"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 ● dslawdesk@yahoo.co.uk

LAW OPINION

Prosecuting Pakistani Perpetrators in absentia

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The establishment of the International Crimes Tribunal, Bangladesh (ICTBD) in 2010 created high hopes that justice for the 1971 genocide might finally eventuate. Keeping pace with the public expectation as of March 2021, the ICTBD has resolved 42 cases involving the 1971 atrocities, and more than five hundred cases await investigation; yet, none of these implicates any of the Pakistani perpetrators who planned, commanded, and executed the genocidal acts throughout the liberation war.

There is a mistaken assumption which Pakistan takes for granted that the 1973 Delhi Agreement and 1974 Tripartite Agreement relieved the Pakistani prisoners of war (POWs) from all sorts of accountability for the 1971 genocide. Speaking truly, while signing the Tripartite Agreement, Pakistan "condemned and deeply regretted" the 1971 atrocities and appealed to the Bangalees to "forgive and forget the mistakes of the past" in order to promote reconciliation. In response, Bangladesh agreed not to proceed with the trial "as an act of clemency" to achieve "reconciliation, peace, and friendship in the sub-continent."

Paradoxically, the hostility between Bangladesh and Pakistan has gradually intensified due to the denial of the atrocities by the latter which also brings back the accountability and recognition of genocide cards to the table. In November 2015, in an unprecedented move, Pakistan officially denied any "complicity in committing crimes or war atrocities" in 1971. The Khyber Pakhtunkhwa Provincial Assembly of Pakistan passed a resolution in 2013 urging Bangladesh not to "revive the issues of 1971" and "terminate all cases registered". While the prosecution progressed in Bangladesh, the National Assembly of Pakistan often adopted resolutions expressing concern and condemnation for the execution of leading perpetrators pursuant to the ICTBD's verdicts. In September 2016, the Pakistani Parliament also asked Islamabad "to seriously raise at all the international forums" that the proceedings of the ICTBD were violative of the Tripartite Agreement.

For long, Pakistan has been denying the widespread and systematic nature of its genocidal acts to the utter disregard of the victimisation of the Bangalees. This trend of denial and falsehood has reinforced the claim for accountability and recognition of the 1971 genocide. Of the international law scholars, Robertson suggests that "there can, in any case, be no amnesty for an international crime like genocide. The deal in Delhi was not a bar to prosecutions, however many years later". As the limitation is not a bar against the prosecution of genocide, even today the perpetrators of the 1971 genocide could lawfully be prosecuted under national or international jurisdiction.

A judicial pronouncement, even though from a domestic forum and in absentia in nature, carries no less value than the political campaign to substantiate state responsibility and individual criminality for the past atrocities.

Ideally, the International Humanitarian Fact-Finding Commission may be engaged as per the Geneva Conventions, or a Fact-Finding Commission may be constituted under the UN mandate to inquire about the international humanitarian and human rights breaches during the 1971- armed conflict. An international prosecution either under the UN mandate or bilateral agreement between Bangladesh and Pakistan can also settle the issue of state responsibility and individual accountability for the 1971 genocide. In the present international political setting, arranging an international prosecution seems impossible; also, there is valid concern regarding our foreign missions' capacity to bag international support for any International Fact-Finding Mission to examine the 1971 atrocities.

Hence, prosecuting the Pakistani perpetrators at least the surviving top commanders in the ICTBD for the 1971 atrocities might symbolize minimal justice against the denial of the liability by Pakistan. Yet, despite available evidence on hand, bringing Pakistani perpetrators to justice would be a critical challenge. Presumably, they would not be appearing before the ICTBD voluntarily; neither Pakistan would cooperate to ensure their appearance, nor any intervention either by Bangladesh or any international community compelling their attendance is likely to happen. In this backdrop of impunity, prosecuting them in absentia might be a practical approach for imposition of historical liability. Internationally, there are instances of trial in absentia on account of atrocious crimes; encouragingly, Bangladesh's national jurisdiction, particularly Statute of the ICTBD also allows prosecuting a perpetrator in his/her absence.

