LAW IN-DEPTH

Facade of food security

KISHOR DUTTA

THE pivotal need of food stands first among the basic needs of mankind. Food is not a trivial commercial commodity having diminutive social and political ramifications. It plays a monumental role in the societal arrangement. The Apex Court of India observed-"maintenance and improvement of public health have a rank high as these are indispensable to the very existence of the community [*Vincent* v *Union of India* AIR1987]".

There is inextricable nexus among sweeping food insecurity, crippling poverty and perennial hunger in the society. In the international milieu the developed states use the food-aid as a Machiavellian stratagem to exploit the food-deficit countries. USPresidentHubert H Humphrey stated,"I have heard that people may become dependent on us for food. I know that was not supposed to be good news. To me that was good news because before people can do anything they have got to eat."

Food security implies that all people have at all times physical and economic access to basic foods. TheWorld Food Summit 1996 has defined the food security as access by all people at all times to the food needed for an active and healthy life. The definition presupposes four conditions prerequisite to food security such as 1. Adequacy of food supply 2. Stability of supply 3. Access to food 4. Quality and safety of food. The Institute of Food and Development Policy of US incriminates not the scarcity of food but the unkempt allocation system as the baneful cause of food insecurity. In 1974 the whole of Bangladesh turned into an agonising spectacle of human tribulations. It was 1943 re-enacted. Amartya Sen argued-"whatever the Bangladesh famine of 1974 might have been, it was not a FAD (Food Availability Decline) famine… market power was used to command and snatch food away…" [*Vide- Conflicts in access to food by Amartya Sen*]

Bangladesh is a low-income and food deficit country with annual average of food grain imports of about 2 million metric tons. Approximately, half of the population live below the food poverty line and spend 70 percent of their household income on food. Among these, 28 million, representing 20 percent of the population are considered ultra-poor. Beyond that, there are another 35 million people living in urban slums and rural villages who are considered living below the poverty line but are not considered ultra-poor. Moreover the sky-rocketing exorbitant prices of the edible foods and dwindling income of the masses has further aggravated the already deteriorating food security posing a grave threat of blood-curdling silent famine in Bangladesh.

The qualitative aspect of food security is jeopardised by the macabre adulteration of edible articles leading to the cataclysmic catastrophe in the health sector. Adulteration demolishes the nutritious qualities of foods, inculcates venomous elements in the foods and thereby pulverises the luminous prospect of a healthy society. Some venal businessmen take resort to this heinous means for merely lucrative ends. A man has natural right to the enjoyment of healthy life. The Apex Court of Bangladesh observed that this natural right is torpedoed by this nefarious practice of contamination of foods.[*Mohiuddin Farooque* v *Bangladesh* 48 DLR 438]. In a welfare state the government endowed with the onerous obligation to elevate the nutrition level of masses cannot deviate from its sacred duty. The Indian Supreme Court observed-"A healthy body is the very foundation for all human activities ….in a welfare state it is the obligation of the state to ensure the creation and sustaining of conditions congenial to good health [*Bandhua Mukti Morcha* v *Union of India* AIR1984]."

The Constitution envisions an egalitarian society which presupposes the decimation of vicious manipulation causing perpetual poverty and perennial hunger. The Supreme Court observed that the people of Bangladesh have fought for ages to put an end to this appalling exploitation[*Re Italian Marble Works Ltd 62DLR70*] The whole edifice of the constitution is founded on the peerless idealism to establish economic justice. This noble aspiration is betrayed when a citizen is afflicted by piercing penury, distressed by corroding hunger and haunted by suffocating dejection triggered by unemployment fiasco.

The ambit of right to life, a non-derogant pillar of civilised society, articulated in Art.32 of the Constitution is ever expanding. The judiciary imbued by the sacred humanity and sacrosanct egalitarianism are coming forward tiding over crippling ambivalence and disabling obscurantism. A new vista was ushered in when the proactive judiciary in a penultimate move proclaimed the right to life encompasses something more than animal existence [*Munn* v *Illinois US* (1877)].

The nuance dividing line estranging the civil and political rights from the economic, social and cultural rights has been put aside by the intrepid judiciary. The obsolete plea of meagre economic capability to fulfill the economic, social and cultural rights has been retorted that the humane consideration and constitutional requirement cannot be measured by pecuniary standard [*Jackson* v *Bishop, F. Supp*]. The precursors of new era realised that in the absence of economic rights, the civil and political rights are illusory and nugatory. In a sanguine move the August Court of India proclaimed that the right to life in any civilised society implies the right to food [*Chameli Singh* v *State of Uttar Pradesh* AIR 1996].

