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Hartal, Mobile Court and Rights of the Accused in Criminal Trial: A Scrutiny of the Mobile Court Act, 2009

Tapos Kumar Das*

Abstract

Hartal is a long practised and legally recognized political right. The observance of hartal requires an absence of intimidation and destruction. Offence committed by any pro-hartal activist can be prosecuted summarily in the mobile court. But rights of the accused guaranteed by the Constitution must be complied with even in a summary trial. In spite of the momentum it added in curbing offences, the operation of the mobile court is challenged due to some functional and conceptual discrepancies. Summary trial amplifies efficiency of criminal justice system. So to maximise its acceptance the author proposes rectification of the discrepancies by amending the Mobile Court Act, 2009.

1. Introduction

In Bangladesh, recent employment of mobile courts to embattle the destructive activities at the time of hartal (strike) has added fuel to the nationwide political debate. In furtherance of the Mobile Court Act, 2009 the Government has launched the operation of the mobile court. The Government believes that the functioning of mobile courts at the time of hartal accelerated maintenance of law and order. On the contrary, pro-hartal political parties allege that the Government has employed mobile courts to accomplice its political motive, to curb the hartal by creating panic amongst pro-hartal activists. To them, hartal is a political right and use of the mobile court to cut back hartal is unconstitutional. They further allege the trial in a mobile court to be inconsistent with rights of the accused guaranteed by the Constitution. To put an end to the battle of words the legal issues involving hartal and mobile court need to be addressed. The present articulation intends to scrutinise the legality of hartal and rational of the mobile court's functioning at the time of hartal. It examines the extent to which the Mobile Court Act, 2009 conforms rights of the accused at criminal trial.

2.1 Definition of hartal

Generally, hartal means a work stoppage caused by mass refusal to participate in work.¹ In Bangladesh hartal is observed both for political and non-political purposes. In political arena hartal means, 'a protest by the people at large or by a group of a

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¹ 'Strike', available at <<http://en.wikipedia.org/wiki/Strike>>, last accessed 12 August 2011.

particular class of our society and it is called for communicating thoughts, discussing public questions, ventilating grievances to [the] Government...regarding the democratic rights and the legitimate claims.² Though hartal presupposes peaceful observance and voluntary abstention from work place, recent hartals in Bangladesh were seen to be accompanied by coercion and destruction. Mostly, hartal is resorted to and observed by the parties in opposition while it is criticised and opposed by the party in power. Therefore, the determination whether hartal is good or bad depends on the position held by the political parties.³

2.2 Is Hartal a right?

A question regarding the legality of hartal was raised before the Supreme Court of Bangladesh for the first time in the case of *Abdul Mannan Bhuiyan v State*.⁴ Facts of the case reveal that during the period of 1998-1999 the public peace and tranquility was jeopardised due to frequent hartal and anti-hartal activities of political parties, such as violent procession, obstruction in movement, destruction etc. On 15 February 1999, perusing a newspaper article,⁵ a bench of the High Court Division (HCD) of the Supreme Court issued a *suo moto* rule under section 561A of the Code of Criminal Procedure, 1898 upon Abdul Mannan Bhuiyan, the then General Secretary of the Bangladesh Nationalist party, and others to show cause as to why pro-hartal and anti-hartal activities should not be declared cognisable offences and the criminal court and the police should not be directed to take action accordingly.⁶ Upon hearing the learned advocates, the High Court bench made the Rule absolute with observations.

The Court in its judgment and order dated 13 May 1999, summarised Chapter viii of the Penal Code, 1860⁷ and then interpreted section 141 of the Code by holding that:⁸

² *Khondaker Modarresh Elahi v The Government of the People's Republic of Bangladesh* (2001) 21 BLD (HCD) 352.

³ *Ibid.*

⁴ (2008) 60 DLR (AD) 49.

⁵ *The Daily Ittefaq*, dated 10-12 February 1999.

⁶ Criminal Miscellaneous case no 668 of 1999 (*suo moto*).

⁷ Chapter VIII: Of Offences against the Public Tranquility.

⁸ The Penal Code, s 141: An assembly of five or more persons is designated an "unlawful assembly," if the common object of the persons composing that assembly is
First -To overawe by criminal force, or show of criminal force, Government or Legislature, or any public servant in the exercise of the lawful power of such public servant;
or
Second -To resist the execution of any law, or of any legal process; or
Third -To commit any mischief or criminal trespass, or other offence; or
Fourth.-By means of criminal force, or show of criminal force, to any person to take or

- i) according to the 5th clause of section 141, a procession or other activities of five or more persons in support of or to force hartal shall be an unlawful assembly punishable under section 143 of same Code;
- ii) every assembly of five persons or more to protest or to oppose hartal shall be an unlawful assembly;
- iii) activities of the members of these assemblies shall be cognizable offence according to their behavior under the relevant sections of Chapter viii of the Penal Code and the criminal Courts and police are directed to act accordingly.⁹

It was the first judicial decision in Bangladesh which went beyond the existing penal law to criminalise any political procession in support of or against hartal. However, challenging the decision an appeal was preferred and the Appellate Division (AD) reversed the HCD's decision in 2007.

