RIGHTS ADVOCACY

Sentencing hearing: An elusive right of the accused

HUSSAIN M F BARI

THE criminal justice system of Bangladesh neither allows any sentencing hearing nor does it invite any pre-sentencing report on the background of the accused when the trial court pronounces its verdict. In awarding sentence the presiding judge basically relies on the prosecution evidence. There is no sentencing policy in vogue in our penal system. However, general punishments specified in statutes for actions and inactions are liable to be punished without mentioning any gradation of offences. In many instances, minimum and maximum punishments and options of various modes of sentencing are also mentioned whereas in some grave offences mandatory severe punishments like death penalty are also proposed. In absence of sentencing policy as well sentencing hearing, judges often award punishment mechanically in exercise of their individual sense of unbridled discretion thereby offer diversity of decisions which lack uniformity.

Criminal justice system is seen as a social institution concerned with prevention, investigation, prosecution and punishment of offenders and offences. Within the criminal justice system itself, there are several stages and agencies of decision making. Sentencing decisions are influenced by a range of factors, many of them personal to those who make them. Sentencing requires a thorough analysis of all the circumstances leading to the commission of the offence, the brutality of the acts of the accused, the background of the accused, the vulnerability of the victim etc. Sentencing is a delicate stage at which decisions are taken in a criminal process that begins with decisions such as reporting a crime or arresting a suspect, and goes through to decisions to release a prisoner on parole or to revoke a probation order or to commit the convict to prison or to award him pecuniary liability.

In our system, after the prosecution evidence is wrapped up, the accused gets an opportunity to provide any explanation whatsoever before the trial court. Such examination made under section 342 of Code of Criminal Procedure (V of 1898) basically exposes the incriminating evidence before him and invites defence evidence, if any. However, this can no way be termed as a pre-sentencing hearing, rather in practice this stage is completed perfunctorily without paying attention to any mitigating circumstances. In trial the defence side generally avoids to bring notice of extenuating factors in sense that it may obliquely indicate the confession of guilt of the accused person. It is needless to mention here that accused side rather tries wholeheartedly to get acquitted. It is to be noted that there is also no definite plea bargaining stage in vogue in our crippled criminal justice system.

In India, there is a statutory provision for sentence hearing. According to Section 325(2), Indian Code of Criminal Procedure 1973, if the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law. Indian Supreme Court held that the provision is mandatory and failure to give an effective sentencing hearing to the accused before the sentence is delivered vitiates the sentence which is not curable in law [*Santa Singh* v *State of Punjab* (1976) 4 SCC 190]. Observance of pre-sentencing hearing is now part and parcel of any developed criminal justice system including the UK and the USA. In those jurisdictions, 'sentencing decisions are shaped and influenced by a context which runs from decisions to investigate and to prosecute, through decisions on mode of trial, remand and plea, to pre-sentence reports and speeches in mitigation, and thence to early release and decisions on fine default and breach of community orders'.

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It may be mentioned here that in Bangladesh a similar provision was inserted in sections 265K(2) which provided that: 'If the accused is convicted, the Court shall unless it proceeds in accordance with the provisions of section 562, hear the accused on question of sentence, and then pass sentence on him according to law.' [Such provision was inserted by Law Reforms Ordinance (Ordinance XLIX of 1978)]. A similar provision was introduced for trial of warrant cases by Magistrates by the same ordinance [Section 250K(2)]. However, both the sentencing provisions were repealed by Ordinance XXIV of 1982.

As indicated above, present criminal procedure offers no real opportunity for the accused to advance any mitigating plea because sentencing is pronounced forthwith after found him guilty. In debates about prison overcrowding, experts suggested that problem aggravated as a result of our inchoate sentencing system. There is no reason why an offender of Bangladesh should not be provided with sentencing hearing which is mandatory legal procedure in any developed legal system. Obviously, sentencing is an important stage in the administration of criminal justice and it should be given its due place in criminal procedure. An accused is also constitutionally endowed with right to fair trial which can no way be fettered or defeated owing to legal technicalities [Article 35]. Therefore, it is recommended that necessary amendment should be inserted in Code of Criminal Procedure (V of 1898) to provide for sentencing hearing which will ultimately ensure better substantive and procedural justice. In this connection, a sentencing policy leaving a fair amount of judicial discretion may be issued by a competent commission.

