REVIEWING THE VIEWS

THE EXECUTION OF QUADER MOLLAH

A legal response to critics

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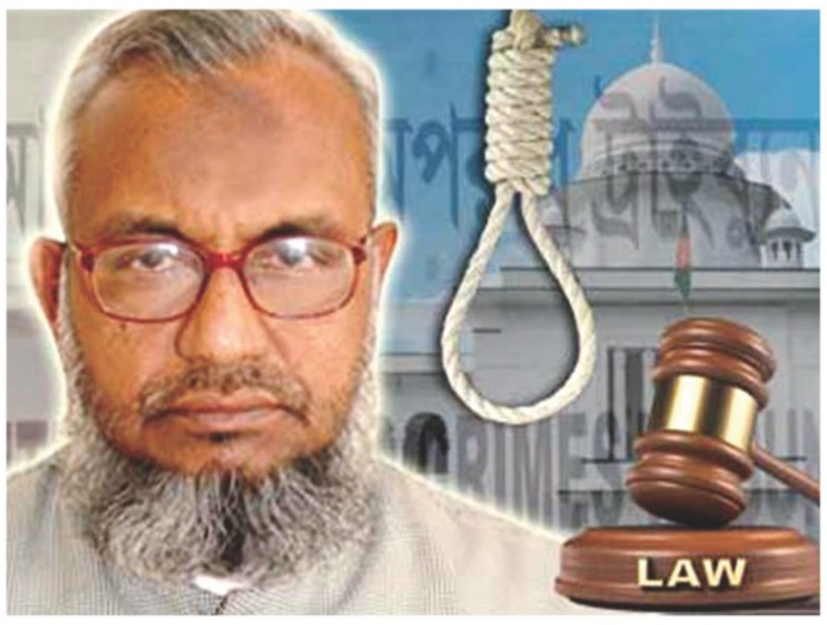
THE recent appeal judgement by the Supreme Court increasing Mollah's sentencing to capital punishment and his execution on 12 December 2013 has provoked a new wave of criticisms. Have the critics seriously studied all judgements, particularly the 790 page-appeal judgement prior to their criticisms? My careful reading of all judgements finds evidence contrary to these criticisms.

The execution is certainly a sad event. But one has to understand that courts are not mercy missions. Their job is to interpret law and evidence presented in relation to a given fact situation in order to arrive at a verdict to the best of their judiciousness. The Mollah case has exhausted all judicial remedies/options available in our justice system, including the review, which is not a right but discretion of the Appellate Division and beyond the scope of 1973 Act under which the case was tried and appealed.

The appeal judgement shows that the conviction in respect of charge 6 was unanimous; only sentencing to death by the majority of 4:1. Given the evidence and court reasoning (pp 242-253, 276, 465, 506-509, and 736-738), it was not in the best interest of the convict to plead innocence. It would have been strategic for any defence in the review petition and hearing to seek a revision of the death sentence with a view to reduce to any amount of imprisonment – perhaps even reverting back to previous life imprisonment. Unfortunately this did not happen in the review.



The death sentence has become a cause for concern to some. Even Article 41 of the 1961 Vienna Convention on Diplomatic Relations requiring diplomats to respect local laws and not to interfere in the internal affairs of a sovereign host state did not deter some diplomats resident in Dhaka to interfere in the judicial process of Bangladesh. The capital punishment, however undesirable from human rights viewpoint, is yet to be outlawed.

Many jurisdictions practice it. In 2012 alone, there were 682 executions in 21 countries including the US with 43 (world's highest per capita incarceration rate) and Saudi Arabia with 79 executions; and about 30,000 are on death row around the world in 2013 (Al-Jazerra, 10 October 2013).

International standard is once again raised as a point of criticism. Despite ad hoc international crimes trials in the past and present, a consistent body of common standard is yet to be emerged. This is because these trials are different, unique, and case specific, established sporadically as a post-facto pursuit of justice on ad hoc and one-off basis to try a particular event of the commission of international crimes.

As a result, their statutes of mandates and powers have been tailored to cater for a specific case and one is not necessarily worthy of adoption in another. The Nuremberg trials had no appeal provision. These diversities defied the emergence of any common international standard, which varies from trial to trial and led to establish the permanent ICC to develop a consistent international precedential standard.

Being a human construct, the interpretations of international crimes vary according to the nature of the crimes involved, experience of the judges, and ability and constraints of the justice system. This explains why we see varying formulation and exposition of the definition of crimes against humanity under the statutes of the ICC (Art 7) and ICTY (Art 5).

