



# Legislative flaws facilitate organ trafficking

ANUP KUMAR BISWAS

THE greatest teaching of humanity is to render service to mankind. The significance of human life lies in dedicating oneself to the distressed humanity and serving the destitute. It is said that money can do almost everything in this mortal world. But sometimes, million dollars is of no use where a drop of blood is needed to save lives. That is why, donating organs (including blood) is considered as the supreme and most valued donation of human capability. Organ donation is the donation of biological tissue or an organ of the human body, from a living or dead person to a living recipient in need of a transplantation. But it is quite regrettable that in the name of organ donation, trafficking or illegal trade of organs has been practised in our country for more than a decade. Transplantation of human organs (mainly kidneys as well as liver lobes and single corneas) has created an illegal market in the country. Due to pervasive poverty and loopholes in existing legislation, this illegal trade has been continuing secretly for years and is yet to be disclosed to public exposure.



and poor people desperately longing for money at any cost, organ trafficking is likely to remain a lucrative business.

- Ignorance of the illiterate poor people about the utility of two kidneys is also a factor in this respect. The buyers and brokers tell them the cock and bull story that two kidneys do not function simultaneously inside human body. One remains active and another keeps sleeping. The doctors will turn on the sleeping kidney and extract the old one. Since people do not need two kidneys at a time, donating one will not cause trouble to the body.
- There is an influx of illegal buying and selling of organs inside the country.

But no effective investigative field work or research has been carried out. Non-availability of data on exact scale of buying and selling of human organs through the underground market as well as negligent approach of the government are making the illegal traders more desperate and reckless.

- Cadaveric donation i.e. donating organs after death, could be an appropriate solution to stop illegal organ trade. But in our country, both in Islam and Hinduism, there is a strict taboo against body mutilation.

### What should be done

A more extensive cadaveric organ donation programme must be launched through educational institutions, news media and religious centers. Organ donation from family members may also be encouraged.

Concerned legislation must be amended and supplementary regulations must be framed by the government in accordance with the standard and legislative provisions of advanced countries.

The government should play an active role in putting pressure on foreign governments to acknowledge the problem and insisting on onslaught on brokers, recipients, doctors and dishonest people involved in the illegal trade.

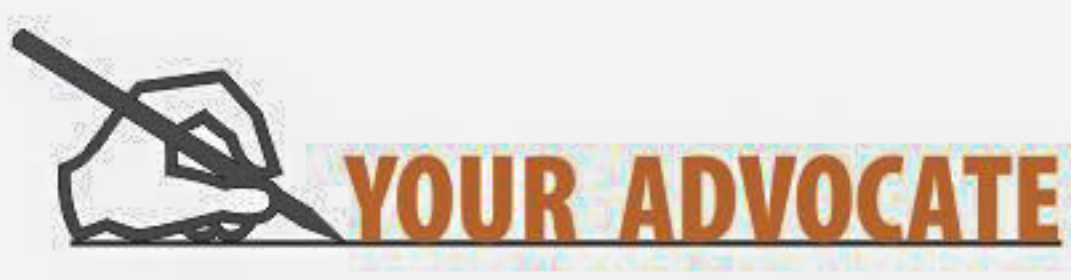
A commission should be set up to verify the relationship between recipients and donors.

A national registry to record recipients' and donors' information must be maintained.

Research should be launched to invent artificial organs which could be used for effective transplantation. Mass awareness among common people must be raised against organ trafficking and regarding organ transplantation laws and procedure. The donors must be made aware of their rights, privileges and due medical care.

Organ trafficking is a gross violation of human rights as the poor people have an equal right to keep their organs intact inside their bodies. They are also entitled to seek justice and protection from deception, forgery, false contract, misrepresentation and similar other criminal offences. Regulating the market will not be a good solution because by that more rich people will live at the expense of the well-being of the poor. It is high time to construct a shield based upon law, equity and justice.

THE WRITER IS ASSISTANT PROFESSOR OF LAW, PREMIER UNIVERSITY, CHITTAGONG.



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.

