



Expectation from the new Chief Justice



TAPOS KUMAR DAS

WELCOME Mr. Justice SK Sinha, the 21st Chief Justice of Bangladesh. Amid much political disillusionment, appointment of the new Chief Justice is epic making at least for two reasons: firstly, a member from minority community for the first time has achieved this honor; secondly, because of his extensive professional and administrative experience and integrity it is widely agreed that, 'right person is in the right position'. His appointment has rejuvenated diminishing public faith on judiciary; has regenerated public expectations to judiciary. The present articulation is a glimpse of public expectations to the Chief Justice.

Sanctity of Oath: As per oath, it is imperative for the Chief Justice to faithfully discharge lawful duties; to bear true faith and allegiance to Bangladesh; to preserve, protect and defend the Constitution and laws; and to do right to the people dispassionately. The Supreme Court is the abode of rights, and illuminating leadership of a Chief Justice may manifest enduring aspiration for equality, human dignity and social justice.

Public Confidence: The rule of law exists in society not for the reason that law is administered by the judiciary and enforced by the executive, but for the reason that it is voluntary accepted and followed by the common people. Therefore, the judiciary (and executive as well) must earn and maintain public confidence for operation of rule of law in society. There is no discontent that public confidence gives legitimacy to the judiciary. For reasons known well, public confidence on judiciary is gradually eroding. The prime concern for the Chief Justice is to regain public confidence. The judiciary must come-out of the

conservationist approach. It must come in regular interaction with Bar, civil society and media even.

Access to Justice: Stakeholders are agreed that apart from resource constraint delay, cost, complexity and corruption are the main barriers to the access to justice in Bangladesh. Even though it is easy to deny the report of the Transparency International Bangladesh and other public perceptions regarding judiciary, neither truth is distorted, nor do things get right by such denial. The public perception is the result of true experience and facts. The Chief Justice as the guardian of the judiciary must take courageous initiative to set things right and to eliminate negative perception.

Public Liaison Office: Even though our court rooms are open for public (except camera trial) other than lawyers and litigants rarely any people visit court premise. Now, electronic and print media provide information about the judiciary to the mass people. As there is no public relation office, the media or party lawyer in many instances provide distorted information to the public. To create public awareness regarding judicial functions, establishment of a public liaison office in the Supreme Court and all district courts is imperative.

Public Grievance Desk: Apart from the verdict, many issues are associated with the administration of justice which may cause public grievance. A person harassed in case management or court administration has no forum to seek remedy. To ensure transparency and accountability in administration of justice it is obvious that there should be a Public Grievance Desk in every tier of the judiciary. Such Desk will promote public confidence upon judiciary.

Appointment Rules: The present criterion for appointment of judges of

the Supreme Court is based on experience only. Being appointed, the Chief Justice has vowed to maintain the seniority principle in appointing judges in the Supreme Court. However, in many jurisdictions vacant posts of the Supreme Court are advertised, and the selection criteria include predominantly merit, then seniority and experience. It is widely expected that the present selection criterion should be amended to encompass all established principles so as to make the appointment process more transparent and acceptable.

Court Administration and Case Management: To eliminate bribery, the affidavit and filing sections should be controlled directly by the Registrar or of his assistants. All section offices should be under 'Close Circuit Camera Surveillance'. Cause list should be strictly followed. There is a growing tendency that judges declare order in open court but take unusually lengthy time to sign the order. Especially in criminal trial it is desirable that the time gap between 'pronouncing' and 'signing' of order should be definite.

Decentralising HC's Sessions: Legal institutions must be accessible if rights are to be enforced. There must be a system of courts available locally to challenge the mal-administration, and for enforcement of fundamental rights. Hence, under the mandate of article 100 of the Constitution the HC's Sessions should be decentralised.

As all know, there is no end of perfection and so of the reform. It is expected that to manifest the towering pledges as enshrined in oath, and to secure public aspiration for justice, the Chief Justice should never cease to intervene if, and when necessary.

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Trial of Rap Music

M JASHIM ALI CHOWDHURY

AS it happens in a usual American family, Anthony Douglas Elonis's wife severed their seven year long conjugal relation and moved out of the home with two young children in 2010. But Mr Elonis started doing something unusual. Losing peace, care and attention perhaps, he divulged into the American rap music of misogynistic tunes which he now claims to have some therapeutic value for his distress. Had he only listened to or sang some of those lyrics; it might have been quite okay. The problem with Mr Elonis is that he went one step further and posted some of those worst rap influenced vulgar and violence directed to his ex-wife in his facebook account. Convicted by the lower courts for criminal intimidation, he now appeals to the US Supreme Court seeking protection of his constitutional freedom of speech.

