LAW REFORM

Reforming the International Crimes (Tribunals) Act 1973

Amending the ICT Act is not just a legal necessity but a moral imperative. Ensuring that the trials are fair, transparent, and beyond criticism will not only honour the memory of the victims of the July massacre but uphold the principles of justice.

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Since the July revolution, there has been a strong push for reforms across the country. As expected, the clamours for reforms have not left the International Crimes (Tribunals) Act 1973 (ICT Act) untouched. As the government prepares to prosecute high-ranking members of the former government, it is crucial to implement extensive reforms to the Act to ensure the proceedings are beyond reproach.

Firstly, the lack of a clear definition for 'crimes against humanity' has raised significant concerns. In a report released on 29 December 2009, the War Crimes Committee of the International Bar Association (IBA) highlighted that the 1973 Act's definition clause was missing a crucial element: the 'widespread or systematic' nature of the attacks. In 2011, both Amnesty International and Human Rights Watch issued statements noting that the definition did not meet international standards. To address this, the Law Ministry has proposed amendments to section 3(2)(a) of the Act to align it with the Rome Statute.

The IBA Report also highlights that the offending acts must be committed 'with knowledge' of their widespread or systematic nature. The current definition does not include this knowledge requirement. However, the proposed insertion of section 3(3) of the Act addresses this by requiring the Tribunal to consider the ICC Elements of Crime. Adopting these internationally accepted Elements of Crimes will significantly improve the Act's definition clause.

Secondly, section 6(8) of the Act has been widely criticised for preventing challenges to the constitution of the Tribunal. Ideally, this provision should be repealed as it is potentially prejudicial to fair trial. The right to a fair trial presupposes that either party will be at liberty to challenge the appointment of Tribunal member.

Thirdly, in the absence of any concrete rules of evidence applicable to the ICT trials, miscarriage of justice becomes inevitable. Section 19(1) of the Act provides that the Tribunal '*shall not be bound by technical rules of evidence*' and that it may admit any evidence '*which it deems to have probative value*'. The IBA Report had noted that the use of the word 'technical' is potentially prejudicial and that the 'probative value test' appears to override the standard hearsay rule. Indeed, section 19(1) of the Act, as it exists, grants the Tribunal a *carte blanche* in admitting evidence as it deems fit. This is seriously prejudicial to a fair trial as the evidence that may be produced before the Tribunal essentially depends on the whims of the judges.

This may be remedied by adopting the ICC Rules of Procedure and Evidence which would ensure that the ICT procedural rules are at par with internationally recognised procedural safeguards. Alternatively, section 23 of the Act may be amended to make the Evidence Act 1872 applicable to the ICT proceedings.

And lastly, the proposed section 20A of the Act seeks to ban a political party that has been found guilty of crimes against humanity. If at all a political party has to be banned, such initiative should be undertaken politically. The judiciary should not be called upon to enter the murky waters of Bangladesh politics to ban a political party. This would raise concerns as to the impartiality of the Tribunal. More importantly, it would cast a shadow on judgments that may be passed against perpetrators of some of the worst crimes committed in the history of independent Bangladesh.

Moreover, the interim government should bear in mind that in the past, attempts were made to amend the ICT Act to ban political parties. However, such initiatives never saw the light of the day because of criticisms from the international community. The same is likely to happen here. If the Act is amended to empower the Tribunal to prosecute and punish a political party, it is likely to raise a hue and cry in the international community. Amending the ICT Act is not just a legal necessity but a moral imperative. Ensuring that the trials are fair, transparent, and beyond criticism will not only honour the memory of the victims of the July massacre but uphold the principles of justice. The time for reform is now, and it is crucial that we seize this opportunity to create a more just and equitable legal framework.

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LAW LETTER

On the livestreaming of court proceedings

People are likely to gain confidence in the justice system when they see justice getting served. This is why courtrooms are deemed open or accessible, theoretically at least, to all. By the same logic, in an age of technologies, in order to foster public confidence, should livestreaming of court proceedings be encouraged? Comparative discussions may prove to be useful in finding the answer.

In the UK, the Crown Court (Recording and Broadcasting) Order 2020 allows only sentencing remarks to be broadcasted under strict conditions. Since 2019, the Court of Appeal (Civil) started livestreaming selective cases via YouTube. In the USA, the audio record of all the cases before the Supreme Court has been archived since 1955. In 2020, 13 federal courts started audio livestreaming.