Recently the government of Bangladesh is mulling to enact a law promising food security in pursuance of its obligation embodied in Art. 15 of the constitution. The very rationale behind this enactment is to put the destitute section of citizens under the umbrella of food security. The optimistic target may be shattered unless we ensure the providence of sufficient food at subsidised rate to the impoverished, gratis allocation of nutritious food to the pregnant mothers and pupils. To the end internal grievance redressal mechanism is prerequisite to reach the benefits at the doorsteps of the poor. There needs formation of national food commission to monitor the implementation of the food security law.To repel any opaqueness, all public distribution system related records shall be kept open for inspection by people.

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LAW OPINION

Why should international crimes trials in Bangladesh be expeditious?

PROFESSOR M RAFIQUL ISLAM

EXPERIENCE in international crimes trials since the Nuremberg reveals a consistent trend of non-technical and expeditious trials. The ICT Act 1973 provides for non-technical and speedy trials and sets a time-driven disposal of appeals. Despite these provisions for expeditious trials and appeals, procrastination for variety of reasons in ICT trials and appeals is evident, which is a legitimate concern in the interest of justice. If any of the accused dies before the ICT verdict and/or convicted dies before appeal decision, all charges against him/her will have to be dropped by death, he/she will remain entitle to the presumption of innocence and continue to enjoy impunity. Such judicial procrastination in effect denies the victims of their right to justice. This is not a hypothetical but real possibility, which if eventuates, will entrench, rather than end, the impunity of perpetrators.

Every criminal trial entails two distinct aspects of justice: procedural justice to ensure fair trials and substantive justice to redress aggrieved victims. The former relates to the conduct of the pre-trial and trial proceedings. The latter relates to the judicial exposition of the crime charged and its commission, perpetrators, and consequences. Conventional principles governing procedural justice have been developed to administer criminal proceedings in national criminal trials. These proceedings are often circumscribed by the technicalities of procedural rules for the admissibility of evidence, the applicable law, and any extra-legal consideration - the usual causes of uncertainty and procrastination in many trials. These principles are not necessarily applicable in international crimes trials for compelling reasons.

There are differences in the definition and constituent elements of ordinary crimes (murder) and certain extraordinary crimes (genocide). The unavailability of typical admissible evidence, such as enough surviving witnesses and physical evidence warrants the differential treatment. The available evidence in international crimes trials are usually newspapers, special reports, photographs and footages, documentaries, tape recordings, hearsay, achieve collections, which are not primarily admissible in national criminal courts. Both evidentiary materials and probative value differ between national and international crimes trials. The approach to the admissibility of evidence in international crimes trials is generally flexible in admitting probative evidence irrespective of its form. Professional judges have the capacity to administer the test of admissible evidence to ensure procedural fairness.

Statutes and charters of special international crimes tribunals/courts contain provisions for expeditious trials through less-technical rules and non-complex procedure for the admission of evidence to avoid unreasonable delay and irrelevant issues. ICTY Rules 92bis, 92ter, and 92quater (adopted 13 December 2000 and 13 September 2006) treat the written statement or transcript of a previous testimony of a witness as admissible evidence in various circumstances without requiring the witness to attend the trial to present evidence orally. Rules of Procedure and Evidence of the ICTY and ICTR also allow, as admissible evidence, statements of a 'consistent pattern of conduct' (Rule 93), judicial notice of commonly known and previously adjudicated facts without proof (Rule 94), and any relevant documentary evidence, which is deemed to have probative value (Rule 89:C).

Interlocutory appeals are the common causes of unreasonable delay, exemplified by Milosevic trial before the ICTY and Case No 2 before the Cambodian Extraordinary Chamber in which the accused died in custody and on trials that continued for years due to successive interlocutory appeals. These trials reveal that nearly all interim rulings on procedures and evidence are susceptible to interlocutory appeals and trials were withheld pending the appeal outcome. Encountering this problem, the ICTY amended its Rule 72, restricting the scope of interlocutory appeals with strict conditions. The Trial Chamber is mandated to grant the certification of compliance with these conditions. The ICT Act 1973 contains no interlocutory appeal provision to serve the cause of speedy trial. The issue of procedural fairness is covered by its open-ended appeal provision. Any procedural irregularities can be raised in appeals before the Appellate Division of the Supreme Court.

