

Privatized Courts: Dilemma of Efficiency vis-a-vis Justice*

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Introduction

“We will sell to no man; we will not deny or defer to any man either Justice or Right”
- Clause 39 of Magna Carta, 1215

If we are to notice the brand-new concept of Privatization of Courts as propagated by the British government recently, it seems somewhat difficult to relate the concept with the above-mentioned Clause 39 of the Magna Carta, 1215. A question comes as to what the “privatization of Courts” means. Although the concept is not so popular, it has now-a-days received new dimensions in the legal arena. According to The Times, the government of United Kingdom was considering privatization of the courts.¹ It was reported that the government would ‘establish the courts as a commercial enterprise, paying its way and freed from Treasury control, with court buildings and thousands of stuffs put in the hands of private companies.’ But the MOJ (Ministry of Justice) also explained that it will not be a wholesale privatization as only particular grounds will be privatized.

The concept of Privatization of Courts is also being considered in California besides Britain. The courts of California have observed a very miserable reality as a result of deep budget cuts. In California, over 50 courthouses have been shut down and over 250 courtrooms are now closed. As a result, justice system has become a chaos there! To cope up with the problems regarding the judicial proceedings around their surroundings, they are putting their utmost effort to accept the new system of privatization of courts.²

The Concept of Privatized Courts

Seen in this context, “Privatization of Court” means establishing the courts as a commercial enterprise, paying its way and freed from Treasury control, with court buildings and thousands of stuffs put in the hands of private companies.’ There remains some confusion with those lines.

* An abridged version of the Write up was published in SCLS BLOG earlier. This piece constitutes the more detailed and elaborated version of the core arguments and counter arguments presented therein.

¹ Sarah Vine, *Privatising the courts system: the public are not customers, they are citizens*, The Guardian (29 May, 2013), <https://www.theguardian.com/commentisfree/2013/may/29/privatising-courts-system-public-citizens>, last accessed on 18th April, 2018.

² Lisa Spiwak, *Moving toward privatizing our courts in California*, Pacific Coast Business Times (29 May, 2015), <https://www.pacbiztimes.com/2015/05/29/moving-toward-privatizing-our-courts-in-california>, last accessed on 18th April, 2018.

Firstly, according to the concept, the courts will be known as a commercial enterprise. People will pay fees and will get remedies from a private court. But, this system has a negative impact. From the very beginning, people have treated Court as a place, where, they think, money-power-race is irrelevant, as a whole, where, every person is equal. It's a very old perception and the basis of justice system. But, when, the concept of "pay and get" justice comes into play, their very ancient belief will definitely stumble. Because, people will fail to treat the Court as an institution of providing justice, they will consider it merely as a grocery shop or super shop, where justice could be brought.

Secondly, the funding of those courts will come from private institutions. It will save a lot of money of the government, no doubt about it. Because, when the private organizations take the financial burden of the courts, the government will definitely be able to save a big portion of money. And, it is also expected that, if courts are privatized, the infrastructure of the court buildings will also get some improvements. It may be true. But, if the courts become unsuccessful to provide proper justice to the people, the enormous infrastructure improvement of the court buildings will be totally useless. And, as a result of privatization, there is a possibility of the failure of providing justice properly. The reason behind this is pretty simple. The possibility of high fee-paying litigants demanding preferential treatment cannot be ignored at all.

Money is not the only Answer, but it makes a Difference"

As, the former president of United States of America, Barack Obama, once said- "Money is not the only answer, but it makes a difference." When, money is getting all over attention in this Privatized Court system, we can't ignore the direct or indirect impact of money. There is a no way to deny those at all.

First, there comes the question of Independence of judiciary. When a court starts to work under the private contributors, the independence of courts will definitely be interrupted. The courts need to be independent from all manners, from all point of view, for the sake of good judgment, good justice system. But, if the courts turn into a commercial enterprise under the private organizations, the independence of judiciary how long will be sustained... this is a big, alarming question.

Second, in Privatized courts, the staffs will be selected by the private organizations & the staffs will work under their order. This is also problematic. If we look at the court system, the staffs have always played a very important and crucial role in the court premises. Without their proper cooperation, it is difficult for the common people to get proper justice there. But, when the staffs start to work under the authority of private companies, the concept of Impartiality may be hampered terribly. It is said by the Barrister Sarah Vine in "The Guardian" on 28th May:

'[E]ven a fool could grasp the imperative to protect their impartiality pay people less, erode their job security, and ask them to serve two masters, and you cannot be surprised if they choose the one holding the purse-strings.'

In spite of this partiality problem, there is also a possibility of selection of unskilled staffs by the private companies who can ruin the basic flow of judicial process due to their lack of proper skills. So, if this is the real scenario, then, we should fear, we should think about the future of Neutrality” of judicial system again, before taking any advance steps. Because, it is always said- Think, before you leap.