During the emergence of international criminal law, article 12 of the 1945 Nuremberg Charter empowered the Tribunal to take proceedings against a perpetrator in his absence, if he was not found or if the Tribunal in the interests of justice found it necessary to conduct the hearing in his absence. Pursuant to this mandate, the Nuremberg Tribunal prosecuted Martin Bormann, the Chief of Nazi Party Chancellery and Secretary of Hitler, in his absence, for his involvement in war crimes and crimes against humanity, and sentenced him to death. In the recent past, in absentia proceedings received much legitimacy due to the UN Security Council's approval. Under its resolution no. 1757 [30 May 2007], the Security Council established the Special Tribunal for Lebanon (STL), to investigate and prosecute the terrorist attack that led to the killing of Lebanese Premier Rafik Hariri and many more. Article 22(1) of the Statute of the STL permits trial in absentia if the accused expressly and in writing waives his or her right to be present; or, has not been handed over to the Tribunal by the State authorities concerned; or, has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges. While conducting a trial in absentia article 22(2) requires the STL to ensure that the accused has due notice of the charges via all possible means including publication in the media or communication to the State of residence or nationality; and, he has an opportunity to defend himself through a defence counsel of his choice either paid by him or by the Tribunal. Moreover, if refused by the accused, his representation by counsel should be ensured by the Defence Office of the STL. The Statute further provides that in case of conviction in absentia, the accused, if he or she had not designated a defence counsel of his or her choosing, shall have the right to be retried in person before the Tribunal, unless he or she accepts the judgment.

In prosecuting perpetrators in absentia, the resolution no. 1757 is of practical importance mainly for the reasons that due to the Security Council's primacy in international political setting, its resolution enjoys status of the highest law in the international legal order; and, the criteria it prescribes, if imitated by any national or international tribunal, could effectively encounter the concerns regarding legality and legitimacy of the in absentia trial.

In Bangladesh, section 10A of the International Crimes (Tribunals) Act 1973 permits the ICTBD to prosecute in absentia, when on account of the failure of the summons or warrant, the Tribunal has reason to believe that the accused person has absconded or concealed himself from the trial. Moreover, section 44 of the Rules of Procedure allows the ICTBD to admit a wide range of evidence unconnected to human testimony. Like the STL, the ICTBD may, to represent the interest of the absconding offender, appoint a state sponsored defence counsel. Besides, if the offender is convicted, a right to appeal in the Appellate Division of the Bangladesh Supreme Court is guaranteed under section 21. Seemingly, in case of trial in absentia the ICTBD is equipped to offer same level of fair trial standard as is prescribed by the Security Council resolution.

Curiously, the provision of in absentia trial remained absent in the original scheme of the ICTBD statute; so, its inclusion in 2012 led to the assumption that the Prosecution office perhaps at that point of time actively considered establishing accountability of the perpetrators whose appearance might not be secured even after due diligence. To our disappointment, the Prosecution Office however failed to capitalise the avenue allowing Pakistan much leverage to outrightly deny the 1971 genocide.

A judicial pronouncement, even though from a domestic forum and in absentia in nature, carries no less value than the political campaign to substantiate state responsibility and individual criminality for the past atrocities. Against Pakistan's repeated denial of liability, our political vulnerability to draw international support for the international investigative or prosecutorial justice necessitated a quest for alternative avenues for genocide justice. Hence, in absentia trial of Pakistani perpetrators might be a timely response against the culture of denial. From the perspective of retribution, in absentia trial might be of little significance; yet, its impact in restoring historical truth might be instrumental. Nevertheless, the Government must conceive of the political advantages likely to gain by establishing individual and state responsibility for the 1971 genocide and support the Prosecution Office to investigate and prosecute the charges against surviving Pakistani perpetrators. Their prosecution in absentia would end the impunity that has been haunting Bangladesh for the last fifty years and be a step towards availing international recognition of the 1971 genocide.

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RIGHTS ADVOCACY

Compensating victims of fire

Law Desk

On Wednesday, March 17, a fire incident took place in the ICU of Dhaka Medical College Hospital. Three of the ICU patients died after being relocated. This is one of at least three recent incidents of fire outbreak in Dhaka Medical College Hospital including a fire in the general ICU of the Hospital in early January. A five-member committee on behalf of the health ministry, a nine-member committee on behalf of the Hospital and a four-member committee on behalf of the fire service have been formed to investigate the fire incident.

Similarly, last year, fire broke out in the coronavirus isolation unit of the United Hospital, the victims of which filed writ petitions before the High Court Division for compensation. Although the High Court Division ordered the Hospital to pay Taka 30 lakh to each victim's family, the decision was later stayed by the Appellate Division. The Constitution of Bangladesh provides protection from arbitrary deprivation of life under Article 32 and the court has, in the past, held that compensation may be awarded in cases of established unconstitutional deprivation of the fundamental right to personal life or liberty of the person concerned, while exercising writ jurisdiction. The duty of care is more strongly established when the concerned party is a public authority.

