

# The existential threat for executive run magistrate courts

M JASHIM ALI CHOWDHURY

FOR many of us, including me, the Mobile Court Act 2009 remained a stillborn legislation since its inception on the face of a rebellious Rokon-Ud-Doula in 2007. Presumably, the lawyers and judges alike took it as a strategic and temporal concession on the part of the judiciary and a face-saving-condolence for the BCS (Admin) that was otherwise adamant not to see the whole administration of criminal justice passing out of its hold overnight. While the lawyers' and judges' long run struggle for implementing *Masder Hossain* verdict found its way-through in November 2007, constitutionality of the executive run mobile courts was to be tested sooner or later. And now, after around 10 years of the reluctant concessions, the chickens come home to roost. *Kamruzzaman Khan v Bangladesh* (W/P No. 8437/2011) along with some other writs of similar nature challenged several convictions and fines imposed upon the litigants by mobile courts run by executive officials on different occasions.

The petitioners challenged their trials and convictions with foundational and section-wise challenges to the 2009 law. Petitioners labeled the law as colourable one (p. 4 of the full text judgment). The court also found it running counter to the mandates of Article 22 of the constitution and *Masder Hossain* ratio though it pretended to pursue those (p 26). Article 22 and *Masder Hossain* verdict combined left no scope whatsoever for the executive magistrates to exercise judicial powers and discharge judicial functions (p. 44). With Article 35 of the constitution guaranteeing an "independent and impartial court or tribunal established by law" for us, 2009 Act permitted the executive magistrates to be the investigator, prosecutor, witness and judge all in a single proceeding (p 43). Interestingly, section 13 of the Act towered the authority executive magistrates even higher. It allowed the District Magistrate or Additional District Magistrate to be the appellate authority of any mobile court trial conducted by their colleagues in the administration. The court, therefore, adjudged the sections 5, 11 and 13 of the Act contemplating executive run mobile courts and appellate courts as contradictory to Articles 22, 27, 31 and 35(3) of the Constitution (pp. 55-56).

The Mobile Court Act dug a bottomless well of unfettered powers, unrestricted discretions, unguided sentencing options and unreasonable modes of handling trials. Firstly, section 6(2) of the Act conferred jurisdiction on the magistrates over a charter of offences to be endlessly expanded under rule making power of the government. The court found it contravening a settled proposition of law that no offence can be created and punished under any



delegated or subordinate or subsidiary legislation (p. 52). Moreover, the breadth of the rule making so delegated was "really astounding" as parliament delegated (section 15) its plenary power of amendment in the schedule (an integral part of the law) in favour of the government (p. 56).

Secondly, section 6(4) left blank check in the executive's desk to determine which offences would be "grievous in nature" to be tried by regular courts and

which others are not. In a flagrant disregard of Article 27 of the Constitution, the magistrates would just pick and choose at their sweet will as to whom to prosecute then and there and whom to commit to the regular courts for trial (p 53). Likewise, sections 8 and 9 of the Act would permit the magistrates to inflict discriminatory sentences and execute them in a grossly unreasonable way (p. 54-55).

Thirdly, while the power to impose punishment by the Mobile Court is made subject to a "voluntary confession" of guilt by the accused, section 7 does not provide any clue as to how to obtain and record the "voluntary confession." In absence of any section-164-like mechanism for obtaining confession, undue pressure and coercion were most likely to reign the ring (p. 53).

Towards the end of the judgment, however, the petitioner and the court conceded that while mobile courts symbolising the "justice on wheels" (p 46) are not unknown in our neighboring South Asian jurisdictions, permitting the executive run kangaroo courts under the guise would be 'de hors' the Constitution (p. 56). Advocate A F Hasan Arif unsuccessfully tried to convince the court that with Article 116A of the Constitution safeguarding the presiding magistrates' functional independence (p. 22), courts run by them may not be readily labeled as kangaroo courts. The Court struck down the submission by holding that Article 116A has lost all its relevance with effect from 1 November, 2007 (p. 61). By holding this the court was best possibly pointing to the existential threats the "magistrates exercising judicial functions" are facing after the *Masder Hossain* verdict. Scope of the executive magistrates' exercising judicial functions being barred, the Court calls for mobile courts, if there be any, manned by the members of the Bangladesh Judicial Service only (p. 63).

