

A Critical Evaluation of Mobile Court Act 2009: How Mobile Court Demolishes Separation of Judiciary and Other Constitutional Principles of Bangladesh

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ABSTRACT--- *Separation of power is a key for the independence of people. Though this principle has not been accepted by the framer of constitution of Bangladesh. Nevertheless separation of judiciary is adopted by the maker of constitution. Judiciary is a place to restore the claims of the people of a country. But it cannot make people happy if it is not independent. The principle of separation of judiciary has been violated by various approaches. One of them is Mobile court. Mobile court is a forum which goes to the threshold of public in order to give prompt relief. It has reversed the general rules of judicial system. Though this fact claims appreciation for delivering justice. But it has been criticized as it is conducted by executive. This paper shows how mobile court infringed article 22 of constitution. It also shows how other principle of constitution is violated. Finally it gives some suggestion for the improvement of the situation.*

Keywords--- mobile court, separation of power, executive, constitution of Bangladesh, judiciary.

1. INTRODUCTION

Bangladesh is a densely populated developing country. Maintaining law and order in socio economic life is a challenge for the ruler. Again every citizen expects a country which is not influenced with bad power and injustice. But this country has a lot of limitations and scarcity of resources. So the ruler has to give remedy within this limited resource. Mobile court is one of them which provide speedy relief. The mobile court is a fast track court. In the social context of Bangladesh and in order to facilitate access to justice at the grassroots level, fast-track courts like mobile courts is an impressive necessity. (1) Sarker, Ashutush 2017) But it has no such constitutional basis nor had any legal basis before 2009. It is an instrument which provides prompt relief in the place of occurrence of offence. It is visualized as an effectual weapon to prevent offence and give instant relief to citizen. It is cost effective means to get speedy relief. It is successful to some extent indeed. Though it provides some beneficial consequences for giving instant punishment to wrongdoer, it has some dark perspectives for influencing fundamental principle that has been adopted by constitution. Constitution provides separation of judiciary from executive which has been violated by mobile court. Separation of power is a principle which is necessary for the independence of citizen. It stipulates that every organ of the state should be independent from other organ. It should be operated by different person. No one should interfere in the function of another organ. Mobile Court is interfering with the principle as it is conducted by executive. Mobile court has violated not only the principle of separation of judiciary but also many other recognized principle of the constitution and due process i.e. right to counsel, right against self incrimination, principle of natural justice etc. These principles are necessary for delivering justice.

2. RESEARCH METHODOLOGY

It is quantitative research mainly following analytical approach. This study is based on information that is collected from primary and secondary sources. Primary information is collected from parliamentary legislation i.e. the mobile court Act, 2009; The Code of Criminal Procedure, 1898; Special Powers Act, 1974 etc. Secondary information is collected from book, journal, newspaper, websites etc.

3. DEFINITION OF MOBILE COURT

Mobile court is a component of hybrid legal system where common law and civil law have been fused as it is conducted through the tradition of adversarial and inquisitorial system. Generally the court that moves from place to place is called mobile court. The word 'Mobile' comes from the word 'mobility' which means the ability to move

freely from one place to another. Again, court is a forum the function of which is to adjudicate legal matter and interpret the law. Mobile Court refers to a particular court which moves place to place to solve various problems which is different to regular court. Section 4 of Mobile Court Act, 2009 provides mobile court refers to a moving programme which is operated in a district or metropolitan area in order to maintain law and order and to prevent offence efficiently in which cognizance of certain offences is taken immediately and inflict punishment. According to Dr. Borhan Uddin Khan, “mobile court can be compared as a mobile phone which is easily moveable to enforce laws as a supplementary and complementary maneuver of court as we understand court derives from the Latin cohorts meaning as a yard and retinue or persons which gathered in the enclosed place.”(2)Borhan, 2007). So from above discussion we can point out some characteristics of mobile court:

- i. It is a special court outside the regular court;
- ii. It is directed to maintain law and order and to prevent offence immediately;
- iii. It can move from one place to another;
- iv. The judge of the court can take cognizance of offence immediately and also give punishment.

