



Reviving the 'stopped' judicial proceedings

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ON the issue of reviving the stopped judicial proceedings, the adjudicators in Courts of justice usually confront few rudimentary dilemmas. There is also disorientation as to the application of the provision enunciated in section 249 of the Code of Criminal Procedure, 1898 in our administration of criminal justice in Bangladesh. To realise the good meaning and application of the provision the same may be scrutinised minutely.

Our contemplation reveals that in section 249 CrPC, judges of judicial and metropolitan magistracy have been given discretionary option to use the power to stop certain judicial proceedings. As per the wordings of that section a Metropolitan Magistrate, a Magistrate of the first class, or with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, in any case instituted otherwise than upon complaint may for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused.

It is transpired from the glimpse of the essence of section 249 of the Code of Criminal Procedure in relation to the Courts' power to stop proceedings that proceeding of GR case or Police case can be stopped under section 249 CrPC and the accused persons may be released to that effect by the same Court. But analysing the heading of that provision we find a confusing terminology contrasting the wording of the provision only for the use of the word 'complainant' therein since the word 'complainant' refers to the person who accuses in any complaint case.

Nonetheless, so far as the spirit of the wording of the said provision of CrPC is concerned this power of 'stoppage of proceeding' is only confined for the G.R. cases. It is settled that under the scheme of CrPC there is no such scope of stopping the proceeding of C.R. cases. Moreover the accused persons who are released for the purpose of proceeding stoppage can not in any way be deemed to be finally exempted from the

criminal liability of that particular case's allegations. It is very important to understand the difference between the disposal orders of the Courts in relation to the 'acquittal' i.e. conclusive exemption from criminal liability so long the order of acquittal remains unaltered and the 'release' i.e. temporal exemption from criminal liability so long the order of proceeding remains stopped. A person released in an order of proceeding stoppage can be subjected to the criminal trial at any time the stopped proceeding resumes.

Magistrate as spelt out in the last portion of Rule 638(2) of Criminal Rules and Orders (CrRO). This legal bar is emanated from the decision given in the case of *Niamat Ali Sheikh and others v Begum Enayetur Noor and others* reported in 42 DLR(AD) 250= 13 BLD(AD) 11=10 BCR(AD) 262. On the basis of the above decision, in sub-rule (2) of rule 638 of the Criminal Rules and Orders (Volume-1), it has been mentioned that after stopping of the proceeding and release of the accused by a Magistrate under section 249 of CrPC, there is no scope of reviving the

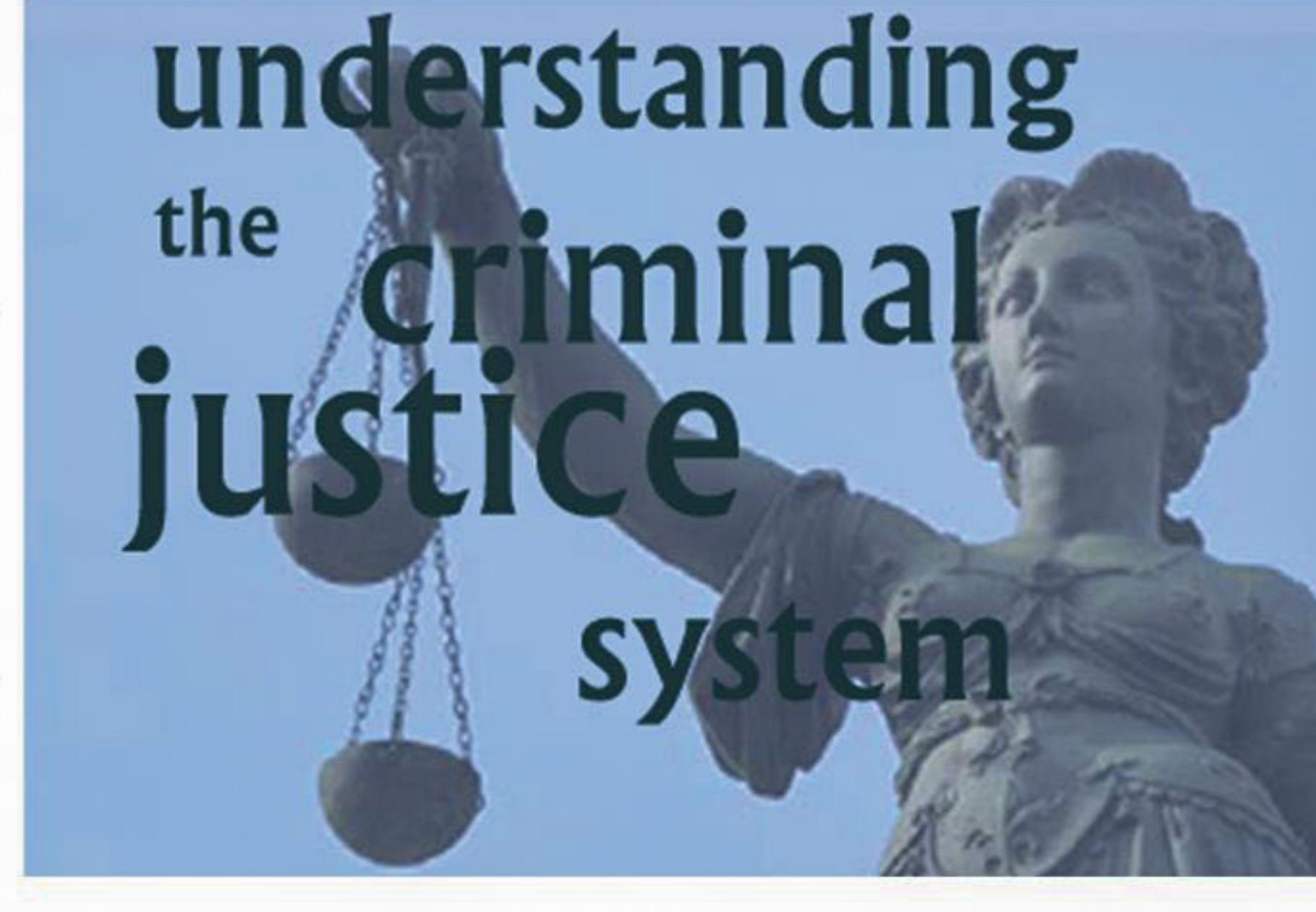
may begin the trial again if witnesses are available.