In the AD the power of the HCD to legislate and create any cognisable offence was addressed by Abdul Matin J in following words:

Offence can be created only by a law, by an act of the parliament and not by any legal pronouncement by any Court.¹⁰ The HCD acted beyond its authority in entering into the field of making law and to declare the pro-hartal and anti-hartal activities as cognizable offence.¹¹ The HCD had no constitutional or judicial power to legislate or create, of its own, a cognizable offence.¹²

However, no issue was raised as to the legality or desirability of hartal and the AD abstained from encountering the issue by holding that:

The virtues and vices of hartal is political question and this court in exercise of its judicial self-restraint declines to enter into such political thicket, particularly in absence of any constitutional imperative or compulsion.¹³

Though the AD remained silent as to the legality of hartal it suggested that, 'if hartal is enforced through force or violence or threat of force or violence will not only be

obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or Fifth.-By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do. Explanation -An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

⁹ *Abdul Mannan Bhuiyan v State* (2008) 60 DLR (AD) 49; para 11.

¹⁰ See n 9, para 42.

¹¹ See n 9, para 43.

¹² See n 9, para 44(b).

¹³ See n 9, para 44.

illegal but will constitute cognisable offence punishable under [the] Penal Code and other penal laws'.¹⁴

Soon after the decision of the High Court Division (in the case of *Abdul Mannan Bhuiyan*) declaring the pro-hartal and anti-hartal activities illegal, in the case of *Khondaker Modarresh Elahi v Bangladesh*¹⁵ a full bench of the High Court Division comprising Mainur Reza Chowdhury, Sayed JR Muddassir Husain and MA Aziz JJ made a contrary decision. It is revealed from the case of *Khondaker Modarresh Elahi* that in April 1999 Khondaker Modarresh Elahi filed an application under article 102 of the Constitution for the enforcement of some fundamental rights (freedom of movement, right to life, property etc) alleged to have been violated by hartal. The application contained instances of violence causing destruction of the properties, physical injury and loss of life of the citizens at the time of hartal. Rule Nisi was issued calling upon the respondents (leaders of pro-hartal political parties) to show cause as to why calling of hartal on 18 April 1999, should not be declared to have been made without any lawful authority and is of no legal effect and also in violation of the fundamental rights of citizens.¹⁶

Abdul Mannan Bhuiyan (respondent no. 3) filed an affidavit-in-opposition contending that hartal being a political issue cannot be resolved by way of any declaration or direction by any court either for or against hartal. He claimed that hartal was observed peacefully and became violent due to the interference of the government agencies and ruling party. He claimed hartal to be a historically recognised and Constitutionally guaranteed political right.¹⁷ In case of *Khondaker Modarresh Elahi*, the HCD observed that:¹⁸

[H]artal in our country has a long history. Since the colonial period hartals have been observed peacefully, spontaneously and without any fear or coercion. A call for hartal without any threat expressed or implied would...be an expression of protest which is guaranteed by article 39(2)(a) of our Constitution. But as soon as the call for hartal becomes more than a call which by use of language of threat or show of force or warning of consequence for violating the call is expressed or implied which is likely to create fear and apprehension in the mind of the ordinary citizen it would cease to be an expression protected by the Constitution.

Thus, a full bench of the HCD acknowledged hartal as a means of expression provided that its observance is free from coercion and destruction and that mere

¹⁴ Ibid.

¹⁵ (2001) 21 BLD (HCD) 352.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

calling of hartal is not violative of fundamental rights unless accompanied by violence and destruction. As in the case of *Abdul Mannan Bhuiyan*, the AD remained silent as to the legality of hartal, the observation of the full bench of the HCD in *Elahi* is the present position of law regarding hartal.

2.3 Is the right to call hartal an 'absolute right'?

Hartal is a historically recognised democratic right; since the independence to the present time political struggles of Bangladesh, hartal has frequently been resorted to by political parties to vindicate their grievance from time to time. Hartal is a means of expression guaranteed by article 39(1)(a) of the Constitution and can be enjoyed subject to any reasonable restrictions, if and when imposed by law. The right to call hartal is not absolute and may be restricted to prevent activities which are illegal and considered undesirable in the public interest.¹⁹ In the case of *Elahi*, Mainur Reza Chowdhury J suggested that calling of a hartal presupposes following caveats:²⁰

- i) a genuine cause for the welfare and greater interest of the people;
- ii) failure of the Government to respond to the demands or grievance raised by the opposition;
- iii) overwhelming public support in favor of hartal;
- iv) hartal should be used as a last resort to vindicate collective grievances in absence of any other alternative forum to register protest;
- v) hartal should be observed peacefully, there should be no threat or intimidation to participate in hartal nor should it be accompanied by violence and /or destruction.

Therefore calling of hartal must be justified by above mentioned conditions and must not depend on personal whim of politicians nor should it be used as a weapon to obstruct development activities or to embarrass the Government.

2.4 Bringing the Mobile Court Act, 2009 to light

To overcome the disrupted law and order situation, on 28 October 2007, the council of advisers of then caretaker government approved the Mobile Court Ordinance, 2007 permitting the creation of mobile courts to exercise summary jurisdiction by executive magistrates.²¹ This Ordinance became ineffective on February 2009 as the

¹⁹ See n 2.

²⁰ See n 2.

