



POST WAR JUSTICE INITIATIVE

Collaborative approach is required

TAPOS KUMAR DAS

IN 2010, the government resumed the post war justice out of a commitment to end the culture of denial and impunity. It was assumed that - many (if not all) of the perpetrators - will be brought to justice. There was an audacity of hope, 'justice might be seen to be done'. What we see in reality - after 8 years of the beginning, the prosecution and international crimes tribunal succeed in completing only 29 cases. So nothing stops the curiosity, whether achievement does resonance repeated high sounding promise of the government! Whether the unusual delay is calculated 'go slow' strategy or there is any 'loophole in legal strategy' impeding expected motion.

In realising the 'promise', whether more tribunal should be constituted and prosecution should be revitalised - these are all policy decisions which could be addressed by the government only. However, the academic view is that if the prosecution alters its legal strategy and facilitate 'approver's testimony' and 'guilty plea' by the offender, disposal time will be minimal.

Tendering pardon to approver
On 24 December 2017, when accused Abdul Latif filed an application before the tribunal seeking permission to be an approver to give testimony, many appreciated the maturity of the justice process (even if prosecution's role in convincing the accused was not clear). When offences are committed by more than one offender, proving each and every charge against each and every defender becomes herculean task as the process involves extended time and resources. To accelerate the trial and saving resources, the tribunal

may, on condition of tendering pardon, secure testimony from one of the accomplices under section 15 of the International Crimes (Tribunals) Act 1973. Clemency is tendered to secure testimony against other co-accused when an application is made by any accused or prosecution face difficulty in gathering evidence to bring home the charge against perpetrators. Accomplice testimony can form the basis of conviction if it is thought reliable as a whole being intrinsically natural and corroborated by independent evidence, either direct or circumstantial connecting the accused with the crime.

Guilty plea
In a trial before the tribunal, the prosecution brings formal charge(s) against the accused. As per section 10

of the Act, at a trial the charges are read out first and tribunal then asks each accused whether he pleads guilty. If the accused pleads guilty, tribunal can record the admission, and may in its discretion, convict him thereon. In doing so, tribunal must be satisfied that the plea is voluntary, informed and unequivocal. A successful plea bargaining can end the trial in two or three hearing. It is an established norm of criminal justice process, recognised and employed by all national and international criminal forums including ICC.

By December 2017, of the 29 cases adjudged by tribunal, only seven have been finalised after completion of appeal and review from the Appellate Division of the Supreme Court. The minimal time required for finality of a case is 24 months (*Abdul Quader Mollah*) whereas maximum time

period is 70 months (*Delowar Hossain Sayeedi*) and per case average disposal time is around 45 months. So, the time required in full-length adversarial adjudication is a hindrance to justice and could be avoided by encouraging plea bargaining.

In plea bargaining, to make the accused admitting the guilt is often critical. Instances of harsh punishment inflicted by tribunal effectively demoralise the accused from admitting guilt. To expedite the trial process 'guilty plea' coupled with 'apologies' could be encouraged by offering 'minimal conviction' to offenders. Post war justice around the globe provide option to acknowledge guilt either as plea bargaining or as 'truth and reconciliation'. Even though guilty plea offers minimal conviction, justice can still be served in the view that perpetrators will face social stigma and ramification for their

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September 2016, the Trial Chamber unanimously found Mr. Al Mahdi guilty. A genuine 'apology' by Al Mahdi was followed by minimal conviction of 9 years imprisonment and he was held responsible for 2.7 million euros in expenses for individual and collective reparations. Here, plea bargaining, makes the case less confrontational, helps saving resources of parties and becomes mutually beneficial - as defender meet minimal conviction and victims get reparations.

Humble entreaty
The options of guilty plea and approver's testimony even though accommodated in the Act 1973, remain unexplored till now. Such options could transform prolonged 'confrontational trial' to 'collaborative justice'. By tendering pardon to one of the accomplices, the tribunal may procure his evidence to prove criminality of other offenders. Guilty plea by the accused permits the tribunal to award conviction without pursuing detail testimony of all witnesses.

As the post war justice initiative is running against time, there is an urgency for speedy disposal. Guilty plea and clemency to approver could be instrumental in bringing a large number of perpetrators to justice in shortest possible time. Moreover, plea bargaining effectively minimises harshness of the punishment as there is a need to lure the offender to admit the guilt by offering minimal conviction. Therefore, these two legal avenues, if explored, in a collaborative manner, will be instrumental in symbolising justice even though in exchange of minimal conviction.

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Takeout(s) Ltd: Trademark infringement and/or passing off?

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THE question of whether Takeout Ltd (hereinafter "Takeout") is associated with Takeout 2.0 Cafe & Restaurant Ltd (hereinafter "Takeout 2.0") is vehemently answered in the negative. On 15 October 2017, Takeout's statement on Facebook denounced the latter — declaring that the two are unrelated. Is this tantamount to a prima facie case for passing-off, if not trademark infringement? Before answering this question and elucidating passing-off, for the sake of understanding, let me briefly discuss trademark infringement.

In Bangladesh, trademarks are governed by the Trademarks Act 2009, and pursuant to Section 2(8), a "trademark" is a registered mark, which can be, inter alia, a name, words, or a combination of colors or the enumerated elements (hereinafter "mark") that indicates a connection between the goods traded and the proprietor entitled to use that mark. A trademark is "registered" when it is recorded with the Trademarks Registry Wing of the Department of Patents, Designs and Trademarks. Section 26(2)(a) provides that a trademark is infringed when a person who is not the registered user (one entitled to use the mark) of the mark uses the mark in the course of business providing goods or services similar to that for which the trademark was originally registered. In simpler terms, if a company, which is a vendor of burgers, is a registered user of a mark, then any company selling burgers thereafter and using a similar mark has infringed the earlier's trademark. However, section 24(1) prohibits instituting a case for trademark infringement if the trademark is not registered.