In June 1990 when the *Niamat Ali's case* was decided by the Appellate Division, there was a provision for stoppage of a proceeding and there was also legislative sanction for reviving the same which was enunciated in section 339D of the CrPC. As a matter of fact, sub-section (4) of section 339C was substituted in 1992 by Act no. XLI of 1992 AD and section 339D was omitted in 1992 AD by Act no. XLII of 1992. In sub-section (4) the words 'shall stand stopped' were used nevertheless in section 249 it is provided that the magistrate may for reasons to be recorded by him, 'stop the proceedings'. In section 339C(4) as the words 'a trial shall stand stopped' were used, there was no scope of reviving the case without legislative sanction and the legislature being sentient of the legal position, provided the statutory legal sanction in section 339D.

Despite the fact that the question of stoppage of trial as provided in section 249 essentially was not the main question for decision in the *Niamat Ali's case*, the observations made by the Appellate Division in respect of the provision of section 249 is binding on all subordinate courts. So, in the light of the above quoted decision of our Apex Court there is no legal scope for the Courts ordering the proceeding stoppage to consider the petition of the informants advanced with the prayer to revive the proceeding of their once stopped prosecutions.

Now, after the elucidation of few crucial questions regarding the 'revival' issue we have a clear-cut provision as to the issue of revival of stopped proceedings in the Criminal Rules and Orders maneuvered from the laws emanated by the landmark decision of our Apex Court. Hence, in similar circumstances the petitions seeking 'revival of stopped proceedings' may be lawfully rejected by the same forum which ordained the stoppage of the proceeding. Thus, for ends of justice the prayers of revival may be disposed of in pursuant to the relevant provision of CrRO and the precedent erected by the Apex Court.

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Now, in this context we face a logical question as to whether a stopped case can be revived at all. If the answer of law is in the affirmative then few consequential questions peep in the mind who can order such revival or whether the judge stopping the proceeding can revive the same in a changed subsequent circumstance requiring restoration of the stopped proceedings for the cause of justice.

To that end, appearing before the Courts ordering the stoppage of the cases the informants recurrently pray for the revival of their cases advancing revival petitions. But it is revealed from the study of relevant provision of law that there is a legal bar to revive a case which is stopped under section 249 by the

case by him. Arguably, as the word 'may' is used in the body of the governing section for proceeding stoppage in the CrPC it is not mandatory for the judges of judicial and metropolitan magistracy to stop the proceeding. Moreover, it is widely thought that the power given in that provision given to a magistrate to stop the proceeding also includes the power to start the trial again if the reasons for stopping the proceeding no more exist. In this connection it may be mentioned that in a number of judicial pronouncements of the Indian Jurisdiction, the interpretation is that the magistrate who passes an order of stay or stoppage of trial under section 249 CrPC,

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To foster the study of International Law



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TO promote research, education and practice of international law among law scholars and practitioners in Asia and to foster the Asian perspectives of international law, the Bangladesh Chapter of the Asian Society of International Law (AsianSIL Bangladesh), in collaboration with the Asian Society of International Law (AsianSIL), organised an international conference on *South Asia and International Law: Engagement or Encounter?* to mark its formal launch on August 23-24, 2014 at Ruposhi Bangla Hotel, Dhaka. Hon'ble Minister Mr. Anisul Huq, Ministry of Law, Justice and Parliamentary Affairs, inaugurated the conference as the Chief Guest.

