# Journal of
# Judicial Administration Training Institute (JATI)

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# Judicial Administration Training Institute

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# Foreword

The Judicial Administration Training Institute, shortly JATI, is the only training Institute in Bangladesh that provides foundation as well as in-service training to people involved in the justice delivery system. JATI has been publishing the Journal of Judicial Administration Training Institute since 2002. This annually published Journal features research articles on legal and judicial issues in Bangladesh and International arena alike, written by judges, professors, lawyers and other legal professionals.

I am pleased to see that the Journal has completed its 22nd year of publication with this Volume XXII of 2023. The Journal has always strived to contribute to the academic discourse on legal and judicial issues in line with the Institute's mandate of legal research. Current Volume contains fourteen scholarly articles that focus on a variety of topics, including criminal sentencing, Alternative Dispute Resolution (ADR), juvenile delinquency, the role of police investigation, women's empowerment, environmental rights and climate change, constitutional torts, labor rights, and the age of a child in the context of labor legislation. The articles are thought-provoking and informative, and they offer insights into a wide range of legal and judicial matters of concern.

Furthermore, the contributors of this Journal have shared their knowledge and expertise with the avid readers. I would like to thank all the authors for their hard work and dedication. I am confident that this Volume will be a valuable resource for anyone interested in learning more about the law and society.

Finally, I am appreciative of the Research and Publication Wing, the Board of Advisors, and the Editorial Board for their hard work and dedication in

publishing this Journal. Together, they have put tireless efforts in making this Journal a valuable source for legal professionals and scholars. In the same vain, I also welcome contributions from legal professionals and scholars to enrich future issues of the Journal.

I believe that this Journal has the potential to reach a wide audience.

May 2023
Dhaka

**Justice Nazmun Ara Sultana**
Director General
Judicial Administration Training Institute

# Editorial Note

We are pleased to present the latest issue of the Journal of the Judicial Administration Training Institute, i.e., the JATI Journal, Volume- XXII of 2023. This current Volume contains fourteen scholarly articles of a diverse range that explore a variety of legal topics. We can get a general sense of what the selected articles are about.

The first paper, bearing the title 'Alternative Dispute Resolution' Urgency to Institutionalized in Bangladesh," examines ADR in Bangladesh's legal framework, its impact, success rate, challenges, and recommendations for institutionalization. It concludes with an action plan for integrating ADR into the country's legal system. Dwelling in this particular subject-matter, another article discusses court-sponsored mediation as a means of reducing backlog and improving access to justice, highlighting the importance of institutionalizing mediation.

The study "Counseling for Juvenile Delinquents in Bangladesh: An Alternative Approach" examines the role of counseling in juvenile correction, while another delves into the practice of recording confessional statements without administering an oath in criminal adjudication in Bangladesh, and investigates whether this practice affects the acceptance of such statements. Additionally, an article discusses the challenges faced during police investigations, which can impede the administration of criminal justice in Bangladesh. However, by working together, we can ensure that justice is not only served, but also appears to have been served.

In "Appropriate Punishment in Criminal Cases: The Guiding Factors to be Considered" the writer emphasizes the need for a statutory guideline for sentencing policy, and analyzes the various factors that should be taken into consideration when selecting an appropriate sentence based on case law. Again, the writer of the article "Judging the Judges: Inside the Mind of a Judge-Watcher" strives to define "judicial temperament" and examines how judges can cultivate this quality, as well as the factors that can cause it to deteriorate in the context of Bangladesh's Judiciary.

In "Women's Empowerment and Marriage Registration in Bangladesh: A Critical Appraisal of Existing Laws and Practice," the author explores the

connection between the registration of marriages and sustainable development goals, and offers suggestions for improving women's empowerment in Bangladesh.

In “Protecting the Rights of Climate Induced Displaced People in Bangladesh: Necessity of a Human Rights Based Legal Framework”, the writer proposes a new legal framework aimed at protecting people who have been displaced due to climate change and upholding Bangladesh's international commitments regarding the protection of human rights. To achieve this, the writer suggests introducing simple but effective human rights policies in Bangladesh.

Several other papers have been published discussing various topics in Bangladesh's legal landscape. One paper focuses on labor rights violations in garment industries and proposes measures to address these issues. Another paper examines the legal complexities of determining a child's age and the challenges of enforcing age-related laws. A third paper discusses the doctrine of constitutional tort and its application in recent court cases. Finally, the important role of the courts as an independent supervisory body over state institutions is emphasized in “Can the Judiciary Alone be the Saviour of the Environment and Protect Environmental Rights?”

At this juncture, we appreciate the invaluable contributions of the distinguished authors. We also sincerely acknowledge the untiring supervision of Madam Justice Nazmun Ara Sultana, honorable Director General of the Judicial Administration Training Institute, in the process of publication of the JATI Journal. And, also we are extending heartfelt gratitude to the endeavor and hard-work of all concerned in bringing out this issue.

We hope you enjoy this issue of the JATI Journal. We welcome your feedback, and encourage you to submit your own articles for consideration.

**Mir Md. Amtazul Hoque**
Editor
JATI Journal 2023, Volume XXII
and
Director (Research & Publication)
Judicial Administration Training Institute

# CONTENTS

# ‘Alternative Dispute Resolution’ Urgency to Institutionalized in Bangladesh[*]

Ummey Kulsum[**]

## Introduction

The government of Bangladesh is actively exploring options to increase the use of Alternative Dispute Resolution (ADR) mechanism with a view to reducing backlogs and delays in court system. According to the statistics of the Supreme Court of Bangladesh, more than 30 lakh cases are pending with courts across the country causing litigants to endure long waits for justice. It is apprehended that if this trend continues, the number of case load would be five million by 2025. These statistics are enough to understand the picture of overburden cases in the Court. It would not be an exaggeration to state that in the wave of large number of case backlogs, a vast number of people are being deprived from access to justice and failed to vindicate their legal entitlements. To tackle the backlog of cases and ensure access to justice, ADR becomes indispensable to establish effective justice delivery system. Insensible drafting of laws, procedural complexities, absence of people- friendly lawyers, highly expensive cost, unreasonable delay in disposal of case, absence of adequate staffs and instruments are the core reasons that make the justice system inaccessible to a large number of people in Bangladesh. Though the Constitution of the People’s Republic of Bangladesh guarantees equal protection and application of law for all citizens, a vast number of people are being deprived from access to justice. Financial incapacity along with other socio-economic conditions are the driving factors that make them vulnerable and their rights remain unrealized. ADR is not a panacea to come out from all the evils, rather it is an alternative tool by which people can avail justice in a friendly way. Access to courts involves cumbersome procedures that generate a sense of fear among the litigants while ADR facilitates to settle disputes amicably and quickly going beyond the complex procedure of court system.

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[*] This article was originally published in March 2021 issue of ICD News, Law for Development, published by International Co-operation Development, Research and Training Institute, Ministry of Justice, Japan.

[**] Joint Secretary (Senior District Judge), Law & Justice Division, Ministry of Law, Justice and Parliamentary Affairs.

## A. Background of ADR in Formal Legal System of Bangladesh

The origin of ADR in the legal system of Bangladesh can be traced back to ancient time. It is applied in different situations in different ways, both formally and informally. In ancient time 'Salish' was a primary forum in the rural Bengal. In such a 'Salish', the local people participated in the process where decision was taken on the consensual basis. Panchayat model was introduced in 1870 during the British period.

In 1919, the Bengal Village Self Government Act was introduced, and Union Courts were setup to resolve disputes locally.

Later, the government established the Rin Shalishi Board to keep peasants free from the Mahazons and the moneylenders and also to avoid clashes. Later, the Family Court Ordinance of 1961 and the Village Court Act of 1976 were introduced, and authority was vested on the Chairman of Union Parishad to try petty local cases and small crimes committed in their area and take consensual decisions. These were later strengthened in 1985 with additional power to cover women and children's rights.

NGOs assisted mediation especially in family related matters, which is a popular method of dispute resolution to the marginalized people. Formal introduction of ADR has been framed by the amendment of Court of Civil Procedure in 2003 and 2004.

## B. Scope of ADR under Laws in Bangladesh

In years, various laws have been enacted with the scope of Alternative Dispute Resolution process. A chart is given in the following to see the list of laws at a glance–

| Serial | Law | Section | Mediator |
|---|---|---|---|
| 1 | Code of Civil Procedure Act, 1908 | 89A, 89B, 89C | The Court or Panel of Mediator or Legal Aid Officer |
| 2 | The Artha Rin Adalat Ain,2003(Money Loan Court Act, 2003) | 22, 23, 24, 25 | The Court itself or Mediators |
| 3 | Family Courts Ordinance, 1985 | 10(3), 10(4) & 13 | The Court |
| 4 | Village Courts Act, 2006 | 6 (kha) | By representatives of the local government and appointed representatives of both parties |
| 5 | Arbitration Act, 2001 | 12 | The Court |

| Serial | Law | Section | Mediator |
|---|---|---|---|
| 6 | Conciliation of Disputes (Municipal Areas) Act, 2004 | 3 and 6 | The Conciliation Board (representatives of local government) |
| 7 | The Labour Act, 2006 | 209-213 | Chief Inspector or officer authorized by the Chief Inspector |
| 8 | Customs Act, 1969, | 192A to 192 K | Facilitator |
| 9 | Income Tax Ordinance,984 | 152 F to 152 S | Income tax authority, Taxes Appellate Tribunal or Court |
| 10 | The Value Added Tax Act, 1991 | 41 Ga | Facilitator and representative of Parties |
| 11 | Legal Aid Services Act, 2000 | 21 ka | Empowered Legal Aid Officers for Alternative Dispute Resolution under Jurisdiction of any law |
| 12 | Code of Criminal Procedure, 1898 | 345 | As per condition mentioned in the Chart of Section 345 |

## 1. Code of Civil Procedure, 1908

In 2003, special provision of Alternative Dispute Resolution has been introduced by inserting section 89A, 89B and 89C in the Code of Civil Procedure. This was the first time when mediation process was inserted in legal system. As per provisions, except in a suit under the Artha Rin Adalat Ain 2003, after filling of written statement , if all the contesting parties are in attendance in the court in person or by their respective pleaders, the Court shall, by adjourning the hearing, mediate in order to settle the dispute(s) in the suit, or refer the dispute(s) in the suit to the concerned Legal Aid Officer appointed under the Legal Aid Act, 2000, or to the engaged pleaders of the parties, or to the party or parties, where no pleader(s) have been engaged, or to a mediator from the panel as may be prepared by the District Judge under sub-section (10) of 89A, for undertaking efforts for settlement through mediation.

## 2. The Artha Rin Adalat Ain, 2003 (Money Loan Court Act, 2003)

Section 22 of the Artha Rin Adalat Ain, 2003 (Money Loan Court Act, 2003) describes that after submission of written statement by the defendant, the Court may refer the case to the engaged lawyers or may send the dispute to the parties for settlement. It is mandatory for the Court to send the case for settlement through mediating efforts if parties submit petition to the Court for settling the case through mediation.

**3. Family Courts Ordinance, 1985**

Family Courts Ordinance, 1985 is a special law to deal family matters specially dissolution of marriage, restitution of conjugal rights, dower, maintenance, guardianship and custody of children. In this law, the word 'mediation' is not mentioned anywhere but there are some provisions which appear as the process of ADR mentioning as pre-trail and post-trial proceedings. In pre-trail proceedings, after submission of written statement and documents, the Court shall ascertain the points at issue and attempt to affect a compromise or reconciliation between the parties. And in post trail proceedings, after the close of evidence of all parties, the Court shall make another effort to affect a compromise or reconciliation between the parties.

**4. Village Courts Act, 2006**

The jurisdiction of a village court is defined in section 6 of the Village Court Act, 2006. The section states to settle any dispute, a village court shall be constituted in the union where an offence causing such dispute has been committed or where the cause of action has arisen. However, if all the parties to a dispute do not live in the same union where an offence causing such dispute has been committed, or where the cause of action has arisen, parties who come from a different union may nominate members from their respective union.

