

LAW reform



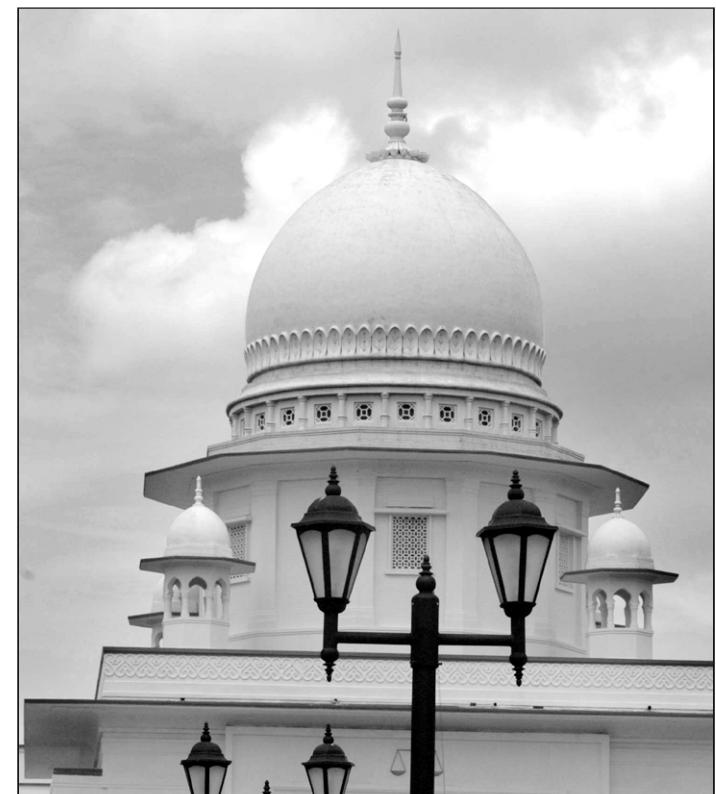
CHALLENGES FOR LEGAL REFORMS IN BANGLADESH

Ensuring the compliance of the World Trade Organisation

MOHAMMAD MONIRUL AZAM

BANGLADESH declared its readiness to become a member of the World Trade Organisation (WTO) from the very beginning of the founding or transformation of this organisation from earlier GATT to present WTO on January 1, 1995 after the successful completion of the Uruguay Round and thereby establishment of the WTO. It is widely anticipated that the entry into the WTO will speed up the economic development while providing foreign investors free access to domestic markets and for more favourable environment for our export-oriented industries. However the accession to the WTO raises some potential legal challenges and to take the full advantage of the world trading system, implementation of the WTO agreements is a must. It's a complete package, either one have to accept the whole or reject the whole, there is no provision for the partial implementation.

Therefore, present legal system of Bangladesh will have to be reorganized at every level to satisfy the requirements of the WTO. To meet this purpose, legal, administrative, and judicial resources must be put into place to act as efficient and integrated whole for the effective implementation of the WTO agreements and to minimize the conflicts with other WTO members. This short article will outline some of the major challenges for the legal reforms in Bangladesh in line with the obligations of the WTO agreements.



Promulgating and repealing laws or regulations

Bangladesh redoubled its efforts to reshape its legal environment in line with WTO obligations just after the accession to the WTO. It is also noting that a permanent Law Commission was established just one year after the accession to the WTO by an Act of parliament in 1996. And the Government has adjusted and is continuing to adjust its laws, regulations, and rules governing such areas as international trade, foreign investment, intellectual property protection and customs inspection, as well as arbitration and dispute resolutions as per the directions of the law commission. Although there is no specific direction to meet the WTO compliance while drafting laws, over the years it is observed that most of the times the law commission has given this prime concern while drafting any law.

In many areas regulated by WTO rules, such as service, information technology, competition policy and market monopoly, there are present no applicable provisions within the legal system of Bangladesh. In line with WTO commitment to open its markets to various services and remove price controls, great changes in laws and regulations is a must.

Bangladesh have to make either new legislation or replace the century old legislation in a number of areas. Mainly legislation related financial services, sale of goods, carriage of goods, travel agencies, environmental services, architectural services, medical services, education, engineering, transportation, cargo-handling, customs-clearance services for maritime transport, maritime agency services, aircraft repair and maintenance services, air transport computer reservation services, freight transportation and forwarding by rail and by road, and storage and warehousing etc.