²¹ 'Cabinet Okays Mobile Court Ordinance: Executive Magistrates Cannot Be Sued' in *The Daily Star* (Dhaka, 29 October 2007) 1. Available at

9th Parliament did not approve it within thirty days of its first session.²² Subsequently on 23 July 2009, in the absence of parliamentary session, the President promulgated the Mobile Court Ordinance, 2009 to permit continuation of mobile courts. Preliminarily the mobile court was considered to be a raft measure against disrupted law and order, but considering the momentum it added in restoring public tranquility, the Government intended to give it a permanent shape by converting the Ordinance into an Act. Accordingly, on 13 September 2009, the Home minister placed the Ordinance before the Parliament in the form of Mobile Court Bill, 2009. The bill was passed on 4 October 2009 and after the signature of the President the Mobile Court Act, 2009 (hereinafter referred to as Act) came into operation on 6 October 2009.²³

3.1 Formation of the mobile court

The mobile courts are constituted under the Mobile Court Act, 2009 to try scheduled offences both in metropolitan and district arena. Executive magistrates so authorised either by the Government or by the district magistrate may preside over the mobile court.²⁴ As per the preamble of the Act, the mobile courts are meant to expedite law and order by restraining crime and thus to achieve greater public interest. Such courts move to the place of occurrence to conduct instant trial of the accused charged with the scheduled offence(s).²⁵ Very often hartal is accompanied by destruction and violence which every Government is vigilant to pin down and in June 2011 for the first time the mobile courts were employed to curb pro-hartal violence.

3.2 Jurisdiction of the mobile court

The Schedule of the Act contains a list of eighty five statutes under which the offences are defined. The mobile court is empowered to take cognisance of the

<<http://www.thedailystar.net/newDesign/news-details.php?nid=9376>>, accessed 28 August 2011.

²² Article 93 of the Constitution of Bangladesh provides that at any time when the Parliament stands dissolved or is not in session, the President may make and promulgate such Ordinances as may be required to take immediate action. An Ordinance made by the President shall be laid before the Parliament at its first meeting following the promulgation of the Ordinance and shall, unless it is earlier repealed, cease to have effect at the expiration of thirty days after it is so laid or, if a resolution disapproving of the Ordinance is passed by the Parliament before such expiration, upon the passing of the resolution.

²³ 'Mobile Court Bill Passed', <<http://www.bdnews24.com/details.php?id=144135&cid=2>>, accessed 24 August 2011.

²⁴ The Mobile Court Act 2009, s 5.

²⁵ Ibid, s 4.

offences which are mentioned in the Schedule and are triable exclusively by a judicial magistrate or metropolitan magistrate.²⁶ Its jurisdiction is limited to imprisonment for a term not exceeding two years and fine to the extent prescribed by the concerned statute.²⁷ Cases which are of serious nature and are triable by the sessions judge fall outside the jurisdiction of the mobile court.

3.3 Procedure of trial in a mobile court

The trial in a mobile court is contingent on two events *firstly*, any of the scheduled offences need to be committed or exposed in the presence of the court and *secondly*, the accused must admit the guilt.²⁸ On commission of the scheduled offence(s) the accused is arrested and is placed before a mobile court. At the initiation of the trial the magistrate presiding over the court precisely formulates charge(s) against the accused, then read out and explain it to him/her and asks the accused whether s/he admits guilt or not.²⁹ The accused may refute charge(s) in self-defence and if his/her explanation is convincing the magistrate may discharge the accused and set him/her at liberty.³⁰ On the contrary, if the accused admits guilt voluntarily his/her confessional statement is written by the magistrate and then he reads out it to the accused. On the admission of guilt the accused is asked to put a signature or thumb impression in the written confessional statement in the presence of two witnesses who also sign or put thumb impressions on it. Merely on the basis of this properly signed confessional statement the court can impose imprisonment and/or fine upon the accused.³¹

There may be cases where an accused neither admits guilt nor should his/her explanation in self-defence is convincing; in such a situation presiding magistrate sends the accused to an appropriate court for a regular trial.³² However, the right of an accused to consult a lawyer is not provided in the Act as the mobile court convicts only on the basis of the admission of guilt by the accused. So if any accused claims to consult a lawyer and/or challenges the summary jurisdiction, the magistrate presiding over the mobile court sends the accused to an appropriate court to contest a regular trial.

²⁶ Ibid, s 6.

²⁷ Ibid, s 8.

²⁸ Ibid, s 6.

²⁹ Ibid, s 7(1).

³⁰ Ibid, s 7(3).

³¹ Ibid, s 7(2).

³² Ibid, s 7(4).

4. Rights of an accused during a criminal trial: comparison of rights

The criminal trial requires compliance with the substantive and procedural law. A person cannot be held guilty but for the violation of penal laws and cannot be convicted except in due process of law.³³ Due process of law requires that at the time of criminal trial even an accused of any offence should not be deprived of the rights guaranteed by the statutes. The Constitution of Bangladesh, the Code of Criminal Procedure, 1898 and the directions of the Supreme Court provide (i) safeguards against arbitrary arrest³⁴ and (ii) protection in respect of criminal trial and punishment. An accused may be tried either in a regular Court or in a mobile court but the safeguards mentioned above can be denied in no situation. The statutory rights of an accused can be discussed under the following headings:

4.1 No unauthorised detention

The Constitution of Bangladesh (hereinafter referred to as the Constitution) as well as the Code of Criminal Procedure (CrPC) require every arrested person to be placed before the nearest magistrate, 'within a period of twenty four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate'.³⁵ Section 4 of the Act requires the mobile court to take cognisance of offence(s) and to complete the trial instantly. So far the experience is concerned in compliance with the statutory obligation mobile courts move to the place of occurrence, take cognisance of the scheduled offences and conclude the trial instantly.³⁶ As the court moves to the place of occurrence it minimises the pre-trial detention of the accused by saving the time of journey.