**5. Arbitration Act, 2001**

The preamble of the 'Arbitration Act, 2001' specifically states that "an Act to enact the law relating to international commercial arbitration, recognition and enforcement of foreign arbitral award and other arbitrations". The act is applicable to domestic arbitration. The Arbitration Act includes three types or methods of arbitration-

a) Arbitration without the intervention of the court
b) Arbitration through court when no suit is pending
c) Arbitration of a suit

**6. Conciliation of Disputes (Municipal Areas) Act, 2004**

Under this Act, "Conciliation of Disputes Board" or "Board" is established to conciliation of disputes in municipal areas. Under section 6, if the offence is committed in the municipal area for which the Board has been established or the cause of dispute arises regarding that matter; in such case it is irrelevant whether any party lives outside the area concerned.

**7. The Labour Act, 2006**

The Labour Act, 2006 has discussed about the rules and procedures relating to industrial dispute resolution through ADR techniques from Section 209 to 213. According to Section2 (62) of the Labour Act, 2006, an industrial dispute may relate to a dispute between owners and labourers, between labourers, or between owners. Accordingly, Section 209, an industrial dispute is deemed to exist only when such dispute is raised by an owner or any bargaining. Section 2(49) states that owner includes any person who employs labour in an organization, or any other person who is heir of such owner, any director or executive assigned with a duty to run an organization, or any person employed by the head of the Ministry or Division to run a state-owned enterprise etc.

**8. Customs Act, 1969**

In 2011, alternative dispute resolution was inserted in the Customs Act. Section 192A states that notwithstanding anything contained in this Act regarding adjudication or disposal of any dispute as defined and mentioned in section 192C which may or may not be pending with concerned customs authority or customs and Value Added Tax appellate authorities, any importer or exporter or pre-shipment inspection agency concerned in such disputes, may apply to the concerned authorities for the resolution of the dispute through the Alternative Dispute Resolution process in the manner as laid down in the next sections and rules and resort to ADR must precede the completion of the procedures under adjudication or appeal provisions of the Act.

**9. Income Tax Ordinance, 1984**

In 2011, “Chapter XVIIB” was added by Section 49 of the Finance Act, 2011 (Act NO:X11 of 2011) and such, new chapter on ‘Alternative Dispute Resolution’ was introduced in Income Tax Ordinance. As per Section 152F, notwithstanding anything contained in Chapter XIX, any dispute of an assessee lying with any income tax authority, Taxes Appellate Tribunal or Court may be resolved through Alternative Dispute Resolution in the manner described in the next sections of the chapter and rules made thereunder.

**10. The Value Added Tax Act, 1991**

In 2011, section 41ka to 41that were inserted in the Value Added Tax Act. Section 41(Uma) (4) of the Value Added Tax Act, 1991 provides for referral of VAT disputes by the Supreme Court of Bangladesh to appropriate authority for resolution through ADR process. Such reference may be made by the Honorable Court *suo moto* or upon application of the aggrieved person. However, referral to ADR upon application by an aggrieved person is conditioned by prior permission of the concerned Division (Bench). The provisions of the Act have been supplemented by the Value Added Tax (Value Added Tax) Rules, 2012.

**11. Legal Aid Services Act, 2000**

In 2015, District Legal Aid Office under National Legal Aid Services Organization is introduced as the first law-accredited institution that can resolve disputes between the parties through mediation process by pre-case and post-case mediation management. In order to implement this objective, the Honorable Minister Mr. Anisul Haque, Ministry of Law, Justice and Parliamentary Affairs, raised the amendment bill of the Legal Aid Services Act in 2013, and unanimously the bill was passed by the Parliament. Such "Legal Aid Officer" was inserted in the law with the empowerment to imply Alternative Dispute Resolutions under the jurisdictions of Court and Tribunal. Subsequently, Law and Justice Division of the Ministry of Law, Justice and Parliamentary Affairs issued a Gazette Notification on "Legal Aid Services (Legal Advice and Alternative Dispute Resolution) Rules, 2015" on February 7, 2015. Under Legal Aid Services Act, 2000 and Rule, the District Legal Aid Officer is empowered to settle the disputes and cases through mediation in an alternative manner, both before and after the litigation.

**12. Code of Criminal Procedure (CrPC), 1898**

The scope of Alternative Dispute Resolution in criminal procedure is not vastly introduced but in limited way it was inserted in Section 345 of the CrPC to compound some listed offences. Compounding an offence means to settle mutually by the alleged victim and the accused. Under the CrPC, an offence is compoundable if it is one of the types of offences listed under the sixth column of 'Schedule A' read with section 199 of the CrPC provides a list of offences which can be compounded by aggrieved party without the permission of a court. Section 345(1) of the Code of Criminal

Procedure, 1898 provides a list of offences which can be compounded by the aggrieved party without the permission of a court and section 345 (2) mentions the list of offences may be compounded by the aggrieved party only with the permission of a court.

**C. Revolution in Justice System by introducing ADR in Legal Aid System**

Law and Justice Division of the Ministry of Law, Justice and Parliamentary Affairs is relentlessly working to reduce case backlogs through developing a well-coordinated approach and building capacity of the relevant justice sector agencies.

For this purpose, concerned division of the Ministry is reviewing the existing laws, procedures and systems of the justice sector and recommending for appropriate method to improve the administration of justice and identify the ways for further improvement to provide legal aid and reduce case backlogs.

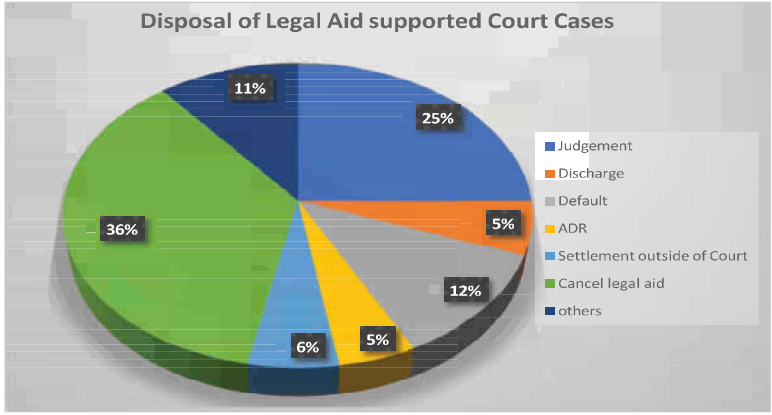
As a part of continuous reformation and to fulfill the constitutional obligation, the Government of Bangladesh has enacted “The Legal Aid Services Act” in 2000 with a view to provide free legal assistance to the poor and marginalized citizens of Bangladesh.

While running legal assistance program for the poor justice seekers, we experienced that most of these people do not want to go for full-fledged litigation. Instead, they want a solution which is amicable, speedy, sustainable and less procedural aspect involved. Hence, we felt the necessity of alternative dispute mechanism conducted by the Legal Aid Office. Under the leadership of Ministry of Law Justice and Parliamentary Affairs, National Legal Aid Services Organization has conducted numerous meetings, seminar, workshops, round table dialogues and survey to develop an effective ADR mechanism for District Legal Aid Offices. After extensive research, the Government has amended the Legal Aid Services Act, 2000 in the year 2013 by inserting section 21A which empowered the District Legal Aid Officer’s to implement ADR through legal conduct at their respective Offices.

The Government has also framed “Legal Aid Services (Legal Advice and Alternative Dispute Resolution) Rules, 2015" to give comprehensive guideline for conducting pre-case and post-case mediation through Legal Aid Officer. Now Government Legal Aid Service is not only confined on advice and legal assistance to the poor and marginalized people, rather it has an effective framework of ADR in the form of pre-case and post-case mediation system. I must say, addition of ADR mechanism in Government Legal Aid Service has brought a new feature in the existing judicial system of Bangladesh.

**D. Disposal of Cases through ADR**

To find out the scenario of implantation of ADR mechanism, the statistics of Disposal of cases were collected in 2017 from respective 20 District Courts. The data showed that there were only 2.24 percent cases disposed by ADR mechanism in regular court system. Besides, to consider the present disposal manner, the statistics of legal aid supported court cases are collected, it shows that 25% cases are closed by judgment, 5% cases are closed by discharge order, 12% cases are closed by default order, only 5% cases are closed by ADR and 6% court cases are settled outside of courts. So, considering these two sources of disposal information, it is clear that till now the Court cannot implement properly ADR process to dispose case. Though the laws are amended, and it creates the opportunity to mediate the cases, maximum court cases are not disposed of by ADR.




Source: 2019 statistics of NLASO, 64 districts’ disposal of legal aid supported court cases.

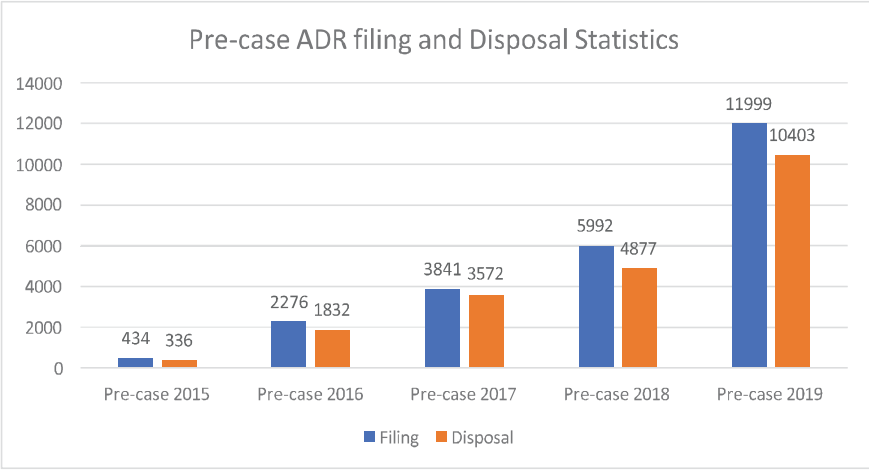
| Serial | District | Opening Balance | Institution | Total | Disposal | Disposal through ADR | Ratio |
|---|---|---|---|---|---|---|---|
| 1 | Dhaka | 96060 | 42838 | 138898 | 24293 | 990 | |
| 2 | Shariatpur | 9493 | 4148 | 13641 | 2704 | 78 | |
| 3 | Mymensingh | 59100 | 14967 | 74067 | 10549 | 163 | |
| 4 | Brahmanbaria | 20455 | 9760 | 30215 | 7991 | 126 | |
| 5 | Barisal | 27035 | 8498 | 35533 | 6423 | 113 | |
| 6 | Gaibandha | 18921 | 4573 | 23494 | 4210 | 14 | |
| 7 | Barguna | 8891 | 4120 | 13011 | 3602 | 311 | |
| 8 | Kushtia | 22151 | 5394 | 27545 | 4619 | 57 | |
| 9 | Narail | 10156 | 3579 | 13735 | 2847 | 33 | |
| 10 | Coxbazar | 28922 | 7937 | 36859 | 5974 | 35 | |
| 11 | Sherpur | 14884 | 3780 | 18664 | 4017 | 48 | |
| 12 | Gopalganj | 16985 | 5632 | 22617 | 4474 | 17 | |
| 13 | Sylhet | 19025 | 16022 | 35047 | 7825 | 94 | |
| 14 | Narayanganj | 45445 | 13488 | 58933 | 10336 | 238 | |
| 15 | Comilla | 25694 | 10142 | 35836 | 7050 | 93 | |
| 16 | Rajshahi | 17485 | 5602 | 23087 | 3336 | 133 | |
| 17 | Narsingdi | 15797 | 7355 | 23152 | 7054 | 105 | |
| 18 | Lalmonirhat | 7577 | 5530 | 13107 | 2606 | 37 | |
| 19 | Rangpur | 21625 | 9523 | 31148 | 9184 | 144 | |
| 20 | Noakhali | 24202 | 8841 | 33043 | 6292 | 208 | |
| | | | | | **135386** | **3037** | **2.24** |