### Query

I am a girl of 22 and studying in a reputed private university in Dhaka. Recently I am quite disturbed with the activities of my friends who are used to make obscene photos and sexually implicit jokes and materials by SMS and MMS. Some of them are sending semi-nude photos of their own. Few of my female friends are also happily participating! In a country like Bangladesh, I am sure it is not lawful. When I objected, there were different reactions. While, some took it seriously and stopped sending me anything, few of them tagged me as 'backdated/un-smart'. But, unfortunately some just continue to send me such things. In this regard I need legal advice to address the matter in a stronger manner.

### Meera

### Response

Thank you very much for your query. Yes, you are very much correct to say that the activities performed by your friends are not at all permitted within the legal framework of Bangladesh. It goes without saying that these are certainly also against our social and cultural values. Such activities are not only condemned in Bangladesh as illegal, the same are also considered as illegal within western liberalism, in countries like the USA, UK, Australia etc.

These activities are termed as 'sexting' in contemporary English, though the wording has not yet been adopted by the legal draftsmen. As per Wikipedia, 'Sexting' is the act of sending sexually explicit messages and/or photographs, primarily between mobile phones. The term was first popularized in early 21st century, and is a portmanteau of sex and texting, where the latter is meant in the wide sense of sending a text possibly with images. In August 2012, the word sexting was listed for the first time in Merriam-Webster's Collegiate Dictionary.

In Bangladesh, such activities may attract violation of different legislations and the violators may face conviction and may be ultimately send to prison. Hence the matter is not at all something to be taken lightly. Your friends should realize that if someone takes it really seriously and files a complaint with the law enforcing agencies, they are very likely to be convicted with criminal offences. To prove of the offence will also be relatively easier as because of the technological records. You will find below a synopsis of the possible offences by your mates.

### Penal Code, 1860

- Section 292: Distributing or in any manner circulating (even in private) any Obscene Material (includes SMS and MMS etc) is a crime punishable up to 3 months imprisonment and/or fine.
- Section 294: Doing obscene act or signing or reciting obscene songs, ballad or words to the annoyance of other in a public place is a crime punishable with up to 3 months imprisonment and/or fine.
- Section: 509: Uttering words or making sound or gesture or exhibiting objects (e.g. photos send in MMS) with intent to insult the modesty of a woman or intruding upon the privacy of a women is a crime punishable with up to 1 years imprisonment and/or fine.
- Bangladesh Telecommunication Act, 2001
- Section 70: A person commits a crime, if he repeatedly makes telephone calls (this shall include SMS and MMS), through cell phone or fixed phone, to another person, which annoys or causes inconvenience to that person and shall be liable to pay up to TK 25,000.00 and in case of default imprisonment for up to 3 months.

