"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH • dslawdesk@yahoo.co.uk

LAW ANALYSIS

JUVENILE JUSTICE SYSTEM

Urgent re-appraisal needed

AHMED EHSANUL KABIR

BANGLADESH became a State Party to the United Nation's Convention on the Rights of the Children, 1989 (UNCRC) in 1990. As a State Party, Bangladesh has the responsibility to implement the provisions of the UNCRC at the domestic level. However, the 1974 Children Act which was a pre-Convention period legislation was not adequate enough to address various requirements of UNCRC. Subsequently, the Children Act, 2013 (CA 2013) was enacted which repeals the 1974 Act with the aim of bringing the country in line with provisions of international instruments such as the UNCRC, as well as decisions of the Bangladesh Supreme Court.

Article 40 of the UNCRC details a list of minimum guarantees for the child and it requires State parties to set a minimum age of criminal responsibility, to provide measures for dealing with children who may have infringed the penal law without resorting to judicial proceedings and to provide a variety of alternative disposition to institutional care. The requirements of Article 40, i.e. obligation as to justice-focused juvenile justice system as enshrined in the UNCRC, have been complied with by a number of provisions set out in the CA 2013. But few provisions are left behind.

Article 40(2)(b)(i) of the UNCRC provides that every child alleged as or accused of having infringed the penal law has to be presumed innocent until proven guilty. Rule 7 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) 1985, provides presumption of innocence as basic procedural safeguards. This is also to be found in article 11 of the Universal Declaration of Human Rights and in article 14, paragraph 2, of the International Covenant on Civil and Political Rights (ICCPR). But the presumption of innocence is not specifically mentioned in the CA, 2013.

Article 14(3)(g) of the ICCPR and 40(2)(iv) of the UNCRC requires that a child not be compelled to give testimony or to confess or acknowledge guilt. Article 35(4) of the Constitution of Bangladesh provides 'No person accused of any offence shall be compelled to be a witness against himself'. Section 30 of the Evidence Act, 1872 permits the Court to take into consideration the confession of an accused. However, it must be noted that this is subject to section 24, which provides that 'a confession made by an accused person is irrelevant in a criminal proceedings, if the making of the confession appears to the court to have been caused by any inducement, threat or promise…'. In a pre-CA 2013 case, *Bangladesh Legal Aid and Services Trust & Another* v *Bangladesh & Others*, 22 BLD 206 it was held that: '… the confession made by a child is of no legal effect'. So, with regard to children who are said to have made a confession, the courts have deviated from the strict rules of evidence. In *Jaibar Ali Fakir* v *The State*, 28 BLD 627 the High Court Division (HCD) recommended changes in the law to include provision to the effect that any confession or statement of a child must be taken in the presence of his/her parent/guardian/friend/legal representative. But, in the Act of 2013 there is no specific provision which prohibits to compel a child from giving confessional statement or to take a confessional statement in the absence of the parents or guardian.

Article 40(3)(a) of the UNCRC provides that States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and, in particular, the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. Section 82 of the Penal Code 1860 exempts children below the age of nine (9) years from criminal liability and section 83 exempts a child from criminal responsibility above nine years and below twelve years, who has not attained sufficient maturity of understanding to judge the nature and consequence of his conduct.

It should be mentioned that many States have raised the age of criminal responsibility to 12. In its 1997 report to the UNCRC Committee, Bangladesh assured that it had a plan to upgrade this age to 12. But no initiative has been taken in this regard, as a result, in the concluding observations on the 5th periodic report of Bangladesh, 2015 at para. 81(d), the UNCRC Committee has again called Bangladesh to raise the minimum age of responsibility "to an internationally acceptable standard".

The legal provisions relating to the obligations as to justice-focused juvenile justice system in the CA 2013 are not entirely in line with the standards and norms set forth in article 40 of the UNCRC. So, the following recommendations have been given: a) specific provision should be incorporated regarding presumption of innocence in the present CA, 2013 to comply with article 40 of the UNCRC; b) definite provision can be inserted for the protection of child from giving confessional statement either in contact with law as witness or victim and in conflict with law as accused; c) the age or criminal responsibility should be further increased at least to 14, and that the age of maturity and appreciation for the purpose of criminality be raised to 16 from the current age of 12.