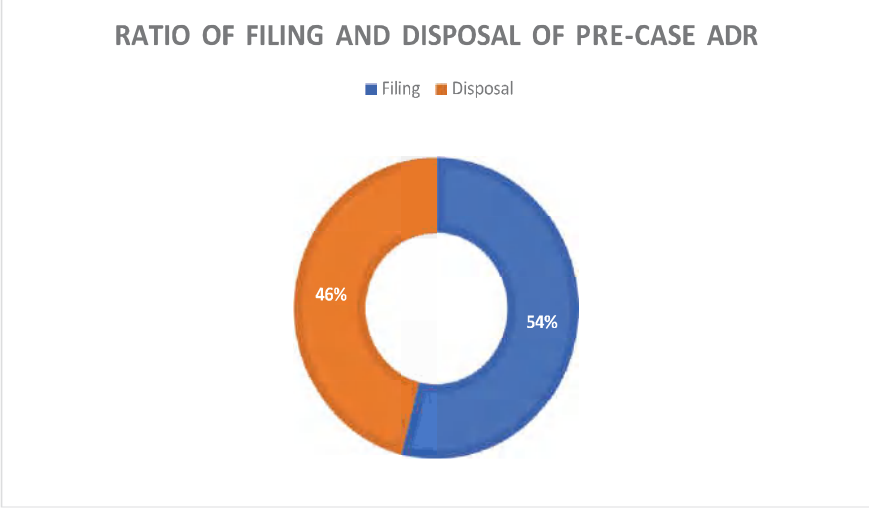
**Source: 2019 statistics of. NLASO, 64 districts' disposal of legal aid supported court cases**

## E. Effect of Amendment 'Legal Aid Services Act, 2000' and Promulgation 'Legal Aid Services (Legal Advice and Alternative Dispute Resolution) Rules, 2015'

After promulgation of the "Legal Aid Services (Legal Advice and Alternative Dispute Resolution) Rules, 2015, the District Legal Aid Office

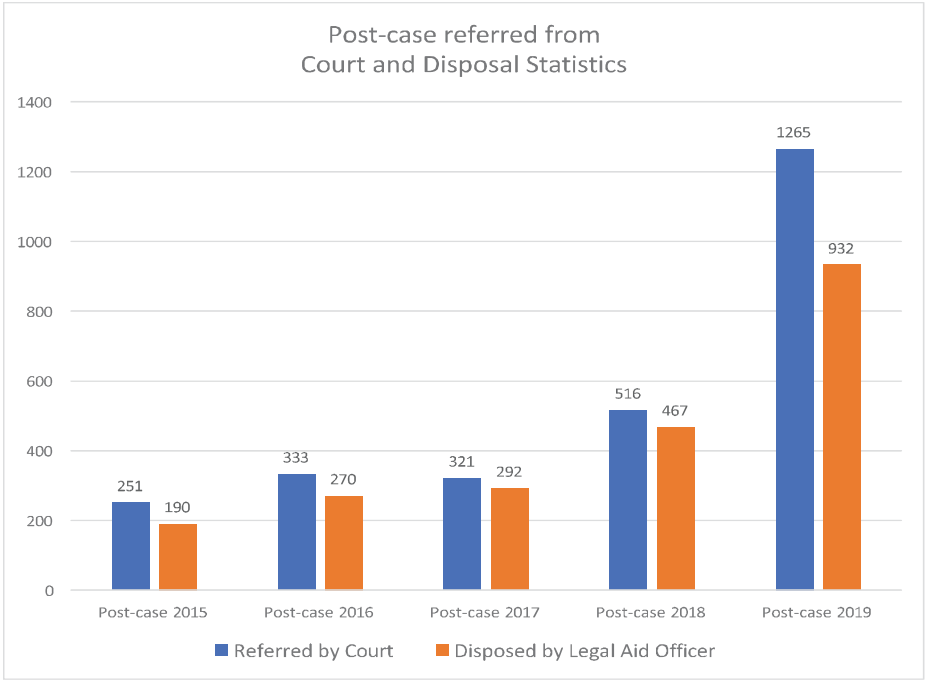
has been formally and officially initiated to applyAlternative Dispute Resolutions method from July 2015.

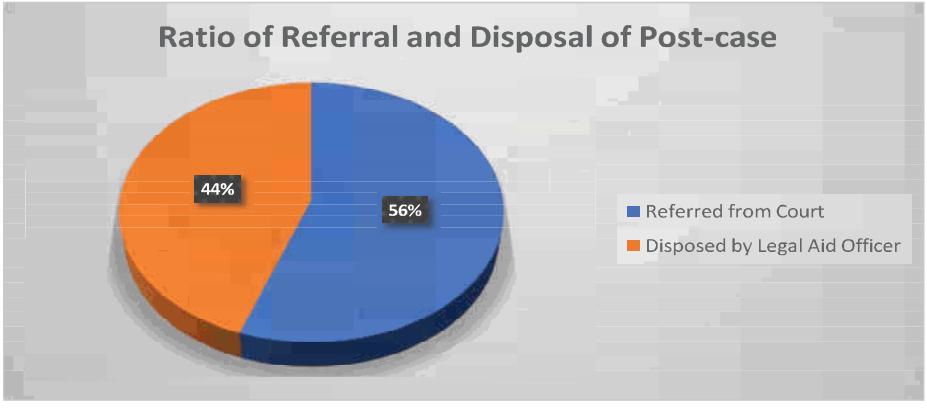



If we consider the statistics of district legal aid office, it shows that each year, the litigants are inspired more to do mediation. And simultaneously, if we analyze the disposal ratio of filling pre-case mediation application and disposal disputes, it shows that legal aid offices have successfully disposed of pre-case disputes in reasonable manner.

It is to be mentioned that the Government has taken initiative in 2017 to amend the Code of Civil Procedure to insert provision of the legal aid officer and create a scope for the court to transfer the case to legal aid officer to mediate the cases as per its own Rules. In the following, post-case mediation statistics are provided:

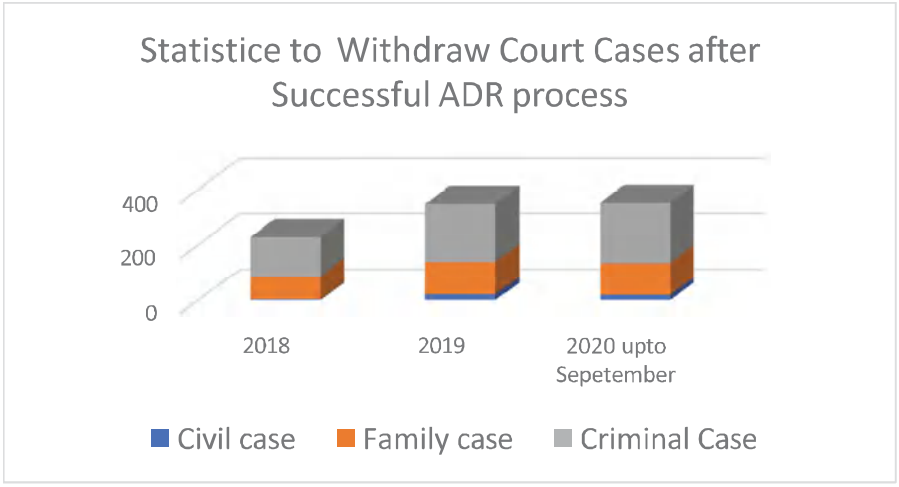


If we analyze the Post-Case ADR statistics of Legal Aid Office, it shows that legal aid offices are very successfully applying the ADR method and so, each year , the ratio of referred cases are increasing and the disposal rate is very significant too.

**F. Success Story for Applying ADR**

The overall statistics of National Legal Aid Services Organization is increasing the expectation of justice sectors' institution that it is high time to declare 'Legal Aid Office' as 'ADR Corner' in whole legal system. One experience of Mr. Kudrut-E-Khuda, legal aid officer, Kurigram is mentioned here to depict the influence of ADR in general litigant's life. On 20 September 2020, Mr. Kudrat-E-Khuda was in a mediation session where the dispute was about theft of paddy from land. At the time of mediation, he came to know that between the parties, there was a case under section 380 of the Penal Code in the Magistrate Court where the numbers of accused were 43. Then, after while, in progress of more discussion, he discovered that the main issue of dispute was land. He discovered more that among the parties, there was not only criminal case but also civil case too. One Injunction Case was filed in 2002, then appeal was held in District Judge Court in 2008. Moreover, there was another case in the High Court Division (HCD) and the HCD declared stay order for a long time on land and the case is running till now. In the meanwhile, in another criminal case, one accused was punished for 8 years for throwing acid towards applicant's wife and another accused was punished for 1-year jail for simple injury. Moreover, another criminal case is running under section 326/337 of the Penal Code for grievous injury against applicant's son at the time of mediation. In these critical conditions, the mediator, Mr. Kudrud-E-Khuda has been successfully able to mediate the issues through mediation process, the parties are agreed to withdraw active cases and resolve their disputes peacefully. Such ADR process open the door of mind between the parties to mediate their issues and stop the long running cases which are ruining their life day by day. It is a great success of introduction of Alternative Dispute Resolution towards District Legal Aid Office. The statistics shows that by ADR process, Legal Aid Officer successfully motivates the parties to withdraw their active cases and as such each year the withdrawal of cases are increasing in court.




**G. Identifying the Reasons of Case-backlog in Bangladesh**

- Each civil court, at least, has to deal with around 1500 civil suits
- Average time taken for disposal of a civil suit is 4-5 years
- A civil suit involves the cooperative role of the plaintiff, defendant and their lawyers in each stage of the suit
- Criminal Courts are also confronting a staggering number of cases
- More than 80% of the prison population are under trial prisoners
- Trial of a criminal case involves the collaborative role of Police, Prosecution, Prison, Victim, Offender, Witnesses and the Courts
- There are more criminal cases pending than civil cases

**Reasons Behind the Civil Justice System**

⇒ Socio-demographic causes
⇒ Inappropriate and insufficient training facilities
⇒ Absence of any integrated case management strategy and policy
⇒ Legal problems
⇒ Problems inherent in the traditional justice system
⇒ Failure and defective functioning of various institutions
⇒ Poor infrastructure of the court and absence of digital record management

**Reasons Behind the Criminal Justice System**

⇒ Failure to ensure the timely attendance of witness
⇒ Delay in the investigation procedure
⇒ The high rate of filing of the criminal cases
⇒ Want of accountability of the justice affiliated agencies
⇒ Want of strict adherence to the provisions of law
⇒ Logistics constraints

**H. Challenges to Implement ADR**

* The courts are over-burdened with cases, so it is difficult for the court to apply ADR method in regular court time
* Generally, people show interest to file suit rather than mediation.
* Lack of proper logistic supports
* Lack of proper training
* Lack of proper legal system to filtering cases at pre-stage to identify amicable cases/disputes for mediation

**I. Recommendation to Way Forward**

⇒ Streamlining the laws and regulations
⇒ Introducing separate prosecution service
⇒ Judicial capacity building
  (a) Enhancing the efficiency of the judges through providing effective training
  (b) Applying digital case management system
  (c) Adopting integrated and uniform case management strategy and policy
⇒ Classifying the cases on the basis of their duration of pendency and managing them differently
⇒ Throttling the discretion of the Court
⇒ Developing NLASO as Access to Justice Office
⇒ Strengthening the Alternative Dispute Resolution Machineries
⇒ Imposition of Adverse Cost
⇒ Introducing effective Inspection, supervising & monitoring authority
⇒ Strengthen the leadership capacity of the controlling authority

⇒ Modification of the summon process serving system
⇒ Pretrial Conference
⇒ Plea bargaining & penalty incentive system
⇒ Need for upgraded File Movement System
⇒ Automation of the Court
⇒ Recommendations for the change in the legal provision
⇒ Upgrading the probation and parole system

**J. Action Plan to Institutionalized ADR in Legal System**

Bangladesh as a major aspect of implementing the SDGs, the Government of Bangladesh has earned numerous global honors for accomplishments in SDGs. While setting out on the trip to actualize the SDGs, we drew motivation from the beliefs of the Father of the Nation, Bangabandhu Sheik Mujibur Rahman, who visualized a prosperous Bangladesh with equal opportunities for all. The Government of Prime Minister Sheik Hasina imagined changing Bangladesh into a middle-income country by 2021 and a developed country by 2041.Bangladesh has just turned into a low middle-income country. We have just deciphered this vision, articulated at the highest political level, into a good agenda by defining perspective plan (2010-2021) and two Five Year Plans (FYPs) related with this. Bangladesh coordinated the 2030 agenda in its eighth FYP (2020-2025). This offered a huge chance to execute the 2030 Agenda, while mirroring the needs of the SDGs in the national plan. The Government has embraced whole of society way to deal with guarantee more extensive investment of NGOs, development partners, private area and media during the time spent detailing of the activity design and implementation of the SDGs. To initiate the process, SDGs implementation and observing committee has been shaped at the prime minister's office to encourage the usage of SDGs Action Plan. Law & Justice Division to ensure Peace, Justice and Strong Institutions under SDGs 16 Goal, has framed an action plan. In short term plan, Law & Justice Division will take initiative to facilitate ADR mechanism and in long term plan, it will take project to establish ADR Center in 64 districts.