It is a common prosecution tendency to prosecute all perpetrators for all crimes committed. But procuring and filing compelling evidence against each perpetrator for each of their crimes is often uphill daunting and time-consuming tasks. The defence also often adopts a dilatory strategy through extravagant claims, exemplified by Radovan Karadzic (Bosnian wartime Serb president) plea of additional 300 hours and testify 300 witnesses to prove his innocence. The ICTY has overcome this cause of unreasonable delay through multiple amendments to its Rule 73 on judicial powers. It was amended in July 1998 to increase the judicial powers to control pre-trial and trial proceedings by calling upon the parties to shorten the length of witness examination, determining the number of witnesses, and setting the time available for the presentation of evidence with a view to expedite the trial (Rule 73bis B,C). In July 2003, the scope of Rule 73bis was extended further, allowing the Trial Chambers to fix the number of crime sites and incidents to be brought in the proceedings (Rule 73bis D).

Unreasonable delay contributed to the death of Slobodan Milosevic on 11 March 2006 after over four years of trials. His death raised worldwide concern about the propriety of his trials, which could have been done differently and expeditiously in the interest of justice to the victims. In response, the ICTY amendment to Rule 73bis in May 2006 again empowering the Trial Chambers to reduce the number of counts charged by directing the prosecution to be selective in including the counts in the indictment (IT/32/Rev.41, 28 February 2008). Recently, the snail pace progress in the Cambodian genocide trial has allegedly resulted in the death of Ieng Sary on 14 March 2013, the Khmer Rouge foreign minister and one of the 3 accused in Case No 002. This raised considerable public antipathy towards the slow progress of the trial, threatening to deny justice to the victims of Khmer Rouge. Since the charges against these accused terminated by their death, they remain legally entitled to the presumption of innocence, their accountability for heinous crimes continue to enjoy impunity and their victims continue to be deprived of their right to justice. The delivery of substantive justice to the victims was made subservient to so-called procedural justice to the perpetrators.

The 1973 Act requires to 'confine the trial to an expeditious hearing of the issues raised by the charges; take measures to prevent any action which may cause unreasonable delay and rule out irrelevant issues and statements' (s11:3). It also does not permit adjournment for any reason other than in the interest of justice (s13) and provides for 'expeditious and non-technical' rules and procedure for the admission of evidence (s19). The appeal process is also subject to set-time in the interest of expeditious outcomes. Both processes must address the recurring sources of unreasonable delay. The prosecution is better-off by being selective in charge framing based on only compelling evidence that minimise time and resources but maximise potential for conviction. Failures of the prosecution (Sayeedi trials) and defence (Azam and SQ Chowdhury trials) to present their listed witnesses should not be rewarded.

Extraordinary crimes warrant exceptional trials, which cannot continue endlessly. Procedural justice is an important means of ensuring fair trials, but not the end in itself. It is neither self-defining, nor have any intrinsic value independent of the trial to which it relates. Lessons from contemporary war crimes trials suggest that procedural justice may be tailored to suit the specific circumstances of a given trial to render substantive justice. Being a means procedural justice, however passionately stressed and immutably construed from human rights perspective, must be understood to facilitate, not to evade, substantive justice. When procedural justice is more obstructive than complementary to substantive justice or does not address, but contributes to, the destabilisation of expeditious trials, it needs to be tailored to advance substantive justice and speedy trials, which the ICTY precisely did by repeatedly amending its Rule 73. Procedural justice should not be stretched too high or far to make it undeliverable and frustrate the very end – the fundamental obligation to end the impunity.

Fixed time-driven judicial settlement is fast becoming a preferred condition on which the efficiency of judicial authority has come to be judged (WTO dispute settlement). The expeditious hearing provisions in the 1973 Act are in line with this trend, which must be practiced as necessary steps to overcome unwieldy complications and as functional tools for the judges to prevent unnecessary delays. It is imperative that the judges pursue these steps and tools proactively in the Bangladesh trials held after prolonged impunity and with very old-age accused and living witnesses. The nature and egregiousness of the 1971 war crimes and compelling values inherent in their absolute prohibition dictate that procedural justice must not outweigh the delivery of substantive justice. The judges must ensure not only that no innocent is punished but also no guilty is escaped through the niceties of procedural justice. Given a traumatised society's high expectations of and demand for accountability, it is in the interest of justice that the judges proceed expeditiously to hold perpetrators accountable for their outrage on humanity in 1971.