4.2 Right to be informed of the grounds of arrest

The Constitution assures that a person who is arrested by the law enforcers in relation to any offence is entitled to know the grounds for such arrest at the earliest possible time.³⁷ However, this protection should not be available if the arrestee is an enemy alien or detained under any preventive detention law.³⁸ An accused placed before the

³³ The Constitution of Bangladesh, article 31.

³⁴ As in the case of *Bangladesh Legal Aid & Services Trust (BLAST) v Bangladesh* (2003) 23 BLD (HCD) 115.

³⁵ The Constitution of Bangladesh, article 33(2) and the Code of Criminal Procedure 1898, s 61.

³⁶ The Mobile Court Act 2009, s 4.

³⁷ Article 33(1).

³⁸ Article 33(3) (a) & (b).

mobile court is entitled to know the exact nature of the charge(s) brought against him/her for the reason that dearth of prior knowledge will seriously prejudice his or her defence.³⁹ In relation to the communication of the grounds of arrest section 7(1) of the Act provides that:

- a) after taking cognisance of the scheduled offence(s), the magistrate presiding over the mobile court shall formulate the specific charge(s) against the accused; and
- b) charge(s) shall be read out and explained to the accused.

A 'charge' is the precise formulation of specific accusation made against an accused to inform him/her the nature of allegation at the very earliest stage of trial so that the accused can concentrate on the case that he or she has to face.⁴⁰ To say otherwise, 'it is a written document containing the description of the offence which the court finds *prima facie* proved by evidence before it or to have been committed by the accused, so as to require him or her to defend him/herself'.⁴¹

The mobile court ensures instant trial of the accused.⁴² So the framing of charge and communication to the accused of the grounds of arrest takes place instantly. Thus, the constitutional obligation of communication of grounds of arrest is satisfied.

4.3 No *expost facto* operation of criminal law

The Constitution ensures protection against (i) *expost facto* criminal law, and (ii) greater punishment than prescribed by prevalent law.⁴³ Criminalisation (making something offence) entails that whatever is criminalised according to the law (i) must not be done, (ii) if done, the doer must face punishment, and (iii) the punishment is determined. Criminalisation requires prior notification to guide potential offenders away from that behaviour; to reduce its overall incidence; to make one's arrest, prosecution, trial and conviction legitimate.⁴⁴

³⁹ Sarkar Ali Akkas, *Law of Criminal Procedure* (2nd edn, Dhaka: Ankur Prakashani 2009) 130.

⁴⁰ *Moslem Ali Mollah v State* (1996) 48 DLR 297.

⁴¹ *Abdur Razzaque v State* (1996) 48 DLR 457.

⁴² The Mobile Court Act 2009, s 4.

⁴³ Article 35(1).

⁴⁴ James Edwards, 'Justice Denied: The Criminal Law and the Ouster of the Courts' (2010) 30(4) Oxford Journal of Legal Studies, 725-748.

The mobile court is allowed to exercise summary jurisdiction in respect of selected offences of eighty five statutes provided in the Schedule of the Act.⁴⁵ Undoubtedly, all these statutes were notified through official gazettes and hence offences under those statutes are free from *ex post facto* effect. Again punishments for the scheduled offences are determined and many offences are originally punishable for a term exceeding two years. But the mobile court's jurisdiction is limited to an imprisonment for a term not exceeding two years.⁴⁶ Therefore, a privilege exists that even though a greater punishment could have been imposed upon the accused by a regular court, whenever s/he is tried by the mobile court for the same offence is awarded a concessional imprisonment for a term not exceeding two years. Thus the constitutional protection against *ex post facto* criminal law and enhanced punishment is reassured in the Act.

4.4 No double jeopardy

Both the Constitution and the CrPC provide protection against double jeopardy.⁴⁷ The double jeopardy clauses generally prohibit three occurrences: (i) multiple punishments for the same offence, (ii) subsequent prosecutions for an offence after a conviction for the same, and (iii) subsequent prosecutions for an offence after acquittal for the same.⁴⁸ The protection against double jeopardy protects individuals from financial, emotional and social consequences of successive prosecutions⁴⁹ and preserves the finality and integrity of criminal proceedings.⁵⁰

According to section 10 of the Act an accused discharged by the presiding magistrate of mobile court is not considered as acquitted. Discharge of an accused is not as same as acquittal. In the case of *Abdus Salam Master v The State*,⁵¹ the Supreme Court of Bangladesh held that there cannot be a fresh prosecution after acquittal, but a person discharged can be prosecuted for the same charge(s) subsequently. Section 403 of the

⁴⁵ A list of statutes is provided in the Schedule of the Mobile Court Act 2009.

⁴⁶ The Mobile Court Act 2009, s 8(1).

⁴⁷ The Constitution of Bangladesh, article 35(2) & the Code of Criminal Procedure 1898, s 403(1).

⁴⁸ Eli J Richardson, 'Eliminating Double-talk from the Law of Double Jeopardy' (1994) 22 Florida State University Law Review 119.

⁴⁹ 'Double jeopardy', available at <<http://legal-dictionary.thefreedictionary.com/double+jeopardy>>, accessed 24 August 2011.

