

"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH

## LAW REVIEW



# Witness protection issue: A legal review

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**T**HE free and truthful participation of witnesses to testify before the Court largely depends on the protective and security measures provided by the concerned Court in any crimes Tribunals as witnesses always have some reasonable fear to be suffered further by the defense party. Since Bangladesh started the trial of war criminals from 2010, the security issue of the testifier became an imperative issue to be determined through relevant national instruments and international experiences. In this regard we will look in to the measures for witness and victim protection in other international and hybrid tribunals as well as the International Crimes (Tribunals) Act, 1973 which can be referred to the proposed law on victim and witness protection as further edition.

**The witness and victim protection and support provisions of international and hybrid criminal tribunals**

The Statutes of the Extraordinary Chambers in the Courts of Cambodia (ECCC), the International Criminal Court (ICC), the International Criminal Tribunal for Rwanda (ICTR), the International Tribunal for the former Yugoslavia (ICTY), the Special Court for Sierra Leone (SCSL), and the Special Tribunal for Lebanon (STL) inserted provisions for victims and witness protection where the Rules of Procedure and Evidence provided policies to implement those provisions of the statutes effectively. For example, Article 68 of the Rome Statute on the International Criminal Court provides that "the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means," noting that these measures should be implemented in particular in the case of a victim of sexual violence. This statutory provision regarding in camera proceedings is implemented through specific sections of Rules 72, 87, and 88 of the Rules of Procedure and Evidence.

Among other functions, these rules define the appropriate use of in camera proceedings consistent with the statute. They also lay out the in camera procedure to consider relevance or admissibility of evidence related to consent in alleged crimes of sexual violence and the

specific procedures, including notice requirements, for requesting in camera proceedings and other available measures.

Provisions guaranteeing the victim and witness protection and applying explicit language conditioning these protective measures on the accused's right to a fair trial are common to all statutes. For example, the statutory language may specify that the measures cannot be prejudicial or that they must not be inconsistent with the rights of the accused.

**Summary of approaches to victim and witness protection in different statutes and Rules of Procedure and Evidence**

ECCC approach: It deals about a very broad directive that proceedings shall respect the rights of victims and

fair and public hearing subject to witness protection measures. It also provides for establishment of Victim and Witness Unit offering protective services. It also specifies that consideration should be given to employment of prosecutors and investigators experienced in gender-related crimes. (See specifically Articles 15, 16, and 17 of the statute, and Rules 34, 69, 70, 75, and 79)

STL approach: It guarantees rights of accused to fair and public hearing subject to witness protection measures. It provides for establishment of Victim and Witness Unit offering protective services and for participation of victims in proceedings. It provides for access to victim compensation. It also states explicit provision that victim participation and victim and witness protection measures shall be incorporated in the Rules of Procedure and

**International Crimes (Tribunals), Bangladesh**

Though the 1973 Act does not contain any provision regarding witness and victim protection, the Rules of procedure has been amended in June 2011 where the term "Victim" has been defined (Sub Rule 26 in Rule 02) as a person who has suffered harm as a result of commission of the crimes under section 3(2) of the International Crimes (Tribunals) Act, 1973." Besides, under the new Chapter VIA, a new Rule 58 A(1) has been inserted on Witness and Victim Protection which says "The Tribunal on its own initiative, or on the application of either party, may pass necessary order directing the concerned authorities of the government to ensure protection, privacy and well-being of the witnesses and or victims. This process will be confidential and the other side will not be notified". Sub Rule 02 inserted arrangements of accommodation of witnesses or victims and other necessary measures regarding camera trial and keeping confidentiality as necessary where violation of such undertaking shall be prosecuted under section 11(4) of the Act.

The success of these protective measures is yet to be proved especially regarding the witnesses of sexual violence. Besides holding the camera trial, the Tribunal should take other protective measures so that the witnesses come forward more to testify before the Tribunal.