Hip hop in general is a cultural movement that comprises of several artistic elements like graffiti, break dancing and rap music. It emerged in 1970s as an expressive outlet for the youths of disadvantaged black communities in Bronx County of New York notorious for organised crimes. However, as the time passed on, rappers realised that sex and violence sells. They changed their focus from making music to making money. Now research shows that 22 percent of rap music deals with violent and misogynistic lyrics.

Convicted by the United States District Court of Pennsylvania, Mr Elonis moved the Third Circuit Court of Appeals. The Third Circuit confirmed the

Rap constitutes a genre that certain members of society view as art and others view as distasteful and descriptive of a mean-spirited culture, yet it is simply one of the fictional forms of inflammatory self-expression, such as poems, musical compositions, and other like writings.



conviction and he appeals the Supreme Court. In his appellate brief to the Supreme Court, he argues that those apparently violent facebook posts directed towards his ex-wife should not be taken as an intimidation. As is said earlier, Mr Elonis believes that rather than conveying a threat of physical attack to his wife, the aggressive contents of his posts were serving some therapeutic dishes to him. Absent a proof intent to threat, it does not matter how his wife feels about it, Elonis argues.

This brings us to the question the Supreme Court faces in this case that, exactly what standard of interpretation is to be followed in judging a threatening speech? When should a person be convicted for a threatening speech? When he personally or subjectively intends to threaten? Or when another person receives his speech as a threat?

It has been argued in Mr Elonis's petition that there are several attendant peculiarities of online communication which would call for a greater caution in this case. First, online speakers know less about their targeted audience. Second, personal reflections intended for a small audience (or even no audience) may reach to people who are unfamiliar with the context in which the statements were made. Third, these communications can easily be decontextualised by audience to whom the tone and mannerisms of the speaker may be unknown. Given the situation, a receiver's perception approach to such communications would subject its author to a heckler's veto, whereby hostile listeners would enjoy an ad hoc veto power over a speaker's freedom of expression. *Watson v Memphis*, 373 U.S. 526, 535 (1963). This is why some feels that the listener's perception standard poses a serious risk of criminalising "poorly chosen words".

As Justice Harlan of the US Supreme Court once put it, "one man's vulgarity is another's lyric." *Cohen v California*, 403 U.S. 15, 25 (1971). The US Supreme Court has consistently recognised the protection of music as a form of artistic expression. As the petitioner Elonis testifies that his facebook posts were inspired by Eminem, his trial becomes a trial of rap music in the alternative.

As the Supreme Court of New Jersey has accepted in August, 2014, rap constitutes "a genre that certain members of society view as art and others view as distasteful and descriptive of a mean-spirited culture," yet it is simply one of the "fictional forms of inflammatory self-expression, such as poems, musical compositions, and other like writings." *New Jersey v Skinner*, 2014 N.J. LEXIS 803, (N.J. Aug. 4, 2014). But the dilemma for the Supreme Court here is that rap song is extremely violent and extremely popular! So what to do? One of the amicus briefs suggests this:

"A careful and contextualized reading is necessary to avoid catastrophic judicial error. Take GZA (a celebrity rapper), for example. When he raps, "I'll hang your ass with this microphone" and later warns "I come sharp as a blade and I cut you slow," he must be asserting his virtuosity as a lyricist rather than making literal threats of violence. Recognizing this type of emblematic flexibility is a sine qua non to interpret rap music."

As the case is pending for judgment, it remains to be seen whether the US Supreme Court is convinced or not.

THE WRITER IS CURRENTLY PURSUING LL.M IN TULANE UNIVERSITY LAW SCHOOL, USA.

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
The recent situation of a child name 'Jihad' fallen to a dug hole in the road, if his parents want to bring an action against those responsible then what remedy will they get? I am concerned because anything can happen to me in this Dhaka city so I want to be aware of it.
Tania Noor
Uttara, Dhaka.

Response
Thank you for your query. It is our understanding that you would like to know about the possible remedies that the Court may grant in tragic incidents like that of Jihad's. The answer depends mainly on whether death or injury has resulted from such mishap and what sort of proceeding has been brought before the Court by the aggrieved.