4. OBJECT OF MOBILE COURT

Mobile court has been introduced for a good object. Traditional judicial system is very slow and time consuming as it follows various principles and procedure. But mobile court is a easy way to get justice immediately. One of the objects of mobile court is to avoid the technicalities of traditional judicial system and to give justice without any hassle. The preamble of mobile court act stipulates the object of mobile court which provides mobile court is conducted to maintain the law and order and to prevent offences effectively and more efficiently. Mobile court is also conducted around the world especially in developing countries in order to give justice at the door of litigant who is poor and unable to reach the court. Finally it can be said that the aim of mobile court is to take justice closer to the people, give immediate solution to social problem and to prevent crime in the spot.

5. THE MOBILE COURT ACT, 2009 IN NUTSHELL

Before 2009 there was no special law for mobile court. It was conducted on the basis various scattered provisions of various law especially of Cr.P.C. Different sections of The Code of Criminal Procedure authorized Magistrate to try a case in the place of commission of offence. In 2009, the Mobile Court Act was passed which provides details regarding mobile court. It is presented below.

Judges of mobile court: The jurisdiction of mobile court is conferred on Executive magistrate which is very controversial. According to section 5, Govt. can confer the responsibility to operate mobile court on any executive magistrate in any district or in any metropolitan area. District Magistrate can confer the power to run mobile court by his written order.

Power of mobile court: According to section 6, executive magistrate or district magistrate empowered by this act, while operating any proceeding under this act, can take cognizance of any crime which is mentioned in the schedule of Mobile Court Act if it is occurred before him and inflict punishment on the basis of criminal’s confessional statement. If the executive magistrate contemplates that the crime is of such nature which requires higher punishment then the magistrate will make arrangement for filling regular case. If any crime which is to be tried by Court of Session or by any tribunal or by any higher courts then the mobile court will direct the police officer to file an *ejahar* against the accused.

Procedure of Mobile Court: According to section 7, while conducting mobile court the executive magistrate or district magistrate will frame charge summarily and read out to the accused. Then the court will ask whether he plead guilty or not. If the accused does not give confessional statement then the court will seek explanation in favor of his statement. If the accused give confessional statement then it will record it and take signature of the accused. The magistrate will also take signature of two witnesses. Then the court will impose penalty. It can also give discharge to the accused if the accused does not plead guilty and give satisfactory statement.

Punishment: According to section 8 of Mobile Court Act, mobile court can give sentence up to 2 years imprisonment and fine can be imposed according to its pecuniary jurisdiction.

Appeal: According to section 13, if anyone is aggrieved by the decision of mobile court he can file an appeal to District Magistrate. It can be heard by district magistrate or by Additional District Magistrate. If the decision is given by District Magistrate, then appeal can be filed to Court of Session. It can be heard by session judge or by additional session judge.

6. DOCTRINE OF SEPARATION OF POWER

Many Researchers and philosophers have expounded the theory of separation of power like Aristotle, John Locke, and Montesquieu etc. This theory tells that every organ of a state shall be free and independent. Every state has three organs: Legislature, executive and judiciary. All of these organs shall be separated and free from interference of other organ. Separation of power refers to the division of powers into distinct branches of government. Each of the department will have their own responsibility. Aristotle first mentioned the concept of separation of power in his book 'The Politics'. Then in 1690, John Locke in his book 'Second Treatise of Civil Government' focused on the theory of separation of power. It provides that, "it is necessary there should be a power always in being which should see to the execution of the law that are made and remain in force. And thus the legislative and executive power comes often to be separated." ((3)Locke,1823, p.144 also cited in Massey 2008). In 1748, French writer Montesquieu formulated and explained this doctrine in his book 'Esprit des Lois'. While writing about separation of power he said, "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehension may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner. Again, there is no liberty if the judicial power be not separated from the legislative and the executive. Where it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control for the judge would then be the legislator. Where if joined with the executive, the judge might behave with violence and oppression. Miserable indeed would be the case, where the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions and that of judging the crimes or differences of individuals." ((4)Montesquieu,1989 also cited in Takwani, 1998). According to Wade and Phillips ((5)cited in Takwani 1998), Separation of powers may mean three different things-