Modifying existing laws and regulations not in conformity with WTO

Bangladesh may need to abolish laws, rules, and regulations that are unsuitable for modification or contrary to WTO compliance and replace them, where necessary, with new legislation.

To date, it has repealed legislation regarding copyright repealing earlier laws, enacted new law in 2000 and also introduced changes in the patent and trademarks legislation.

Although Government either amended or repealed a number of laws, till date there is no systematic study so far, within the knowledge of this writer to examine the legal system of Bangladesh in line with WTO obligations. Someone may think it is not necessary, but to take the benefits under the WTO agreements and to pose the threat and detrimental effects (if any), against the national interest in the WTO agreements, a systematic study is a must to pave the possible avenues to serve the national interest.

For example The State Council of China after its accession to the WTO has examined all the administrative regulations passed prior to 2001, and has already abolished 221 regulations. China within a very short span of time (officially became a member of the WTO on December 11, 2001) has modified laws, regulations, and rules governing areas such as foreign investment, customs, intellectual-property protection, foreign trade, foreign exchange, and insurance etc. In the field of foreign trade alone, China has finished the revised drafts of 148 laws. Moreover, China either abolished or amended around 571 laws after accession to the WTO due to conflicting with WTO rules.

Preparing administrative and judicial institutions

In addition to the necessary statutory changes, all the WTO members have to ensure that all laws, regulations, and rules are applied and administered in a uniform and impartial manner. To meet this purpose, programs for the training and education of government employees, stakeholders and judges to understand the WTO system is a must.

To ensure WTO compliance, numerous changes in customs procedures and inspections dispute resolutions and governmental screening



systems are also necessary.

In addition, the government has to concentrate on shortening the customs process, use of Electronic Data Interchange (EDI) and to modernize the customs administration etc.

Recently established ICC Arbitration centre in Bangladesh and newly enacted Arbitration Act 2001 replacing the earlier law of 1940 is a very positive step forward. In addition to this, the government may create a body to handle WTO complaints from foreign-funded enterprises. Finally, to protect the national interests, the government has to take special care by providing legal and technical assistance, arranging constant training and capacity building programs and promoting research activities relating WTO rules.

Concluding remarks

The legal environment in Bangladesh, with the aid of presently established Anti-Corruption Commission and if constitutional commitment is fulfilled by the separation of the judiciary from the executive as per the direction of the Supreme Court and along with the establishment of the office of the Ombudsman and Human Rights Commission in the coming days, may step forward towards ensuring transparent and sustainable legal system and good governance in the country.

These efforts, combined with the political commitment and the expectation of more changes to come in the near future to meet the WTO compliance and protection of the national interest as well, will make Bangladesh more thriving and prosperous. However, it may take a longer time for Bangladesh to play an efficacious role under the rules of a market-oriented economy. But within a favourable and smooth legal system, after fulfilling the WTO compliance and framing strategies for protecting national interest as well, within 10 to 15 years it may transform into a mature and stable market-oriented economy and would be able to take maximum benefits.

The author is a Lecturer, Department of Law, University of Chittagong.

FACT file



Woman sentenced to be buried and stoned to death

Hajreh Esmailvand's death sentence was upheld by the Supreme Court last month. Her unnamed co-defendant is at risk of imminent execution by hanging.

News reports, in addition to women's rights websites in Iran, suggest that the judiciary has confirmed that Hajreh Esmailvand is in detention, and that her execution has not been carried out. The judiciary is reportedly considering the method of execution and this means it will reconsider the sentence itself in accordance with Iran's international obligations.

According to reports, Hajreh Esmailvand was sentenced to five years' imprisonment, to be followed by execution by stoning, for adultery with an unnamed man who at the time was a 17-year-old minor. Although the exact date of her arrest and trial are not known, it is reported that she has been imprisoned in the town of Jolfa, in the north west of Iran, since January 2000.

The Iranian Penal Code is very specific about the manner of execution and types of stones which should be used. Article 102 states that men will be buried up to their waists and women up to their breasts for the purpose of execution by stoning. Article 104 states, with reference to the penalty for adultery, that the stones used should "not be large enough to kill the person by one or two strikes, nor should they be so small that they could not be defined as stones."