The preceding paragraph begets the inquiry of whether Takeout is registered a mark. Unfortunately, I am incognisant of whether one was. If I accept registration occurred, then Takeout has grounds to commence proceedings against Takeout 2.0. If, however, Takeout failed to register a mark, while they would be disallowed from litigating trademark infringement, since Bangladesh is a common law country (similar to, inter alia, England and Canada), a remedy available to

the company would be the tort — a civil wrong — of passing-off. What, though, is passing-off?

Passing-off is the protection of the plaintiff's goodwill, which is the power to attract and retain customers, from misrepresentations made by the defendant that his goods are those of the former's. The components of passing-off are the following: (1) plaintiff has established goodwill; (2) defendant misrepresented information; and (3) the diversion of customers caused actual, or threatened, damage to the plaintiff's reputation. In seriatim, I shall probe each element.

First, passing-off protects one's proprietary interests over a business, which is acquired through the production of quality goods with

burgers cannot call its business "Burger King," or for the purposes of this commentary, "Takeout." It is irrelevant whether Takeout 2.0 publicly stated a relation with Takeout; rather, it is the name itself that is the misrepresentation.

The pertinent question is whether the misrepresentation is likely to cause confusion in the mind of the casual customer who is unlikely to scrupulously examine products. I answer affirmatively, adding that (1) the name "Takeout 2.0," (2) the font used to compose the restaurant's name, along with the color combination of yellow, black, and red on its placard, and (3) the font and color combination used to draft the menu can lead the casual customer into thinking Takeout 2.0 is associated with Takeout, for the reason that the former has emulated the latter in extenso, rendering their products indistinguishable. As in, Takeout retains a reputation with its name and a confusingly similar name, selling the same products to the public and operating in the same geographic region can confuse consumers.

Third, the preponderance of Bengalis may be unable to discern between the two companies, which would be inimical to the goodwill of Takeout, as it would divert customers from the original source to an ersatz. If customers have been diverted, then it is actual damage and Takeout is entitled to an award of damages and/or an injunction. If customers have yet to

be diverted, then it would be a case of threatened damage, warranting an injunction sans damages.

Overall, the usage of the name "Takeout 2.0" to sell the same products to the public in the same geographic region as Takeout is a misrepresentation and has the strongest probability to create confusion in the mind of the casual customer. Therefore, it is recommended that Takeout 2.0 change its name and characteristics to distinguish itself from the original, and that the Office of the Registrar of Joint Stock Companies pay closer attention when permitting companies to register names so that they are not confusingly similar.

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Compensation for the crime victims

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WITH the increasing emphasis on human rights and notion of restorative justice, awarding compensation to crime victims is being utilised in furtherance of more effective and compassionate criminal justice in countries around the globe. UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power 1985 urges the member countries to incorporate provision for compensation to crime victims in their criminal justice system. In most of the countries, compensation is commonly awarded to victims of rush driving and road accidents which is also a crime under the Penal Code 1860 (section 338A) in Bangladesh.

However, awarding compensation to victims of crimes and rush driving is barely practiced in Bangladesh. In a few cases, the High Court Division (HCD) and criminal courts awarded compensation to crime victims or their families. But such practices are not developed in a coherent manner. Therefore, our judicial system lacks of a set of standards and guidelines for computation and awarding of such compensation. This vacuum has made the judges passive and reluctant in awarding compensation in criminal cases, even when the law empowers them to do so. In this context, the recent judgment of the HCD awarding compensation of Tk. 4.62 crore on Tareque Masud's death by a road accident sets a landmark example in promoting compensatory jurisprudence in Bangladesh. It is believed that this judgment will be lit as a beacon for the future court to award compensation to victims of road accidents as well as other crime victims.

In 2013, Catherine Masud filed a compensation case under section 128 of the Motor Vehicles Ordinance 1983 to the Manikganj Motor Accident Claims

Tribunal. In 2014, the case was transferred to the HCD under Article 110 of the Constitution of Bangladesh on the ground of 'general public importance' (67 DLR 523). A division bench was constituted to try this case and finally delivered their verdict awarding an exemplary compensation to the victim's family in December 2017. The point here is that this provision of law under the Motor Vehicles Ordinance 1983 has provided avenue for thousands of victims of similar road accidents to claim compensation from the offenders, but it has been long unused and forgotten. Tareque Masud's compensation case will certainly create awareness in the minds of judges, lawyers and people that compensation from the concerned offenders in similar circumstances can be claimed and awarded.

Judges are well equipped to award compensation to crime victims under section 545 of the Code of Criminal Procedure 1898, section 15 of the Prevention of Oppression against Women and Children Act 2000, section 9 of the Acid Control Act 2002, sections 38 and 39 of the Children Act 2013, section 15 of the Prevention of Torture and Custodial Death Act 2013, section 28 of the Prevention of Human Trafficking Act 2012 (section 39 provides the scope to file civil case for compensation), section 16 of the Domestic Violence (Prevention and Protection) Act 2010, etc.

However, options for providing compensation largely remain unused perhaps due to the insensitivity of judges towards crime victims. Therefore, it is imperative that the passivity of the judges in awarding compensation to crime victims be broken. The judges have to act proactively with a sense of judicial activism so that the crime victims may get back a fearless and dignified life.

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