This two days' conference specifically focused on the areas of International Human Rights Law, International Humanitarian Law, Refugee and Migration Law, International Trade and Investment Law and International Environmental Law. The participants of the conference were the Judges of the International Court of Justice, jurists, distinguished lawyers and academics from eighteen different countries of the world. The conference was unique as it accumulated diverse voices of International law from different perspectives. The typical and atypical factors connected with the international law discourse were thoroughly addressed from cross cultural perspective. This conference was successful to introduce the Asian perspectives on International law issues including the context of Bangladesh to a wider world with an active and engaged voice from the participants.

Dr. Borhan Uddin Khan, Professor of Law, University of Dhaka and President, Bangladesh Chapter of the Asian Society of International Law underscored the importance of active contributions of Asian States to the development and evolution of International law, while addressing the inaugural session.

The new global order emerging at the end of the Second World War was marked by the affirmation of the universality of human rights and the sovereignty of equality of nations. The role of International law was transformed from preserving the global status quo to becoming an instrument of dynamic change. In this regard, Dr. Kamal Hossain, Senior Advocate, Supreme Court of Bangladesh said, the concerns of the Asian countries have contributed significantly to shaping the evolving global agenda particularly in areas of their common concern such as development and human rights.

Professor Dr. Surakart Sathirathai, President of Asian Society of International law, said that throughout our Asian history, Asia has accumulated so much wisdom in the practice of the relations between states and their peoples. But without an instrument or a platform where Asians can accumulate and crystallise their legal and customary practices into law, international law became the result of western dominant state practice.

Asian contributions to the future development of international law will be so valuable towards peace, prosperity and towards both state to state and people to people relations of this century, he added.

H.E. Judge Hisashi Owada, Judge and Former President of the International Court of Justice and the Founder President of the Asian Society of International Law stressed in his key note address (he was unable to attend due to illness) that Asia has risen as an active and influential player in international relations -in fields such as peace and security, international trade and investment, human rights, environment and many other fields of international activities.

The nations of Asia, as well as people in academia and in the field of practice working in Asia, should come forward to have their voices heard on these important issues and to contribute to the development of interna-



tional law and to consolidate the rule of law in various fields of present day international relations, he urged.

During two days of the conference, there were more than twenty speakers who presented paper on the five thematic international law issues.

It is to be noted that established under a trust, the Bangladesh Chapter of the Asian Society of International Law (AsianSIL, Bangladesh), is a country chapter of the Asian Society of International Law (AsianSIL). In line with the overall objectives of the AsianSIL, the Bangladesh Chapter aims to serve as a centre of activities among international law scholars and practitioners in Bangladesh for study and research in the discipline of international law. To materialise this objective, the Bangladesh Chapter will initiate a wide range of activities, including but not limited to, organising conferences, seminars, workshops, trainings, moot court competitions etc. and especially, at an appropriate time, publishing a specialised journal dedicated to international law related issues - the Bangladesh Journal of International Law.

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IMPEACHMENT OF JUDGES

let's establish check and balance

A procedure for removal of Judges of the Supreme Court by way of address of the Houses of Parliament to the President for 'proved misbehavior or incapacity' is going to be revived in our constitution by upcoming 16th amendment as the cabinet approved a proposal to amend the constitution to restore parliaments' authority to impeach judges. The original constitution (of 1972) had empowered parliament with the authority to impeach.

By virtue of the supreme judicial council a judge can be removed from his office for his incapacity or gross misconduct under article 96 under of the constitution. We should reach at a solution where both judiciary and legislature sounds in harmony. There can be two procedures one is complaint procedure and other is motion procedure, under complaint procedure one can file a complaint before supreme judicial council against a judge about his prima facie misconduct or incapacity. Then if the council finds the allegation true e.g. proved, then it can be sent to the house for motion procedure. In this system both judicial and legislative kudos can be endorsed. But in no way parliament can come first to take the procedure in account, this is the job of council. As per the provision judges will be impeached for proved misconduct and incapacity. This means a judge can only be impeached in parliament when the allegation brought against him is proved beyond reasonable doubt.