As a matter of practicality, the court was ready to acknowledge the government's duty to maintain law and order and to prevent commission of offences. Yet as a matter of principle, it was not ready to abdicate the judicial power of cognizance and trial in favour of the government officials (p. 45). Unfortunately that was what the executive branch was asking for and the grandeur of magistracy being the bone of contention, the Mobile Court Act 2009 was bound to be nullified in due course of time. As I recollect from my recent conversation with an honorable judge of the High Court Division, mobile courts will not perish but the kangaroo courts will.

THE WRITER IS AN ASSISTANT PROFESSOR, DEPARTMENT OF LAW, UNIVERSITY OF CHITTAGONG.



FOR YOUR INFORMATION

## Relief against medical malpractice

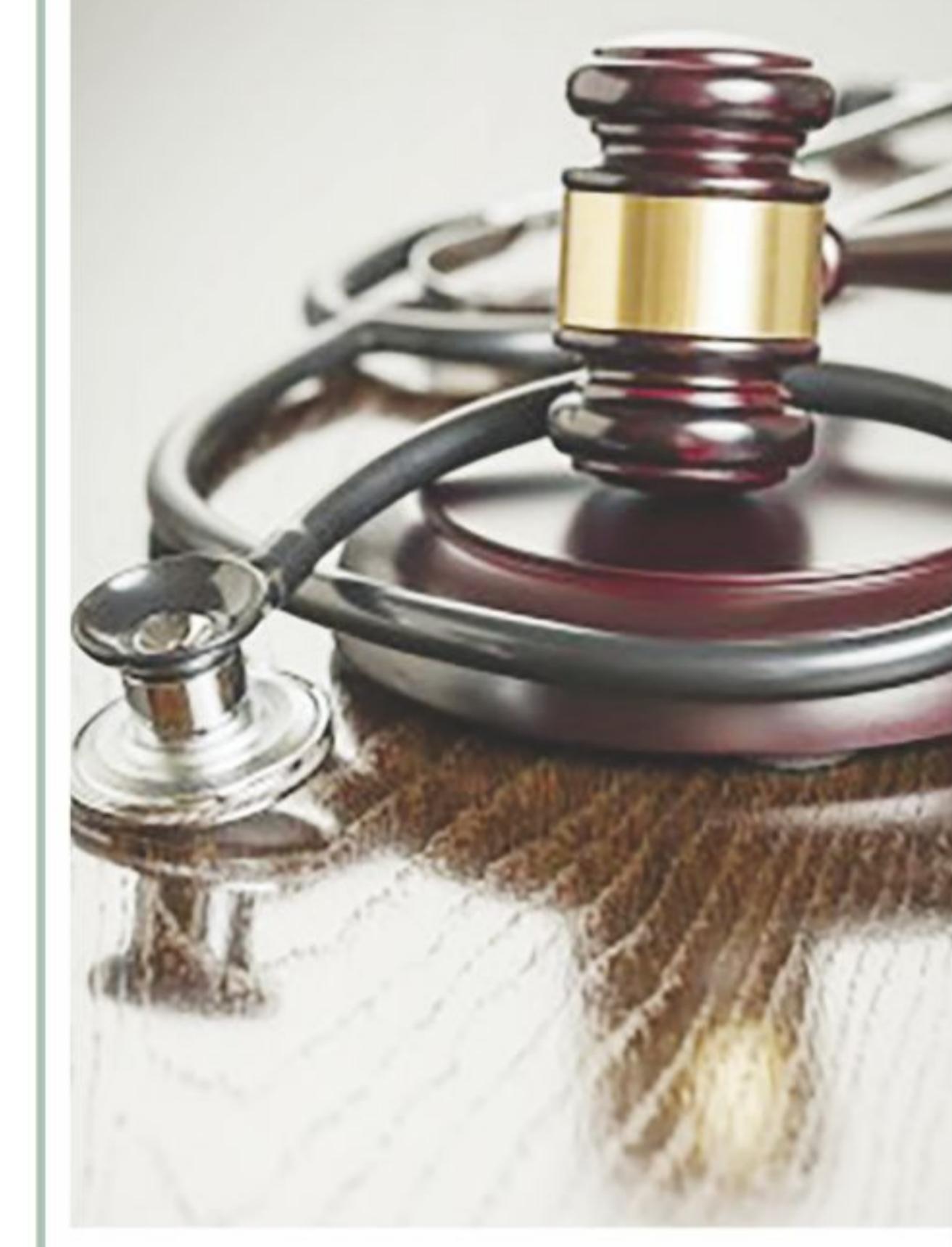
RAISUL ISLAM SOURAV

MEDICAL malpractice is not only a domestic issue rather a global concern all over the world. But it draws media's attention only when someone dies or something bigger happens therefrom.