⁵⁰ Bryon L Land, 'Increased Double Jeopardy Protection for the Criminal Defendant: Grady v Corbin' (1991) 27 Willamette Law Review 916.

⁵¹ (1984) 36 DLR (SC) 58.

CrPC also maintains this distinction between discharge and acquittal. Similar to the CrPC the Act also assures protection against double conviction and double prosecution for the convicted but not for the discharged.⁵²

4.5 No self-incrimination

The Constitution assures that a person accused of any offence shall not be compelled to be a witness against himself or herself.⁵³ S/he cannot be required to provide the authorities with the information that might be used against him/her in a criminal trial. This privilege protects the accused against improper compulsion by the authorities to admit guilt.⁵⁴ Stumer suggests that, 'presumption of innocence serves two 'vital and mutually-reinforcing values': *first*, it 'extends the maximum protection to the innocent', and *second*, it 'enhances respect for the rule of law'.⁵⁵ Therefore, privilege against self-incrimination contributes in avoiding miscarriage of justice.

The mobile court can impose sentence only when the accused admits the guilt.⁵⁶ There is no provision of coercion or compulsion in admission, the magistrate can merely ask the accused whether s/he admits the guilt.⁵⁷ If the accused refuses to admit the guilt the magistrate sends him/her to face a regular trial before an appropriate court.⁵⁸ Furthermore, the Act requires the written admission of guilt be endorsed by the accused and two other witnesses.⁵⁹ Thus, the Act ensures voluntariness of admission and provides double check against self-incrimination.

4.6 No degrading punishment

The Constitution ensures protection against degrading punishment.⁶⁰ Accordingly, there is no provision of excessive or degrading punishment in the Act; not only that the Act has moved further and provided concessional punishment for few of the scheduled offences. Section 8 of the Act has limited the jurisdiction of the mobile

⁵² The Mobile Court Act 2009, s 10.

⁵³ Article 35(4).

⁵⁴ Mike Redmayne, 'Rethinking the Privilege against Self-incrimination' (2007) 27(2) *Oxford Journal of Legal Studies* 209-232.

⁵⁵ Andrew Stumer, *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Oxford: Hart Publishing 2010) 190 and 82.

⁵⁶ The Mobile Court Act 2009, s 7(2)

⁵⁷ Ibid, s 7(1)

⁵⁸ Ibid, s 7(4)

⁵⁹ Ibid, s 7(2)

⁶⁰ Article 35(5).

court to an imprisonment not exceeding two years. Though any scheduled offence may be punishable with the imprisonment for a term exceeding two years the mobile court cannot exceed the limit of two years imprisonment.⁶¹ Comparatively, the Act allows a concessional punishment than the accused could have met in a regular trial.

4.7 Access to legal advice and assistance

The principle of natural justice requires that everyone has the right to speak in self-defence and is not condemned unheard-of. It is one of cardinal principles of criminal justice that an accused, whose life, liberty, or properties are in legal jeopardy, has the right to confront the evidence against him/her in a fair hearing.⁶² The Constitution also ensures that an arrestee is entitled to consult and be defended by a lawyer of his/her choice.⁶³ Even though the arrestee may waive this right, s/he should be informed of it and if requested, legal advice and assistance should be made available to him/her.⁶⁴

Here seems a deviation from the constitutional mandate as the Act provides no immediate access to legal advice and assistance to the accused. Full compliance of the procedural safeguards (including the right to consult and be represented by a lawyer) may futile the purpose of the summary trial. As the purpose of the Act is to provide prompt justice a procedural device ensuing delay perhaps was considered reasonable to avoid by the Legislature.

The summary trial is conducted on the basis of admission of guilt by the accused; whenever the accused admits the guilt s/he gives up the right to legal representation at the trial. But it seems quite reasonable that even before waiving this right (by way of admission of guilt) the accused is entitled to get informed about those procedural safeguards either by the magistrate himself or by a State sponsored lawyer who may accompany the drive of the mobile court. To accomplice this constitutional essence, it is better to insert a provision in the Mobile Court Act, 2009 to ensure pre-trial legal advice to the accused.

⁶¹ I.e. offences under ss 148, 152 & 225 of the Penal Code are punishable for a term exceeding three years.

⁶² <<http://legal-dictionary.thefreedictionary.com/audi+alteram+partem>> accessed 27 August 2011.

⁶³ Article 33 (1).

⁶⁴ Layla Skinnis, 'The Right to Legal Advice in the Police Station: Past, Present and Future' (2011) 1Criminal Law Review 19-39.

4.8 Access to the appellate forum

Appellate opportunity prevents departures from the standard required by the administration of justice and thus maximises public acceptance of the judicial decisions.⁶⁵ So it is expected that a summary trial should be followed by appellate opportunity as well. The Act provides that a convicted dissatisfied with the decision of the mobile court can prefer an appeal before the court of district magistrate or sessions judge. If the mobile court is presided over by a metropolitan magistrate or executive magistrate (other than District Magistrate or Additional District Magistrate), an appeal against his decision shall be preferred to the district magistrate.⁶⁶ The district magistrate can hear the appeal or can refer it to any additional district magistrate for disposal.⁶⁷ If the mobile court is presided over by the district magistrate or additional district magistrate, an appeal against this decision shall be preferred in the court of session.⁶⁸ The sessions judge can hear the appeal or can refer it to any additional sessions judge for disposal.⁶⁹

Though a criminal appeal may lie on the grounds of fact and/or law,⁷⁰ appellate opportunity provided in the Act is limited only to the extent and/or legality of the sentence passed by the mobile court.⁷¹ Even in regular criminal trial this restriction is equally applicable when an accused pleads guilty and is convicted by a court of session or any metropolitan magistrate or magistrate of first class on such plea.⁷² If the presiding magistrate of the mobile court does not record the 'admission' properly or awards conviction exceeding two years, the door of appellate forum remains open.⁷³

⁶⁵ Akkas (n 39), 130.