Lastly, the proposed national law on victim and witness protection addresses many significant needs of members of this vulnerable group, and acknowledges the importance of support mechanisms that address physical, psychological, and economic well-being of victims and witnesses who will testify before the Court. However, the proposed legislation does not provide comprehensive measures compared to those provided by international and hybrid criminal tribunals. So if we want to ensure the safety and security for witnesses of any crime in future, we need to take certain guidelines from the international and hybrid tribunals which are consistent and feasible to the present socio-economic context of Bangladesh.

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the accused and that the Court shall take measures to protect victims and witnesses. (See specifically Article 33, and Rules 12, 24, 25, 29, and 60).

ICTY and ICTR approach: It contains a directive that proceedings shall respect the rights of victims and the accused and that the Court shall take measures to protect victims and witnesses. Explicit provision that victim and witness protection measures shall be incorporated in the Rules of Procedure and Evidence adopted by the judges. (See specifically Articles 14, 19, and in particular Article 21 of the ICTR statute, Articles 15, 20, and in particular Article 22 of the ICTY statute and Rules 34, 53, 69, 70, 75, 77 and 79, ICTR and ICTY)

SCSL approach: It guarantees rights of accused to a

Evidence adopted by the judges. (See specifically Articles 12, 16, 17, 25, and 28 of the statute and Rules 50, 51, 52, 93, 116, 133, 137, 139, 159, and 166).

ICC approach: It provides comprehensive statutory provisions establishing Victim and Witness Unit and specifying victim and witness protection obligations of Prosecutor, pre-trial chamber, and trial chamber provide protective measures, particularly in cases of sexual violence. Also includes provisions on victim participation, reparations, a victim trust fund, and specific provisions for the protection of victims involved in requests for assistance. (See specifically Articles 43, 53, 54, 57, 64, 75, 79, 87, and in particular Article 68 of the statute and Rules 16, 17, 18, 19, 43, 72, 76, 81, 87, 88, and 112)



## Treatment of detainees must be lawful and humane

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**I**T has almost become a common practice for law enforcing agencies to bring accused in front of media when they nab persons having potentials to attract public attention. They also tend to take confessional statements from the detainees while exposing their names and identities before the media. Both RAB and police have facilitated such confessions in the media on a number of occasions. This trend became so fashionable that those involved with alleged media trial appeared to be oblivious about the legitimacy of the action even.

It has been reported in The Daily Star (December 2, 2012) that New Market police arrested Javed Imam, a senior assistant judge of Bhola District Judge's Court, in front of the capital's Eden Women's College on Saturday evening for allegedly carrying 342 bottles of Phensedyl. Police produced him before the media the same day and filed a case against him with New Market Police Station. However, persons involved with this incident were accounted this time.

Firstly, Metropolitan Magistrate summoned five police officials to appear in person in order to explain the reason for producing a senior assistant judge before the media without taking permission from a magistrate. The same court earlier rejected a bail petition of Javed and ordered police to send him to jail. The order came as a surprise for many as the practice though illegal became quite common in recent times.

"Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate" - said in Article 33(2) of the Constitution of Bangladesh. In lieu of producing before magistrate, tendency of producing before media is a gross violation of constitutional rights. The practice became popular when some persons were arrested in connection to sensational cases drawing plenty of media attention. However, practice gradually became

wide spread as a section of law enforcing agency attempted to gain popular support through media.

Moreover, those media trial including the suspended Senior Assistant Judge were also clear violations of specific guidance regarding duties after making an arrest provided in the Code of Criminal Procedure (CRPC). "A police-officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the

inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law" - said in Article 31 of the Constitution. Even the accused has right to enjoy protection of law and he/she must be treated in accordance with law. Repeated violations of rights of the detained persons have previously been ignored and a section of law enforcing agencies brought many accused including female in front of media neglecting human dignity.