### Pornography Control Act, 2012

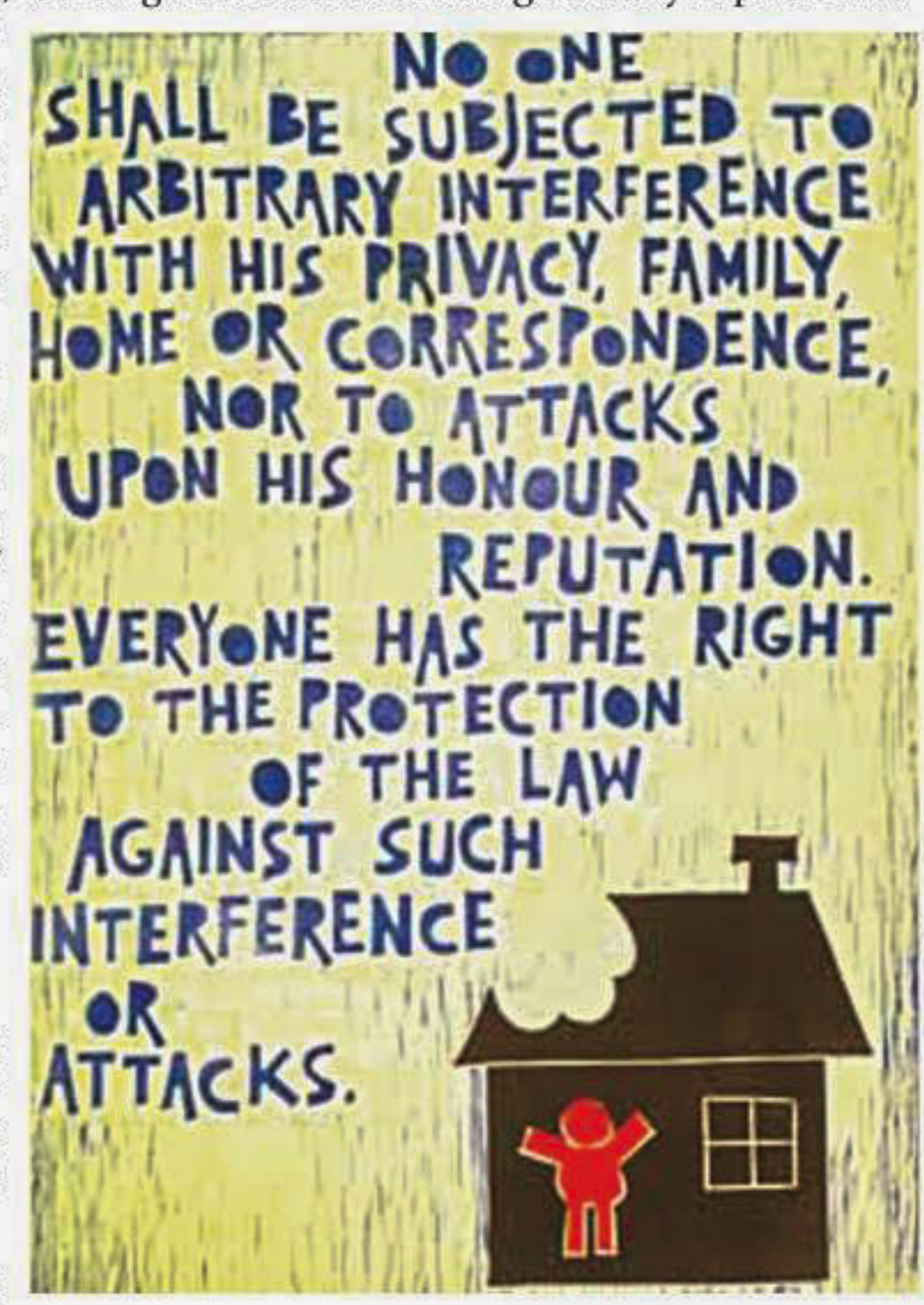
- As per the definition of Pornography under the 2012 Act, sexting is certainly considered as pornography.
- Section 4: As per section 4, no one can produce, distribute, preserve, store, market, carry, buy or sale any pornography. The person, who produces the pornography, will be fined with maximum BDT 200000 and imprisoned up to 7 years, while the person who circulates the same will be fined up to BDT 200000 and imprisoned up to 5 years.

### Information and Communication Technology Act, 2006

- The activities stated by you may also attract section 57 of the 2006 Act and the violator may be liable for fine up to BDT 10000000 and imprisonment up to 10 years.

In the light of the above, I am sure that you will be able to realize the gravity and seriousness of the illegality. You should advise your friends accordingly and warn them that they may put themselves into serious peril at anytime by continuing with such activities.

FOR DETAILED QUERY CONTACT: OMAR@LEGALCOUNSELBD.COM.



# Instrumentality of Domestic Court to enhance criminal justice

TAPAS K. BAUL & TOMASZ LACHOWSKI

DOMESTIC tribunals like the International Crimes Tribunal of Bangladesh are the future of international criminal justice. Even though the 15th session of the Salzburg Law School was on "Africa's recent efforts to enforce the complementarity regime along the consensus of Kampala", the main spectrum of the discussion was that the International Criminal Court's (ICC hereinafter) system under the Rome Statute could be fully implemented namely through the national courts' contribution. Therefore, the main role of the international community in pursuing justice does not belong solely to the ICC alone.