⁶⁶ The Mobile Court Act 2009, s 13(1).

⁶⁷ Ibid, s 13(2).

⁶⁸ Ibid, s 13(3).

⁶⁹ Ibid.

⁷⁰ The Code of Criminal Procedure 1898, s 418.

⁷¹ The Mobile Court Act, s 13(5): right to appeal is subject to the provision of section 412 of the Code of Criminal Procedure, 1898. Section 412 provides that where an accused has pleaded guilty and has been convicted, there shall be no appeal except to the extent or legality of the sentence passed by the trial court.

⁷² The Code of Criminal Procedure 1898, s 412.

⁷³ The Mobile Court Act 2009, s 8(1)

4.9 Speedy and public trial

Delay causes specific prejudice to the criminal trial when the prosecution had in some way deliberately manipulated the criminal process so as to take unfair advantage against the accused. Delay jeopardises effectiveness and credibility of a trial.⁷⁴ Therefore, the Constitution assures that every person accused of a criminal offence is entitled to the right to speedy and public trial.⁷⁵ It aims to protect all parties from excessive procedural delays and to avoid that an accused remains too long in a state of uncertainty about his fate.⁷⁶

Again, when a State seeks to enforce the penal law against a citizen it is required to demonstrate to the accused and to the public at large how and why the sentence is justified. Public trial is a part of the measures by which this demonstration is secured.⁷⁷ Publicity of hearings is an important safeguard in the interest of the individual and of society at large.

Aim of the Act as has been expressed in the preamble is to secure prompt justice and to this end mobile court concludes a trial in a single session without any recess. Trial of the mobile court takes place in public and is also open for the media which is

⁷⁴ John Jackson, Jennifer Johnstone & Joanna Shapland, 'Delay, Human Rights and the Need for Statutory Time Limits in Youth Cases' (2003) August, Criminal Law Review 510-524.

⁷⁵ Article 35(3).

⁷⁶ *Stogmuller v Austria* (1979-80) 1 EHRR 155, para 5.

⁷⁷ Ian Dennis, 'The Right to Confront Witnesses: Meanings, Myths and Human Rights' (2010) 4 Criminal Law Review 255-274. Dennis forwarded the following propositions in favor of public trial:

- i) Bentham recognized publicity as an essential device for deterring insincerity and helping to ensure accuracy of testimony. As he put it, "publicity is the very soul of justice. It is the keenest spirit to exertion and the surest of all guards against improbity."
- ii) Friedman suggested that openness of procedure ensures that "the witness's testimony is not the product of torture or of milder forms of coercion and intimidation"⁷⁷ Friedman's point shows that publicity may also deter the state from violations of the rule of law in obtaining evidence, thus promoting the expressive value of the verdict. Spigelman CJ also identified publicity as an essential role in maintaining public confidence in the administration of criminal justice.
- iii) Thus publicity of trial ensures that evidence against the defendant being honest and reliable which will maximize the factual accuracy of adjudication. Factual accuracy is a fundamental condition of the legitimacy of a criminal verdict; a verdict that is founded on evidence that is demonstrably perjured or mistaken is a miscarriage of justice and lacks legitimacy.

unlikely in a regular trial. Thus, the Act satisfies constitutional requirements of speedy and public trial.

4.10 Trial by independent court

Independence of a court includes the ability of a judge to decide each case according to an objective evaluation and application of the law, without influence from outside agents or factors. An independent court acts as a shield against unwarranted deprivations by the State of the rights and freedoms of individuals.⁷⁸ Therefore, the Constitution pledges that trial of the accused should be conducted by an independent court or tribunal established by law.⁷⁹ Independence of the court requires it to be free from the influence of the executive.⁸⁰ In deciding whether a court is independent or not regard must be taken to the factors such as the manner of appointment of presiding officer, tenure and terms of office, existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence.⁸¹

The independence of the mobile court appears to be compromised at least for two factors; *firstly*, it is presided over by an executive magistrate and the continuation of his/her judicial capacity depends upon the pleasure of the Government; *secondly*, posting, promotion and discipline of an executive magistrate depends upon the Government.

4.11 Trial by impartial court

Impartiality of the judicial body enhances public confidence in the administration of justice. Judicial impartiality entails that a judge must be neutral and free from bias.⁸² Justice should not only be done but manifestly and undoubtedly seen to be done.⁸³ Justice is rooted in confidence and confidence is destroyed when right minded people go away thinking that the judge was biased.⁸⁴ So reasonable apprehension of not getting justice in the mind of the accused should be taken into serious

⁷⁸ Application under s. 83.28 of the Criminal Code (Re), (2004) SCC 4 <<http://www.canlii.org/en/ca/scc/doc/2004/2004scc42/2004scc42.html>> accessed 20 September 2011.