Pakistan Supreme Court also started livestreaming hearings in 2023 with petitions challenging the Supreme Court (Practice and Procedure) Act 2023. In India, the livestreamings of cases of constitutional importance began through a writ petition named *Swapnil Tripathi and Ors.* v *Supreme Court of India and Ors* (2018). In this judgement, citing livestreaming as the extension of the principle of an open court, the court gave comprehensive guidelines and also suggested that oath ceremonies, farewells, and other speeches of the judges may also be livestreamed.

During the Covid pandemic, our judiciary embraced the digitalisation of the judicial processes. In the days of lockdown, to ensure access to justice, the then President promulgated *Adalat Kartrik Tottho-Projukti Bebohar*

Ordinance 2020 which was later adopted by the parliament when it came into session. The Act empowered the court to conduct trials, to hold inquiries, to take evidence and hear arguments, and to give orders or pronounce judgments in the virtual presence of the pleaders, litigants, accused, and other concerned persons. Holding virtual court was much more complex compared to livestreaming considering that livestreaming only involves airing the offline court proceeding on the internet while virtual court requires that all concerned stakeholders of the proceeding participate remotely.

Livestreaming court proceedings may potentially bring about transformative changes within our legal framework. In particular, it may help re-establish public confidence in our judicial system. The young law students and novice lawyers can enrich themselves by witnessing the judicial proceedings firsthand as well.

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CONSTITUTIONAL POLITICS

The missing 'Q' in constitution-making

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The conversation on adopting a new constitution in recent days is significant for at least two reasons. First, it provides an opportunity to understand and address the fundamental concerns about the 1972 Constitution that remain unaddressed. Second, it allows us to envision a more inclusive and just society through a new constitution-making process. In doing so, the existing Constitution, which retains the values of the 1971 Liberation War, should be approached with caution. My focus here is on the need for the inclusion of 'queer' voices in the constitution-making process of Bangladesh, such as Hijra, who do not necessarily conform to normative gender and sexual identities and who have faced marginalisation in a heteronormative society like Bangladesh.

Historically, the significance of gender and sexuality in the drafting of the Constitution of Bangladesh has been sidelined. The Constitutional Assembly debate in 1972 was dominated by Bengali cis men. Out of the thirty-four members of the Constitution Drafting Committee, only one woman was included. While the question of gender equality in public life was briefly discussed, the drafting members did not seriously address gender equality in private life. For instance, Article 28(2) of the Constitution, which guarantees equality between men and women, uses men as the ultimate standard of equality, meaning women are expected to aspire to the rights that men have only in the context of state and public affairs. Consequently, intimate and personal life, and how it should align with the constitutional principle of equality, remain overlooked.

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At the same time, the Constitution of Bangladesh rests on a putative gender binary heteronormative framework. Although the Constitution speaks of equal protection for every person (Article 27), its ideal subjects are (cisgender) men and women. Anyone deviating from this constitutional model of heterosexual subjecthood might not be able to enjoy some of the constitutionally guaranteed rights. For instance, the right to privacy is not extended to homosexual individuals, among others, in Bangladesh. This is evident from section 377 of the Penal Code, 1860, that criminalises same-sex relationships and behaviors. This provision treats such acts as unnatural and categorises them with terms like 'against the order of nature', equating them with bestiality. The law thus enforces "compulsory heterosexuality," which serves as a yardstick to assess so-called normal sexual behavior in a patriarchal society.

Thus, to address the historical marginalisation while dealing with how a constitution shapes the lived experiences of queer communities and impacts their human rights, it is important to include groups like Hijras in both the debate on and the actual constitution-making process when there is one. In this process, the structural system where the constitutional change takes place needs to be repositioned and reimagined to accommodate diverse voices, including the queer ones. This would challenge the manner in which "constitutional heteronormativity" comes to dictate how a rights-based constitutional order would look and who could benefit from it. It could start with the discussion of the repressive sexual and gender behavior and the extent to which it shapes the experience of queer persons in their relations with the constitutional rights and freedom.

Equally important is to challenge the (gender) binary based on the so-called natural sexes model of the Constitution during the drafting. Having queer representation would facilitate the process as it would allow us to rethink our approach to constitution-making vis-à-vis sexual and gender freedom. It is worth reminding us that, like any other element of a heteronormative society, law tends to be based on and suffer from heterosexual biases, to which the gender binary remains fundamental. What is the cachet of allowing the voices of diverse gender and sexual groups is that it has the potential to nip the heteronormativity in the constitution-making process in the bud before it crystallises into law. After all, it is imperative that our (new) constitution does not endorse heteronormative values in order to avoid recreating the very system that has put different lived experiences and voices into exclusion and oppression through unjust laws.

The writer studied law, gender and sexuality at NYU Law as a Vanderbilt Scholar