



HUMAN RIGHTS MONITOR

Trying crimes from a human rights perspective

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CRIME in any form undermines the rights of the victim. While some of these rights are created by national penal laws, others are inalienable human rights enshrined either in national constitutions as bill of rights or in international human rights instruments. It is generally understood that ordinary crimes are committed by persons in their private capacity, and the state is not responsible for such breaches of national penal laws. By contrast, the state is held responsible for the violation of human rights by its agencies or officials. This distinction between ordinary crimes and human rights violations is, however, not often clear. Indeed, the state may in some way be held responsible for the acts of private individuals. Also, there is a new approach called horizontal application of human rights coming to the fore which argues that private individuals themselves may be held liable for human rights violations. Put simply, both private citizens and the state owe a duty to uphold human rights of citizens.

The aim of this article, however, is not to go any deeper into that debate, but rather to elucidate the link between crimes and human rights, and to make a call for a human rights-based approach to the trial of crimes.

There is an emergent trend of considering certain crimes like trafficking in human beings, violence against women and children, sexual harassment, and forced labour as forms of human rights violations. Take, for example, the case of violence against women. The list of human rights violations this particular form of crime generates is quite long. It violates the right to life and the right not to be subjected to torture, the right to liberty and security, the rights to equal protection of law and to equality in family, the right to just and favourable conditions of work and so on. The same is the case also with the crimes of human trafficking, sex-based violence and harassment, and forced labour. It is pertinent to mention here that within one year into its independence, Bangladesh empathically displayed its commitment to uphold human rights of its citizens by incorporating major human rights into Part III of the Constitution. In recent years, it has also ratified dozens of major international human rights treaties, thereby

assuming an obligation not only to internalise human rights principles, but also to ensure the adherence to these principles especially by the Government and all other state agencies.

Interestingly, in the field of administration of criminal justice, a plethora of criminal statutes, supplementing the country's bill of rights, seek to uphold the rights of victims of crimes, instead of any stand-alone human rights legislation. This specialty, coupled with the gratuitously strict adherence to the national penal laws by the courts, however, ironically results in an inadequate protection of human rights of victims of certain crimes that severely undermine their human rights and dignity. For example, our courts used to send women victims of violence to prison, needless to say, against their will and in the name of placing them in a 'safe custody'. In case of victims of trafficking, the courts tend to send the victims to shelter-homes almost on a regular basis, without adequately taking into account the primacy of the victims' right to liberty and self-dignity and the human rights conditions of those shelter-homes. Although certain legislation like the Suppression of Repression against Women and Children Act 2000, and the Human Trafficking Deterrence and Suppression Act 2012 largely remedied the issue of inhumane 'safe custody', the instances of judicial orders sending victims of crimes to prisons are still prevalent.

Positivist, rather than rights-based, approach to criminal laws by the judges sometimes not only results in acquittals, but also seriously impairs the victims' right to have justice. In *State v. Anjali Devi @ Monju Devi*, 29 BLD (2009) (HCD) 445, for example, the High Court Division overruled a conviction of a child-trafficker, mainly on the ground that the offender having been caught within the territory of Bangladesh, the trafficking offence was yet to be complete. While doing so, it reasoned that as the child was not trafficked to India, the intention of the trafficker is unclear and hence cannot be convicted. With all due respect to the court, this kind of reasoning seems to be deficient in a rights-sensitive understanding of the complex phenomenon of human trafficking. By contrast, the Court in this particular case, by adopting a rights-based approach, could have prosecuted the accused for the viola-



tions of human rights and dignity of the victim. In another instance, *Debabrata Baiddya v. The State*, 26 BLD (2006) (HCD) 15, the accused on the pretext of taking the victim to a private tutor called and took him away from his residence and since then the victim went missing. While dealing with this case of human trafficking, the High Court Division did not dig enough to find out the person or persons responsible for trafficking. It can be argued that, had the court been sensitized enough to the effect that it was dealing with no ordinary victim, but rather with a victim of modern day slavery whose fundamental rights were seriously breached, it could have looked for avenues to find evidence and convict the traffickers effectively.