Dissimilar constructions of genocide may be found in the ICTY, ICTR, Special Court of Sierra Leone, Kosovo Courts, East Timor Panels, and Cambodian Chambers. The claim of the existence of a uniform international standard that the Bangladesh ICTs are failing is not borne out by fact.

Lessons from contemporary war crimes trials suggest that procedural aspects are tailored to suit the specific circumstances of a given trial and it is an evolving process. Commencing in 1993-94, the ICTY and ICTR are still developing and improving their trial procedures. The ICTY Rule 73 on the judicial powers was amended after the *Dusco Tadic trial* in 1998 as Rule 73bis (B) (C), the scope of which was substantially extended by adding Rule 73bis (D) in July 2003, and increased even further in May 2006 as a consequence of the custodial death of Slobodan Milosevic. This increased judicial power of the ICTY is not found in other ad hoc international crimes trials.

There was no express provision that entitled the victims to participate in the Cambodian Chambers proceedings but its Internal Rules 2007 has allowed such participation. There is nothing in law that prevents the Bangladesh Tribunals to develop their own procedural standard as the need arises in the course of conducting the trials.

Minimum procedural standard is an important means of ensuring fair trials. But procedural standard is not the end in itself in the context of a trial. It is neither self-defining, nor does it have any intrinsic value independent of the trial to which they relate. It is a means towards the end of justice. Being a means, procedural standard, however passionately stressed and immutably construed from human rights perspective, must be understood to facilitate, not evade or hinder, the end of justice.

When they are more obstructive than complementary to justice or when they do not address, but contributes to, the destabilisation of expeditious trials, they need to be tailored to advance the cause of justice and speedy trials, which the ICTY precisely did in case of its Rule 73bis.

It is on public record that the Defence has been pursuing a policy of dilatory tactics to prolong these trials. Defence lawyers are fined for their unexplained and unreasonable absence. The ICT-1 received a list of 2939 defence witnesses in *Azam case* (para35) and 1153 in *SQ Chowdhury case* (para 41). The ICT-2 received a list of 1000 defence witnesses in *Kamaruzzaman case* (para 35) and 3328 in *Alim case* (para 25). The ICT-1 fined Taka 1000 for unexplained absence in *Azam case* and ICT-2 fined TK 5000 for repeated failures to appear before the Tribunal without 'valid grounds' in *Alim case* (Daily Star, 23 July 2013).

Due process must be sought in good faith not only against those who undermine it but also against those who abuse it. Expeditious hearings pursued in international crimes trials are necessary steps to overcome unwieldy complications and functional tools to prevent unnecessary delays. The interest of justice requires judges to pursue these measures proactively in trials like the Bangladesh held after a prolonged period of impunity and with very old-age accused and living witnesses.

Due process is not the monopoly of the accused; victims too are entitled to it. The accused right to due process cannot override the victim right to justice. Judges must provide fair treatment to both the accused and victims. They are duty-bound to guard against the evasion of substantive justice under the guise of procedural justice.

The egregiousness of international crimes and compelling values of their absolute prohibition dictate that procedural justice must not outweigh the delivery of substantive justice. The pursuit of justice requires judges to ensure not only that no innocent is punished but also no guilty is escaped through the niceties of procedural justice. Ultimately it is for the judges to strike a balance and the ICTs has been striking a fair balance between the competing interests and rights of both sides.

Another issue is whether Parliament can amend a law on a matter under sub-judice with retrospective effect. Parliament, being the law-making body under the constitutional separation of power, can enact law regardless of what is going on in courts. Common law jurisdictions are littered with examples of parliamentary amendments on matters under judicial consideration.

On 13 September 2013, an Indian court handed down death sentence to four accused convicted of gang rape leading to the murder of a 23-year-old woman (a medical student) in Delhi on 16 December 2012, when the maximum penalty for rape was life imprisonment. In response to a judicial committee report and amid legal proceeding of the incident before an India first-track court, Indian Parliament amended the rape law with the maximum penalty of capital punishment, which was applied retrospectively to the rape incident of 16 December 2012.

More appropriately, Article 36new of Law on the Cambodian Chambers granting 'the accused, the victims, or Co-Prosecutors' the equal right to appeal, is an amendment subsequent to the original Law 2004 but applies to the crimes committed in the 1970s.

