LAW OPINION

ICTA 1973 and Its International Standards

PROFESSOR M RAFIQUL ISLAM

INTERNATIONAL Commission of Jurists in its "Enquiry into the Events in East Pakistan in 1971" studied the rampant commission of international crimes and their culpability in Bangladesh and recommended the formation of an international tribunal by the Bangladesh government to prosecute these crimes and punish their perpetrators (The Events in East Pakistan, 1971: A Legal Study, No. 8, June 1972, pp. 26-41). Bangladesh enacted International Crimes (Tribunal) Act 1973 (Act) and established a special Tribunal, which formulated its Rules of Procedures (Rules, Tri:/87/Bidhi/10) in 2010. The 1973 Act and Rules have been criticised by some for its alleged inadequacies, falling short of international standards. In a previous piece (Star, 19 February 2011, p. 22), I have shown that there is no common, but minimum, international standards, which vary appreciable from trial to trial. In successive pieces, I would compare the 1973 Act and Rules with the mandates and rules of procedure of major ongoing war crimes trials to challenge these criticisms, which are ill-conceived.

Special Tribunal and composition: The crimes designated in s3(2) of the 1973 Act are crimes at international law. There are qualitative differences in the legal definition and constituent elements of ordinary crimes, like murder, under national criminal law and extraordinary crimes, notably genocidal murder, in international criminal law. International crimes are organised, massive, and their trials involve a myriad of perpetrators including those behind the scenes, spreading over more than one jurisdiction, and raising complex issues of international law. Not every national criminal justice system is well equipped to handle the magnitude and dimensions of these trials. Nor is it possible to try these crimes solely under national penal law. The 1973 Act also requires expeditious trials and non-technical rules and procedure to avoid unreasonable delay and irrelevant issues (ss11:3, 13 &19). The competence and jurisdiction of national courts is often circumscribed by the technicalities of the applicable law, procedural rules, and extra-legal consideration - the usual causes of uncertainty and procrastination in many trials. The expeditious disposal of the Nationality of Golam Azam case in 1994-1995 in stark contrast with the Bangabandhu murder trial from 1996 to 2009 precisely illustrate this potential risk. Special tribunals with specific mandates are capable of rendering expeditious justice by addressing usual procedural complexities. The unavailability of typical admissible evidence, such as enough surviving witnesses and physical evidence, warrants the differential treatment of international crimes. Special tribunals also apply both national and international law in a mutually supportive way. It is these special factors that warrant the formation of special tribunals, which led to the formation of special tribunal/court in Nuremberg, Bosnia, Rwanda, Sierra Leon, East Timor, Kosovo, and Cambodia. The special Tribunal established under s6 of the 1973 Act to try the international crimes of 1971 is in order with the international practice.

Section 6 of the 1973 Act embodies rules relating to the composition of the Tribunal.

It deals with the selection of a chairperson, number of members/judges and their qualifications, the seat, procedures for filling up any vacancy during trials, absence of any member from any sitting, and freedom of witness calling and evidence taking (s6:1-6). The opinion of the majority shall prevail and should be treated as the expressed decision of the Tribunal with no dissenting opinion in public (s6:7). The prosecution, the accused persons, and their counsel cannot legally challenge the constitution of the Tribunal and the appointment of its chairman and members/judges (s6:8). The 2009 amendment to the 1973 Act provides for the independence of the Tribunal in exercising its judicial functions and ensuring fair trial (s2A). These provisions are similar to the composition of the tribunal, qualifications, appointment, and status of judges under the ICTY and ICTR Statutes (Arts 1013).