Firstly, a criminal proceeding may be initiated. A criminal proceeding is concerned to punish the accused person for his crimes. The relief that a court may grant, in the form of punishment, in a criminal proceeding may extend from fine to imprisonment or even death. In cases like Jihad, where the victim suffers a death, the responsible person/persons may be charged accused under section 299 of the Penal Code for committing culpable homicide. As per section 299 of the Penal Code whoever causes death by doing an act with the knowledge that he is likely by such an act to cause death commits the offence of culpable homicide. Culpable homicide may also amount to murder if a clear intention of causing death or causing serious injury ultimately amounting to death, can be established against the accused. However, in cases like Jihad such intention may be difficult to prove.

The one that has more probability of being established in the eye of the Court is culpable homicide without an intention to

cause death or serious injury amounting to death, as there is no requisition of establishment of intention to cause death or serious injury amounting to death. The punishment for such culpable homicide has been codified in the Penal Code under section 304, whereby a person who has been found guilty for such offence shall be sentenced with imprisonment for term that may extend up to 10 years, or with



fine or with both.

Further the responsible persons may also be held liable under section 304A of the Penal Code for causing death by their negligence, which is my view, is more appropriate in the given scenario. Negligence need not be absolute rather it is the failure to observe such care as the occasion demands to protect interest of other persons. If such an offence is proved against the accused, the accused shall then be punished with imprisonment for a term of five years or with fine or with both.

However, in cases where the victim does not suffer death but inflicts injury or serious injury, the accused may be charged under section 337, 338 etc. of the Penal Code respectively. Under these, the accused if found guilty of the offence shall be faced with imprisonment for a term of six months or two years respectively. The court has also the discretion to sentence the accused with fine or both fine and imprisonment under the aforesaid sections of the Penal Code.

Jihad's family has already filed a case for negligence conduct causing death to Jihad at the Shahjahanpur Police Station against several accused. Since it is a specific matter and now dealt with by the court, I refrain from making any specific comment/observation on the specific incident.

Secondly, parallel to the issuance of a criminal proceeding, in cases like this, the victim or his family is left with options of bringing a tortious claim for negligence against the persons responsible before the civil court. To establish negligence the claimant needs to establish to the court that the defendant/the responsible person owed a duty towards the plaintiff and duty was breached because the defendant was negligent in performing his duties as a result causing death or injury to the plaintiff. If the same can be proved the court will award damages in the form of compensation for death/injury. However, it is a matter of regret that tortious claims are very infrequently used and raised before the courts of Bangladesh. In the absence of a coherent application of tort law in Bangladesh, a more practiced course for bringing an action in such cases may be by filing a writ of mandamus petition before the Hon'ble High Court division of Bangladesh.

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Reinforcing development and human rights

STRESSING that the United Nations is built around the three pillars - peace and security, development and human rights, Secretary-General Ban Ki-moon, On January 19, 2015 underlined the need to pay attention to their interdependence, during an address to the Security Council.

"The founders of the United Nations well understood that if we ignore one pillar, we imperil the other two," said Mr. Ban. "The post-2015 sustainable development agenda is an important opportunity to reinforce the interdependence of development, peace and security, and human rights" he added.

The Secretary-General said he was encouraged that during debates so far held about completing the Millennium Development Goals (MDGs) by the end of this year, launching a post-2015 sustainability agenda and reaching an agreement on climate change, Member States had paid considerable attention to peace and security and to human rights.

The General Assembly Open Working Group on Sustainable Development Goals had discussed the importance of inclusive growth and decent work, called for reducing inequality and ensuring universal access to basic services, including health care and education, had explicitly linked peace with social inclusion and access to justice for all, and had called for inclusive, representative decision-making.

Every country could benefit from sustainable and inclusive development, tackling persistent exclusion and inequality, ensuring that the most vulnerable have access to basic services and can participate in political dialogue, tackling the "blatant injustice" of discrimination against women and girls, and extending social security provision to the world's population still lacking a safety net for times of illness or unemployment.

Post-conflict societies in particular need to prioritise social, economic and political inclusion in order to rebuild trust between communities. Women's participation in reconciliation and reconstruction also depended on gender equality and women's empowerment, he said.

"The Peace building Commission provides coordinated international support targeted at countries emerging from conflict," continued Mr. Ban.

Even in countries at peace, governments, the private sector and civil society must demonstrate commitment to inclusive development in education, health and job creation. It is also necessary to strengthen institutions of governance and political representation as they were some of the most crucial determinants of inclusive development.

COMPILED BY LAW DESK