The 15th session (held from 4-16 August) gathered professionals, academics, and legal practitioners from 28 countries throughout the world with an intention to disseminate the most recent challenges and threats to the crime of aggression and other related issues adopted through the resolution No. 06 of 2010 in Kampala (Uganda). The introductory address was delivered by Judge Sanji Mmasenono Monagong, the First Vice-president of the ICC. Other renowned speakers were - Professor Otto Triffterer, Professor Roger Clark, Professor William Schabas, and Col. William Lietzu. The whole program was co-ordinated by Astrid Reisinger Coracini, who is based in New York working at the New York University.

During 2010 Kampala review conference the delegates of the member states tackled the issue of the definition of the crime of aggression, the very last international core crime over which the ICC could not exercise its jurisdiction since its establishment in 1998. Eventually the defi-

nition was drafted relying the individual responsibility of the offender on the previous determination of an act of aggression. It has to be mentioned that crime of aggression is a leadership crime which means only the head of the states, decision-makers and military-commanders can be subjected to the court's jurisdiction.

The 'crime of aggression regime' had not become effective immediately after the Kampala review conference. It will become effective from January 1, 2018 if at least 30 Member states to the ICC ratifies the regime within January 1, 2017 and so far, 7 countries have ratified the suggested amendments to the ICC, i.e., Article 8 bis (definition), 15 bis and ter (triggering mechanism) and yet a long way to go before 'crime of aggression regime' becomes effective. According to the speakers, provisions like optional 'opt-out' rule will attract the member states, however, strong reservation from the non-member states like USA may cause confusion among the member states.

Regarding triggering mechanism of ICC's intervention in case of an act of aggression, more filtering approach has been adopted, since before exercising its jurisdiction over the crime of aggression, ICC Prosecution must refer it to the UN Security Council (UNSC hereinafter) because under Article 39 of the UN Charter, UNSC alone has the power to decide whether the act is aggression or not. If the UNSC fails to decide within the next six months then Pre-Trial Division (not Pre-Trial Chamber) of six Judges may authorize the Prosecution to initiate investigation in the situation. Another triggering mechanism is -



the UNSC can refer a situation directly to the Prosecution for investigation and in that case the Prosecutor can start investigation immediately. At the moment this 'narrow' and 'rigid' mechanism is the only matter of concern since the permanent members of the UNSC will use their veto power if the Prosecutor refers a case to the UNSC for its approval, hence, there is a threat that the 'aggression' regime will lose its effectiveness even before it becomes effective on January 1, 2018. However, few of the speakers and participants opined positively that now the world at least has a definition of aggression and a proposed mechanism to bring to justice

those under the law who will commit an act of aggression.

The second significant development within the area of international criminal justice concerns the issue of victims' participation in the ICC proceedings and their confirmed right to reparation. Undoubtedly, ICC regulations seem to be unique and, moreover, move the criminal court slightly to the field of reparative justice (what confirms the new trend in the global criminal justice to refrain from the solely retributive approach). Prior to the Rome Statute, victims were used mainly as witnesses, without their

substantive and (more efficient) procedural rights during the proceedings, even though, for instance, right to reparation was strongly approved in public international law (*Chorzów Factory case*) and human rights law by different international and domestic bodies. The first ICC conviction (in *Lubanga* case) brought the decision on the establishment of the main principles regarding reparations. In the light of the Court reasoning, reparations can be either individual or collective (e.g. the new hospital for the local community affected by the crime), completed by the convicted or, in case of lack of funds of the previous one (like in *Lubanga*), through the independent, but inter-related body to ICC - Victims Trust Fund. The question, whether criminal court is the proper place to deliver other than criminal justice still remains open, however the reparations regime under Rome Statute cannot be underestimated.

International criminal justice is strongly dependant on the domestic courts' capacity. The obligation to cooperation with ICC would remain 'the law in books' without the political will and concern by the given state, interested in prosecuting and punishing wrongdoers. Salzburg Law School Session is definitely one of those forums of international discourse that can bring attention and awareness among international community in fulfilling the most important principle, regarding ending impunity and mass and systematic atrocities, with the core one - *Nunca Más* (Never Again).

THE WRITERS ARE PROSECUTOR, INTERNATIONAL CRIMES TRIBUNAL IN BANGLADESH AND PHD CANDIDATE AT THE UNIVERSITY OF LODZ, POLAND RESPECTIVELY.