Jurisdiction and power: The legal contents of the crimes to be tried are described in s3(2) of the 1973 Act. The constituent elements of crimes against humanity, crimes against peace, genocide, war crimes, and violation of humanitarian laws are consistent with the definition of these crimes at international law. The Tribunal can try any other crimes at international law; and abatement or conspiracy to commit and complicity in the commission of any such crimes. The conventional and judicial exposition of these crimes is readily available in the Charters, Statutes, and Judgments of the Nuremberg Tribunal, Nuremberg Principles of the International Law Commission (ILC) 1947, Genocide Convention 1948 (Art 2), Geneva Conventions1949, International Crimes Tribunal for Yugoslavia (ICTY, Arts 2-5), International Crimes Tribunal for Rwanda (ICTR, Arts 2-5), Special Court of Serra Leone (SCSL), Extraordinary Chamber of the Cambodian Court (ECCC), and International Criminal Court (ICC, Arts 5-8).

The 1973 Act (s11) and Rules (chapter V) confer wide-ranging powers on the Tribunal to take cognizance of an offence, investigation reports, and evidence; summon witnesses; administer their oaths; warrant their presence; production of documentary and evidentiary materials; and testimony during the trial. The Tribunal may ask any accused person any explanatory question arising from the evidence against him/her at any stage of the trial and without any prior warning. In addition to conducting speedy trials, the Tribunal can punish any person obstructing or abusing its process, disobeying its orders or direction, prejudicing to a case, or contempting the Tribunal. It has the power to direct and issue arrest warrant, custody order, and continued detention in custody of any person charged with any of the designated crimes. The Chair of the Tribunal can make any administrative arrangements necessary for the performance of the assigned functions. These powers are similar to those available in the Statutes of ICTY (Arts 8-10, 20) and ICTR (Arts 7-9, 19).

To be continued...

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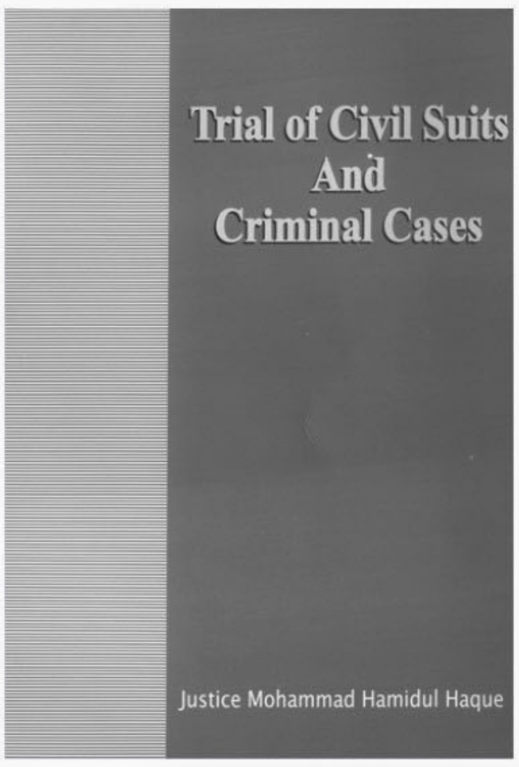
LAW BOOK REVIEW

Understanding civil and criminal trial

JUSTICE Hamidul Haque possesses a sublime judicial career all through his life. Presently Director General of Judicial Training Institute (JATI), Justice Haque served as a judicial officer in different tiers of the judiciary. Retired as a Judge of the Appellate Division, Justice Haque has affianced himself in equipping up the novice judges through intensive training at JATI since 2004. The book under introduction 'Trial of Civil Suits and Criminal Cases' is the product of his illustrious knowledge on substantive and procedural law. The book deserves appreciation from the very fact that it has come from the pen of a jurist who has command over law and language.