The Supreme Court sought opinions from seven eminent lawyers (amicus curiae)as to whether the amendment was retrospectively applicable to the Mollah appeal case. All but two opined affirmatively. This is because all such trials are post-facto in which charters/statutes have been adopted subsequent to the commission of the crimes. All laws and amendments pertaining to such trials have always been subsequent developments and by nature their application is inevitably retrospective.

If it is argued that the retroactive application of the amendment compromises due process, it must be noted that the previous disparity in appeal right militated against the due process to which the winning party was entitled to.

Every case has complainant and respondent and both are entitled to equal rights and treatments and the amendment was necessary to render justice and due process to all parties equally as has been done in Cambodia. Can the Appellate Court enhance the sentence of trial courts? Of course can, as in Duch Case 001, the Cambodian Supreme Court Chamber increased Duch's conviction from 35 years to life imprisonment on 3 February 2013.

The Bangladesh ICTs are exclusively national in character. It is inappropriate to assess a national trial process in the light of practice and experience in international and mixed trials. The ICTs are composed of very senior, experienced, and professional sitting judges of the Supreme Court (except one).

Judgements are littered with the citations of and reliance on the past judicial precedents of other tribunals and have categorically raised and extensively addressed the due process requirements prescribed in the International Covenant on Civil and Political Rights 1966 applicable in these trials. All judgements show that the evidence presented before the Tribunals of the commission of international crimes in 1971 by the alleged accused and convicts has been overwhelming.

This evidentiary advantage made it comparatively easier for the Prosecution to prove its case and harder for the Defence to rebut prosecution cases. Defence responses fell short of being innovative and ground-breaking. The pleading of identical grounds in every successive case despite their reasoned rejection by the ICTs was no more than going through the motions of defending indefensible.

The precedential value of the Bangladesh experience lies in its civic and judicial response to militant ideology-induced criminality. The decommunalisation of the brand of senseless communal politics that contributed to the commission of gruesome crimes in 1971 is of paramount significance in this era of violent terrorism and ideological radicalism.

The violent role the accused and convicts in 1971 and their followers now to sustain the culture of impunity remain a cause of concern in Bangladesh. Jammat and its followers remain desperate to achieve the impunity of their convicted leaders violently, which is legally unachievable.

Notwithstanding these circumstances, international crimes trials in Bangladesh represent the quest of humankind to combat these crimes and prosecute their perpetrators as a collective resolve to ensure dignified human existence. It is unfair to judge these trials by only highlighting and exaggerating their imperfections.

The critics should not lose sight of ICT achievements in breaking the protective garb of impunity and delivering justice to many victims that the international community has failed to do. Should the critics remain ignorant of the realities of ad hoc international crimes trials, their criticisms would sound more superficial and rhetorical and less substantive and constructive.

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LAW INTERVIEW

Exploring a culture beyond impunity

__Paulo Casaca__ is the Founder and Executive director of the "South Asia Democratic Forum". He was Portuguese Member of the European Parliament (PSE) from 1999 to 2009. Mr. Casaca worked as a team leader of a report commissioned by the US based NGO Committee to Study the Organisation of Peace "A Green Ray over Iraq" presented to the United Nations last March. Mr. Casaca recently visited Bangladesh and attended in couple of seminars including a seminar on "Genocide, Human Rights and Justice "organised by the Liberation War Museum of Bangladesh. __Md. Golam Sarwar__ from Law Desk talks with him on the following issues.

Law Desk (LD): How would you view the concept of Genocide, Human Rights and Justice in the context of Bangladesh?

Paulo Casaca (PC): The three concepts are bound together. Bangladesh was born out of Genocide, and as long as it remains unpunished, the whole fabric of a state of law where human dignity stands at its core is jeopardised. Bangladesh national war of liberation makes part of the new generation of such movements that came into being after the European colonial era. It was a direct consequence of a totalitarian vision that smashed the cultural identity of one people.

LD: After 42 years of independence the country is exploring the culture beyond impunity by convicting and executing the war criminals, how would you see this?

PC: I hope very much that now the time has come to do it. It is late, but better late than never. Only on the basis of justice is it possible to envisage peace and reconciliation. Any solution that is not based in justice is bound to cause the repetition of the phenomena that managed to go by in impunity.

I think Bangladesh has a quite advanced judicial system with bright and competent professionals at its base that are making a very good job in face of a formidable multi-million dollar international campaign in favour of impunity.