However, the record of protection of human rights of such victims is not all doom and gloom. The courts in some cases tried the crimes from a human rights consideration. One such good instance is the case of *Abdul Gafur v. Secretary, Ministry of Foreign Affairs (HCD)*, 14 August 1997, where it was held that human trafficking affected the victim's right to life and liberty as guaranteed

in the Constitution, and as such the victim is entitled to be rescued and repatriated.

Ridwanul Hoque, a leading scholar on judicial activism in Bangladesh, traced some of such instances in a recently written Training Manual where, as he showed, the judges sensitised in human rights awareness made a difference by granting innovative remedies for the protection of victims' human rights (Training Manual for Judges and Prosecutors on Violence against Women, JATI and IOM: Dhaka, 2011). Taking into consideration the unique social status and gender based vulnerability of women, the High Court Division in *Dilruba Aktar v. AHM Mohsin* (2003) 55 DLR (HCD) 568, ordered the criminal fine to be paid to the victim as compensation for the offence of taking second wife without the permission of the 'arbitration council', although the relevant law did not specifically provide for this remedy (Hoque, *ibid.*). In *Shibu Pada Acharjee v. State* (2004) 56 DLR (HCD) 285, the court considered rape a deplorable violation of one's right to life, and held that the perpetrator should receive serious punishment so

that justice be done to both the victim and society. Also, in *State v. Moslem* (2003) 55 DLR (HCD) 166, the Court has reduced the evidential requirements in rape cases considering social factors.

The cases outlined above make it clear that a different approach in using these existing criminal legislations from both lawyers and judges accounts for a much better result in the protection of human rights of the victims of serious crimes. But hardly the lawyers argue for and the judge resort to human rights based approach while trying this particular type of crimes. For the judges, they are the guarantor of justice. They pledge to perform the noble job of safeguarding the rights of fellow citizens. While strict adherence to the national penal laws may undermine their noble job of protecting the rights of general people by making themselves handicapped, being sensitized about the value of human rights breached when crimes are committed, they can make a big difference in ensuring proper criminal justice.

The lawyers also have a part to play in improving the present unfortunate condition. They must incorporate human rights based arguments while representing the victims of such crimes. These small but significant arguments should help to inform and sensitize the judges to act proactively to protect the human rights of the victims of such crimes.

Having said that, it must also be kept in mind that the approach to human rights violations and ordinary crimes need not be seen radically differently. Indeed, the victims of crimes and human rights violations have many needs in common, such as a possible need for medical attention including the help for emotional problems, entitlement to compensation as reparation, and various forms of special protection and assistance. Marking the human rights of victims of crimes as the primary consideration in the pursuit of criminal justice responses to the concerned crimes, integrating gender and age-based perspectives into investigations and prosecutions, and designing and delivering support services to victims in a manner that is compatible with a human rights based approach would bring in a marked difference in ensuring justice for those subjected to crimes.

The writer is student of law at the University of Dhaka.

YOUR ADVOCATE



This week Your Advocate is Barrister Omar Khan Joy, Advocate, Supreme Court of Bangladesh. He is the head of the chambers of a renowned law firm, namely, 'Legal Counsel', which has expertise mainly in commercial law, corporate law, family law, employment and labor law, land law, banking law, constitutional law, criminal law, IPR and in conducting litigations before courts of different hierarchies. Our civil and criminal law experts from reputed law chambers will provide the legal summary advice.

Query
We all know that recently the Government made changes to the rule for filing appeal against the verdict of the international crimes tribunal that is trying the alleged war criminals. I am interested to know if the appeal against verdict will be made on law or on fact?

Wahid
Mohammadpur, Dhaka.

Response
I would like to thank you very much for your queries. From your queries it appears that you want know the grounds (i.e. legal or factual) on which appeals against the Judgment of the International Crimes Tribunal (ICT) are based upon.

ICT was constituted in the manner provided under the International Crimes (Tribunals) Act 1973 (hereinafter referred as "Act"). The Act is a comprehensive set of provisions designed for not only the

AD under the provision prior to the amendment to the Act made in 2013.