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LAW EDUCATION

Arbitration as an effective method of ADR

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THE notion of arbitration as a means of resolving high scaled commercial disputes outside of the court has developed in Bangladesh in the recent past. Arbitration in Bangladesh either- ad hoc or institutional or fast tract one is being governed by the section 89B of the Code of Civil Procedure and Arbitration Act, 2001 which is based on UNITRAL model law. The Act of 2001 will apply to all arbitrations in the country except those which may not be submitted to arbitration by virtue of another law. The 2001 Act is the replacement of the earlier one of 1940.

Arbitration as a sister concern of alternative dispute resolution (ADR) is a method for settlement of diverging disputes outside of courts, by one more impartial and independent arbitrator(s), which the parties have agreed to by means of arbitration agreement. The terminology arbitration is defined by Roomly, MR in the reputed case of *Collins* v *Collins*, 28 LJ Ch 186 (1858) as a reference to the decision of one or more persons either with or without an umpire of a particular matter in difference between the parties. The realisation of Lord Woolf, MR in the last decade of 20th century, with two evils of civil justice- delay and cost, echo the need of ADR including arbitration not only in the United Kingdom but also across the globe. Moreover, confidentiality, flexibility and global enforceability of arbitral award, have added an edge for uplifting the popularity of the concept.

The number of cases pending in both the higher and subordinate judiciary has shown the gruesome judicial gridlock. Recent seminar presentation document of Bangladesh International Arbitration Centre (BIAC) revealed a horrifying scale pendency of civil suits in the country. According to the document over 77% civil cases in the Appellate Division and 27% civil cases in the High Court Division is pending. Also, above 66% civil suits is pending in the districts and divisional level. However, the exact number of commercial suits is not estimated in the document but the document perceives partial solution of these through ADR. Terming the backlog of suits as a mammoth obstacle to ensure justice the incumbent Chief Justice has recently also pointed the role of ADR in reducing pendency of suits and establishing peace and stability in society.

The procedures and tactics as apply in the arbitration proceeding are completely different from the complex legal procedure of the court. The arbitral tribunal has the sole jurisdiction to try matter at its own accord without availing the normal course of dispute mechanism process. But in doing so the tribunal must not violate prevailing norms of law except the relaxation ensured by law. For example, the usual rules of evidence and procedure may be disregarded if the Arbitral Tribunal wants (sec-27 of the Arbitration Act, 2001).

An arbitral award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding both on the parties and on any person claiming through or under them and such award shall be enforceable under the Code of Civil Procedure in the same manner if it were a decree of a court (Sec-39 & 44 of the Arbitration Act, 2001). Section 45 of the Arbitration Act, 2001 also recognise and provide the mechanism of enforcing foreign arbitral award by the national court. Besides, as Bangladesh is a party to New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, foreign awards can be enforced in 149 member countries under the Convention.

As no procedure of dispute resolution including the judicial one is out of imprecision. So, arbitration has its own lacunae because arbitrators are also human being and may lack in impartiality and integrity during the initiation and completion of arbitration. Expense of arbitration proceeding in Bangladesh is comparatively higher than the court proceeding. Undeniably there is an extra cost in respect of the fees of the arbitral tribunal. Another difficulty in arbitral proceeding arises if challenges are made to the arbitration agreement or to an arbitrator.

Since arbitration is of paramount popularity around the world as to resolution of commercial disputes our country should not lag behind in using and popularising it. Its popularity can expedite easy access to justice and also can attract foreign investment apart from image building in outside world.

The academic syllabi and curricula for ADR, particularly of arbitration are not comprehensive in most of public and private universities. So, Bar Council as a regulatory body of legal education in cooperation with University Grants Commission (UGC) and Ministry of Education can direct the university authorities to transform the syllabus and curricula for spread of knowledge on the issue.

There are provisions of arbitration in different laws including Artha Rin Adalat Ain 2003, Bangladesh Energy Regulatory Commission Act 2003, Bangladesh Labour Act 2006, Real Estate Development and Management Act 2010 etc.

Truly speaking, the practice of arbitration is monopolized by some elite lawyers and retired judges all around the world. The same practice by some leading class lawyers and retired Supreme Court judges including former Chief Justices is also visible in Bangladesh to a bigger extent because of the preference of the contacting parties.

The success of resolving dispute outside the court is rested upon the people's participation in the various modes of ADR facilitated by the government, judiciary and the lawyers' community as a whole. To encourage people to avail the fruits of ADR especially of arbitration is now the demand of time now and in the days ahead.

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