



LAW campaign

## Amending the wounds

IMTIAZ MOINUL ISLAM

THE Honorable Supreme Court recently passed a revolutionary judgment dismissing the appeal and upholding the High Court's decision in the 5th amendment case with some modifications. In the judgment, the honorable Judges seem to refrain from emphasizing on the aspect that we, the young generation, should be acquainted and educated with the true history of our national struggle. I embarked upon this enlightening journey and had myself introduced to historic judgments dating from the 16th century kings' reign in England up to modern day revolutionary deliberations and I urge my fellow young lawyers to go through the judgment for enrichment of knowledge. I have gathered this with my limited knowledge that the Honorable Supreme Court has declared the 5th and later in another judgment, the 7th amendment illegal but as the Constitution can only be amended by the Parliament hence soon the Parliament is going to amend the Constitution following the guidelines prescribed in the Honorable Supreme Court's judgment. It has been contemplated that illegally amending the Constitution by 5th and 7th amendments and declaring marshal laws should be termed as criminal offences against the state however Part VI of the Penal Code enumerating offences against the state is inadequate for the punishment of past usurpers and new laws need to be enacted and amalgamated with amendments of existing laws. New laws or amended laws will safeguard against any future catastrophe however Article 35 (1) of the Constitution acts as a bar to such initiatives being effective for past usurpers. A few things are challenging my legal rationality and I humbly wish to bring those to notice of my respected senior veteran lawyers for their kind perusal and further guidance.

As we know, every criminal offence is consisted of two elements; the *actus reus* (Latin for guilty act) and the *mens*



*rea* (Latin for guilty mind), the general wave of opinion envisages that the Supreme Court do not have the authority to strike out the 5th and 7th amendments by amending the Constitution itself and indeed it has not done so. The Supreme Court has merely declared that the said amendments were contrary to the Constitution and they should be void and the perpetrators should be punished. The practical position is now that the illegal amendments are continuing with full effect and it is only when the Parliament validly re-amends those amendments or strike them out exactly then the crimes committed by 5th and 7th amendments would stop and the *actus reus* of those result crimes would be completed. The Honorable Supreme Court have also condoned some of the Articles inserted by marshal law proclamations to avoid anomaly and prevent chaos by applying the doctrine of necessity however the Honorable Judges clearly stated in page 171 of the judgment, "a Court of law cannot extend benefit to the perpetrators of illegalities by declaring it legitimate". We have to succumb to the fact that even if some Articles

are useful and thus condoned but their insertion were by wrong methods hence should be deemed as crimes and the *actus reus* for which are still continuing and it will be so until the Parliament re-amends the said amendments following Article 142 of the Constitution never mind along the same wordings. The Supreme Court opined in this connection in the 5th amendment judgment in page 92, "Further, if the Constitution is wronged, it is a grave offence of unfathomable enormity committed against each and every citizen of the Republic. It is a continuing and recurring wrong committed against the republic itself."

In my humble belief, this provides the Parliament with a tremendous opportunity to punish the perpetrators if it so wishes and safely avoid attracting Article 35 of the Constitution. Article 35 provides: "No person shall be convicted to any offence except for violation of all law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from that which might have been inflicted under the law in force at the time of the commission of the

offence."

The Article incorporates the ideas of the "ex post facto laws" which makes that criminal which was not so at the time the act was performed and "the time of commission of the act" denoting the *actus reus* of an offence. Not all acts forming the basis of an *actus reus* are single, unconnected events. The law will treat the *actus reus* as having started with the initial act (said amendments) and ended with the Parliament striking them out i.e. the sequence of events is so inevitably linked that it can all be viewed as a single transaction.