## Conclusion

As the pressure of litigation in the courts increases rapidly, it is imperative for stakeholders in the legal and social spheres to use alternative methods of litigation. It goes without saying that there is no alternative to dispute resolution to reduce the complexity of the case. The popularity of alternative dispute resolution in Bangladesh has increased more than ever. And at present, law makers create the opportunity to mitigate the dispute through alternative dispute resolution by inserting mediation scope in laws.

# Role of Legal Aid Officer in Access to Justice: A Case Study on Rangamati Hill District

Mohammad Faruque*

**Abstract**

The role of Legal Aid Officer through legal aid, legal advice and mediation is very crucial for creating the opportunity in accessing to justice in Bangladesh. Although the supply of these valuable legal services provided by Legal Aid Officer is not enough in terms of demand but at least it covers a section of poor, underprivileged and marginal population, particularly women in Bangladesh. Mediation, a form of alternative dispute resolution (ADR) is a voluntary, cost and time efficient process of negotiation between disputing parties assisted by neutral third parties. It can be conducted by any persons or statutory bodies subject to the consent of the disputant parties. Legal Aid Officer (LAO), a judicial officer who is empowered by law to provide legal aid and resolve disputes through mediation and pave the way for access to justice for the poor and underprivileged people and makes the justice delivery system as inclusive in Bangladesh. This paper addresses the role of legal aid, legal advice, and mediation services provided by LAOs under the existing laws and rules in Bangladesh. It focuses on Rangamati Hill District, a hilly district in the southeastern part of the country. This district is home to a diverse population of Bengalis and 14 different ethnic-tribal groups, such as Chakma, Marma, Tripura, and Tanchangya.

**Keywords:** Mediation, Legal Aid Officer, Access to justice, Legal Aid, Legal Empowerment.

## 1. Introduction

The empowerment of Legal Aid Officer through legislation with the tools to provide legal aid, legal advice and mediation service is one of the crucial steps in accessing justice, a fundamental right of the people. The integration of these legal tools for accessing justice is unique in nature

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because it will enable to achieve the needs of poor, vulnerable and marginal people of society. Providing mediation service to resolve disputes through Legal Aid Officer (LAO), a member of Bangladesh Judicial Service appointed by the government on deputation, is an innovation in the field of Alternative Dispute Resolution (ADR) of Bangladesh since it is neither a court-based ADR program nor a private initiative. It's a new dimension introduced very recently in the field of ADR of Bangladesh which proved to be successful in resolving disputes and helping access to justice concurrently with other dispute resolution mechanisms to some extent. LAO is entitled to provide legal aid and legal advice to the people who does not have sufficient means under the Legal Aid Services Act, 2000. Due to demand of the indigent people for integrated legal aid services, Government of the People's Republic of Bangladesh has amended this Act in 2013 and inserted the provisions for mediation and legal consultation or advice by LAO. LAO has the power to settle any case which is referred by any court or tribunal[1] but also any case brought by the disputants voluntarily in the legal aid office. Legal Aid Officers have the capacity to adopt three strategies to enhance access to justice which is also supported by many accesses to justice literature.[2] Three strategies have proved to be effective and passed the test of time such as individualized legal aid and legal advice (pro bono, subsidized legal services, public defender models); improving accessibility of individuals or groups procedures (at courts, in informal justice systems, in every day justice practices or ADR) and empowerment through legal needs related information (legal information, codification, public legal education, negotiation, and conflict management skills).[3]

## 2. Who is Entitled to Legal Aid?

The Legal Aid Services Act, 2000 has defined Legal aid as the assistance in terms of legal advice, the cost paid to the Mediator or Saliskar for any Mediation or Salish under the Code of Civil Procedure, 1908 as any other

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1 Section 21A (2) of Legal Aid Services Act, 2000

2 Cappelletti, M., & Garth, B. (1978). Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective. Articles by Maurer Faculty Paper 1142.http://www.repository.law.indiana.edu/facpub/1142

3 Maurits Barendrecht (2011) "Legal Aid, Accessible Courts, or Legal Information? Three Access to Justice Strategies Compared," Global Jurist: Vol. 11: Issue. 1 (Topics), Article 6. Available at: http://www.bepress.com/gj/vol11/iss1/art6

existing law, lawyer's fees as provided under Rules, litigation costs and other incidental expenses, provided to the economically insolvent, rootless, and other indigent litigants who for various socio-economic constraints have failed to avail justice. Under Rule 2 of Legal Aid Services Rules 2014 the following groups of people are categorized as eligible to apply for legal aid:

1.(a) Insolvent or economically insolvent person whose annual income is less than Tk.1,50,000/- for Legal Aid in Supreme Court and Tk.1,00,000/- for Legal Aid in any other Court
(b) Physically challenged, partially challenged, jobless person
(c) Freedom fighter whose annual income is less than Tk. 1,50,000/- and any worker whose annual income is less than Tk.1,00,000/-

2. Whatever contrary mentioned in sub rule-1 the following person shall be entitled to legal aid:
(a) Any child
(b) Any person victim of human trafficking
(c) Any child and women victim of physical, mental, and sexual torture
(d) Homeless or rootless person
(e) Any person of minor races, ethnic sects, or communities
(f) Any person victim of family violence or any aggrieved person who is on the risk of being victim of family violence
(g) Recipients of old age benefit
(h) Impoverished mother holding VGD (Vulnerable Group Development) cards
(i) Women and child who are victims of acid burns by miscreants
(j) People having land or house at Adarsha Gram
(k) Financially insolvent widows, economically disadvantaged women, deserted wives
(l) The handicapped
(m) Persons considered eligible for legal aid by the institution due to their insolvency, helplessness or socio-economic backwardness
(n) Prisoners who are detained in custody untried by Court of law unable to afford legal representation to defend their own case
(o) Persons declared or considered insolvent or helpless by the court of law

(p) Persons who are recommended or considered as in solvent or helpless by jail authority
(q) Any other persons who are determined as insolvent

**3. Legal Aid and Access to Justice**

Section 2(a) of the Legal Aid Services Act, 2000 defined legal aid as to provide legal aid to litigants who are incapable of seeking justice due to financial insolvency, destitution, helplessness and for various socio-economic conditions. Legal Aid is a mechanism to provide legal assistance through government funding for those people who do not have the ability to pay for legal advice, assistance, and representation before the court of law. Legal aid includes legal advice and legal aid in the case to be filed, or pending before court, remuneration for the mediator or arbitrator appointed for dissolving a case through mediation or arbitration in accordance with section 89A and 89B of the Code of Civil Procedure, 1908; any other assistance along with expenses for a case, remuneration for the lawyers at the rate determined by the regulations for the purposes of sub-section (i) to (iii).[4] Legal aid paves the way for ensuring some fundamental rights mentioned in the constitution of Bangladesh such as equality before the law, the right to counsel and right to a fair trial and thus play crucial role in access to justice. Legal aid is one of the key instruments of access to justice and is also at the center of the principle of equality and of the overarching objective of the sustainable development goal i.e., to leave no one behind. Access to legal aid translate into access to justice for the poor, the underprivileged and marginal people of the society.[5] Legal aid is an important ingredient of a fair, humanitarian, and effective criminal justice system which is based on the rule of law. It ensures for other human rights which includes the right to a fair trial and is a crucial safeguard that ensures fundamental fairness and public trust in the criminal justice process.[6] Legal aid helps to remove financial obstacles of the poor and indigent people in access to justice. Experts who are

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4 Section 2(A), ibid

5 Access to Legal Aid: Decade of Action available at https://www.unodc.org/unodc/en/justice-and-prison-reform/legal-aid.html accessed on 8 March 2023

6 United Nations Office on Drugs and Crime(2014), Criminal Justice Handbook Series, Early Access to legal aid in criminal justice processes: a handbook for policymakers and practitioners available at http://www.unodc.org/documents/justice-and-prison-reform/Early access to legal aid eBook.pdf

working with legal aid also believe the role of legal aid in access to justice. Executive Director of Legal Aid, Ghana Yahaya Al-Hassan observed that we cannot talk about development if people within a community do not think they have equal access to justice. Nobody feels safe. We cannot even begin to talk about development if citizens do not share a sense of belonging and entitlement to their community justice system. Legal aid is such a fundamental necessity for human existence: it calls for a much greater public investment than we currently see. Legal aid is one of the key factors in promoting access to justice. The United Nations believes that one of the main challenges in accessing justice is the cost of legal representation and legal advice. Legal aid programs are one of the strategies to enhance access to justice.[7]

## 4. Legal Advice by Legal Aid Officer

Legal Aid Officers are empowered to provide legal advice or legal consultation services under the Legal Aid Services (Legal Advice and Alternative Dispute Resolution) Rules, 2015. Legal advice means any advice or opinion provided upon any legal questions or issues.[8] Legal Aid Officers in Bangladesh are law graduated from renowned law schools of Bangladesh and have experience as a judge and so people have confidence upon them regarding legal advice. It is observed that information failure is a significant issue in the justice system. People often do not understand legal issues, what to do or where to seek legal assistance. Many people are excluded from the justice system because information is complicated or simply difficult to find.[9] Under these circumstances, Legal Aid Officer can play a vital role in preventing information failure. In the period from 2009-2022, Legal Aid Officers provided legal advice to 313700 people. The LAOs provide information to the people through legal advice and consultancy. The benefit of providing information through legal advice is that people can use it to solve their legal problems. Getting appropriate

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7 United Nations and the Rule of Law, "Access to Justice," https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/,accessed on March 13, 2023

8 Section 2(GA) of Legal Aid Services (Legal Advice and Alternative Dispute Resolution) Rules,2015

9 Brad Selway Memorial Lecture (2009), A strategic framework for access to justice, University of Adelaide, 23 September 2009 available at ttps://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/WPVU6/upload_binary/wpvu60.pdf;fileType=application%2Fpdf#search=%22media/pressrel/WPVU6%22

and the right type of information on legal issues empowers them to take necessary steps to solve the problems in a satisfactory and cost-effective way.