All death sentences in Iran must be upheld by the Supreme Court before they can be carried out. In November 2004, the Supreme Court upheld the death sentence against Hajreh Esmailvand but changed the lower court's verdict from 'death by hanging' to 'death by stoning'.

Reports suggest that the Supreme Court ordered that the remainder of Hajreh's five year prison sentence be annulled so that the stoning sentence could be carried out before 21 December.

The news follows reports of a 19-year-old girl, "Leyla M", who has a mental age of eight, reportedly facing imminent execution for "morality-related" offences in Iran after being forced into prostitution by her mother as a child. According to a Tehran newspaper report of 28 November, she was sentenced to death by a court in the central Iranian city of Arak and the sentence has now been passed to the Supreme Court for confirmation.

Leyla M was reportedly sentenced to death on charges of "acts contrary to chastity" by controlling a brothel, having intercourse with blood relatives and giving birth to an illegitimate child. She is to be flogged before she is executed. She had apparently "confessed" to the charges.

Leyla was forced into prostitution by her mother when she was eight years old, according to the 28 November report, and was raped repeatedly thereafter. She gave birth to her first child when she was nine, and was sentenced to 100 lashes for prostitution at around the same time. At the age of 12, her family sold her to an Afghan man to become his "temporary wife". Her mother became her new pimp, "selling her body without her consent". At the age of 14 she became pregnant again, and received a further 100 lashes, after which she was moved to a maternity ward to give birth to twins. After this "temporary marriage", her family sold her again, to a 55-year-old man, married with two children, who had Leyla's customers come to his house.

One in three women around the world suffer serious violence in their lifetime, at home, in the community or in war, just because they are women.

Reference: Amnesty International UK.



LAW update



INTERNATIONAL CRIMINAL COURT

Shield for victims and witnesses....

SULTANA RAZIA

In the struggle towards International justice participation of the victims in the criminal proceedings is a very innovative approach and it breaks the age-old tradition of judicial process. It makes the justice more accessible and at the same time victims have a control over the whole process and undoubtedly participation of the victims strengthens the cases.

Rome Statute deals with delicacy regarding victims and witnesses protection as the previous experience of International Criminal Tribunals for Rwanda ("ICTR") and the former Yugoslavia ("ICTY") showed that victims faced lack of security and challenges including physical and psychological and witnesses were refused to take part on the court's proceedings for the fear of reprisals.

Rome Statute can be treated as the most effective mechanism that acknowledges the right of the victims and treated victims not only a witness of the crimes within the jurisdiction but also as a person who has a valid interest in the outcome.

Who are the victims?

Victims before the ICC may be individual persons or organisations or institutions, and the harm that a victim suffers may take different forms. It can be

= physical harm to a person's body or
= psychological harm, by which a person's mind is affected because of what she or he has had to do or see; or
= material harm, by which goods or property has been damaged or lost as the result of crime.

A person can also be a victim though s/he has not suffered directly. S/he can be a member of a victim's family who has been killed or suffered harm as a result of crime.

Victims will be able to participate stages of the Court's proceedings determined to be appropriate by the court and in a manner, which is not prejudicial or inconsistent with either the rights of the accused on a fair and impartial trial.

A legal representative may also present the views and concerns of the victim at stages where the court considers it appropriate. The ICC may provide financial assistance to assist victims in securing legal representation if necessary.

Victims and Witnesses Unit

The Victims Participation and Reparation Unit (VPRU) and the Victims and Witness Unit (VWU) of the court deal primarily with victims' rights where a person will be considered to be a victim by the court when her or his personal interests have



been affected because of the commission of a crime falling within the jurisdiction of the ICC.

The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence. This unit also informs victims about court appearances and the limits of confidentiality.