So long as the requisite *mens rea* is formed before the sequence begins or during the sequence (and before it ends), the defendant will be liable. For example, in *Fagan v. MPC* (1969) 1 QB 439, a police officer ordered the defendant to park his car and he reluctantly complied. In doing so, he drove the car on to the policeman's foot and he refused to move it. The Court held that this could constitute a common assault. This *actus reus* was a continuing state of affairs for so long as the car rested on the officer's foot and the *mens rea* was formed before the car was removed. Similarly as long as the amendments are not being struck out they are like the car, an illegal burden on the nation's chest and on the Constitution; they constitute a continuous state of affairs for the *actus reus* of the offence of violating the Constitution which can be taken to be a single transaction until the said amendments will be re-amended.

If declaring marshal law/amending the Constitution without following Article 142 becomes unlawful and punishable offences then the every amendment made by 5th and 7th Amendments will become continuing unlawful acts forming the *actus reus* and when the Parliament will re-amend them/struck them out at that time the *actus reus* would be completed.

If the Parliament enacts precise statute(s) focusing only to punish such crimes and also make necessary amendments in the Penal Code and bring it into force before they re-

amend/strike out the said amendments then what will it have as valid instruments to try such offences as the *actus reus* would continue to be subsisting until the re-amendment/strike out.

The case of *Samuels v. McCurdy*, 267 US 188 established the principal that a law does not come with the definition of ex post facto law by providing punishment or penalty for the continued maintenance of certain conditions which, prior to enactment of the law, were lawful or there was no law making it an offence. Here continued effect of the illegal amendments is still subsisting and it will continue to be so until the exact re-amendments/strike outs will be made according to the Supreme Court's suggestions.

Before doing the amendments/strike outs, necessary laws might as well be passed if punishing the perpetrators is desired. With my limited knowledge, I feel that the Parliament should first pass/amend necessary laws and then shun out the said amendments and make necessary adjustments as directed by the Honorable Supreme Court. The reasoning behind this spawns from the doctrines of *id quod alias non est licitum, necessitas licitum facit* (that which otherwise is not lawful, necessity makes lawful), *salus populi suprema lex* (safety of the people is supreme law) and *salus publicae est suprema lex* (safety of the state is the supreme law) to exemplify that be you ever so high, the law is above you so that no more usurpers can assume the authority to play with the interest of the state and its people and that no crime, no matter how smartly committed, goes unpunished.

It is my earnest hope that my novice efforts bear some substance and appeal to the pioneer legal minds who are constantly working hard to deliver us the long cherished "Shonar Bangla" dreamt by the father of the nation but then mythologized for us new generation by some anarchist.

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HUMAN RIGHTS advocacy

## Revisiting our prison system

MOHAMMAD SHAHIDUL ISLAM

Retired prison official said recently that our criminal justice system seems to be dealing with two categories of people: those who live above the law and those who are absolutely crushed by it. His statement makes sense. If we view it rationally, prisoners are one of the weakest constituencies in our society. They have no voting rights, have very limited access to the outside world and are under the complete control of the prison authorities. They cannot speak with the press, write letters or speak with their families without the permission or censorship by the prison officials. The

without much expense.

For example; various courses could be offered leading up to University level education. We can also impart courses in vocational training including computer technology. We can provide professional training in carpentry and fabric painting and also initiate programs for women empowerment by training them in weaving, making toys, stitching and making embroidery items. Wage earning and gratuity schemes and incentives can be used to reduce the psychological burden on the convicts. Such practices will help in changing the traditional and colonial outlook our Prison system and also help the prisoners to become more responsible, creative and potential citizens.

need immediate attention. These are: overcrowding, delay in trial, neglect of health and hygiene, prison vices and management of open-air prisons.

That our jails are overcrowded is a well-known fact. For example, if there are over 25,000 inmates in prisons though the prisons can accommodate only for 11,000. Overcrowding contributes to a greater risk of disease, higher noise levels, surveillance difficulties, which increase the danger level. This apart, life is more difficult for inmates and works more onerous for staff when prisoners are in over capacity. It is, therefore, to be taken care of.