**5. Mediation by Legal Aid Officer**

Different types of ADR are practiced in Bangladesh by different institutions under numerous laws and regulations. Based on the actors involved, ADR may be categorized under three major heads such as Court-annexed ADR i.e., ADR by civil courts, Statutory ADR conducted by various statutory bodies of the government and informal or non-statutory ADR run by non-government organizations (NGOs), Private Organizations, and individuals. This study will address the statutory ADR particularly mediation by the Legal Aid Officer, a latest innovation in the field of mediation in Bangladesh. By virtue of power provided by Section 22A, Legal Aid Services Act, 2000, Government of the People's Republic of Bangladesh has enacted Legal Aid (Legal Advice & ADR) Rules, 2015 and empowered Legal Aid Officer (LAO) to provide legal advice, legal aid as well as to take initiative to dispose the disputes through mediations. This rule which is made in 2015 provides the detailed legal framework necessary to institutionalize the mediation program conducted by LAO. The Government may in the manner prescribed by rules, appoint necessary number of Legal Aid Officers and determine their duties and responsibilities.[10] LAO has two option to mediate the dispute. It can mediate a dispute which is submitted by the parties in their own initiative to the legal aid office i.e., pre-case mediation and the case referred to by the courts or tribunals within the local jurisdictions. In this way, LAO is involved with both court annexed mediation program as well as party-driven mediation program. This is unique in its nature due to its design to accommodate all kinds of mediation programs as well as stakeholders particularly women, the poor, minorities, indigenous groups, internally displaced people, persons with disabilities. Being a judicial officer, LAO has some distinct and comparative advantages over other dispute resolution mechanisms such confidence, legal knowledge, neutrality and expertise and rapport with judicial officer as a fellow colleague. After hearing the applicants and perusing the submitted documents of the applicants, if LAO is satisfied that reasonable causes are exist, he may

[10] Section 21(A)(1) Legal Aid Services Act, 2000 (Act of VI of 2000)

advise the applicants to dispose of the disputes through compromise primarily.[11] If the applicants are agreed to settle the dispute through mediation, LAO will inform the matter to the other parties and ask their consent by fixing a date.[12] If other parties provide consent, LAO shall take steps to arrange a settlement conference with the presence of both parties.[13] LAO will convene settlement conference at Legal Aid Office or in any other convenient place in a fixed date.[14] Section 9 of the Rules provides guidelines for the LAO which should be followed during the mediation of disputes. The LAO shall preside over the settlement meeting, decide the mode of operation of the meeting, shall highlights the advantage of mediation including the subject matter of the dispute, taking the signature of the parties as a record of attendance, recording the procedures and functions of the meeting, reading over recorded matter relating to the dispute to both parties and take signatures. She/he will not put pressure upon any of the parties to accept his/her proposal. The fundamental principles of the settlement meeting shall be based upon equality, equity, good conscience, and neutrality.[15]

Legal Aid (Legal Consultation & ADR) Rules, 2015 prescribes what should be the role of LAO in resolving dispute through mediation which is like that of standard and universally accepted guidelines for mediators. The LAO shall create the environment for settlements, explain the principles and procedures of dispute settlements to the parties, collect information about the dispute from the parties, identify the causes of disputes, maintain neutrality in mediation meeting by applying different strategies, take steps to exchange views among the parties, assist the parties to choose alternative choices from different types of solution so that they may come to decision and finally act as a mediator.[16]

Parties is entitled to nominate representatives and send them to participate in the settlement meeting.[17] If any dispute is resolved through settlement

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11 Section 3(4) The Legal Aid (Legal Consultation & ADR) Rules, 2015
12 section 4(1), ibid
13 Section 4(2), ibid
14 Section 5, ibid
15 Section 9, ibid
16 Section 11, ibid
17 Section 12, ibid

conference, that shall be written in the form of the contract and must be signed by the parties or their representatives, witness from both sides and finally Legal Aid Officer shall put his signature and seal of the office as a president of the settlement meeting.[18] If settlement meeting is failed or not possible to reach in a positive decision, the Legal Aid Officer, in this case, shall record the reasons for such failure and prepared a report.[19] Legal Aid Officer shall deliver the copy of resolution of the settlement meeting within 5 days of such meeting to the parties and forward a copy of report to the Legal Aid Committee.[20] Any discussion, consultations, evidence or statements regarding a dispute in the settlement conference with the presence of Legal Aid Officer under the Legal Aid Rules shall be considered as confidential and that shall not be used as evidence in any proceedings in the court.[21] In case of a dispute which is presented before the Legal Aid Officer for resolve on compromise, the Legal Aid Officer shall keep away from providing any legal opinion on the disputed matter without the permission of the both parties.[22] Settled contract which is executed or report prepared by the Legal Aid Officer under this rule in any dispute shall be a valid legal document and be accepted as evidence in any legal proceedings.[23] Legal Aid Officer is empowered to mediate litigated suits referred by any court or tribunal under section 21A of the National Legal Aid Services Act, 2000. If any suits are referred to resolve through alternative dispute resolution by any court or tribunal, the Legal Aid Officer shall record such suit in the concerned register and issue notice to both the parties in this regard.[24] In case of any suits referred by any court or tribunal to the Legal Aid Officer, in such case, Legal Aid Officer shall follow the concerned law relating to the suits or in case of absence of any detailed provision in this respect, Legal Aid Officer shall follow the directions of the concerned court or tribunal.[25]

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18 Section 13, ibid
19 Section 13(2), ibid
20 Section 13(3), ibid
21 Section 14, ibid
22 Section 15, ibid
23 Section 16, ibid
24 Section 17, ibid
25 Section 17(1)

After the completion of the proceeding of alternative dispute resolution under this rule, the Legal Aid Officer shall send the resolution or report, in case of failure to both the parties and concerned court with record and documents within 5 days from the date of completion of the dispute resolution.[26] By providing all kinds of services such legal aid, legal advice, and mediation to the marginal people under one roof in an integrated manner by Legal Aid Officer is going to be popular to the community day by day and gaining confidence and make the legal aid office as a resort of hopes and aspirations.

**Statistics of Legal Aid and Mediation Provided by National Legal Aid Service Organization: (From 2019-2022)[27]**

| Name of the Office | Legal Advice/ Consultation Service | Providing Legal Aid in Cases | | Alternative Dispute Resolution Service (Pre & Post cases) | | | Information Service by Hotline | Number of Beneficiaries Received Legal Aid | Compensation (Post & Pre-Case) |
|---|---|---|---|---|---|---|---|---|---|
| | | Number of Case | Disposed of Case | Step taken for ADR | Disposal through ADR | Number of Beneficiaries of cases resolved by ADR | | | |
| SCLAO | 21894 | 2788 | 2116 | | | | | 24682 | |
| DLAO 64 nos | 128419 | 319278 | 153876 | 68141 | 60405 | 108015 | 17328 | 573040 | 907771516 |
| DCLLAC | 18221 | 4070 | 423 | 3124 | 1758 | | | 25415 | 60303792 |
| GLANHL Call center 16430 | 145166 | | | | | | | 145166 | |
| Total | 313700 | 326136 | 156415 | 71265 | 62163 | 108015 | 17328 | 768303 | 968075308 |

SCLAO= Supreme Court Legal Aid Office; DLAO= District Legal Aid Office; DCLLAC= Dhaka-Chattogram Labor Legal Aid Cell; GLANHL= Government Legal Aid National Helpline Call Center

## 6. Legal Aid, Legal Advice and Mediation at Rangamati District

Rangamati Hill District is a distinct region with regard to ethnic, cultural, and ecological diversity, situated in south-eastern part of Bangladesh. It has border with Tripura State of India to the north, Bandarban District to the south, Mizoram state of India and Chin State of Myanmar to the east and Khagrachari District and Chattogram District to the west. The area of

26 Section 17(2)

27 National Legal Aid Services Organization website http://www.nlaso.gov.bd/#

the district is 6116 square kilometers, largest district of Bangladesh in terms of area.[28] Rangamati is a hill district having diversified population with multicultural and ethnic backgrounds. There are eleven distinct small ethnic groups in this district such as Chakma, Marma, Tripura, Tanchangya, Murang (Mro), Chak, Khiayang, Khumi, Pangkhoya, Bom and Lusai.[29] These ethnic groups are different from each other in terms of language, customs, religious beliefs, and socio-political organizations Due to diversity with regard to population and geography, Rangamati hill district is governed by customary laws, national laws, and Chittagong Hill Tract Regulations, 1900. Almost all the land of the Rangamati is Khas i.e., government owned land and land acquired through government settlement. There was no cadastral survey or any other government survey such as Revisional Survey regarding the land of this hill district and so, land dispute in this district is very complex and peculiar in nature, different than that of other plain land district of Bangladesh. As a consequence, most of the civil suits are related to the unlawful possession and dispossession of the land. Moreover, most of the criminal cases arise out of these civil or land disputes. Around 400000 Bengalis were settled in Chittagong Hill Tracts in the late 1970 through 1980s under government policy.[30] Land disputes has been increased due to settlement at that time. Moreover, after the CHT Peace Accord on 02 December 1997, a great deal of investment in tourism took place in Rangamati. Ethnic and Bengali people sold lands for tourist spots which also contributed to the augmentation of land disputes. The socio-economic condition of ethnic-tribal and Bengali settlers' people is very impoverished. Their livelihood is dependent on agriculture and fishing. The income from agriculture is not good enough to become solvent. So, the people of Rangamati need legal aid, legal advice, and mediation from Legal Aid Officers to get access to justice. They do not have enough financial means to get these services.

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28 Available at Wikipedia https://en.wikipedia.org/wiki/Rangamati_Hill_District accessed on 12 March 2023

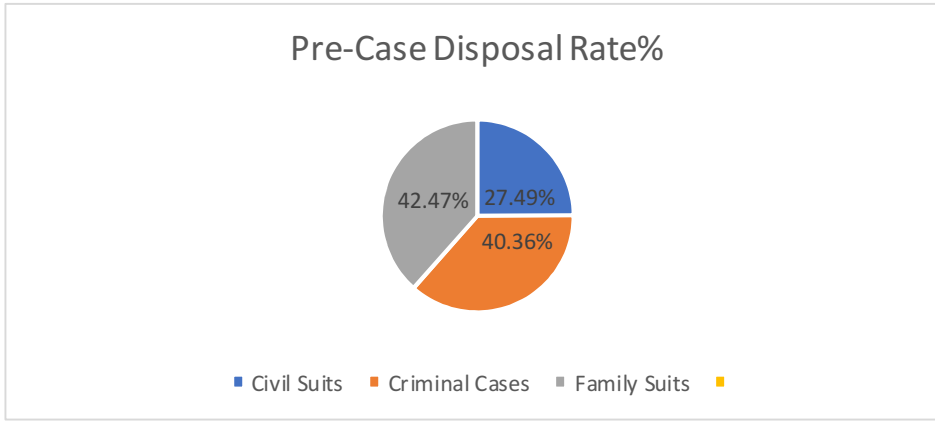
29 http://www.rangamati.gov.bd/bn/site/page/YpJo-%E0%A6%AD%E0%A6%BE%E0%A6%B7%E0%A6%BE-%E0%A6%93-%E0%A6%B8%E0%A6%82%E0%A6%B8%E0%A7%8D%E0%A6%95%E0%A7%83%E0%A6%A4%E0%A6%BF

30 Mohsin, Amena. (1997) The Politics of Nationalism: The case of the Chittagong Hill Tracts, Bangladesh, Dhaka: The University Press Limited

**Mediation and Legal Aid provided by Legal Aid Officer, Rangamati Hill District:[31]**
**Period from January 2022 to December 2022**