Now the question is who will conduct the proof procedure, certainly it rests upon council not the house. Because there is a jurisprudential principle that '*nemo judex in parte sua*' which means 'no person can judge a case in which he or she is party or in which he/she has an interest'. Furthermore the term 'misconduct' needs to be expressed with utmost certainty by prescribing specific bits and pieces only upon which a judges can be said to have committed misconduct.

But the proposed the 16th amendment may destroy the check and balance between legislature and judiciary and thus independence of judiciary may be at stake which may lead to politicising the judiciary.

Just imagine a situation - if the Supreme Judicial Council is abolished and the present parliament gets back its earlier authority, it might take action against some judges. If the government changes and another party come to power, it will take action against some others [judges] and it will continue. Is it possible for every time for any party to hold two third majorities in parliament? If it is not be so, how will judges be impeached then? If any party holds so, then judges will be removed and appointed wholesale on the basis of whom of that ruling party. And this would be easy by virtue of Article 70 of our constitution. Such a situation will definitely lead the judges to be politicised and influenced for the sake of protecting his office consequently independence of judiciary and 'judicial review' will be at stake.

We are not talking about complete separation of power in the quest of independence of judiciary rather we are talking about, as Dr. Ambedkar says, harmonious governmental structure.

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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
I am willing to purchase an apartment in a costly area in Dhaka city. However, from my friends and families I have heard about lots of problems that they have faced with the developers. This is very common in our country. Before I can invest my very hard earned money for buying an apartment what papers and documents shall I check and what shall I do to avoid any future problem. I would really appreciate your valued advice.
Anonymous

Response
Thank you very much for your query and it is good to know that you are following the 'your advocate' column. It is unfortunate that many buyers have been experiencing difficulties with their developer companies while buying apartments. I would like to highlight some important points which every buyer shall ensure before entering into any purchase agreement with the developer, which may substantially reduce the possibility of future disputes.

As we know in the ordinary course of business the developer initially gives an allotment of the apartment to the purchaser through an allotment letter upon receiving booking money. Thereafter, the developer enters into an agreement with the purchaser whereby the purchaser undertakes to make further payment as per payment schedule of the said agreement. Once the payment is done and the flat is handed over the flat is registered in the name of the purchaser.

Before entering into such agreement or even before paying any money, you must check the reputation of the Developer. You shall visit some other projects completed by that Developer. After checking the background and reputation of the Developer you need to check the title of the land where you are intended to purchase the flat. It is very important to inquire about the chain of ownership of the land and other papers and documents, i.e. the title deed of the landowner, Bia Deeds, all Khatians, Mutation etc. and to investigate whether any case or dispute is pending with regard to the property.

It is also very important to check the approval/plan of RAJUK to construct building thereon. You have to also check the Deed of Agreement executed between the landowners and the Developers and the Irrevocable General Power of Attorney executed in favour of the Developers by the

landowners. It may be wise to see the REHAB membership certification of the developer as well. You need these documents to get checked by a lawyer to ensure that all the terms and conditions are in order and would not construe against the interest of the Developer.

If all the documents are found in order then you can proceed to pay booking money and execute the agreement with the Developer. In this situation to avoid any future complexity, we suggest you to carefully read the agreement line by line to see that the terms are reasonable and acceptable to you. In most of the cases, the developers prepare very sketchy or one-sided agreement. Amongst other clauses, particular attention shall be given to the followings:

- i) Verify the spot in order to ascertain peaceful physical possession of the Developer.
- ii) Fix the full and final price. See the parking cost, utility cost, registration cost and other cost so that you know what you have to pay from beginning to end. Carefully read the price enhancement clause, if any.
- iii) Incorporate very clear clause regarding handing over date and date of registration.
- iv) Insert the specification of all products/fixtures to be supplied by the Developers for your flat and common fixtures etc. If there is any alteration keep the provision of adjustment.
- v) Check the compensation clause in case of delay in handing over.
- vi) Get the Money Receipt with requisite revenue stamp against every payment.
- vii) You need to check whether there is any cancellation Clause and if so whether it was solely designed to protect only Developer's interest. In many cases the developers are suddenly cancelling the allotment for the simplest failure of the purchaser. Also check the refund clause in case of lawful cancellation.
- viii) You need to check whether there is any clause affecting any changed scenario.
- ix) See the warranty or maintenance term after handing over.
- x) Try not to violate any clause of the agreement and adhere to the payment schedule.

- xii) All major communications shall be made in writing and the same shall be received by the developer.

In short, you need to ensure the Deed of Agreement or any other relevant documents are executed by the Developer in favour of the flat-purchaser protecting the flat-purchaser's right, title and interest over the flat. I hope if you follow the above, you can significantly reduce the possibility of future dispute and problems; and if you face problem a well articulated agreement will guide you through.

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