The release on bail of certain categories of remand prisoners, who constitute the bulk of prison population, will result in lessening the over capacity. Overcrowding may also be taken care of by taking recourse to alternatives to imprisonment. These being - fine, civil commitment and probation. There is yet another baneful effect of overcrowding. It does not permit segregation among convicts - those punished for serious offences and for minor. The result may be that hardened criminals spread their influence over others.

On the other hand, juvenile offenders kept in jails get mixed up with others and they are likely to get spoiled further. So, problem of overcrowding is required to be tackled in right earnest for a better future. It is apparent that delay in trial finds under-trial prisoners in jail for a longer period while awaiting the decision of the case.

The release of these prisoners on bail where the trial gets protracted would hopefully take care to a great extent the hardship caused in this regard. The mental agony, expense and strain which an under-trial prisoner has to undergo and which, coupled with undue delay, may result in impairing the capability or ability of the accused to defend himself. This problem has persuaded the many courts of the country in holding the right to speedy trial a manifestation of fair, just and reasonable procedure.

Speedy trial would encompass within its sweep all the stages including investigation, inquiry, trial, appeal, revision and retrial. A perusal of the historical data shows the pathetic position in which most of the jails are placed insofar as hygienic conditions are concerned. Most of them also lack proper facilities for treatment of prisoners. The society has an obligation towards prisoners' health for two reasons. First, the prisoners do not enjoy the access to medical expertise that free citizens have. Their imprisonment places limitations on such access; no physician of choice, no

second opinions and few if any specialists. Secondly, because of the conditions of their imprisonment, inmates are exposed to more health hazards than free citizens. Prisoners therefore, suffer from a double handicap.

Talking about vices, there are many types of vices prevalent inside our prisons. It is an open secret. In many of them, a mix of inmate ingenuity, complicit visitors and corrupt staff has kept the level of inmate drug abuse constant over the past decades despite concerted efforts to reduce it.

A recent boom in cell-phone smuggling has complicated matters; with inmates sometimes using phones to arrange drug deliveries and other major crimes.

There must be a more rational way to deal with prison vices rather than awarding hard punishment to them. In the situation in which they are placed, a sympathetic approach is also required. Open-air prisons play an important role in the scheme of reformation of a prisoner. They represent one of the most successful applications of the principle of individualization of penalties with a view to social readjustment. It has been said so because release of offenders on probation, home leave to prisoners, introduction of wage system, release on parole, educational, moral and vocational training of prisoners are some of the features of the open-air prison (camp) system.

In terms of finances, open institution is far less costly than a closed establishment and the scheme has further advantage that the Government is able to employ in work, for the benefit of the public at large, the jail population, which would have otherwise remained unproductive. The monetary returns are positive and once put into operation, the camps pay for itself. A fair prison system is a crying need of our time in the backdrop of great increase in the numbers of prisoners and that too of various types and from different strata of society. Efforts should be made to improve the system by introducing new techniques of management and by educating the prison staff with our constitutional obligations towards prisoners.

And, it is in this context we should appreciate if government takes some initiatives and the Prisons Department will be subjected to radical reforms with immediate effect. The Department does not meet the present-day requirements. It will be heartening to note that if the concerned Minister understands the gravity of the problem and takes steps to engage in interventions to ease the situation.

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majority of these voiceless people remain in prison pending trial or conviction. They continue to be held in overcrowded prisons for years while the occupancy in prisons have exceeded by over twice above its sanctioned capacity.

Often, they have no own lawyers, live in pathetic conditions, do not have access to adequate medical care and are likely to be tortured or exploited. The system fails the prisoners at every turn and the agencies blame each other for non-performance and unaccountability. Advancement globally, it is now an accepted fact that rehabilitation of inmates will be meaningful only if they are employed after release and for that purpose educational and vocational facilities should be introduced or upgraded. To accomplish this objective, few simple steps could be initiated

Rights Advocates of inmates' rights are of the opinion that inmates are always deprived of basic human rights. This is due to the inherent policies in the system, which still reflects the archaic penal philosophy. In countries whose penal philosophy is motivated by the rehabilitative philosophy, inmates are treated first as citizens with certain inalienable rights despite being in prison and not just as criminals who the society is without.