⁷⁹ Article 35(3).

⁸⁰ *Ringeisen v Austria* (1979-80) 1 EHRR 455.

⁸¹ *Bryan v UK* (1996) 21 EHRR 342.

⁸² CK Thakker, *Administrative Law* (1st edn, India: Eastern Book Company 1992) 181.

⁸³ Lord Hewart CJ, in *R v. Sussex* (1924) 1KB 256, 259.

⁸⁴ Lord Denning, *The Discipline of Law* (Butterworth's, 1st Indian reprint, Aditya Books Private Limited 1993) 87.

consideration.⁸⁵ Bias prevents a judge from making an objective decision.⁸⁶ That is why if any judicial proceeding is compromised by actual or apparent bias the decision will be null and void.⁸⁷ Hence, the Constitution emphasises on the impartiality of a criminal court.⁸⁸

There is no option of filing individual complaint to the mobile court. The presiding magistrate moves to the place of occurrence, takes cognisance of the scheduled offence(s) and instantly awards conviction on the basis of admission of guilt by the accused. So in a trial by mobile court the initiator of the proceeding and the decision maker is the same person i.e., the executive magistrate. This circumstance may result in a reasonable apprehension in the mind of the accused that s/he will not get a fair and impartial trial from the court concerned.

Furthermore, the executive magistrates are part of the Government. Offences are considered as the violation of rights *in rem* in which the Government is necessarily an interested party. So the person aggrieved (Government) is judging its own case (by an executive magistrate) in violation of the rule against bias. Against this criticism the Government may put forward the defence of a statute as has been suggested by Craig as one of the exceptions of bias.⁸⁹ Though the preamble of the Act suggests that it was a raft measure against disrupted law and order situation, after two years of promulgation the plea of 'imperative situation requiring immediate action' to ignore *nemo judex* rule will not be well acclaimed.

The appearance of impartiality is important for public acceptance of judicial decision. Whether any particular judge harbours bias is immaterial, the system must be structured in such a way as to avoid reasonable suspicion of bias.⁹⁰ Therefore, to

⁸⁵ *Sohali Thakur and others v State* (1999) 19 BLD (HC) 103.

⁸⁶ Akkas (n 39) 167.

⁸⁷ Peter Leyland & Gordon Anthony, *Textbook on Administrative Law* (5th edn, Oxford: Oxford University Press 2005) 390.

⁸⁸ Article 35(3).

⁸⁹ PP Craig, *Administrative Law* (5th edn, London: Sweet & Maxwell Limited 2003) 464. Craig suggests three exceptions of bias: (i) Statute: In imperative situation requiring immediate action the Parliament can enact a statute ignoring the rule against bias. (ii) Necessity: In a compelling situation when the person whose impartiality is in question is the only person to proceed, rule against bias may be relaxed. (iii) Waiver: An individual can deliberately waive his/her right to challenge the decision on the ground of bias.

⁹⁰ *R v Lippé* [1991] 2 SCR 114 available at <<http://www.canlii.org/en/ca/scc/doc/1990/1990canlii18/1990canlii18.html>> last accessed 4 September 2011.

uphold the constitutional urgency of judicial impartiality the executive magistrate of the mobile court needs to be replaced by a judicial magistrate.

5. Concern over plea bargaining

Admission of guilt is a statement by an accused acknowledging the commission of any offence.⁹¹ In many jurisdiction it is known as plea bargaining. When the accused pleads guilty, the prosecution needs not to go through the investigation or examination of witness, the judge may pass conviction mere considering this plea.⁹² Plea bargaining helps in resolving cases early in proceedings before much of the costs involved in investigating, prosecuting and going to trial have been incurred.⁹³ It saves time and resources and thereby increases the efficiency of the criminal justice system. Possibly this is the justified reason for introducing plea bargaining in trial by mobile court. Though plea bargaining may be an effective way out of time and resource constraint, unrestricted plea bargaining is criticised for the following reasons:⁹⁴

Firstly, even if plea bargaining gains efficiency, it comes at a more profound cost by undermining the integrity of the criminal justice process itself.

Secondly, plea bargaining is coercive. If the penalty for going to trial is too high, if it is simply too risky to claim innocence, then defendants may be coerced into pleading guilty.

Thirdly, unrestricted plea bargaining encourages the innocent to plead guilty, not because they believe the trial process to be unfair, but simply because it becomes rational to do so when faced with an outlandish plea/trial differential.

Fourthly, plea bargaining undermines consistency of outcomes. If plea/trial differentials are too high then similar defendants charged with identical crimes may receive vastly different sentences depending on the weight of the evidence against them. This undermines both public confidence and very basic notions of justice.

Therefore, it is suggested that if a decision is to be reached pursuant to a plea bargaining, the defendant should be required to plead to a charge which is the most

⁹¹ <<http://legal-dictionary.thefreedictionary.com/admission+of+guilt>> accessed 27 August 2011.

⁹² *State v Satyapada Biswas* (1962) 14 DLR 121.

⁹³ Nick Vamos, 'Please Don't Call it "Plea Bargaining"' (2009) 9 Criminal Law Review 617-630.

⁹⁴ Ibid.

serious readily provable charge, substantiated factually and consistent with the nature and extent of his/her criminal conduct.⁹⁵

The plea of guilt does not amount in law that the accused has committed the offence. Court's duty is to see whether the facts brought on record amounts to an offence in law.⁹⁶ The Magistrate has the discretion to accept or not to accept the plea of guilt. The accused cannot be convicted on his admission unless the facts admitted amount to an offence.⁹⁷ In addition utmost importance shall be given to ensure voluntariness of plea bargaining.

