LAW OPINION

War crimes trial and international standard

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THE standard of trials to be followed in the ongoing trials of international crimes against humanity/war crimes, launched pursuant the International War Crimes Act 1973, has become a catch cry for some quarters both nationally and internationally. Concerns expressed and calls made relate to the compliance with the so-called international standards on the pretext that the 1973 Act does not meet those standards. The issue of inconsistency of the trials with constitutional Articles 35, 47(3) and 47A banning the application of law in certain specified situations has been raised by arguing that the law enacted in 1973 cannot be applied retrospectively to try the crimes committed in 1971.Finally the appeal provision against the Tribunal's decisions is inadequate.

International standards: The issue has dual aspects: substantive law of the designated crimes and procedures to be followed in the trial. The crimes before the Tribunal are recognised crimes at international law. International criminal law has developed their legal contents and criminal elements as well as the responsibility and culpability of their perpetrators. The Tribunal would interpret and apply well developed international criminal law and judicial precedents to try these crimes and the alleged criminals. The Tribunal would discharge this task to the best of its ability and judgement. Despite the existence of some past and present ad hoc war crimes tribunals' decisions, a consistent body of international criminal law jurisprudence is yet to be emerged. This is due to the fact that these tribunals have been established sporadically on ad hoc and one-off basis to deal with a specific fact situation under limited mandate. The International Criminal Court (ICC) has been established as a permanent judicial body to develop a consistent pattern of international criminal law interpretation and precedents, which is yet to emerge. So which international standards in the interpretation of the substantive law of international law crimes are being pleaded?

Being human construct, the dissection of international criminal law pertaining to the designated crimes, more often than not, vary appreciably according to the nature of the crimes involved, experience of the judges, and ability and constraints of the justice system. The differing circumstances of the commission of the crimes and complexion of the tribunal, international, national, or mixed, can have a bearing on the perspective and exposition of the applicable law and precedents in a given trial. This precisely explains why we see varying exposition of the law pertaining to the crimes of genocide, to give an example of many, in the Bosnian War Crimes Tribunal, Rwandan War Crimes Tribunal, Special Court of Sierra Leone, and Special Dili District Court in East Timor, Internationalised Courts for Kosovo, and Extraordinary Chambers Court of Cambodia. The Bangladesh Tribunal is a national one and may not be as mature and capable as that of international ones. But this does not necessarily warrant presupposing that the Bangladesh Tribunal is incapable of rendering legally subsumable reasoned interpretation of the substantive law of the crimes under trial. Given so many resource-rich war crimes trials' judgements, it is a foregone conclusion that this available experience is set to provide pertinent lessons, understanding, and jurisprudence for the Tribunal in conducting trials.

In international criminal trials, there is no common but a minimum international standard to be followed procedurally in procuring and presenting evidence. Every war crimes trial is unique and different from the next. A procedural standard followed in one may or may not be worthy of adoption in another. Lessons from contemporary war crimes trials suggest that procedural aspects are usually tailored to suit the specific circumstances of a given trial and it is an evolving process. Commencing in 1993-94, the Bosnian and Rwandan Tribunals are still developing and improving their trial procedures. So is the situation with the ICC. Nothing prevents the Bangladesh Tribunal to follow these precedents to develop its own procedural standard as the need arises in the course of conducting the trials. Minimum procedural standards and due process are important means of ensuring fair trials. But these procedural standards should not be stretched too high to make it undeliverable. The procedural means of the trial, however rigidly and immutably stressed, cannot frustrate but promote the very end the peremptory obligation to end the impunity of perpetrators.

Constitutional consistency: The designated crimes under trials are recognised crimes at international law long before the enactment of the Bangladesh Constitution and the 1973 Act, which merely a catalyst to try those specified crimes committed in 1971, predating these two documents. The designated crimes and their prohibiting international law existed at the time of the commission of those crimes in 1971 and the Tribunal will merely apply such law. Even if it is conceded for the sake of arguments that the national law and constitution are relevant to this trial, they are relevant only to the extent of their consistency with international law and obligations. No one is entitled to plead the inconsistency of its national law as a defence to exonerate from the definite responsibility to try these designated international law crimes, which can come well within the purview of universal jurisdiction (Pinochet case 1999). This responsibility to try these crimes and punish their perpetrators is a recognised jus cogens (peremptory) norm of international law from which no derogation is permissible. If the Bangladesh national law/constitution come into conflict with this fundamental international obligation, international law prevails over national law, which warrants amendments to comply with the international obligation of Bangladesh.