Trial of Civil Suits and Criminal Cases

Justice Mohammad Hamidul Haque

Published by the Author (December, 2010)
Available at: JATI

The author has underpinned the fundamental topics of trial of civil litigations and criminal cases in a systematic and simplified manner. Discussed from a Bangladesh perspective, the book contains fifty chapters in two parts within a remarkably precise volume. The author has explained the topics like principles of *res judicata*, institution of suits and execution of decrees under civil law with sufficient judicial precedents decided by the apex court of Bangladesh, which perhaps is the best strength of the book. With the introduction of this book, the readers are relieved from the monotonous civil and criminal law books encrypting a sentence wise case reference with no facts, issues, reasoning and nexus. Justice Haque has been a difference in this regard. A topic is elucidated with real facts of a case, the arguments of the parties and *ratio decidendi* of the decision quoting the author judge. The lucid and candid presentations on the topics like principle of criminal liability, institution of criminal case, framing of charges, admissibility of evidence, judgments etc are also full with reasoning, examples and arguments, which may be proved to be of immense help for a young judge.

Law students would cheer up such a meticulous publication as a strong response against the unrivalled dependence on authors of Indian civil and penal law. Merely substantive knowledge of law does not come to an aid to a young judge or a lawyer. Our students pass out without sufficient preparation on processual jurisprudence. Justice Haque's book may melt this snow and be an eye opener for the legal learners. Indeed, this would be a book for ready reference by the academicians as well. The book can be considered as a unique combination of substantive and procedural law on civil and criminal matters. It would be of essential value for the judges who would undergo the judicial training at JATI. 'Trial of Civil Suits and Criminal Cases' is a significant contribution to the corpus of our native jurisprudence.

- From Law Desk.

LAW ANALYSIS

Sheltering the shelterless

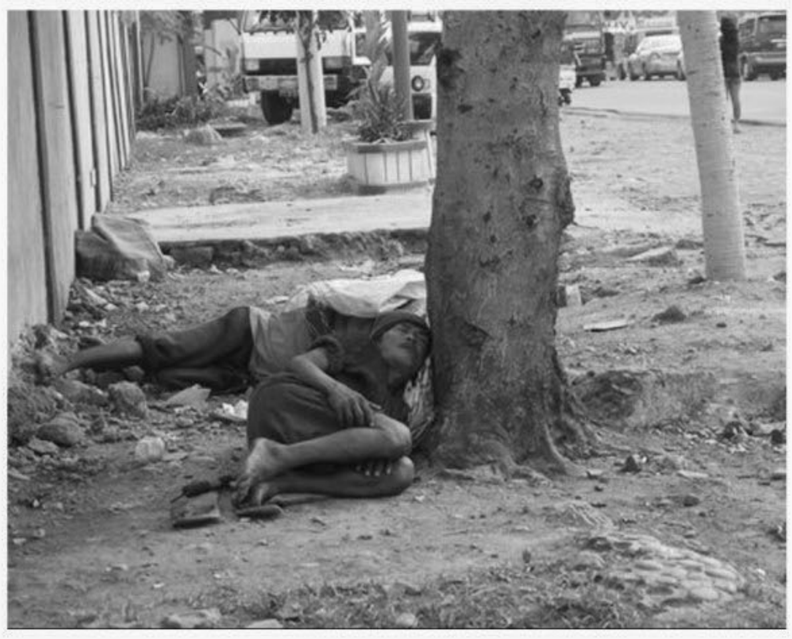
TASLIMA YASMIN

VERY recently, Cabinet has approved the Vagrant and Shelterless People (Rehabilitation) Act 2010, in an effort to make the existing Bengal Vagrancy Act of 1943 time-befitting. It promises to provide rehabilitation of the vagrants and shelterless people as opposed to the scheme of the old 1943 law. Unfortunately, however, the newly approved law, although presented as an instrument for 'rehabilitation,' largely continues the draconian regime put in place for 'beggars' under the outmoded colonial-era law. This is an attempt to analyze the shortcomings that remain in the new draft Act of 2010, addressing the legality of the entire scheme of the Act.