In some of those countries we find specialists like psychologists, social workers and medical doctors working as prison officers. The bottom line is that the role of the prison officers will change from being a guard or 'strict disciplinarian' to being a reformer and a change agent. The research on prison justice and prison reform shows that there are five major problems which afflict our system and which

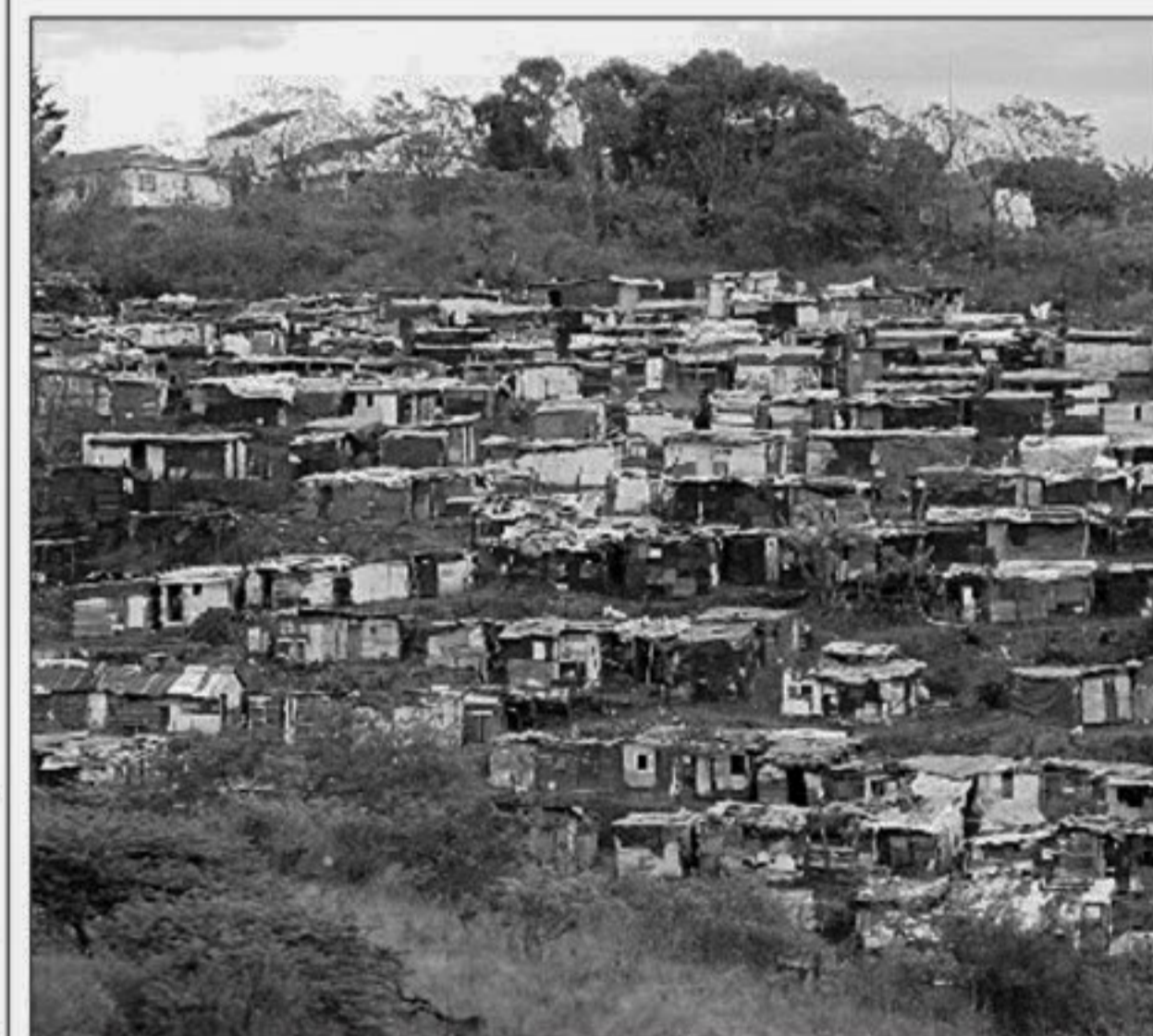
RIGHTS corner



## One billion slum dwellers cannot be ignored

GOVERNMENTS cannot celebrate the UN World Habitat Day on 4 October while ignoring one billion people living in slums, Amnesty International said on October 5, 2010.

"A couple of weeks ago in New York, governments promised to help 100 million living in slums. The problem is that more than a billion people live in slums. They don't have water, schools, sanitation, or health care," said Widney Brown, Senior Director of International Law and Policy at Amnesty



International. Mass forced evictions of people living in slums are being carried out around the world, with Roma communities evicted across Europe, slum dwellers in Delhi forcibly evicted to make way for the Commonwealth games and more than 200,000 people facing eviction in Port Harcourt, Nigeria.

The recent Millennium Development Goal (MDG) Summit failed to call on governments to stop forced evictions, despite evidence that such evictions drive people further into poverty and undermine all the MDGs. It instead asked governments to 'reduce slum populations', raising fears that this could encourage more forced evictions.

"From France to Zimbabwe to Cambodia, we have documented how governments are destroying homes of some of the poorest people in their countries. Those whose homes are destroyed are failed by the law, they get no compensation and no place to live," said Widney Brown.

"It is time for World leaders to move beyond the rhetoric we heard in New York and take urgent action to protect the rights of people living in slums."

Source: Amnesty International.

RIGHTS monitor



## Protracted conflicts boosting world refugee totals-UN

PROTRACTED conflicts around the globe are driving up refugee totals and creating new populations who need to be resettled in other countries, United Nations refugee chief Antonio Guterres said on Monday, October 4, 2010.