The existing ways to get remedy are not well circulated. Some legal procedures are not only complex but also time consuming, expensive and often it is tough to get expected result due to many factors including biased or improper investigation, stringent rule of evidence etc. Therefore, victims or their families are reluctant to bring formal allegation against medical practitioner rather they often get involved in unexpected conflicts with them to mitigate their sudden agitation.

However, one can file complaint in the form of an application addressing the registrar of the Bangladesh Medical and Dental Council (BMDC) regarding any grievance caused by any mal-treatment of a doctor, dentist or medical assistant. After receiving that, the BMDC will form a committee to enquire into the matter. If the accusation is proved, they can take action against that accused. Such action ranges from giving warning to cancellation of registration depending on the gravity of wrong committed under the Medical and Dental Council Act, 2010 and the Code of Medical ethics adopted by the BMDC.

Nevertheless, the council is neither entitled to give any compensation nor is empowered to take punitive action. From after the formation of the council to 2010 there were only 47 complaints filed in the BMDC and among them registration was cancelled permanently in only one case and in another one, registration was suspended temporarily. In rest of the cases, the council merely warned or criticised the doctors



## End human trafficking

HUMAN trafficking is a crime that exploits women, children and men for numerous purposes including forced labour and sex. Article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons elaborately defines Trafficking in Persons. Every country, either as a country of origin, transit or destination for such victims, is affected by this crime. In accordance with an estimation of The International Labour Organization 21 million people are victims of forced labour globally. This estimate also includes victims of human trafficking for labour and sexual exploitation.

According to the United Nations Office on Drugs and Crime (UNODC) Global Report on Trafficking in Persons children make up almost a third of all human trafficking victims worldwide. In addition to that, women and girls comprise 71 per cent of human

trafficking victims, the report states. In 2010, the General Assembly adopted the Global Plan of Action to Combat Trafficking in Persons. This Plan calls for integrating the fight against human trafficking into the UN's broader urging Governments worldwide to take coordinated and consistent measures to defeat this scourge. One of the crucial provisions in the Plan is the establishment of a UN Voluntary Trust Fund for victims of trafficking, especially women and children.

In 2013, the General Assembly held a high-level meeting to appraise the Global Plan of Action. The World Day against Trafficking in Persons was proclaimed by the United Nations General Assembly, in its resolution A/RES/68/192. In pursuance of this resolution, member States designated July 30 as the World Day against Trafficking in Persons. This resolution

declared that such a day was necessary to "raise awareness of the situation of victims of human trafficking and for the promotion and protection of their rights."

In September 2015, the world adopted the 2030 Sustainable Development Agenda and embraced goals and targets on trafficking in persons. These goals call for an end to trafficking and violence against women and children.

Another important development is the UN Summit for Refugees and Migrants, which produced the groundbreaking New York Declaration. Of the nineteen commitments adopted by countries in the Declaration, three are dedicated to concrete action against the crimes of human trafficking and migrant smuggling.

COMPILATION BY LAW DESK (SOURCE: UN.ORG)

or dentists. The enquiry is conducted by fellow physicians which is questioned in terms of its neutrality. The council's website doesn't have any mechanism to file the complaint through online. Further, they have no power to deal with conduct of unregistered doctors. It is evident that the system needs to be revisited. Apart from BMDC, the concerned appointing authority of the accused physician may take departmental action like suspension from job.

Albeit there is no express provision in law for tortious claim to get compensation for medical negligence, one can surely file a civil suit for damages. However, compensation for mental trauma is yet to be recognised in our law. Complicated and arduous civil litigation system, requirement of *ad valorem* court fee, lack of technical knowledge of lawyers' and judges', stringent provision of producing evidence etc, are refraining the complainants from filing civil litigations.

The scope for criminal action for medical negligence is very narrow as well. The Penal Code (PC) 1860 only suggests to prosecute a medical practitioner for his negligence under section 304A; punishment of which is maximum five years imprisonment or fine or both. Victim or his near ones may bring action under sections 314, 321-326 and 336-338 also. The PC requires presence of strong mental element (*mens rea*) to prove the guilt while exemptions and immunities given for the defense of 'good faith' as enshrined in sections 88 and 92 of the PC narrows the scope for bringing criminal action against clinical malpractice.