The Constitution of the People's Republic of Bangladesh (hereinafter referred as "Constitution") in Article 103 confers jurisdiction on the AD to hear and determine appeals as of right from judgments, decrees, orders or sentences involving confirmation of death sentence or sentences amounting to death or life imprisonment of the High Court Division or of any such other court or tribunal as may be declared by the Parliament by law to come under Article 103.

The Criminal Procedure Code 1898 (hereinafter referred as "CRPC") in Section 418 has provided that criminal appeals (whether made by the Government or accused) may lie on a matter of fact as well as matter of law. The Act on the other hand has not provided anything specifically as to the grounds (i.e. factual or legal) upon which an appeal to the AD shall be made against an order (i.e. conviction,

acquittal, and sentence) of the ICT. Though the Act in Section 23, has specifically proscribed the application of the CRPC, in its proceedings, the instant provision of the CRPC may be considered as a general principle of criminal appeal.

Therefore, it may be contended that in the absence of any specific provisions, appeals made to the AD by the Government or the convict against order/judgment of the ICT may be based on factual and/or legal grounds which is also consistent with the usual norm of criminal appeal in Bangladesh.

I hope you will have answers to your queries from the aforesaid opinion.

For detailed query contact: omar@legalcounselbd.com.



LAW WEEK

Writ against Mahmudur's remand Order on April 21

The High Court has fixed April 21 for passing an order on a writ petition challenging the legality of placing Mahmudur Rahman, acting editor of Bangla daily Amar Desh, on a 13-day remand in three separate cases. Mahmudur's wife Firoza Mahmud filed the writ petition with the High Court on April 17 saying that the authorities took her husband on remand violating the relevant laws and an HC directive. An accused cannot be taken on remand for more than three days in a phase but Mahmudur was remanded for 13 days, which is against the law, Firoza claimed. After holding hearing on the petition, the HC bench of Justice Naima Haider and Justice Zafar Ahmed on April 18 fixed the date for order. On April 11, police arrested Mahmudur at the newspaper's Karwan Bazar office and put him on 13 days' remand through a local court in three cases. -*The Daily Star online edition April 18 2013.*

Hearing on Sayedee, govt pleas May 2

The Supreme Court on April 18 fixed May 2 for starting the hearing on appeals filed by the government and Jamaat leader Delawar Hossain Sayedee against a war crimes trial verdict. On February 28, the International Crimes Tribunal-1, set up to deal with the crimes against humanity cases, handed down death sentence to Sayedee on two wartime offences out of eight. Sayedee on March 28 appealed to the Supreme Court against the death penalty. The government on the same day also filed another appeal with the SC seeking capital punishment for Sayedee on all the charges he was found guilty. The six-member bench of Appellate Division headed by Chief Justice Md Muzammel Hossain on April 18 fixed the date for the hearing on the appeals following a prayer moved by Attorney General Mahbubey Alam.

Electing President

HC order on writ seeking stay April 21

After hearing arguments from both sides, the High Court on April 17 fixed April 21 to pass an order on a writ petition filed seeking a stay on the April 29 presidential polls.

Eunus Ali Akond, a Supreme Court lawyer, submitted the petition to the HC on April 9, arguing that the "president is not elected democratically by the people" and challenging article 70 of the constitution. The article says, "A person elected as a member of parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he resigns from that party or votes in parliament against the party."

Eunus said the article curtails people's fundamental rights by prohibiting lawmakers from going beyond their own party's choice of presidential candidate. -*The Daily Star April 18 2013.*