And in an address to his UNHCR agency's governing executive committee, he called on the international community to offer broader and better protection for the some 43 million people driven from their homes by local or cross-border warfare.

"We are witnessing the creation of a number of quasi-permanent, global refugee populations," said the former prime minister of Portugal, citing the experience of Afghanistan and Somalia as examples.

The year 2009, which saw a world total of 15 million refugees, was the worst ever in terms of the numbers who returned home voluntarily, mainly because conflicts were becoming more intractable and peace more difficult to achieve.

In addition, there are some 27 million people who have been forced to flee their homes but are still living inside their own countries, according to the refugee chief.

In U.N. terminology, refugees are those who have fled across borders because of fighting and natural disaster, like Afghans living in camps in Pakistan and Iran and Iraqis who have taken refuge in countries like Syria and Jordan.

Those who have not crossed international borders are termed internally displaced, or IDPs, and are in principle supposed to be the responsibility of their national governments.

Guterres said over half the refugees for which the UNHCR is responsible -- just over 10 million -- were caught up in protracted conflicts, and most of them were living in developing countries which could least afford to support them.

Some 5 million more refugees are Palestinians who fled their homes after the establishment of the state of Israel in 1948 and are living in camps across the Middle East under the protection of another U.N. agency, UNRWA.

"We need to increase international solidarity and burden sharing. A better understanding and recognition by the international community of the efforts of host countries is absolutely necessary," Guterres declared.

He said there was a huge gap between the demand for resettlement in other countries from refugees who had given up hopes of returning to their homes and the available places offered, mainly by richer countries.

"UNHCR estimates that as many as 800,000 refugees need resettlement, yet the number of places available annually is only 10 percent of that," said Guterres, whose 60-year-old agency is funded by voluntary contributions from U.N. members.

Source: UN Wire