- i. That the same persons should not form part of more than one of the three organs of Government, e.g. The ministers should not sit in Parliament;
- ii. That one organ of the Government should not control or interfere with the exercise of its function by another organ;
- iii. That one organ of the Government should not exercise the function of another.

Thus, separation of power is a theory that provides that every organ of a state shall be free and independent as there are three organs of a state. One organ shall not be controlled or interfered by other organ. Same person shall not control more than one organ. It is a theory which is essential for rule of law and for establishing justice in a country.

7. WHETHER BANGLADESH ADOPTS SEPARATION OF POWER

Separation of power is a type of doctrine that ensures freedom of people. Nevertheless, following this doctrine strictly is quiet tough job as state is run by human body not by machine. Interference by one organ to another is quiet obvious in case of emergency or for any other reason. Bangladesh constitution theoretically adopted this doctrine by assigning three functions of a state to three organs. However, if we evaluate it critically there is no separation of power. The Constitution provides for separation of powers between three organs of the state. But it is not a separation of powers of the type practiced in the American jurisdiction (6)(Islam, 2012).

The constitution vests the executive power of the Republic to the executive body which is mainly cabinet, the legislative power to the parliament and the judicial power to the Supreme Court.(7)(Mujibur Rahman vs Bangladesh ,1992) This is what written in the constitution in black and white. But if we critically analyses the real scenario of the constitution, the thing is different. Especially the executive function and legislative function is integrated in same person. Member of cabinet is selected from Member of Parliament. Only one-tenths of the total number of minister can be appointed from outside the parliament. Members of Ministry are also Member of Parliament. Same person is holding two position of organ which is against the theme of separation of power. Again executive is enacting laws by enacting ordinance. Therefore, it can be said that there is no separation between legislature and executive. However, separation of judiciary from executive is a crystal clear provision of the constitution.

8. SEPARATION OF JUDICIARY

Separation of Judiciary from the executive is a key for the freedom of people of a country. An effective court is necessary for establishing rule of law. A. V. Dicey insisted on effective court system for the establishment of rule of law. Separation of judiciary has been established by the constitution of Bangladesh since its origin. Article 22 of the constitution provides that the state shall ensure the separation of the judiciary from the executive organ of the state. As it is mentioned in the fundamental principle of state policy it is the basic structure of the constitution. Bangladesh constitution ensures separation of judiciary from every other organ especially from executive. Same principle was enunciated in Masdar Hossain Case in 1999 as well as executed in 2007. Masdar Hossain was a district judge. In 1995, he together with 441 judicial officers filed a writ petition in Supreme Court claiming separation of judiciary from executive. That proceeding is known as Masdar Hossain Case. In 1997, the court gave decision along with twelve directions for implementing separation of judiciary. In 1999, the Appellate division upheld those directions (8)(Hossain, 2020). Finally in 2007; the decision was effected by the then caretaker government. Specially, the judicial magistrate courts were separated from the executive. Therefore, it could be theoretically said that judiciary is separated from executive.