For the betterment of the society there is no alternative but to devote all possible efforts for the well-being of the children. It is hoped that, the policy makers, the academicians, the civil society and the executives will put their all efforts for an effective juvenile justice system in Bangladesh.

THE WRITER IS AN ASSISTANT PROFESSOR OF LAW, JAGANNATH UNIVERSITY.

FOR YOUR INFORMATION

Medical negligence

RAISUL ISLAM SOURAV

MEDICAL negligence - also termed as clinical negligence which denotes negligent act or omission by the physicians, surgeons, pharmacist, anesthesiologists, nurses, intern-doctors, medical assistants, hospital personnel or any other medical service provider in performing his professional duty towards the patient.

Medical malpractice is usually seen as an actionable civil wrong, the remedy for which is normally monetary compensation. However, medical malpractice coupled with criminal negligence generally gives rise to a criminal offence and is generally dealt with by the criminal law. Clinical negligence is a breach of legal duty to take care owed by one person to another which results in damage being caused to that person. It is gross deviation of a medical professional from accepted level of healthcare.

There is very limited scope under the Penal Code (PC), 1860 to prosecute a medical practitioner for his negligent performance. Nevertheless, the exemptions and immunities given for the defense of "good faith doctrine" narrowed the scope for criminal action against medical malpractice in Bangladesh. In addition, the Code of Medical Ethics, 1991 touches the matter in a triviality.

The persons allegedly engaged in the process of medical mistreatment or surgical operation including the surgeon, fellow physicians, anesthesiologists, nurses and hospital personnel in any given criminal action shall come within the periphery of the criminal responsibility of the alleged offences committed by them in furtherance of their common intention.

It is high time to define medical negligence properly with its nature and uniqueness. To do this, opinion

can be taken from physicians, public health specialists and also from citizen representatives. Standard medical education, training and enhancement of skills need to be ensured to upgrade the standard of public health sector. Medical ethics should be studied with more importance in the medical curricula. Furthermore, hospital and supporting staffs must be well equipped. Nevertheless, accountable administration in both private and government hospitals would reduce the case of negligence.

However, to prove the claim, the claimant must establish that a) the alleged commission or omission must have a causal relation in order to be qualified as negligence; b) in determining 'negligence' it is to be seen whether in a given situation a person of general prudence would have taken a particular step in that situation c) the plaintiff incurred an injury, loss or harm, d) the damage or harm done to the patient was a direct result of the negligent care and e) even the state of negligence is to be determined in the light of overall consideration i.e. hospital facilities, assistants' and staffs' activities and behavior etc.

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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

Recently I was required to extend the term of my driving license from the BTRA. Some officials charged an additional payment while granting my application. I would like to know whether there are any laws that keep the public office and officials in check. If yes, what are they?

A victim
Dhaka

Response

Thank you for your query. I do feel your despondencies about the unwarranted sufferings that you had to go through at the office of the Bangladesh Road Traffic Authority (BTRA).

Public office or its officials are getting involved into corruption by seeking 'additional payment' for the realisation of a right which by law is available to an individual. Generally, we refer to this additional payment as 'bribery'. Bribery for the realising of rights most frequently occurs during the acquiring of permits, licenses, registration, etc. and in your case even for submitting the application for getting an extension of your driving license.

In Bangladesh bribery and corruption is combated mainly by the Prevention of Corruption Act 1947 (PCA) and the Penal Code 1860 (PC) and corruption conducted by public servants is dealt with by the PCA 1947 and Chapter 9 of the PC 1860. Under the PCA 1947, engaging in corruption by accepting bribery is considered a serious criminal misconduct.

According to Section 5 of the PCA 1947, a public servant commits criminal misconduct if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains or attempts to obtain for himself or for any other person any valuable thing or pecuniary advantage. Furthermore, the public officer shall also be in breach of the said section of the Act if he takes any gratification (other than legal remuneration) as a motive or reward. The Act not only identified bribery and gratification as serious misconduct but had also made it clear that any public official found to be guilty of such misconduct shall not only be punishable with 7 years imprisonment under the Act but may also be subject to fine and confiscation of his illegal pecuniary resources.