I think that even those who had a negative position in the beginning but have honestly observed the development of the trial have a positive impression on the way it has done its work. Stephen J. Rapp, Ambassador at Large of the US for War Crimes Issues, duly concluded after three visits to the country that: "We have full trust in the good intentions of ICT prosecutors and judges. I think these are enough for fair justice." (BDST, May, 02, 2011).

But in spite of the opinions of honest, serious and experienced people like Ambassador Stephen J. Rapp – which are really to take note of if we take in consideration the severe political bias of the State Department in favour of Muslim Brotherhood – the campaign to denigrate the Bangladeshi judicial system has been overwhelming.

As I have been stressing, organisations that have demonstrated their lack of respect for human rights, like Human Rights Watch, has been crucial in this campaign for impunity of the genocide perpetrators.

LD: How would you define the execution of death penalty in case of war criminals?

PC: Let me tell you very clearly that I am against death penalty in all circumstances and I have been through all my life, since when I initiated an Amnesty International local group in the Azores archipelago in Portugal.

I think we have two distinct issues here. One is the call of the *Shabagh* movement for the culprits of genocide to be applied the maximum existing penalty, and I do subscribe to their plight without restrictions. The other is the existence of death penalty in Bangladesh, in the US and elsewhere, and here my position remains what it ever was.

LD: Despite continuous warnings from Superpowers and International Agencies the Government of Bangladesh hanged a war criminal Quader Mullah, what would be your comment in this regard?

PC: I regret the way some major powers as the United States are interfering in the present issue, the way they are doing, and there are several reasons this is regrettable.

The first is that the US have actually someone very competent, someone who studied the issue thoroughly, someone who is actually in charge of the process – Ambassador Stephen J. Rapp, and they should let the issue to remain a human rights and state of law issue and so let it be dealt with by him.

The second is that the US have special historic responsibilities on what happened in 1971, and they should be more concerned to take lessons on their inaction at that time than to give lessons to others.

The third is that this is in complete contrast with what they did on Iraq less than ten years ago. Shall we forget the US authorities handled Saddam Hussein to the Iraqi government for him to be hanged, just to quote the most well-known case of co-operation with the capital punishment of a political leader?

About International agencies, it is really difficult to understand that organisations like Human Rights Watch that either stand silent or made formal but insincere protests when those who campaign for impunity for Genocide perpetrators murder members of minorities, normal citizens or witnesses who gave evidence in the ICT, campaign near daily for the Genocide perpetrators lives.

If one contrast the way HRW covered the persecution of crimes against humanity in Iraq and Bangladesh we see how scandalously partisan to human rights is the approach of this organisation.

Whereas there is no possible comparison between the due process of law in Bangladesh with the savage rule prevailing in Iraq, the contrast between the apologetic style used by HRW in Iraq and the high gear propaganda against the judicial authorities in Bangladesh is flashing.

HRW was the organisation that more openly made propaganda for the invasion of Iraq – it even created an obligation to intervene that should be applicable to Iraq but nowhere else – and excelled ever after in covering most of the abuses against human rights done in this country, but in Bangladesh, it stands exactly for the opposite of what it did in Iraq.

The manipulation of human rights by political or commercial objectives is a disgrace and should be tolerated by no one.

LD: How would you explain the judicial accomplishment in the latest case of Quader Mullah?

PC: Regarding the judicial decision on Mr Kader Mullah, I think there is plenty of evidence explaining why the Bangladeshi judicial authorities considered appropriate to sentence him to the maximum penalty, and I do not understand how we can put this decision in question.

As I explained, I would like to see the day that death penalty will no longer be used in any country or situation, but I fail to understand why this concern should be raised now and not in other circumstances.

I think that the increase in the rate of the terrorist activities of the genocide perpetrators on the wake of the execution of this criminal does not prove that impunity is the best solution but quite on the contrary, it proves that impunity is the worse solution in the long run.

LD: Thank you indeed.

PC: Thanks.

FOR YOUR INFORMATION

Revisiting the significance of preamble

WE, the people of Bangladesh, having proclaimed our independence on the 26th day of March, 1971 and through a historic struggle for national liberation, established the independent, sovereign People's Republic of Bangladesh;

গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধান

Pledging that the high ideals of nationalism, socialism, democracy and secularism, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the national liberation struggle, shall be the fundamental principles of the Constitution;

Further pledging that it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens;

Affirming that it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh so that we may prosper in freedom and may make our full contribution towards international peace and co operation in keeping with the progressive aspirations of mankind;...

PREAMBLE OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH.

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