In cases of death or injuries occurring as a result of wrongful or negligent acts, the injured person or the family member of the deceased person can institute a suit under the Fatal Accidents Act, 1855. While disposing of the said case the court has discretion to award such compensation. However, the suits instituted under this law often take many years to be disposed and has shown little effectiveness.

Furthermore, the *CCB Foundation* v *Bangladesh* case, the court relied on an Indian judgment and observed that "in instances where public functionaries are involved and the matter relates to the violation of Fundamental Rights or the enforcement of public duties, the remedy would still be available under the public law notwithstanding that a suit could be filed for damages under private law".

Therefore, there is growing acceptance of awarding compensation under public law for negligence, inaction or wrongful acts of public bodies resulting in deprivation of fundamental rights of the people. Although the judiciary has taken a progressive approach in this regard, there still remain concerns as to the speedy and effective implementation of these orders.

LAW WATCH

Refund of advance VAT or turnover tax from Government treasury

Barrister Khandoker M. S. Kawsar

Bangladesh has proudly graduated from the LDC and now SDG or Ease of Doing Businesses are the beacons or lighthouses Bangladesh is proceeding towards. To make Bangladesh a manufacturing hub, imports are still an integral part of the journey towards this development. An importer is required to pay Advance Tax (AT) at import stage at the rate of 5% on the taxable value of imported goods, which seems to be an obstacle for Bangladesh to overcome in the Ease of Doing Business indicator of World Bank. This requirement of payment of AT is the introduction of one of the unique features of the Value Added Tax and Supplementary Duty Act, 2012 (VAT & SD Act) and the Value Added Tax and Supplementary Duty Rules, 2016 (VAT & SD Rules) both of which came into force on July 1, 2019.

Initially, the business communities and the associations opposed this inception strongly as they articulated that most of the importers' import of goods lie with having credit facilities from the banks, therefore cost of doing business will increase manifold if some amount is paid in advance and kept in the custody of the government for some time. Though the Revenue authority said that this introduction of AT will widen their expansion of network as well as will help them to obstruct money laundering through mis-invoicing, the entrepreneurs and manufacturers had been demanding withdrawal as the payment of AT will increase their cost of production. They will be in trouble to repay to their banks and the paid AT which is unadjusted will be stuck in the government treasury for quite some time. Worthy to mention that, this payment of Advance Tax is refundable and the concerned importer can adjust such advance tax as a decreasing adjustment in that tax period or subsequent 4 (Four) tax periods. If not adjusted, the businesses will have to apply to the relevant Commissionerate. But when the importers are seeking refund to the Commissionerate, in practice, the Commissioners are becoming unable to refund suo moto and then the importers do not have any other option but to go for writ for the refunds. This necessity of taking resort to litigation is putting burden on the importers.

Once the processes of application have been followed by the importers properly, the Commissioner is bound to refund the amount within three months after the application for refund has been made to the Commissioner. Not refunding the same by the

Commissioner within this stipulated time is violative of the fundamental rights of the importer.

According to one provision, any person who has paid an AT but is neither registered nor enlisted may, in the prescribed manner, make an application to the Commissioner for a refund of such advance tax and the Commissioner shall, after receiving such an application, dispose it in the prescribed manner. The language of these subsections imply that the Commissioner is bound to refund the AT if any application for refund is made by neither a registered nor an enlisted person. Would a Commissioner be bound if application is made by a registered or an enlisted person? It is legally presumable that a Commissioner should be bound. But in reality, this is not happening and the business concerns are not getting refunded easily.

Some unnecessary burdens have been imposed on the importers for seeking refund of the AT. Concerns like House building, Land Development, or Property Development get facilities of adjusting in the Returns indefinitely and can apply for refund any time, but for all other business concerns, the excess amount of money after adjustment in the monthly Returns (*Mushak*-9.1) shall be carried forward and may be deducted over the following 6 (six) tax periods, after which any remaining excess money shall be refunded in accordance with the provisions of this Act. It is recommended that, all concerns should get similar facility of adjusting in the Returns indefinitely and should be given chance to apply for refund anytime. Or the Commissioner will refund the amount to the importers suo moto after 6 (six) tax periods has been adjusted in Return.

AT is like guarantee of a due and the guarantor should get redemption once the due is paid. Once the due is paid, process of redemption should be a smooth one. Therefore, refund in relation to paid AT should also be a simple process. In the above circumstances, some more Recommendations are: Manufacturers should be exempted from paying AT; only Commercial importers or traders may be burdened with such imposition; the commissioners should have the sole discretion to recommend for refund of the AT and the recommendations of the Commissioners should be given priority by the VAT Enforcement Department of NBR.

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