There is no denying that prescribing sentences for various offences is a legislative function while pronouncing of sentence is the province of judiciary which requires consistent exercise of discretion (not unfettered one) on the basis of a sentencing policy. The basic notion of such policy requires looking at individualism of the accused and the offence committed vis-à-vis the overall wellbeing of the community at large. While desert (proportionality) principle should dominate the policy, due regard should be had to the juvenile delinquents, mentally disturbed prisoners, females. The protection of victims also should receive particular attention in the proposed policy. The stratification of offences may be helpful in many petty offences thus for example, offering alternative modes of sentence in lieu of imprisonment. For example, community engagement for limited period may be helpful for many debutant offenders. The stakeholders including presiding judges, lawyers and prison- officials should be well- conversant with the scope, philosophy and development of sentencing laws.

LAW EVENT

Combining social and legal minds

MUHAMMAD MAHDY HASSAN

THE 14th Human Rights Summer School (HRSS) organised by the Empowerment through Law of the Common People (ELCOP) has been completed its 12 days long journey with success. 48 law students from home and abroad attended this residential training programme. HRSS is different for its unique training methods which include community visit, capacity building to work in a team successfully, brain storming to refresh the mind of young law students, formal sessions conducted by the experts from home and abroad. 'Learning by doing' is one of the most important principles of this school.

Tomasz Lachowski, one of the instructors of community visit, with the children of Gonotuli cleaner's area

The objectives of community visit are to identify the legal grievances of the minorities; to suggest specific measures whereby deprivations and grievances may, as far as practicable, be remedied by effecting reforms of the existing customary and legal framework of each of the communities and to create a group of potential motivators and community leaders. This is an intensive field research designed to know and examine various aspects of their community life; their lifestyle, culture, religion, custom, laws, traditional economy, social. The objective of this work is to bring the law students out of the classroom to mobilise the prospective community leaders for human rights training and motivation.

The participants visited two places namely Nazira Bazar and Gonoktuli cleaner's area this year (2013). The people of these areas are known as Horizon community. During the visit, the participants collect information by way of interview, focus group discussion and from other sources and observation.

After coming back from visit, the participants sit together with their respective team members, analyse the data collected, share the data and observation with each team with others and prepare the presentation. The ways and techniques applied in the presentation are most effective method to make the participants skilful on the methodology of research, the way to present effectively, approach and attitude towards the way of thinking for the benefit of the poor and marginalized people. Expert opinions during the present by the participants are the most effective method. The objective of this school is to make the participants as rebellious lawyers who can realise and feel the exact condition of disadvantaged and poor people of the society so that they can stand beside them in their next career life upholding the motto of the school 'Lawyering with the poor is lawyering for justice'. This school is the brain child of Prof. Dr. Mizanur Rahman, the Chairman, National Human Rights Commission, who has a dream to make a group of lawyers for working together for ensuring equality, human dignity and social justice in the society.

THE WRITER IS A STUDENT OF LAW, UNIVERSITY OF DHAKA AND PARTICIPANT OF 14TH HRSS.

CONSTITUTIONAL ANALYSIS

Judicial role in Constitutional supremacy

TALUKDAR RASEL MAHMUD

THE constitution of a republic is presumed to be a nucleus within legal mainframes of that territory. In case of constitutional supremacy, the constitution is supreme over the parliament and the parliament can exercise its functions being only within the bounds of the constitution. The entire legislative, executive and judicial activities of the state are guided and regulated within the limit of the constitution. Constitutional Supremacy generally arises only where the constitution is written and rigid. Constitutional Supremacy mandates its superiority under all circumstances where no actions-legislative, executive, or judicial shall be valid unless it conforms to the constitution literally and spiritually.

It is pertinent to mention that the American Constitution is pioneer in designating constitutional supremacy as a supreme law of the land under article-(iv) as it had a painful experience that even a representative body might be tyrannical and there should be a law superior to the legislature. However, constitutional supremacy embolden judiciary in scrutinizing the constitutionality of any legislation made by the parliament and can declare law void on the grounds of inconsistency with the constitution.