Now look at this matter from another dimension. If we privatized our court system, the courts will turn into a business enterprise, it may be true. But, think about another circumstance. As the courts will turn into business companies, their existence will depend on their defendants and plaintiffs, if their customers are satisfied by their services, their existence will be guaranteed. And how they will please their customers? Surely, it is by providing justice. So, here, by this privatized courts system, a healthy competition of providing justice to the clients can also be flourished between the private courts, so that they can attract more customers to their courts easily. Though it will be for their business purposes, at the end, it will help to uphold the justice system properly, to be very frank. And, if any of such courts wants to do some injustice, the risk is upon them to deal!³

Implications for Bangladesh

Now, look at the country of Bangladesh, what will happen, if we introduce the system of privatized courts here. If we look at the judiciary of Bangladesh, according to the case records, it is found that, unsettled cases in the country increased by 75 percent between 2008 and 2015.⁴ The number of pending cases in all courts stood at 3,156,878 (31 December 2016). This huge backlog has been created as the new cases outnumber the ones settled by the court system.⁵

A recent UNDP forecast said the case logjam may reach 5 million by 2020.⁶ The judges in the lower courts are suffering from lack of manpower and infrastructural facilities. In this particular ground, “privatized courts” will definitely play a significant role. Because, the money will be provided by the private companies, as a result, the infrastructural facilities will be improved; manpower will be adequate as they will be paid by the private companies also. Court system will be fluent and speedy. But, it contravenes the Supreme law of Bangladesh, the constitution. According to Article 27 of the constitution of the People’s Republic of Bangladesh- All citizens are equal before law and are entitled to equal protection of law.⁷

³Daniel Popeo, *Privatizing the Judiciary*, Foundation for Economic Education,(1 August, 1988), <https://fee.org/articles/privatizing-the-judiciary>, last accessed on 18th April, 2018.

⁴Ashutosh Sarkar, *Cases piling up in courts of Bangladesh*, The Daily Star (29 August, 2015), <https://www.thedailystar.net/backpage/cases-piling-courts-134359>, last accessed on 20th April, 2018.

⁵Mizanur Rahman Khan, *5m pending cases by 2020*, The Prothom Alo (17 January, 2017), <http://en.prothomalo.com/bangladesh/news/136201/5m-pending-cases-by-2020>, last accessed on 23rd April, 2018.

⁶Justice for all, <http://www.bd.undp.org/content/bangladesh/en/home/ourwork/democraticgovernance/successstories/justice-for-all.html>, last accessed on 23rd April, 2018.

⁷Article 27, Constitution of the People’s Republic of Bangladesh.

And, it is quite natural that- when I am paying more for the court and I am appointing most of the staffs of the court... I will definitely feel some extra alleviation in the court. And, the possibility of high fee-paying litigants demanding preferential treatment, which we discussed earlier, is also a factor here. So, the constitutional line of “Everyone is equal in the eye of law” -will definitely suffocate in the long run.

It is also believed that a huge logjam of cases will disappear, if the present courts turn into privatized courts. This conception is repugnant in the sense- the main reason behind those logjams of cases are not the infrastructural inadequacy or lack of staffs in the court premises, rather the mentality of the people related to the justice system. The mentality of holding the cases for a long time as a result to suck more and more money from the clients, bad tradition of negligence in all sectors of judiciary... are the main culprits behind it. So, it is quite clear that, privatization of courts will do no good to remove huge number of unsolved cases, if the bad tradition of negligence and typical mentality of these people are not overthrown properly.

Call for a Careful Balance

It is harsh reality that infrastructural reformation of the court buildings is a crying need. And, for the sake of it, we need a lot of money. And sometimes, it’s also difficult for the government to provide strong financial support. In this ground, we can adopt a portion of the concept of privatization of courts. If money is provided by the private organizations, the financial liability of the state will definitely be lessened. But, ultimately, the “main switch” of judiciary, must be operated by the government and it should not be handed over at all. If any sector of our judicial system works under private funding, the govt. will have to monitor the whole process there, more intensively, more carefully, more cunningly. There should be the tradition of “accountability.” If strict monitoring and the tradition of “accountability” is maintained properly, it can be hoped that, privatization of courts will definitely put some good contributions in the field of judiciary. At the same time, it should also be injected in the mind of the common people that- “Privatization of courts means helping the people, not depriving them. If the people gets assurance that, the concept of Article 27 will never be hampered here and everyone will be treated equally and reasonably before the judges, no matter they are working under public courts or private courts... then, it is very wise to think that, the concept can be adopted, at least for a time being, to know, how it works.

And, we will have to accept the harsh reality also. When the judiciary system is not functioning properly, when it is facing a lot of problems regarding infrastructural facilities, regarding legal negligence, regarding a ton of pending cases, at this very moment, it is not unwise to consider the concept as like Britain and as like California. If the main principle of judicial proceedings which is Providing justice remains unaffected, then there is no bar to welcome this “unknown concept” in our much-known legal premises.