Appeal: The 1973 Act (as amended) provides for appeals against conviction, sentence, and acquittal by the Tribunal before the Appellate Division (AD) of the Supreme Court within 60 days. It does not prescribe any conditions or criteria whatsoever for the admissibility of such appeals. This unlimited right exposes each and every decision, even the clearest ones, of the Tribunal to appeal. This is likely to undermine the prestige and authority of the Tribunal and expeditious trials pending the appeal outcome (s. 11 of the 1973 Act). This has the potential of creating an overload of apparently unapplable decisions for political expediency. Encountering the difficulties of appeals, particularly interlocutory, the Yugoslav War Crimes Tribunal has restricted the scope of appeals with strict legal conditions that substantially affect the outcome of the trial. The right to appeal under the 1973 Act is far more generous than that of various war crimes tribunals. There must be certain rigorous admissibility tests for recourse to appeals under the 1973 Act to prevent undue delay, irrelevant issues, expansive statements, and frivolous appeals to Tribunal's decisions.

A comparison between the Bangladesh Tribunal and other war crimes tribunals reveals that the former is, by and large, consistent with the latter in terms of salient features, notably composition, jurisdiction, and power of the tribunal; liability regime; prosecution, investigation, and trial proceedings; rules of evidence, rights of the accused; protection of victims and witnesses; and judgement, immunity, and indemnity. Concerns expressed on the so-called inadequacy of the Bangladesh law governing the trials appear to be unduly pre-emptive. Such trials are not one-off, but continuing with progressive development. The Bangladesh Tribunal may well have a shaky or tentative commencement due to some initial teething problems and resource constraints. But as it goes ahead, it will eventually be matured, experienced, resourceful, and gathering momentum to carry out its task. This is nothing unusual. Most, if not all, recent international crimes tribunals started with a cautious approach and built on. Even the ICC has started with many unfinished businesses, which are still being worked out. This is attributable to the past legacy of these crimes, the commission of which was seen a by-product of war that represented power and weapons to effect the contemptuous subordination of enemies. Their legal governance was marked by ambivalence at its best and silence at its worst. The emergence of powerful human rights movements to end the impunity of heinous international crimes within the corpus of norms and criminal prohibition is of recent origin. It is thus strategic for such trials to be gradually progressive and somewhat guarded.

The 1971 war crimes trials represent the humankind' quest to combat and prosecute certain designated international crimes as a collective resolve to ensure dignified human coexistence. Prosecution, conviction, and punishment of their perpetrators are on the increase both internationally and nationally. The international community and the UN have been supportive of ending the impunity and immunity of perpetrators by bringing them to justice. Bangladesh must do its part and go ahead with the trial. The process must be guarded against its sceptics, detractors, and deniers who cynically and deliberately use their voluble and stratagems criticisms to protect the rights of the perpetrators at the expense of long overdue justice to the victims of the gruesome crimes against humanity/war crimes of 1971.

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RIGHTS MONITOR

Gender friendly policy

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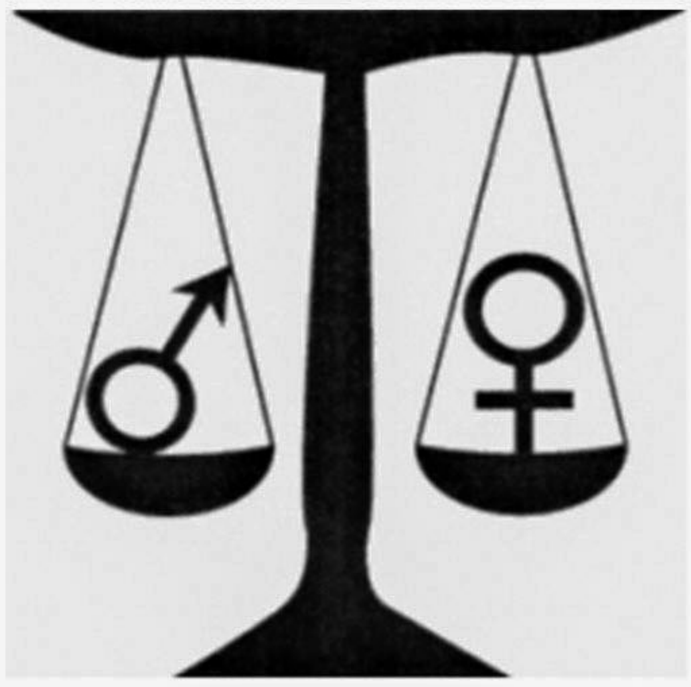

THE police have a vital role to play in maintaining internal law and order system and establishing the rule of law in the country. For controlling the law and order situation, tackling the ever-increasing sophisticated crimes, and punishing heinous crimes like murder, rape, mugging, hijacking, abduction, smuggling, acid-throwing, and violence on women and children, the need for the police force is indeed very important. However, despite having impressive achievements in various sectors, Bangladesh suffers from weak governance and a lack of government capacity to deliver basic services. The Poverty Reduction Strategy Paper 2008 acknowledges that the vulnerable, particularly women and children struggle to get justice from the police and the formal and informal justice system as well. Yet, society as a whole has a negative conception about the police. In case of Indian Sub-Continent, this unfavourable impression dates back to 1813 with the birth of the police force in British India. The police system that was established during this period was governed more by the considerations of maintaining control and dictatorial rule rather than providing sensitive and people-friendly policing to people.