The Supreme Court of America openly and clearly invalidated an act of congress as unconstitutional for the first time in *Marbury* v *Madison* case [1 Crunch 137;2L. Ed.60(1803)]. It was held in this case that "……*the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitution, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instruments.*" It was also held in Marbury V Madison case that "……*certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be that an act of the legislature, repugnant to the constitution is void.*" Later on, in *Eakin* v *Raub* case[12 Sergent and Rawle (Pennsylvania Supreme Court)330(1825)] , it was stated that "…the power of the supreme court to declare acts of congress unconstitutional has so long been an integral part of our constitutional system, and Marshall's reasoning in the case of *Marbury* v *Madison* is so impressive." So American constitution propagated the idea of constitutional supremacy and empowered judiciary in scrutinizing the consistency of legislation with constitution.

However, judiciary plays an important role in constitutional supremacy continuity by declaring any act invalid inconsistent with constitutional provisions as an act of Congress was invalidated by the Supreme Court in *Dred Scott case* [19 How.393, decided in 1857].

The idea of constitutional supremacy was rooted in American Constitution and matured subsequently in different written constitutions of the world. The Constitution of the People's Republic of Bangladesh mandates its supremacy under article-7. As per article-7(2) of our constitution, it is clearly stated that "*this Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void.*" The spirit of constitutional supremacy enshrined under this article intends to erase interventions by any unconstitutional act to ensure its continuity.

We already have experienced the violation of our constitutional supremacy by military intervention, martial law and bringing amendments inconsistent with the constitutional mainframes. But, judiciary played an adamant role by invalidating those unconstitutional acts in that milieu.

Ordinarily, the approaches of judges in revolutionary situation are in two broad ways: by applying the kelsen doctrine of revolutionary legality and by applying the doctrine of necessity. The first application of kelsen's doctrine of efficacy was made in the *State* v *Dosso*[PLD 1958 (SC) 533] case in Pakistan. In this case, the Chief Justice Munir observed that "…..*where a constitution and the national legal order under its disrupted by an abrupt political change not within the contemplation of the constitution, then such a change is a revolution and its legal effect is not only the destruction of the constitution but also the validity of the national legal order irrespective of how or by whom such a change is brought about*".

The other approach made by the Judges to meet revolutionary situations is the application of the doctrine of state necessity. This doctrine was followed in *Begum Nusrat Bhuto* v *chief of Army staff and the Federation of Pakistan* [PLD 1977 (SC) 657]. The upshot of this doctrine is to bridge the gap between the law and the facts of political life and to avoid the possibility that state and the people should be allowed to perish for the sake of its constitution and to accommodate an action which was undoubtedly an extra-constitutional step.

However, the kelsen theory of revolutionary legality or the doctrine of state necessity was neither directly mooted nor re-evaluated by way of any explicit or implicit challenge to the imposition of martial law in Bangladesh. Here some fringe question came up for justification, but in considering the same the appellate Division pronounced itself on the constitution and martial law the broad sweep of which has a far reaching significance and which will reverberate the corridor of constitutional debate of years. In *Halima Khatun* case [30 DLR (SC) 207] Justice Fazle Munim decided it on favor of the spirit of supremacy of the constitution enshrined in Art 7(2) of the constitution. Again, Justice Ruhul Islam said that though the constitution is not abrogated, the position of it is reduced to subordinate to the proclamation and the supremacy of the constitution is violated [*Haji Joynal Abedin* case, 32DLR (AD) 110]. However, judiciary also played a dominant role in constitutional supremacy continuity in Bangladesh by declaring 5th and 7th amendment of our constitution void and unconstitutional.

Bangladesh has a written and rigid constitution with constitutional supremacy, but we experienced that the spirit of its supremacy is ignored, suspended or amended several times with parlous motives by usurpers. No doubt, it is a herculean task for judiciary to uphold constitutional supremacy continuity in Bangladesh. It is relevant to note the Maxim *Quad initio no valet, fraction temprise no vated* means *'what is void in the beginning does not become valid by passage of time*'. So, it should be a zealotry role of judiciary to scrutinize the validity of any legislation inconsistent with the constitution to uphold its supremacy.