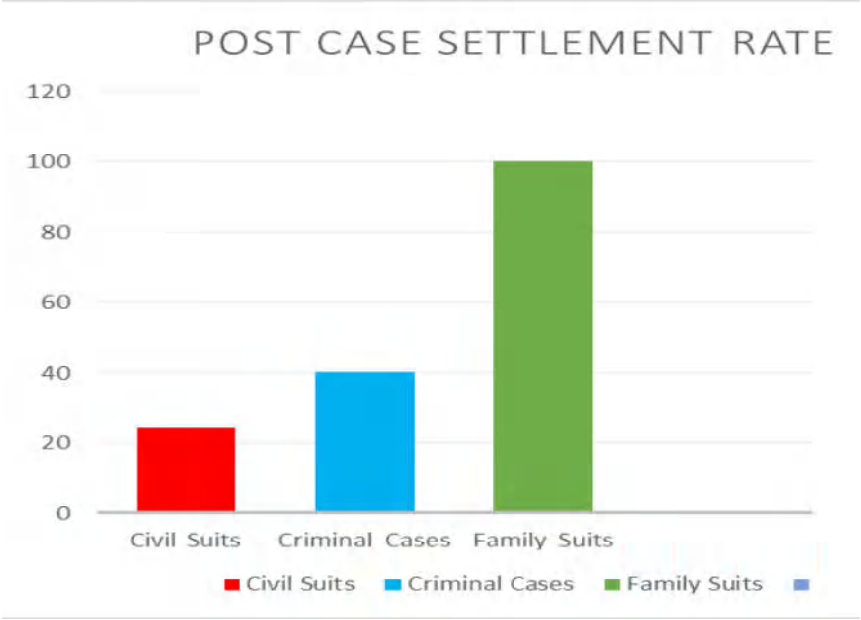
i) Application received for amicable settlement: 948
ii) Number of Disposal of Disputes: 831
iii) Number of Beneficiaries: 2560
iv) Money Recovered: 1,03,13,294.00
v) Number of Beneficiaries of Free Legal Aid: 916
vi) Trial Cases withdrawn from the Court due to Settlement: 93
vii) Activation of Upzila Legal Aid Committee: 08
viii) Activation of Union Parishad Legal Aid Committee: 25
ix) Views Exchange Meeting with Schools, Colleges, and Imams: 15
x) Physical on the Spot Settlement Meeting in Suit Land: 120

**Pre-case Successful Disposal Rate (from 09/12/2021 to 31/12/2022)[32]**




31 Information collected from District Legal Aid Office, Rangamati Hill District.
32 Ibid

**Post Case (Pending before Courts) Successful Disposal Rate**[33]




### 6.1 Mediation by Legal Aid Officer on the Spot or Suit Land

The Legal Aid Officer is entitled to arrange a settlement conference in the district legal aid office or any other convenient place under rule 5 of the Legal Aid (Legal Consultation & ADR) Rules, 2015. She/he can arrange a settlement meeting at the place of occurrence or in the suit land. Arranging settlement conferences at the suit land has a lot of advantages particularly land related disputes. The advantages of visiting the spot or suit land are that it provides a clear and realistic idea about the possession of the parties, the boundaries of the suit land. The local Union Parishad (a basic and important unit of local government) chairman, members, karbari, head men of the concerned local area are involved to make the settlement conference more inclusive, acceptable, credible, and enforceable. The Legal Aid Officer acts as coordinator or catalyst or mediator in this settlement conference. Settlement conference on the spot has been gaining popularity and acceptance among the justice seeker people of the hills due

[33] Ibid

to its transparency and reality. It reduces the cost and time of taking rigorous evidence regarding possession of the Suitland at the legal aid office. A real picture is stronger and more believable than oral words.

### 6.2 Challenges of Legal Aid Officer at Rangamati Hill District

Although Legal Aid Officer is empowered to arrange a settlement conference on the spot of suit land under rule 5 of the Legal Aid (Legal Consultation & ADR) Rules, 2015, but no vehicles or transport facilities are provided to Legal Aid Officers to visit place of occurrence or suit land. Moreover, no security is provided to the Legal Aid Officers during the visit time at the suit land. The law-and-order situation of Rangamati Hill district is not good due to insurgency of different ethnic groups and so, visiting suit land or place of occurrence for the purpose of providing mediation and legal aid services is very risky. Another challenge of this district is that no record of rights about land has been performed here. Record of rights is one the most important public documents to determine the land rights of the owners. After signing the Peace Agreement in 1997, Chittagong Hill Tracts Land Dispute Settlement Commission was established but unfortunately, the commission could not start its functions due to regional politics and movement of the local people against the commission. Since the government approved record of rights is not available regarding the land of this district, it is very difficult to settle the dispute without visiting the place of occurrence or suit land. Moreover, to determine the boundary of the suit land and possession, the assistance from surveyor is required which is also one of the challenges to provide legal services to the poor and marginal people. Lack of supporting human resources at the legal aid office is one of the impediments in the smooth and efficient functioning of the legal aid office. At present, there is only one Legal Aid Officer at the whole district and so, it is difficult to provide legal aid services to the grassroot people who are living at the remotest part of this hill district. Bangladesh is going to graduate from the least developed country to lower-middle income country very soon and so more investment is required in legal aid services and the capacity of Legal Aid Officer as well as number of Legal Aid Officers should be strengthened to catch up with the more people.

## 7. Mediation and Access to Justice

Mediation is enthusiastically promoted as a vehicle for providing access to justice.[34] Access to justice is very crucial for ensuring rule of law, good governance, and enjoyment of basic human rights. But courts of Bangladesh are burdened with huge backlog of cases which are creating impediment in the access to justice. At present more than 3 million cases are pending in the courts against 1700 judges. The average growth rate of the cases is around ten percent during the last five years. Considering that growth rate, the backlog of cases will double within the next five years if no action is adopted. Rising trend of backlog of cases is one of the sources of concern that challenges the very purpose of the court system.[35] Considering the delay in the disposal of cases by the courts, Gladstone, a British public servant said in nineteenth century that Justice delayed is justice denied.[36] In view of delay and cost of litigation, traditional court system of Bangladesh appears to be not accessible and inclusive and causing obstacles regarding access to justice and so providing access to justice to the justice seekers particularly the underprivileged people is a challenging issue in Bangladesh.

Mauro Cappelletti and Bryant Garth noted in their international and interdisciplinary study of access to justice that access to justice, from historical point of view, is a reform movement, where they categorized three waves of law reform such as legal aid, procedural devices for class action, and promoting systematic reform of the legal system through alternative dispute resolution.[37] Mediation service, a most popular form of ADR provided by the LAO to the poor and underprivileged people is a systematic reform of the legal system of Bangladesh as to make legal system inclusive and pro-people. Mediation service provided by Legal Aid Officers to the poor people is almost free of cost because the Legal Aid

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34 ABA Section of Dispute Resolution, Access to justice through Alternative Dispute Resolution, White Paper 2 (2002), https://www.americanbar.org/ content/dam/aba/ images/dispute resolution/publications/A2J_%20white_paper.pdf

35 Strategic Plan 2017-2022, Supreme Court of Bangladesh, http://www.supremecourt. gov.bd/ resources/contents/Strategic_Plan.pdf

36 Bruce and Allan Zullo, eds, and Kathryn, cam., Lawyer's wit and Wisdom: Quotations on the legal profession, in Brief (Philadelphia, Pa: Running Press,1995, P.139

37 Mauro Cappelletti & Bryant Garth, Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective, 27 BUFF. L. REV. 181, 196–223 (1978)

Officer is paid by the government. On the other hand, mediation which is provided by the private organizations or lawyers require costs.

Access to justice system suggests the creation of ways to resolve disputes which are within the ambit of the formal legal system by adopting multidimensional strategies including mediation, early neutral evaluation, arbitration, and many combinations of other methodologies that structured to promote speedy resolution of disputes. The litigation process has become an end in and of itself without the litigants having a meaningful role in the last few decades. The vigorous expansion of dispute resolution mechanisms in the past for about thirty years has evolved, in part, due to the ability of these processes to adapt to the needs of the litigant people and not exclusively on the process and its formalities.[38]

## 8. Impact of Access to Justice on Human Rights, Rule of Law & Development

Governments can strengthen their legitimacy, their capacity to effect social change, and their ability to promote economic growth by giving access to justice. Although the idea is widely understood and accepted in the developed world, governments in the developing world occasionally do not place a high focus on it. Most states correctly acknowledge that access to justice is a weapon for social change and economic growth in addition to being a right.[39]

Access to justice is a basic principle of the rule of law. Access to justice is an essential condition for the effective implementation of human rights, as well as for democracy and the rule of law. Access to justice involves legal protection, legal awareness, legal aid, and counsel, adjudication, enforcement, and civil society oversight. Access to justice supports sustainable peace by providing the population with a more attractive alternative to violence in resolving personal and political disputes. In the absence of access to justice, people are unable to have their voice heard,

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38 William Davis & Helga Turku, Access to Justice and Dispute Resolution, Journal of Dispute Resolution, Volume 2011 Article 4 page 50

39 Doncily, supra note 3, at 43

exercise their rights, challenge discrimination, or hold decision-makers accountable.[40]

**9. Does Mediation can be Considered as a Part of Justice System?**

In 1995, the Commonwealth Attorney General's Department promulgated the Justice statement in 1995 where four key themes and beliefs regarding access to justice were described namely (i) a commitment to equality before the law; (ii) a belief in the desirability of preventing disputes from occurring or escalating where possible; (iii) making it possible for people to resolve disputes by simple and accessible means; and (iv) ensuring that the services already delivered in the legal system are delivered more efficiently and with a much greater awareness of and orientation to their consumers– the public.[41] All the above key themes and beliefs reinforce the importance of ADR in promoting access to justice.

The ability of people to defend and enforce their rights and obtain a just resolution to legally actionable issues in accordance with human rights standards, if necessary, through impartial formal or informal institutions of justice and with appropriate legal support, is broadly referred to as access to justice.[42] In many parts of the world, the adoption of Alternative Dispute Resolution (ADR) processes was premised on creating better access to justice for citizens, particularly those with lesser mean.[43]

The term access to justice has many dimensions, such as, access to justice from a right-based perspective refers to the ability of people from disadvantaged groups to prevent and overcome human poverty by seeking and obtaining a remedy, through formal and informal justice systems, for grievances by observing the principles and standards of human rights.[44]

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40 United Nations and the Rule of Law: Access to Justice, available at https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/

41 http://www.austlii.edu.au/austlii/articles/scm/jcontents.html

42 Praia Group Handbook on Governance Statistics: Access to and Quality of Justice (forthcoming 2019) available at https://www.ohchr.org/en/documents/tools-and-resources/praia-handbook-governance-statistics accessed on 12 March 2023

43 Woolf (1996): Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales

44 UNDP (2005): Programming for Justice: Access for All, A Practitioner's Guide to a Human Rights based approach to access to justice, available at

Access to justice institutions whether formal or informal should be affordable, accessible and should also process the case in a timely manner.[45] People-centered justice services encompass a vast number of processes and procedures which includes a range of alternative resolution mechanisms such as mediation, online dispute resolution, pre- and post-resolution support, in addition to more formal judicial and non-judicial proceedings.[46] There must be a different approach to access to justice today- a people centered approach to access to justice that takes consideration of the individual's choice by providing opportunity for resolving disputes through multidimensional resolutions systems.

To resolve disagreements, the multidoor courthouse model accepts both traditional litigation and alternative dispute resolution methods. At the Pound conference in 1976, Professor Frank E.A. Sander of Harvard Law School was the first to propose the idea of a multidoor courthouse. Public litigation, or conflict resolution, can only be done in the traditional courthouse through a single door. Realizing that litigation is not always the best course of action for settling problems gave rise to the idea of the multidoor courthouse. The parties should be given a variety of options in addition to adjudication, such as mediation, arbitration, early neutral evaluation, summary jury trials, and mini trials.[47] So it is evident that multidoor courthouse concept also embrace the concept of alternative dispute resolution including mediation as a means of access to justice.

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https://www.undp.org/sites/g/files/zskgke326/files/migration/asia_pacific_rbap/RBAP-DG-2005-Programming-for-Justice.pdf

45 ABA (2012), Access to Justice Assessment Tool – A Guide to Analyzing Access to Justice for Civil Society Organizations, Rule of Law Initiative, American Bar Association, Washington, https://www.americanbar.org/ content/dam/aba/ directories/ roli/misc/ aba_roli_access_to_justice_assessment_manual_2012.pdf

46 https://www.oecd-ilibrary.org/sites/597f5b7f-en/1/2/5/index.html?itemId=/content/publication/597f5b7f-en&_csp_=67307576eea7cf85ba9867047256bcbf&itemIGO=oecd&itemContentType=book

47 Stuart, Kenneth K.; Savage, Cynthia A (1997): The Multi-Door Courthouse: How it's working, https://www.courts.state.co.us/Administration/Section.cfm?Section=odrres

## 10. Legal Empowerment through Legal Aid, Legal Advice, and Mediation

It is evident that legal aid, legal advice on legal issues and mediation, a popular form of alternative dispute resolution provided by Legal Aid Officers, an experienced judicial officers under the supervision of National Legal Aid Services Organizations to women, the poor, minorities, indigenous groups, internally displaced people, persons with disabilities, the sick and other groups that are more disadvantaged, marginalized, and vulnerable in communities play a crucial role in access to justice, a vehicle for empowerment to get access to other human rights. Access to justice helps to empower the marginal people to recover their legitimate rights which can be termed as legal empowerment. In this respect, access to justice can be considered as an instrument to ensure legal empowerment.