The primary criticism of the definition of vagrant person in the 1943 Act is its subjectivity and arbitrariness. The new draft contains the same definition according to which, as long as the authorised police think that there is a 'likelihood' of a person being reliant on alms, he or she may be treated as a vagrant. The new definition not only reiterates what was contained in the old statute, but goes a step further and adds a new category of vagrants which is, to say the least, equally arbitrary. The new category that "a person who is wandering about without any specific reason and creating public nuisance", is vague in so much as the statute is silent about definition of 'public nuisance' and thus it presents the law enforcement agencies with a free hand to decide whether a person is creating public nuisance or not, and thus giving them an opportunity to pick and chose the persons they wish to put in this new category.

The title of the draft Act, appears to be providing a mechanism for rehabilitation of "vagrant and shelter less" people. However, if the whole scheme of the Act is considered, it appears that it is inconsistent with any such promise of rehabilitation. The Act has in several sections used words like 'caught' (Dhrito), 'detained' (Atok) and 'released' (mukti) in reference to vagrants, which is incompatible with the idea that through this Act, the State shall rehabilitate (punorbashon) the vagrants who by definition have no means of sustaining themselves. The Act places the *prima facie* burden of proof on the vagrant person himself to show that he/she is not a vagrant. Moreover, a person may be legally detained for up to 15 days in a "reception center" even before evidence is collected regarding his/her status as vagrant.

The Act does not clearly define the term 'rehabilitation' nor does it provide for the measures to be taken by Government for a meaningful rehabilitation of any 'vagrant' person. The Act, in section 18, merely states the provisions for employment/self-employment of such persons, but there is no clear guideline on the adoption or operation of any such employment generation measures. On the other hand, the proposed rehabilitation measures do not appear to address issues such as access to housing, education or food. Additionally if 'employment' is the only focus of rehabilitation, then the scheme of the Act clearly fails to address those persons who are unable to work due to physical or intellectual disabilities, age-related infirmities or other chronic conditions.



Section 9 (5) of the draft Act provides that if any vagrant woman detained in a detention center has an accompanying child below 7 years old, such a child would be allowed to be with the mother until reaching the age of 7 after which s/he will be separated from the mother and be admitted in an orphanage. Such a provision for separating a child as young as 7 from its mother is breach of the fundamental rights to family life of both the mother and the child. Additionally, the mandatory requirement that a child be transferred to an orphanage removes the scope for the concerned authority to exercise any discretion, and to make decisions based on a consideration of the best interests or welfare of the child. Furthermore, the Act is silent about the treatment of any vagrant woman found with a child over 7 years at the time of her detention.

Although the new law incorporates a definition of a 'child' as a person aged under 18 (rather than 14 as previously), it has surprisingly omitted the reference to 'child vagrant' in relevant provisions. For instance, section 9 of the Act of 1943 had provided that any authority issuing any order to send a person to a vagrancy home is required to ensure that children, among other classes, are segregated from other vagrants. In contrast, the new section 11 (similar in terms to section 9 of the 1943 Act), does not include any such provision nor does it specify that there should be special consideration given to whether custodial orders should be made with respect to placing 'children' in vagrancy homes at all. Moreover, in almost all of the substantive provisions of the new Act there is no effort to address vagrant children or to identify any particular treatment that they would need at the vagrancy centres.

The approach taken in the new draft Act does not move from the earlier position of criminalizing begging instead of improving the plight of the beggars. The government has a constitutional responsibility to respect the fundamental human rights and freedoms of every person, guarantee the dignity and worth of every human person and improve the material standard of living of the people. By enacting a law cloaked as 'rehabilitation' which in reality is no more than another means of bringing about the detention and punishment of persons living in poverty, the government cannot avoid its responsibilities towards vagrants and homeless people whose survival is solely dependent upon begging and who do not have the means to fulfill even the basic necessities of life.

Any measure addressing the situation of so-called "vagrants" must realize that for a citizen of a democratic country, being poor, disabled, or disadvantaged and having no other means of survival cannot and should not be a premise for human rights deprivations.

The writer teaches law at BRAC University. She is thankful to Ms Sara Hossain and Hezzy Smith for their inputs in the article.