Apart from these, Ss. 52 & 53 of the Consumer Rights Protection (CRP) Act, 2009 opens another door for the victim to claim compensation for medical negligence. Because a medical patient is considered as a consumer and the medical institutions or professionals are service providers under section 2 though it is not expressly stated in the Act. Hence, one can file complaint directly to the Directorate of National Consumer Rights Protection (DNCRP) over phone call to 01777 753 668 or through email to ncrc@ncrc.gov.bd or via postal communication with the Director General, DNCRP, 1, Karwan Bazar (TCB Building-7th floor), Dhaka-1215. However, the appellant will get 25% of fined money if s/he wins the case.

The CRP Act also provides forum for parallel civil jurisdiction for compensation which can be pursued with availing criminal jurisdiction simultaneously. The court of the Joint District Judge in whose local jurisdiction the matter has arisen is competent to try the matter and an appeal can lie to the High Court Division.

Medical professionals must be accountable to ensure highest standard in healthcare. To guarantee this, enactment of a specialised legislation particularly to deal with the matter and formation of an independent regulatory body are crying needs to ensure good governance in healthcare sector in Bangladesh.

THE WRITER IS AN ADVOCATE, SUPREME COURT OF BANGLADESH.

## Combating trafficking in persons

principal anti-trafficking law. ILO estimates that 21 million people around the globe are subjected to exploitation and forced labour due to trafficking. Human trafficking through sea-route among its various forms has become a catchphrase in Bangladesh that has tensed up the

elsewhere. Using undue influence, threat, fraud, coercion and other horrible means, traffickers prey on the vulnerable.

Bangladesh has ratified to the UN Convention Against Transnational Organized Crime (2000) in 2011 and has taken the issue of trafficking

also been initiated by the government to protect the women and children from trafficking.

Attempts to combat trafficking in Bangladesh consist of three dimensions: (1) Prevention of trafficking at its source by addressing the root causes of the crime; (2) Providing redress to the trafficked persons through viable sustainable livelihood options; and (3) Efforts on the part of the criminal justice system to prosecute and penalise the traffickers.

According to the Global Report on Trafficking in Persons (2016), many States have criminalised most forms of trafficking as set out in the UN Trafficking in Persons Protocol. The number of States doing this has increased from 33 to 158 between 2003 and 2016. Such an exponential increase is welcomed and it has helped to assist the victims and to prosecute the traffickers. The US Human Trafficking Report (2017) reveals that the government of Bangladesh has demonstrated significant efforts during the reporting period through finalising and adopting the implementing rules for the Prevention and Suppression of Human Trafficking Act (2012) in January 2017 and drafting an implementation roadmap for the 2015 - 2017 national action plans.

THE WRITER IS AN ADVOCATE, SUPREME COURT OF BANGLADESH.



nerve of common people in recent years. It is treated a 'high profit/low risk' crime that viciously hampers the right to life and liberty of its victims. Extreme poverty, low life standard, and frustration resulting from unemployment force people to be trafficked in search of employments

seriously. It has enacted several other legislations since 1933. In order to strengthen protection and prosecution, the government has enacted Human Trafficking Deterrence and Suppression Ordinance (2011) and Human Trafficking Deterrence and Suppression Act (2012). Some action plans have

ARIF AHMED

TRAFFICKING in persons is one of the most atrocious crimes and gross violation of human rights in the present world that exploits women, children and men for various purposes including forced labour and sex. Today trafficking has developed into a widespread criminal practice which is given equal status of "modern form of slavery" and can also be treated a trade in people for the purpose of forced labor, sexual abuse, slave trade, commercial sexual exploitation and involves the restriction of movement of people from one place to another.

According to section 3(1) of Human Trafficking Deterrence and Suppression Act (2012), "Human trafficking" means the selling or buying, recruiting or receiving, deporting or transferring, sending or confining or harboring either inside or outside of the territory of Bangladesh of any person for the purpose of sexual exploitation or oppression, labor exploitation or any other form of exploitation or oppression by means of:

(a) threat or use of force; or (b) deception, or abuse of his or her socio-economic or environmental or other types of vulnerability; or (c) giving or receiving money or benefit to procure the consent of a person having control over him or her.

At the universal level, the UN Convention Against Transnational Organized Crime (2000) governs as the