THE WRITER IS A RESEARCH ASSISTANT FOR LAW AT BANGLADESH INSTITUTION OF LAW AND INTERNATIONAL AFFAIRS (BILIA).

LAW LETTER

Constitutional face-off

OUR Constitution is the solemn expression of the will of the people of Bangladesh. It is the supreme law of this land. If any law is inconsistent with this Constitution, that other law shall, to the extent of inconsistency, be void. This Constitution is our pride, most beloved and all respected since we achieved this after 9 months blood curdling war of Independence in 1971.

Politics with this Constitution is something not new in Bangladesh. Defamation of Constitution, misuse of Constitutional power, violation of Constitution are very popular means of blame game. Political parties who secures 2/3 majority in the Parliament is entitled to bring any amendment in the Constitution. Such provision is not prima facie dreadful but in a country like ours where politicians lack basic humanitarian attributes such power can be lethal for the nation. If we see that Constitution of the United States went through 27 amendments in 238 years of Independence and no amendment has been brought since the last 22 years and whereas, we already have fifteen amendments in 43 years of Independence. I am not against the frequent rate of amendments but am concerned with the idea to treat our beloved Constitution as a weapon/shield to safeguard one's political agenda.

Recently another constructional controversy ignited with the oath-taking ceremony of 292 newly elected Parliament Members. On 9th January 2014 Speaker administrated the oath of newly elected Members of 10th National Parliament. The former Members of 9th National Parliament are also there since the same is not dissolved yet. Therefore right now we have more than 600 MPs in a Parliament of 350 seats. The situation is surprising but true. BNP is terming such oath-taking ceremony and formation of government as a violation of Constitution and Awami League claims such actions are in consistency with the Constitution.

Before I put my opinion I would like to mention few relevant provisions of the Constitution. Article 123(3) of the Constitution provides "A general election of the members of Parliament shall be held - (a) in the case of a dissolution by reason of the expiration of its term, within the period of ninety days preceding such dissolution; and (b) in the case of a dissolution otherwise than by reason of such expiration, within ninety days after such dissolution. Provided that the persons elected at a general election under sub-clause (a) shall not assume office as members of Parliament except after the expiration of the term referred to therein".

Article 148(2A) provides that "if, within three days next after publication through official Gazette of the result of a general election of members of Parliament under clause (3) of article 123, the person specified under the constitution for the purpose or such other person designated by that person for the purpose, is unable to, or does not, administer oath to the newly elected members of Parliament, on any account, the Chief Election Commissioner shall administer such oath within three days next thereafter, as if, he is the person specified under the constitution for the purpose."

From the plain reading of Article 123 it appears that taking oath and forming government before dissolution of 9th national Parliament i.e. before 25th January 2014 is unconstitutional. On the other hand if we read Article 148 we understand that it is now constitutional obligation to administer oath since the official gazette of election result was published. Therefore I will term this predicament as a "face-off between Constitutional provisions".

In this particular complex scenario both the Articles of the Constitution are applicable and the same is defiance and compliance of the Constitution at the same time. Now few questions can arise like (1) how this complexity kicked off, (2) who is responsible for this and (3) how it can be cured? The answers to the questions are all inter-related. First of all Election could be held a few days later like just before 24th of January 2014 in order to avoid the confusion or it could have been held under Article 123(3)(b) i.e. within 90 days after dissolution of 9th Parliament. On the other hand Election Commission could have avoided the controversy by publishing the Gazette of the election result after few days as there is no legal bar for them to do that. If the Gazette is published on 23rd or 24th January 2014 and the oath takes place on 25th January 2014 the entire activities would have been in consistency with the Constitution. Without keeping the same in mind the Election Commission hastily published the Gazette and the government is left with no option but to violate an Article of the Constitution to comply with another of the same.

In a concluding remark I would say in one sense taking oath by the newly elected members are legal but it will remain debatable always. The newly elected should refrain from forming cabinet until 25th January 2014 to remedy the present controversy a little. In future both Government and Election Commission should do their home work cautiously on Constitutional provisions regarding the holding of General Election to avoid Constitutional Face Off.

Syed Emran Hossain