Recently few important and appraisable steps are taken by the government of Bangladesh and by the joint collaboration of government and Non-government intervention for increasing responsiveness of police force to maintaining violence against women in Bangladesh. Refurbishment of Model Thana, introducing community policing and victim support centre, set up one stop crisis centre and recent progress in policy reform are good examples. But these initiatives do not work properly because of our institutional problems. For example: the idea of Model Thana introduced by Bangladesh Police is an excellent attempt but in practice, though the infrastructural facilities of Model Thanas are increased, in most of the cases these are not women friendly and are not maintained properly for lack of manpower and budget shortage. Further, it is an additional task for the existing service delivery officers to provide these new services because no person is recruited against the new task. As a result, the standards of service delivery in Model Thanas are not increasing proportionately.

The investigation department of the police has lack of efficiency, adequate machinery and educated human resources. The Investigation Officer (IO) is engaged to investigate a case along with other responsibilities of maintaining law and order system and giving protocol to the VIP personnel, as such, they can not perform their investigation task properly. The ''Ten years experience of Monitoring State Intervention to Combat Violence against Women'', October 1998-November 2008' report of Naripokkho reveals that in Model Thanas the Women Investigation Cells existing only by name but have no functions in the true sense. The report further explores that the Investigation Officer are not enough gender sensitive. In the service, 80% of policewomen themselves do not think that Bangladesh police is women-friendly while some believe that it depends on the status of women who come to police stations. It may well be stated that some do practice women-friendly policing, but this should be institutionalized rather than left to individual discretion.

Gender bias among police personnel is reflected in their services to women when women come in contact with the police as complainants, counter complainants, respondents, suspects/accused, informers, or visitors and their rights as such need to be safeguarded. Although the Domestic Violence (Prevention & Protection) Act, 2010 has come into force from December 30, 2010 but due to lack of gender responsive training and insufficient knowledge about their responsibilities prescribed by the law, police personnel still do not know how to work with such victims. Partly, due to societal attitudes about domestic violence and partly related to budget constraints, police officers often treat domestic violence cases as "unimportant," and not worthy of police attention, and think that they would be best resolved within the family. Police inefficiency and apathy also contribute to women's inability to prosecute their cases on their own. Women who bring their complaints against their family or relatives are often discouraged by the police from filling in a First Information Report (FIR) or even a General Diary (GD) and in this case, police may refuse to cooperate when asked to give testimony in court.

Till now violence against women in Bangladesh is on the increase and there is a wide gap between the number of actual incidents and the number of reported incidents to the police. In spite of this the reported incidences of violence against women pose to threaten the existing arrangement or initiatives by the state itself. Bangladesh has a number of laws conducive to the rights of women but the state is not completely able to uphold women's rights prescribed by these laws. Female offenders still suffer from mistreatment and abuse of authority by the police. Where the perpetrator of violence is an agent of a law enforcement agency, the police generally do not take necessary care to prepare the charge sheet, tend to treat the agent favourably, or try to appease the complainant by filing a GD instead of a FIR. In case of rape victims, the police and other law enforcement agencies take it for granted that women who are raped are either of bad character or prostitute. My question is, Is it ever lawful to rape any woman, even if she is a prostitute or a woman of the most ill reputation or the worst character? It may sound unbelievable. But this is the harsh reality that they look down upon the oppressed women and show no interest to take their cases unless compelled and pressurized from higher authority. Consequently, women do not want to go to the thana in fear of police harassment. As a whole, a woman when oppressed receives further oppression, repression and violation from the law enforcing agencies that are there to protect her.

The increased awareness of women's rights has brought forward the need for women-friendly policing to protect women against indecent police behaviour. Crime is increasing; the criminal justice system is getting cracked under heavy workload; society's expectations from the police are high but the police's status and resources are poor. A colonial mind set continues to prevail, often resulting in maltreatment of women and children. Routine inspection and supervision have decayed. Prisons are overcrowded, prisoners under trial are not treated separately from convicts, and women face great insecurity even in "safe custody," and a large number of children are in prison.

These situations need to be changed for upholding the right to get access to justice. By taking all of these challenges, police itself should be more gender responsive and more service oriented towards women who come to them for seeking help and assistance. An accountable, transparent, and efficient police service is very urgent which could ensure the safety and well being of the citizens and upgrading the law and order situation of the country. Police should be much more gender sensitive at the time of service delivering. Bangladesh Government also requires considering the fact to continue support to strengthen police.

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