In accordance with Articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR), both the Rome Statute and the ICC's Rules of Procedure and Evidence include measures that protect the rights of the accused at all times. Bangladesh is a party to ICCPR and it has been stated in Article 14 (2) of the Covenant that, "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law". The presumption of innocence (the principle that one is considered innocent until proven guilty) is a legal right of the accused and producing the accused in front of media limits this guaranteed right.

"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person" - said in Article 10(1) of the ICCPR. However, law enforcing agencies seldom treat accused persons with respect and dignity. Where persons were made appear in front of media, inherent dignity of the human beings was simply ignored.

To recapitulate, order made by courts has brought the issue of the treatment of detainees forward. The issue has been neglected over the years and detained persons faced unexpected situation due to their alleged appearance before media. If High Court provides a comprehensive guideline regarding treatment of a detained person, it would bring an end to unlawful treatment of detainees.

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case, or before the officer in charge of a police-station" - said in Section 60 of the CRPC. While neglecting constitution and established laws of the land, popular justice has been practiced for quite a period of time by producing detainees in front of media and personnel involved with those incidents went unpunished.

Furthermore, right to enjoy protection of law in all situations has been codified in the constitution. "To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the

## Restrictive environment for human rights defenders in Bangladesh

**T**HE Observatory for the Protection of Human Rights Defenders, a joint programme of the International Federation for Human Rights (FIDH) and the World Organisation Against Torture (OMCT), expresses concerns about the restrictive environment for human rights defenders in Bangladesh, after it completed a fact-finding mission in the country on November 22, 2012.

"With the existing polarised political context and increasing tensions ahead of the upcoming 2013 general elections, human rights defenders are put at further risk of human rights violations", the mission stated upon its completion. The Observatory mission, which was carried out from November 14 to 22, 2012, investigated on the environment in which NGO workers, journalists, environmentalists, lawyers and trade union leaders are carrying out their human rights activities. "While laws have become a tool used by the State to hinder the work of and suppress dissident voices through judicial harassment, a lack of proper judicial safeguards and remedies has allowed for the culture of impunity to continue", it added.

In Bangladesh, extrajudicial killings, enforced disappearances and torture in custody occur regularly. From July 1, 2008 to September 30, 2012, a total of 506 extra-judicial killings were reported, and for the year 2011 alone, 30 enforced disappearance cases were documented by FIDH and OMCT member-organisation Odhikar. Both State and non-State actors are allegedly involved in such human rights violations. One of the recent cases includes the killing of labour leader Aminul Islam in April 2012.

Too often, when such violations occur, there is no prompt and proper investigation. This produces a climate of fear and culture of impunity. In such a context, individuals and organisations documenting such abuses and crimes can be exposed to reprisals.

Some editors, reporters and journalists who denounce unlawful practices or disclose sensitive information about corruption reported facing indirect or direct threats to their safety. This sometimes has led to self-censorship. In this context, Just News BD journalist Mutafizur Rahman Sumon was imprisoned in July 2012 and ill-treated for campaigning against the impunity for crimes against journalists - such as the murder of journalists Sagar Sarowar and Meherun Rumi on February 11, 2012. A reporter with RTV Channel, Mr. Bayezid Ahmed, has also been facing threats by unknown individuals after he unveiled a case of corruption within the Railway Ministry early October 2012.

The mission found that judicial harassment is another major concern, as a number of lawyers, journalists, trade unionists or environmentalists reporting on human rights violations have faced numerous spurious charges often brought before a biased judiciary. Such cases, which can last months or even years, are used as another means to silence the denunciation of human rights violations.

The mission delegates also witnessed a number of legal and practical obstacles to the activities of human rights NGOs, whose projects are often delayed or arbitrarily refused by the government's NGO Affairs Bureau. Such obstacles could potentially intensify against human rights organisations as an NGO Bill on "foreign funding" is currently being drafted.

In addition, the trade union environment is polarised along the two main political parties, and the few independent unions that exist face obstacles to their work. In particular, the legislative and political framework presents many obstacles to the formation and functioning of trade unions.

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