Legal empowerment interventions include the provision of legal aid and community paralegals, capacity building and awareness-raising for both citizens and providers[48] and public interest litigation. The right to legal aid in criminal cases is enshrined in many human rights treaties and in most national constitutions. In fragile and conflict-affected contexts, formal legal aid schemes are often established, but are limited by the lack of lawyers in the country. Other civil society initiatives, such as reliance on community paralegals, can provide awareness-raising, advice and mediation (Maru, 2010b).[49] Legal empowerment is a key 'demand-side' response to addressing deficits in the rule of law. It entails extending legal provisions to the poor and encouraging them to be more proactive in claiming their rights.[50]

## 11. Constitution of Bangladesh and Access to Justice

The Constitution of the People's Republic of Bangladesh upholds the importance of access to justice. The preamble of the Constitution affirms that the state aims to realize a socialist society through the democratic process. This society will be free from exploitation and will secure the rule

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48 Bakrania, S. with H. Haider (2016). Safety, Security and Justice: Topic Guide. Birmingham, UK:GSDRC, University of Birmingham

49 Maru, V. (2010): Allies Unknown, Social Accountability and Legal Empowerment, Health and Human Rights in Practice,12(1),83-93

50 Roseveare, C. The rule of law and international development. Department for International Development (DFID), London, UK (2013) 87 pp.

of law, fundamental human rights and freedoms, quality, and justice for all citizens. It also guaranteed that all citizens are equal before the law and are entitled to have equal protection of law.[51] Civil rights and liberties are protected and advanced when citizens have access to and confidence in the justice system.[52]

Rule of law loses its credibility and importance if citizens are not able to access to justice services of the state. International Courts such as the court of Justice of the European Communities and the European Court of Human Rights realize that governments should have an affirmative and positive obligation to provide access to justice to its citizens[53]. ADR program can enhance access to justice for vulnerable social groups of people who do not have adequate and fair access to the traditional judiciary. It can also reduce time and cost to resolve disputes and increase the satisfaction of the disputants with the results.[54] Rethinking conventional methods of providing legal and justice services and placing a priority on meeting people's needs are necessary if we are to ensure that no one is left without access to justice. Services must be "personalized" and adaptable to the user and the circumstance.[55] ADR programs may increase access to justice for marginal social groups who do not have adequate or fair access to the courts due to constraints. It can be cost effective and time efficient in resolving disputes and increase the satisfaction of the disputants with outcomes.[56]

Several country studies found multiple benefits in addressing legal needs and providing access to justice to wide range of legal assistance and access to justice programs, for individuals, families, and communities. There is

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51 Article 27 of the Constitution of the People's Republic of Bangladesh

52 Samuel J. M. Donnelly, Reflecting on the Rule of Law: Its Reciprocal Relation with Rights, Legitimacy, and Other Concepts and Institutions, 603 THE ANNALS AM. ACAD. POL. & SOC. Sco. 37, 37-42 (2006).

53 https://www.venice.coe.int/images/ SITE%20IMAGES/ Publications/Rule_of_Law_ Check_List.pdf

54 Alternative Dispute resolution Practitioners Guide, Part III Page 6 available at https://www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf

55 OECD (2019) Equal Access to Justice for Inclusive Growth: Putting People at the Centre

56 Alternative Dispute Resolution Practitioner Guide, Scott Brown, Christine Chervenak, David Fairman, https ://www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf

evidence of positive sectoral impacts in areas such as housing and the prevention of homelessness, enabling gender equality and reducing domestic violence, supporting inclusion through facilitating access to social benefits, enhancing consumers financial protection and debtor relief, facilitating access to health care and support for medico-legal problems, supporting child welfare and families, supporting positive outcomes for migrants and immigrants, reducing recidivism and enhance victim support, supporting employment and promoting equality and diversity and promoting equal access to education.

## 12. Conclusion

Legal Aid Officer plays a crucial role in accessing to justice of the poor, indigent, vulnerable, underprivileged, and marginal people particularly the women through legal aid, legal consultation, and mediation in Rangamati Hill District. Mediation service provided by the Legal Aid Officer has gained popularity and acceptability to the poor people due to its neutrality and efficacy. It has added new dimension in the field of alternative dispute resolution system of Bangladesh and expanded the horizon of the ADR. Due to the inherent weakness of the village court on account of its political affiliation and biasness, an ADR based mechanism in delivering justice services to the marginal people, District Legal Aid Officer has created a ray of hope in a limited scale through its professional and institutional reputation and expertise. Logistic support such as surveyors surveying land for land disputes, computer operator, transportation facilities should be provided to the Legal Aid Officer so that she/he can discharge her/his function more efficiently. Awareness about the program of legal aid offices should be developed so that people can avail this opportunity. The capacity of all the stakeholders such as Legal Aid Officers, support staffs of the legal aid, panel lawyers of legal aid, members of the legal aid committee regarding legal aid, legal consultations, and mediation should be strengthened through training, motivation and incentives. Prevailing institutional mechanisms for access to justice should be strengthened by preparing rules on mediation and establishing a digital database for national legal aid services.

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2) Access to Legal Aid: Decade of Action available at https://www.unodc.org/unodc/en/justice-and-prison-reform/legal-aid.html accessed on 8 March 2023
3) United Nations Office on Drugs and Crime(2014), Criminal Justice Handbook Series, Early Access to legal aid in criminal justice processes: a handbook for policymakers and practitioners available at http://www.unodc.org/documents/justice-and-prison-reform/Early access to legal aid eBook.pdf
4) United Nations and the Rule of Law, "Access to Justice," www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/
5) Section 2(GA) of Legal Aid Services (Legal Advice and Alternative Dispute Resolution) Rules,2015
6) Brad Selway Memorial Lecture (2009), A strategic framework for access to justice, University of Adelaide, 23 September 2009
7) Wikipedia https://en.wikipedia.org/wiki/Rangamati_Hill_District accessed on 12 March 2023 http://www.rangamati.gov.bd/bn/site/page
8) Mohsin, Amena. (1997) The Politics of Nationalism: The case of the Chittagong Hill Tracts, Bangladesh, Dhaka: The University Press Limited
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10) ABA Section of Dispute Resolution, Access to justice through Alternative Dispute Resolution, White Paper 2 (2002), https://www.americanbar.org/ content/dam/aba/ images/dispute_resolution/publications/A2J_%20white_paper.pdf
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13) Mauro Cappelletti & Bryant Garth, Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective, 27 BUFF. L. REV. 181, 196–223 (1978)
14) William Davis & Helga Turku, Access to Justice and Dispute Resolution, Journal of Dispute Resolution, Volume 2011 Article 4 page 50 http://www.austlii.edu.au/ austlii/articles/scm/jcontents.html
15) Praia Group Handbook on Governance Statistics: Access to and Quality of Justice (forthcoming 2019) available at https://www.ohchr.org/en/documents/tools-and-resources/praia-handbook-governance-statistics accessed on 12 March 2023
16) ABA (2012), Access to Justice Assessment Tool – A Guide to Analyzing Access to Justice for Civil Society Organizations, Rule of Law Initiative, American Bar Association,Washington,https://www.americanbar.org/content/dam/aba/directories/roli/ misc/aba_roli_access_to_justice_assessment_manual_2012.pdf https://www. oecd-ilibrary.org/sites/597f5b7f-en/1/2/5/index.html?itemId=/content/ publication/ 597f5b7f-en&_csp_=67307576eea7cf85ba9867047256bcbf&itemIGO=oecd&itemContentType=book

17) Stuart, Kenneth K.; Savage, Cynthia A (1997): The Multi-Door Courthouse: How it's working, https://www.courts.state.co.us/Administration/Section.cfm?Section=odrres
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19) Article 27 of the Constitution of the People's Republic of Bangladesh
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21) Alternative Dispute resolution Practitioners Guide, Part III Page 6 available at https://www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf
22) 22OECD (2019) Equal Access to Justice for Inclusive Growth: Putting People at the Centre
23) Alternative Dispute Resolution Practitioner Guide, Scott Brown, Christine Chervenak, David Fairman https ://www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf

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2) The Legal Aid (Legal consultation and Alternative Dispute Resolutions) Rules,2015
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# Counseling for Juvenile Delinquents in Bangladesh: An Alternative Approach

Dr Nahid Ferdousi*

**Abstract**

Juvenile crime is a complex set of psycho social problem that is caused and reinforced by number of influencing factors. A child is considered as juvenile offender by the law when such children commit a fault which is illegal and is not acknowledged by the society. To reduce percentage of juvenile crime and refurnishing juvenile offenders into normal life government should start counseling programs at level starting from police stations to correctional institutions. Juvenile delinquency can never be controlled with fear and punishment but reversing any offensive behavior is very much possible with proper counseling and correction programs. The Children Act 2013 focuses rights-based approach towards children but there are fewer alternative measures for correction and rehabilitation instead of punishment. In Bangladesh, not much significant development is observed in terms of disbursing proper counseling programs and establishing adequate number of Child Development Centres (CDCs) and rehabilitation centres in order to support juvenile justice process. The study analyses the significance of counseling in juvenile correction in Bangladesh.

**Keywords:** Juvenile delinquents, counseling, rehabilitation, correction, alternative approach.

## 1. Introduction

Like many countries of the world juvenile crime scenario has become a major concern in Bangladesh. Being one of the emerging countries of Asia, Bangladesh is now progressively shifting towards industrialization which also opens many doors of opportunities and obstacles as well. Society with unprivileged children will eventually increase the total volume of juvenile delinquency of a society. One fourth of Bangladesh total population comprise of juvenile which rise a great concern for parents, societies and government as well in ensuring juvenile appropriate development. These children and adolescents are being involved in

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extortion, property grabbing, drug dealing, eve-teasing, rioting, theft, snatching, robbery, rape, serious injury, and even murder. They are also committing organized crime by forming criminal gangs. Their increasing involvement in sex crimes, kidnappings, drug crimes, murders is going to a frightening stage.[1]

Since independence in 1971, Bangladesh was struggling to manage its shattered economy, political unrest and natural disasters. After independence, for the first time law enforcement agencies face the need to put more emphasize on controlling juvenile delinquent. From 2014 across Bangladesh, the juvenile justice is regulated by the Children Act 2013.[2] One of the most significant contributions of such Act is separating children courts and reform the institutional set up of child-oriented justice system. Approximately 1,191 minor were arrested in 821 cases across country in the second quarter of 2020.[3] Large percentage of such child and teenagers were arrested under the case of drug, mugging, murder and rape. Major portion of such juvenile offender were forwarded to the correctional centers.[4]

According to Ministry of Home Affairs of Bangladesh percentage of street children involve in antisocial activity or unlawful act. According to UNICEF, approximately there are 32 million teenagers in Bangladesh which is approximately 21% of the population.[5] Therefore juvenile crime has become a concern for the government and law agencies of Bangladesh.[6] However, Bangladesh Bureau of Statistics has estimated a different number which is much larger than that. As per Bangladesh

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1 Nahid Ferdousi, Trends and Factors of Juvenile Delinquency in Bangladesh: Some Observations, Bangladesh Journal of Law, Bangladesh Institute of Law and International Affairs, Vol. 11 Nos. 1 & 2, 2011, 131-148.