6. Separation of judiciary and cognisance by executive magistrate

Long desired separation of the judiciary as envisaged in article 22 of the Constitution⁹⁸ paved its way through the Supreme Court's decision in the case of *Secretary, Ministry of Finance v Masder Hossain*.⁹⁹ Following the direction of the Supreme Court in *Masder Hossain* case the President promulgated four Rules¹⁰⁰ under article 115 of the Constitution in order to ensure separation of judicial magistracy from the executive. Magistracy has been categorised as executive¹⁰¹ and judicial¹⁰² and since 1 November 2007, judicial powers of executive magistrates have ceased to exist and all criminal cases which were tried by executive magistrates earlier are now tried by judicial magistrates.

Hence, to authorize the executive magistrates by section 5 of the Act to take cognisance of the scheduled offences and to try those offences summarily is

⁹⁵ <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/index.html> accessed 7 September 2009.

⁹⁶ *Serajul Haque v State* (1970) 22 DLR 124.

⁹⁷ *Kalu Bepari v State* (1958) 10 DLR 346.

⁹⁸ The Constitution of Bangladesh, Article 22: 'The State shall ensure the separation of the judiciary from the executive organs of the State'.

⁹⁹ (2000) 52 DLR (AD) 82.

¹⁰⁰ The Rules are namely, the Bangladesh Judicial Service Commission Rules, 2007 (S.R.O. No-7); the Bangladesh Judicial Service (Pay Commission) Rules, 2007 (S.R.O. No-8); the Bangladesh Judicial Service (Constitution, Recruitment, Suspension, Dismissal and Removal) Rules, 2007 (S.R.O. No-9); the Bangladesh Judicial Service (Posting, Promotion, Leave, Control, Discipline and other Service Conditions) Rules, 2007 (S.R.O. No-10).

¹⁰¹ See n 71, s 10.

¹⁰² See n 71, s 11.

inconsistent with the idea of separation of magistracy.¹⁰³ However, this apparent inconsistent authorisation may be defended by section 11(3) of the CrPC which permits the Government to require any executive magistrate to perform the functions of a judicial magistrate.¹⁰⁴ In view of this authority the government may empower any executive magistrate to preside over the mobile court. Nonetheless, because of article 7,¹⁰⁵ the Parliament cannot make any law having the effect to infringe the separation of judiciary as envisaged in article 22 of the Constitution. Therefore, the existence of section 5 of the Act to empower executive magistrate to exercise judicial power appears to be unconstitutional. In such backdrop, it is imperative to amend the Act to ensure that instead of executive magistrates mobile courts are presided over by judicial magistrates.

7. Conclusion

Criticism has been made by terming the mobile court a kangaroo court or king's court which is the master of own will and subject to no legal norms. Such accusation may be deliberated or misconceived. Discussions made above reveal that the trial in mobile court is circumscribed by the rules of evidence and procedure and conforms most (if not all) of the rights of the accused guaranteed by the Constitution.

Long delay in criminal trial very often results in failure to prove the case; consequently a sense of impunity generates and public confidence on administration of justice becomes minimised. So if any pro-hartal activist commits any scheduled offence there is no wrong in his instant trial by the mobile court. The functioning of the mobile court should not be out-weighted merely for the reason that it moves to the place of occurrence or provides swift justice. The operation of the mobile court is a message to the street-fighters that no minimal wrong will go unpunished. Nevertheless, caution should be taken so that all procedural hurdles are complied with by the mobile court fairly.

¹⁰³ Rafiqul Islam, 'Cognizance Power of Executive Magistrates: Some issues' *The Daily Star* (Dhaka: 1 April 2011) <<http://www.thedailystar.net/law/2009/04/01/index.htm>> accessed 17 August 2011.

¹⁰⁴ The Code of Criminal Procedure, 1898, s 11(3): The Government may require any executive magistrate to perform the functions of a judicial magistrate for a period to be determined in consultation with the HCD and during such period, the magistrate shall not perform the functions of an executive magistrate.

¹⁰⁵ The Constitution of Bangladesh, article 7 provides that 'any law inconsistent with the Constitution shall to the extent of the inconsistency be void'.

The court would grind to a halt if every case commenced was to proceed to trial.¹⁰⁶ Therefore the summary trial in mobile court is in the pragmatic interests of the operation of criminal justice system. But the issue to be asked is whether the practice of settling in summary trial necessarily results in a fair outcome for the accused. This concern requires consideration of two notions, one is functional and the other is conceptual. Functionally, the operation of the mobile court is a real risk at least to three rights of the accused: the presumption of innocence, right to legal assistance and right to participate effectively in the criminal trial. Conceptually, it contradicts at least two dogmas: rule against bias and separation of judicial magistracy from the executive. These functional and conceptual discrepancies require amendment of the Mobile Court Act, 2009 to ensure that (i) cognisance power of the executive magistrate is cancelled, (ii) mobile court is presided over by a judicial magistrate and (iii) pre-trial legal advice is made available to the accused.

¹⁰⁶ WJ Morrison and A Gearey, *Common Law Reasoning and Institutions* (London: University of London press, 2007) 244.