9. MOBILE COURT AND SEPARATION OF JUDICIARY

As discussed above, mobile court is conducted by executive magistrate. Originally, the device of mobile court needs not to be run by executive magistrate. But the provision of Mobile Court Act provides that the court shall be run by executive magistrate which is the gross violation of separation of judiciary as well as constitution. As mobile court is also a court. It also follows the proceeding of court. All the judges of the court should be appointed from Bangladesh Judicial Service Commission. It must be under the supervision of Supreme Court. However, District magistrate and executive magistrate are appointed for mobile court which is the violation of basic structure of the constitution. But basic structure can't be altered (9)(Anwar Hossain Chowdhury Vs Bangladesh also cited in Haq 2020). In a hearing of writ petition High Court Division of Bangladesh Supreme Court declares that: Empowering executive magistrates with judicial powers is a frontal attack on the independence of judiciary and is violative of the theory of separation of powers and declared the sections 5, 6 (1), 6(2), 6(4), 7, 8(1),9, 10,11, 13 and 15 of the mobile court Ain [Act] No 59 of 2009 are ultra vires the constitution and violative of two basic structures of the constitution, namely, independence of the judiciary and separation of powers.(10)(cited in Sarker, Ashutosh, 2017)

So the judges of mobile court are appointing by violating constitution and they have no competence to try any case. Mobile court is also popular in many other countries. But those courts are conducting through judicial officer. Thus, all other countries can maintain separation of judiciary which is not being possible in Bangladesh though it is mentioned in Masdar Hossain case as well as in Constitution.

10. OTHER ISSUES OF MOBILE COURT

Mobile court is not only scandalous for being conducted by executive branch but also it is being talked for many other reasons. Mobile court is violating many constitutional principles. There are many issues like violation of natural justice, improper legal knowledge of judge, personal weapon of judge etc. All of the drawbacks are discussed below:

10.1 Violation of constitutional provision

Constitution is the supreme law of the country. It is supreme because it provides pros and cons of every particular thing of a country. Constitution provides how to conduct a trial, what should be the feature of a court, to which a court shall be bound, how an accused shall be treated etc. Mobile court is an abstract forum where trial is conducted immediately by executive branch. But constitution provides trial should be conducted by judiciary. Constitution provides that every court shall be under the supervision of Supreme Court. But Supreme Court has no control over mobile court. Again constitution provides every accused shall have the right to consult and be defended by legal practitioner. By violating this provision it is contravening principle of due process. Mobile court doesn't provide such facility.

10.2 Defects in Procedure

There are some procedural defects in Mobile Court Act, 2009. Mobile court follows summary trial. According to the Code of Criminal Procedure 1898, in summary trial the magistrate can impose maximum two years imprisonment. Mobile Court always tries proceeding under The Special Powers Acts, 1974; Penal Code, 1860 ; The Drug Control

Ordinance ,1982 etc. It tries crime like food adulteration, Sale or Display of fake cosmetic, Sale of adulterated medicine etc. Punishment of these crimes is death or life imprisonment or 14 years rigorous imprisonment and also fine. Usually in such crime the court imposes fine instead of filling a case. Again the court can pronounce judgment only on the basis of confession of the accused. But if the accused does not confess it cannot pass judgment. There is no investigation or police report. Section 388 of The Code of Criminal Procedure provides that the monetary fine could be paid in two or in three installments if an accused cannot pay it instantly. The court can even release him temporarily on bond. But this provision cannot be applied in mobile court due to an overriding clause of the mobile court act.

10.3 Violation of Human Rights

Mobile court often violates human right as well as fundamental right. Mobile court always imposes instant execution. The nature of judgment is often monetary which is very high. Accused hardly keeps such amount with him. As a result he usually fails to pay the fine instantly which takes him behind the bar. The situation violates freedom of liberty which is one of the basic human right as well as fundamental right. There is no provision of bail in mobile court. But many of the offences that are tried mobile court are bailable. Bail in bailable offence is a right. So there are defects in the act.

10.4 Infringement of Natural justice

Natural justice comprises of some principles that are essential for conducting fair trial. One of its principle is no man shall be condemned unheard. It means hear the other side after giving him proper opportunities. It includes giving a notice and time to prepare his defense. However, trial under mobile court is executed instantly. There is no time to prepare a defense and to appoint a lawyer. No one can consult a lawyer. Hence, it is infringing a principle of natural justice(11) (Chowdhury, 2019). Again, it also violates the principle that no man shall be a judge in his own case. Mobile court is conducted by executive magistrate and he is also a representative of executive body. So he has pecuniary interest over the fine imposed by him. Mobile court is the one man show of executive magistrate. He is the judge, he is the public prosecutor, and he is the witness. The fact absolutely violates the principle of natural justice as no judge can give evidence in the trial conducted by him.