The provision relating to corruption and bribery under the PC which is similar to criminal misconduct under PCA 1947, and in broad terms, makes it an offence for a public to take any gratification other than his remuneration for the performance of official responsibilities (section 161). Besides as per the Penal Code, section 165, it is also an offence if a public servant obtains valuable thing, without consideration or with inadequate consideration, from person concerned in proceeding or business transacted by such public servant. If any public servant, in your case concerned official at the BTRA, is found to be acting in contravention of any of the provisions of the PC he may be subject to imprisonment, ranging from 1-3 years, or fine or both as punishment.

Additionally, receipt of bribe, gratification, gifts or awards amounts to clear breach of the rules 5 and 6 of the Government Servants (Conduct) Rules 1979 and which might result into disciplinary actions against the concerned public official by the Authority.

Of late other new laws combating bribery and corruption have come into function such as the Anti-Corruption Commission Act 2004. Although the contents of the Act mostly deal with the formation and functions of the Commission, nevertheless, the Act allows the Commission the rights to investigate and enquire about the possession of assets of the concerned public officials. If the official is found to be in possession of any property or liquid assets, which he should not be in receipt of by law or the property is not consistent with the known sources of his income, he may be subject to imprisonment for a period of maximum 10 years as punishment. It is worth noting that the Anti-Corruption Commission may upon receipt of complaint initiate investigation against public office/officials.

Nevertheless, it is matter of utmost regret that despite the existence of all these laws in the contemporary society to keep these public officials accountable for their services, the existence of this bribery and corruption in almost every sectors become so epidemic and rampant that the public's legitimate expectation from the government offices has stopped down to the level zero. I would like to urge all the relevant Authorities and Commissions to provide for more vigilant support in encountering corruption.

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LAW EVENT

Seminar on legal research held at Dhaka University

ON January 5, 2017, Bangladesh Law Digest (BDLD) organised a seminar on 'Legal Writings and Legal Research' at the Department of Law, University of Dhaka. Law students from more than 20 universities of Bangladesh attended the seminar. Dr. Borhan Uddin Khan, Professor and Chairman, Department of Law, University of Dhaka was present as the chief guest in the seminar while Ms. Shirin Sultana, Lecturer in Law, University of Dhaka was present as the special guest. The keynote speaker was Mr. Mohammad Golam Sarwar, Lecturer in Law, University of Dhaka.

The Bangladesh Law Digest (BDLD) is an online law journal that started its journey back in June 2015 by some law students of Dhaka University. It strives to develop the skills of legal research and writing for law students and publishes articles aiming to serve both practical and academic purposes.

In his introductory speech, Dr. Borhan Uddin Khan emphasised the importance of legal research for law students. Highlighting the absence of legal research in the curriculum of many law schools of Bangladesh, he lauded the efforts of BDLD for taking such an initiative to organise the seminar. Ms. Shirin Sultana urged BDLD to continue such efforts and stated that the concerted efforts of law students and teachers would go a long way into paving the path for better legal research works in Bangladesh.

Mr. Mohammad Golam Sarwar then delivered the keynote speech in the seminar. He gave an overview of legal research, its importance, types of legal research and research methodologies. He remarked that originality of work was vital for legal research. He also noted that inter-disciplinary approach enhanced the quality of a research.

Mr. Sarwar further commented that law students should keep an open mind while praising and criticising any issue and that there should always be a balance of these two in a research work. On the issue of legal writing, he said that it was the task of the writer to ensure that even a layman could understand the ideas put forward by him. He advised to avoid jargons and be concise and lucid with words. Urging everyone to avoid plagiarism and other forms of copying, Mr. Sarwar emphasised that due credit must be given to past research works in reference, which will consequently boost, not diminish the quality of work of any researcher.

THE EVENT COVERED BY ALI MASHRAF, A CONTRIBUTOR OF BDLD.