Functions of the Unit

The Victims and Witnesses Unit shall, inter alia, perform the following functions, in accordance with the Statute and the Rules, and in consultation with the Chamber, the Prosecutor and the defence, as appropriate

(a) With respect to all witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, in accordance with their particular needs and circumstances:

(i) Providing them with adequate protective and security measures
(ii) Recommending to the organs of the Court the adoption of protection measures and also advising relevant States of such measures;

(iii) Assisting them in obtaining medical, psychological and other appropriate assistance;

(iv) Making available to the Court and the parties training in issues of trauma, sexual violence, security and confidentiality;

(v) Recommending, in consultation with the Office of the Prosecutor, the elaboration of a code of conduct, emphasising the vital nature of security and confidentiality for investigators of the Court;

(vi) Co-operating with States, where necessary, in providing any of the measures stipulated in this rule;

(b) With respect to witnesses:

(i) Advising them where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony;
(ii) Assisting them when they are called to testify before the Court;

(iii) Taking gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the

proceedings.

Article 68 of the Rome Statute is the main article laying out the procedural provisions relating to victims and witnesses. Along with that article some other provisions found elsewhere in the Statute require or allow the organs of the Court to take appropriate measures to protect victims and witnesses.

These measures may include:

- = In camera proceedings or any other means to present evidence by using electronic or other techniques;
- = Participation of victims at appropriate stages of the proceedings;
- = Withholding of evidence or information that would gravely endanger the security of a witness.

The Statute also includes a provision enabling the Court to award reparations to or for victims.

Under the Rome Statute and the ICC Rules, victims have the opportunity to participate in criminal proceedings at the Court in a number of ways.

= The participation and Reparation Unit's work will specifically encompass responsibilities concerning outreach, the processing of applications for participation, legal representatives, and NGOs in relation to victim participants, all of which involve significant protection issues.

Additionally, victims' legal representatives are entitled to attend and participate in hearings and, at the discretion of the Chamber, may question the accused, a witness, or an expert.

Victim participants and their legal representatives may consult the trial record and, where possible, be present for announcements of decisions on admissibility, jurisdiction, criminal responsibility, sentencing, and reparations.

Responsibilities of the Unit

For the efficient and effective performance of its work, the Victims and Witnesses Unit shall: ensure that the staff in the Unit maintain confidentiality at all times and recognising the specific interests of the Office of the Prosecutor, the defence and the witnesses, respect the interests of the witness, including, where necessary, by maintaining an appropriate separation of the services provided to the prosecution and defence witnesses, and act impartially when cooperating with all parties and in accordance with the rulings and decisions of the Chambers.

Reparation under ICC

A victim may also apply to receive reparations from the ICC. Reparation means that a victim may be entitled to receive compensation, rehabilitation and / or restitution for the harm

suffered as a result of the crime which was committed against her or him. Thus, while it is impossible to place a price on how much victim has suffered, the ICC may give victim money to compensate for what the victim has lost as a result of a crime, and to compensate for her or his suffering. The ICC can order that the person convicted of a crime against victim pay the victim these reparations. A Trust Fund has also been established to gather funds that will be used to provide victims with reparations.

Restitution involves returning to a victim her or his property where it was illegally taken away, while rehabilitation is intended to allow the victim to continue his or her life as normally as possible. This can take the form of money to pay for legal, medical, psychological and other care, and can even include apologies from perpetrators of crimes to the victims.

In a nutshell ICC provides following provisions for the victims and witnesses:

- = Victims and witnesses of sexual violence may testify in closed hearings or through special means to protect their privacy.
- = They can also have a special helper (such as a psychologist or family member) present while giving testimony.
- = Victims of sexual violence will not be "put on trial" when they give testimony, and their privacy will be protected.
- = The confidentiality of victims and witnesses will be protected
- = The definition of "consent" in cases of sexual violence is strictly limited to protect victims.
- = Judges must prevent the harassment or intimidation of victims and witnesses during questioning, particularly in cases of sexual violence.

To strengthen the evocative participation of the victims and witnesses they must receive adequate protection and at the same time from the initial interaction their physical and emotional protection must be addressed carefully.

It may be started from the investigation stage through trial and post-trial. And for that the capacity of the court should be extended because without that victim's co-operation cannot be achieved and their active participation is not possible in the whole proceedings.

Being optimistic only then we can treat International Criminal Court as a shield to protect victims and witnesses to uphold human rights.

This is the shortened version of the paper which was presented in the "Advocacy workshop on the International Criminal Court", organised by Odhikar.

The author is a Law Desk Assistant of The Daily Star.