fighting against human trafficking

WITH the support of USAID/Bangladesh, Winrock International organised a National Conference in Dhaka with the presence of US Ambassador and honorable government officials. The conference was organised to accelerate the fight against human trafficking in Bangladesh and to commit to specific actions to improve the implementation of Bangladesh's anti-trafficking legal framework. The achievements of the Government of Bangladesh in combating human trafficking were highlighted by many.

Dr. Kamal Uddin Ahmed, Additional Secretary, National Point of Contact for Anti Human Trafficking, Ministry of Home Affairs, said most of the victims of human trafficking are aged between 18 and 24 years. Ms. Sadia Muna Tasneem, Director General, United Nations and Human Rights, Ministry of Foreign Affairs, said human trafficking is the fastest-growing illegal business in the world. It is a trans-national organised crime and one of the causes of the increasing number of trafficking of persons is global mobility of population.

US Ambassador Dan W. Mozena recognised the adoption of the Human Trafficking Deterrence and Suppression Act of 2012 and the 2012-14 National Plan of Action to Combat Human Trafficking as major achievements of the Government of Bangladesh. He emphasised the importance of turning present framework into operational reality and encouraged all conference participants to contribute to that goal. He reiterated the U.S. Government's commitment to help

Bangladeshi institutions to fully implement the 2012 anti-trafficking law. Ambassador Mozena recommended that Bangladesh should finalize, adopt, and disseminate the implementing rules for the 2012 Human Trafficking Deterrence and Suppression Act (HTDSA) and train government officials on its implementation. He also encouraged the government to increase efforts to prosecute trafficking cases and convict trafficking offenders.

He said, "The shackles of modern slavery are lies, false offers of jobs, education and bright futures, drugs, fear, torture, sexual abuse."

Bangladesh has made important progress in the battle against trafficking, and this progress was recognised in the 2013 Trafficking in Persons Report, which was just released by the State Department. Ambassador Mozena stated that "I think the greatest need now is for the government to finalise the implementing rules to facilitate full implementation of the 2012 anti-trafficking law. These rules are the critical next steps in winning the war against trafficking as they will close loopholes, clarify vague sections of the law, and thus facilitate prosecutions."

FROM LAW DESK.



PEOPLE'S VOICE

Pursuit of democracy

KISHORE DUTTA

THE elevated ideal of democracy stirred the nation to actualise the long-aspired freedom tiding over the cataclysmic catastrophe in 1971. Much blood has been spilled in the quest of emancipation from bondage. But this blood-bath freedom has not been able to terminate the nefarious manipulation of masses by the Machiavellian coterie. Tony Blair once stated, "Principle without power is futile". True but politics without principle is barren. The odious bickering for power demolishes the lofty ideals of mutual trust and priceless toleration among the contending parties.

Democracy presupposes presence of mutual trust, culture of shunning gimmick to tamper the election and forging consensus over the national issues. Traumatizedly the political parties of Bangladesh have not matured enough to conform to these luminous ethos of democracy. The genesis of caretaker government can therefore be said to be an inexorable corollary of the vicious culture of political prevarication to perpetuate the clinging to power. But unless this obnoxious culture of exploitation of election is jettisoned, no methodology can act as a panacea for this macabre malady corroding the state polity.

The incessant political turmoil has further been accelerated by a historic verdict of the Supreme Court invalidating the 13th amendment to the Constitution. The Appellate Division observes this amendment demolishes democracy, infringes independence of judiciary and thereby pulverises the pivotal pillars of the Constitution. The judgment has been criticised not to reflect the popular aspiration and to undermine the quivering political structure of the country. But the courts are neither representative body nor designed to be good reflex of the democratic society. The SC of Pakistan observed, "The court has the right to expound the law in complete indifference to any popular reaction even if the result is disaster" [Federation of Pakistan vs. Moulvi Tamizuddin P.L.D 1955].

Democracy is kept in abeyance during the tenure of the caretaker government. True that before the 13th amendment to the Constitution, there was constitutional dispensation of interim government. But the pre-amendment interim government was not pari-materia of the post-amendment

one. The pre-amendment interim government was interim only for the purpose of holding election but it retained its popular mandate in all other attributes. The fallacy gets crystallised if we look to the unamended Art 72 read with Art 123(3) of the Constitution providing that the election of parliament shall be held 90 days preceding the expiry of tenure of parliament so that democratic continuity of the Republic is not disrupted.

The post-amendment interim government was designed to facilitate the free and fair election within its tenure of ninety days. But the last caretaker government resorting to myriad ruses procrastinated the holding of election and adhered to power for two years. The constitutional checks and balances were shattered when the last caretaker government ruled out the court ruling to hold election within ninety days [Sultana Kamal vs. Bangladesh 14MLR]. Even the constitutional inhibition of taking policy decisions was flouted.

Independence of judiciary is the glittering pearl in the constitutional edifice of Bangladesh which cannot be fizzled out in any manner. But politicization of judiciary shakes the very root of the edifice. To cow down this abominable phantom, the SC has underscored the consultation with the chief justice [Bangladesh v MD. Idrisur Rahman 29BLD (AD) 79]. Pursuant to the 13th amendment to Constitution, the last retired Chief Justice was destined to spearhead the caretaker government. This imprudent amendment further aggravated the position as every government left no stone unturned to place their dear one in the post of Chief Justice by denigrating supersession of senior-most judges of the AD. To curb down these ludicrous supersessions, the SC has recommended selection to the post of Chief Justice to be made by an independent constitutional body and to be decided finally by the president [Hasan M.S. Azim v Bangladesh 31BLD62].

The original Constitution contained total prohibition against the appointment of a judge of SC after his retirement in any office of profit in the service of Republic [Art.99]. The purpose behind this prohibition was that opening up of opportunities for appointment after retirement may serve as an allurements during his service. Subsequently the bar was relaxed by military usurpers in the case of appointment in the office of profit either judicial or quasi-judicial. This distortion opened the Pandora's Box of political favoritism for judges of SC to be appointed in lucrative posts after their retirement. Further aggravating when SC in good many case reported in 49DLR1, 49DLR176, 11BLC339 interpreted the term 'service of the Republic' to include only the service adumbrated in part IX of the Constitution and proclaimed that the holders of the Constitutional posts articulated in Art.147 (4) are not in the service of the Republic and therefore the retired SC judges are not debarred to assume the constitutional posts. At long last the SC declared the distortion of Art.99 illegal and observed that the holders of all offices of the government be it civil, military or constitutional are in the service of the Republic and the Judges of SC are debarred after their retirement to assume the constitutional posts [Rahul Quddus v Justice MA Aziz 60 DLR511].

Democracy without periodical elections is farce of democracy. The Constitution has endowed the Election Commission with the sacred duty to hold free and fair election. The ongoing political crisis emanates mainly from the inveterate distrust in the integrity and power of the EC to discharge its constitutional duties. Therefore there is no alternative to strengthening the EC which only can evade the resort to supra-constitutional stratagem. The government can adopt the model of UK for appointment of election commissioners. In UK there are Speaker's Committee and appointment by the Queen's Address to the Commons. The Speaker's Committee comprises both treasury and the opposition. The established convention is before addressing any name for the appointment in the post of election commissioner before Commons, Queen Consults with every party having at-least two MPs. Thereafter the Speaker's committee secures consensus over the appointment. The process is transparent and arouses public confidence in the appointee.

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