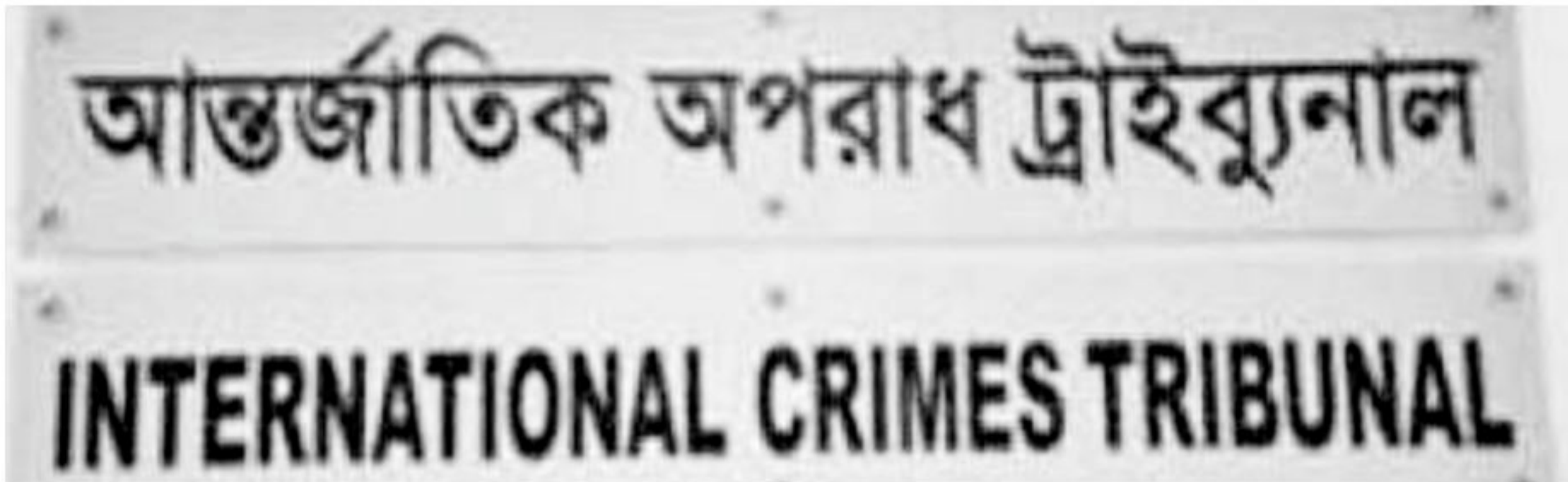
Lungi Ban in Baridhara

HC asks cops about action against issuers

The High Court on April 16 directed the police administration to inform it in four weeks about their steps against the people responsible for barring lungi clad rickshaw-pullers from entering Baridhara area in the capital. The HC bench of Justice Quazi Reza-Ul Hoque and Justice ABM Altaf Hossain passed the order on a suo moto move in response to a April 3 report of The Daily Star headlined "Ban slapped on lungi clad rickshaw-pullers". Baridhara Society/Baridhara home owners' association has instructed security personnel not to let in rickshaw-pullers in lungi, according to the report, requiring them to be in trousers to enter Baridhara, particularly Block K. The court also issued a rule upon the government to explain in four weeks why it should not be directed to take legal action against the president and secretary of the society who allegedly instructed security personnel not to let in lungi clad rickshaw-pullers in that area. Commissioner of Dhaka Metropolitan Police, deputy commissioner of police of Gulshan zone, officer-in charge of Gulshan Police Station, president and secretary of Baridhara Society have been made respondents to the rule. -*The Daily Star April 17 2013.*

Dear reader,

You may send us your daily life legal problems including family, financial, land or any other issues. Legal experts will answer those. Please send your mails, queries, and opinions to: Law Desk, 64-65, Kazi Nazrul Islam Avenue, Dhaka-1215; Tel: 9144330, 8124944, fax 9144332; email: dsllawdesk@yahoo.co.uk.



constitution of the ICT but also for its jurisdiction, power and also provides details of the investigation, trial procedure, Judgment and appeal. The Act in Section 21 provides for appeal by the Government and the convict as of right to the Appellate Division (hereinafter referred as "AD") of the Supreme Court of Bangladesh. The Government has made an amendment to the provision dealing with appeal by way of the International Crimes (Tribunals) (Amendment) Act 2013 thereby enabling the Government or complainant or informant (as the case may be) to prefer an appeal to the AD against an order of acquittal or an order of sentence. Please note that the convict is able to prefer an appeal against conviction and sentence as of right to the