10.5 Improper Confessional Statement

Mobile Court passes judgment on the basis of confession. There are some rules for recording confession. Mobile court fails to follow those rules. Section 164 and section 364 of The Code of Criminal Procedure provide the detail rules for recording confession. Confessional statement should be recorded by First class magistrate. It should be recorded after explaining that it can be used against him in trial. It should be recorded in a proper place where no police shall be present. Any deviation from these rules will make the confessional statement null and void. However, Mobile court follows none of these rules. Confessional statement is taken in the presence of police where the magistrate is in dominant position. The accused confesses with fear. This type of confession is self incriminating which is violating article 35 of the constitution.

10.6 Too Much Haste

Mobile court follows a swift procedure in order to give justice. But justice is not a magic that can be done in a pinch of time. It requires an adequate time. Court has to follow minimum procedure. All decision can't be taken by considering prima facie case. A case can be different from mere appearance. Mobile court helps main culprit to escape. Again Mobile court start trying cases even before the offender understand the allegation against him. Accused doesn't get enough time to prepare his defense. In a case Justice Fortescue held that even God gives chance to Adam for fair opportunity to answer(12)(Haq, 2020). By this way Mobile court skips many important factor.

11. OPINION FOR MOBILE COURT

Mobile court can be better if some step is taken. Some opinion can be taken in consideration as follows:

- i. First of all mobile court should be separated from executive organ. It should be conducted by judiciary for implementing separation of judiciary from executive. Conducting trial is the

- fundamental function of judiciary. So it cannot be performed by any other organ. First class magistrate can be appointed for conducting trial under Mobile Court.
- ii. Secondly, Mobile court should be brought under the supervision of Supreme Court. Supreme Court is the highest organ of judiciary. It has the supervisory power over all judicial organs. Mobile court should be subject to the direct supervision of Supreme Court as like other inferior courts.
 - iii. Thirdly, the appellate court of the Mobile Court Act should also be changed. Appeal should be filed to the Court of Chief Judicial Magistrate. In a survey which is based on newspaper report it has been seen that in 98% of cases, Judgment given by Additional District magistrate are cancelled in Session Judge. So, it would be better if CJM is appointed as an appellate court.
 - iv. Fourthly, Confessional Statement should be taken carefully after maintaining all the rules of law. Section 164 and 364 of Cr.P.C should be taken in regard. Court can't give verdict on the basis of confessional statement. It should be corroborated by other circumstantial evidence.
 - v. Fifthly, the provision of bail should be included. Bail is an exclusive right to an accused. Even in non bail able offence, bail is given to the accused by the discretionary power of the court. Absence of bail makes the Mobile Court Act defective.
 - vi. Sixthly, proper training should be given to judicial officer for conducting mobile court as it requires versatile knowledge.
 - vii. Last but not the least, more time should be given to the accused. Too much haste makes confusion in the mind of the accused. No prompt trial should be conducted. He must be given time to take preparation of the case.

12. CONCLUDING REMARK

Mobile court could be the best mechanism for enforcing law if it used with the compliance of constitutional principle which is not very difficult. Then the percentage of cancellation of the verdict of mobile court will be reduced. People will be benefited. But the absolute benefit will be gained if the executive is not authorized to try a proceeding under mobile court who lost their power to try after 2007. After 2007 government should have implemented the separation of judiciary more strictly. But it had enacted the Mobile Court Act where separation of judiciary is tarnished. It is used to make bureaucrats happy after they claimed their lost power who is already burdened with troublesome administration. So the state machinery should take proper initiative to make the mobile court better.

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