2 The Children Act 2013 (Act no. 26 of 2013).

3 Md. Fahmedul Islam Dewan, Juvenile Delinquency in Bangladesh, The Daily Sun, 13 Nov, 2021.

4 Md. Mohinuddin, Types and Features of Juvenile Delinquency in Bangladesh, 02 September, SwEduCareBd 2019. Website: https://www.sweducarebd.com/2019/09/types-and-features-of-juvenile.html

5 Adolescents in development, UNICEF platforms prepare youths for positive action, UNICEF, 2020. https://www.unicef.org/bangladesh/en/adolescents-development

6 M. Jamil Khan and Md. Sanaul Islam Tipu, Children‘s Involvement in Crime on the Rise, Dhaka Tribune, 1 October 2016.

Bureau of Statistics the number of children between 5 and 17 years of age are approximately 40 million. Within this 40 million around 1.3 million children are directly or indirectly involved in hazardous jobs, where due to poverty and illiteracy rate around 70% are engaged in criminal activities.[7]

To reduce such number of juvenile delinquencies of a society there is no alternative of correction and rehabilitation centers as well as counseling programs in Bangladesh. The correctional treatment and rehabilitation program of juvenile delinquents all over the world has been undergoing changes. The main purpose of juvenile treatment is to protect the children from recidivism and ensure their rehabilitation as well as smooth reintegration into the society. As unhealthy environment, scarcity of essential necessities and wrong accompany and mentor influence a child mind tremendously. Therefore, they require customized counseling that focus more on a child's psychosocial aspect and can help those juveniles in readapting into the society smoothly. Juvenile counseling has always been found to have a very affirmative and influencing effect on behavior modification. Counseling can increase discipline among the delinquents and makes them aware of their actual value through reinforcing their feelings and level of understanding.[8]

Juvenile counseling is developed from the advancements that have taken place in the fields of psychology and psychiatry which makes juvenile counseling a broad umbrella of rehabilitation. At the beginning of the 20th century, criminal policy around the world was greatly influenced by scientific advances that focused more on criminal behavior. Therefore, apart from imprison punishment a number of alternative approaches have been introduced. Counseling is one of the approaches which focus more on underlying issues of an offender such as their character, mind, and disposition.[9] In this regard, the provisions of the Convention on the Rights of the Children (CRC) that mentions 'whenever appropriate and desirable,

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7 Md. Fahmedul Islam Dewan, Juvenile Delinquency in Bangladesh, The Daily Sun, 13 Nov, 2021.

8 Rijvi Ahmed, Theory and practice of criminology: Bangladesh perspective, University Publication, 3rd Edition, October 2021, 164.

9 Pupul Dutta Prasad, Reimagining Counseling in the Juvenile Justice System, Economic and Political Weekly, Vol. 55, Issue No. 9, 29 Feb, 2020. Website https://www.epw.in/engage/article/reimagining-counselling-juvenile-justice-system

measures for dealing with such children without resorting to judicial proceedings'. Hence, the child offenders commit only minor offences, the CRC and other international standards like the Riyadh Rules or the Beijing Rules explore a range of measures involving removal from juvenile justice processing and referral to non-custodial and alternative social services.[10]

Despite having acknowledged the Act 2013, there are concerns about the implementation of the provisions related to applying non-custodial interventions to children offender, rehabilitation centers and diversion programs such as family conferencing, restorative justice and alternative dispute resolution.[11] Due to limited correction centres or Child Development Centres (CDCs) under the Act 1974, and there are no new CDCs yet established under the Act 2013. Two of them were established at Tongi in 1978 and Jashore in 1995 for boys and one at Konabari, Gazipur in 2003 for girls. Thereafter, CDCs are not developed in accordance with the 2013 Act as well as international standards. Due to shortage of social case worker, counselor, probation officer, child offender do not get the opportunity of diversion, family conference and alternative measures. The ministry of social welfare has given the department of social services the authority to include and carry out alternative measures for children such family conferences or diversion. All communication in diversion programs, family conferencing and alternative dispute regulation remain confidential and cannot be used as legal document in court proceedings.[12]

Since there are no rehabilitation and after-care services, the children again commit crime even after release. Thus, the role of correctional institutions is not adequate for prevention of delinquency as well as rehabilitation of delinquents. In fact, poor conditions remain in the CDCs and correctional facilities such as communal, educative, specialized training, emotional,

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10 CRIN, Inhuman Sentencing of Children in Bangladesh. London, United Kingdom: Child Rights International Network, 2015.

11 The Children Act 2013, section 48.

12 M. Imman Ali, The Children Act 2013: A Commentary by Justice Imman Ali, Dhaka: Penal Reform International and Bangladesh Legal Aid and Services Trust, 2013.

medical and manual plans and strategies are not up-to-the mark.[13] Due to the functional structure and resource constraints, law enforcing agencies, courts, and child development centers are not able to provide counseling services that reflect juvenile rehabilitation.[14] The main objective is to explore the importance of counseling as an alternative treatment for prevention of juvenile delinquency in Bangladesh.

## 2. Methods

The methods of such study majorly depend on secondary data which are different journals, articles, publications, nation polices, programs and initiatives of countries, international standards and policies on juvenile delinquents and other researcher finding. Exploring such secondary data researcher tried to portrait present juvenile delinquents scenario of Bangladesh and identify most effective instrument to rehabilitate juvenile delinquents.

## 3. Importance of Counseling and Rehabilitation in Juvenile Justice

The treatment model of juvenile offenders all over the world has been undergoing changes for protection from recidivism and ensures their rehabilitation. Juvenile counseling as a treatment of child offenders refers to a set of activities and various practices in the justice process. Juvenile Counseling is one of the best methods of uprooting the real cause of any juvenile crime. Proper counseling, enhancing moral and family bonding, religious beliefs and easy education can easily divert any juvenile delinquent towards a healthy social life and living.[15]

It can be a great source of dealing with specific emotions, traumatic situation and anti-social behavioral situation. Most criminal justice system across world holds the idea that counseling is an indispensable part in crime prevention. An effective counseling therapy can empower a juvenile

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13 M. Rezaul Islam and Md. Anwarul Islam Sikder, “Effectiveness of Legal and Institutional Framework forJuvenile Justice in Bangladesh: A Critical Analysis”, Social Research Reports,Vol. 26, 2014, pp. 66-81.

14 Nahid Ferdousi, Deprive Children in the Development Centers, The Daily Star, and 27 April, 2015.

15 John Ryals, "Juvenile Offenders' Perceptions of the Counseling Relationship" University of New Orleans, Theses and Dissertations, 2003, 96. https://scholarworks.uno.edu/td/24

delinquent in improving relations integrating conflict along with decreasing the probability of reoffending.[16] Counseling aims to help offenders to reimagine the implications of terms rehabilitation, treatment and possible curing. It gives a proper guideline to a child to explore various situations and use various outside resources to cope with any difficulties. The major aim of juvenile counseling is to ensure their academic, social, emotional and personal development. Counselor gives career counseling and directs an offender towards a better future with proper rehabilitation, formal education, vocational training or part time job etc. At present every government across globe has the provision that allows an offender child to undergo specific counseling sessions during their time in prison or jail. Through in person interaction with juvenile counselors usually help an offender by preventing recidivism and discouraging any sort of escalation of crimes from petty to serious offenses.[17]

Generally, children having issues like truancy, drug abuse and assault are enrolled for juvenile rehabilitation programs. Juvenile rehabilitation is a unique system which is carefully designed to support minor or juvenile. It is being used widely in western world comparing to Asian countries. Juvenile rehabilitation methods across globe vary in a great manner. Majority of the juvenile rehabilitation programs are designed to prevent future delinquency through providing strong guidance than to serve as outright punishment. In developed countries rehabilitation service includes many featuring activities like after school programs and boot camps facilities.[18]

In developing countries like Bangladesh percentage of such programs is almost zero. There is a lack of alternative approaches to the treatment of juvenile counseling and rehabilitation. Rather punishment is imposed upon the child offenders as per the gravity of offence. India, Malaysia and Singapore have adopted many of such juvenile rehabilitation services to

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16 Ben wolf, The Benefits of Adolescent Counseling, Hope & Healing for Life, 16 May, 2016. https://hopeandhealingforlife.com/2016/05/benefits-adolescent-counseling/

17 N. Sam M. S. PsychologyDictionary.org, April, 29 2013. https:// psychologydictionary. org/ youth-counseling/ (accessed 12 December 2022)

18 Tahsin Khan, Protecting the Rights of a Child Offender: The Bangladesh Perspective'IOSR Journal of Humanities and Social Science, 22(3) 2017, 49.

strengthen their juvenile justice systems. In most cases mainly juvenile rehabilitation is not designed to punish any minor rather it allows children to explore their true potential.[19] Although many social activists argue that containing a minor in any facilities is somewhat equal to punishment. In juvenile rehabilitation facilities children are often involved in comprehensive skill building programs personalized intensive counseling. In many cases it is being observed that the size and type of juvenile rehabilitation programs has a direct impact on recidivism. In majority of the cases of boot camp style it is being observed that minor who get involved in boot camp program due to any lower volume of offense like truancy are less prone to crime in their future life. On the other hand, it is also being observed that any minor who have committed a serious offense like murder or rape can have a more harmful effects due to enrolling at the normal boot camp programs. In many countries juvenile rehabilitation programs are used as the first stage whereas in many countries it is being used as the end stage. Children or minor who are more menacing than criminal is usually enrolled in after school programs which are mainly held in detention facilities.[20]

In Bangladesh, there has not been much progress made in terms of providing appropriate counseling services and developing enough rehabilitation facilities to support the juvenile justice system. There is only three correction institute across country which is very less in percentage comparing country's total adolescence population. In a population of over one hundred and sixty million, large portions of Bangladesh population are below fifteen years of age who mostly belongs to rural areas. There are only two correctional homes for boys and one correctional home for girls to support a huge number of juveniles. Each of such correctional homes had a capacity of around two hundred inmates which is very inadequate comparing total number of children.

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19 Farhana Helal Mehtab, Juvenile Justice System of USA and Bangladesh: A Comparative Study of Diversion and Alternative Measures and Hard Realities of Juvenile Justice System in Bangladesh '(2009) 12 The Dhaka University Journal of Law 54.

20 What is Juvenile Rehabilitation, Felicia Dye, Web: www.mylawquestions.com/what-is-juvenile-rehabilitation.html

According to a news report from the Prothom-Alo, there are 909 children against a capacity of 300 seats at Tongi child development centre, 353 children against a capacity of 150 seats at Pulerhat child development centre in Jashore and 89 children against a capacity of 150 children at the girls development centre in Konabari, Gazipur. Thus, these child development centres accommodate children more than their capacity and they recommended setting up several more child development centres.[21] Child rights are not being upheld by the overcrowded child development centers intended to help children who are in conflict with the law. According to a New Age article, showed that the two centres in Gazipur and one in Jashore have 1,236 inmates against 600 seats. As per the Children Act of 2013, child inmates must be categorized into groups based on their age and the type of offenses they have committed, but this has not been possible due to a lack of seats. The circumstance requires a lot of minor offenders, including kids charged with murder, robbery, and rape, to live in a room with 8 to 15 other kids.

Although the overcrowding issue is acknowledged by the relevant authorities, they stress that the centers provide children with the necessary educational and psychological help to alter their conduct. However, the claim is not supported by the deaths of three prisoners at the Jashore center in 2020. The Act of 2013 ostensibly shifted the legal system for children who come into contact with the law or are in conflict with it in favor of restorative justice, but in practice it still favors punitive measures.[22] Unfortunately, the number of juvenile counseling programs, correction and rehabilitation center is not sufficient enough to support one percentage of total juvenile population which in the long run may turn into a disaster.

**4. Juvenile Counseling Services in Institutional Settings**

The amount of juvenile delinquency cases is increasing in a rapid manner. Increase number of juvenile delinquency cases also moderating the crime pattern. As a result, it is very much nation must process juvenile counseling services in institutional settings which can surely moderate the behavior of any offender in a more positive away and reduce complexity.

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21 Child development centres: How long this dire situation will last, Editorial Desk, The Prothom Alo, 21 November, 2022.

22 The NewAge, Editorial Desk, December 3, 2022.

It is being observed that juvenile delinquents in adult prisons failed to forecast beyond the instant goal of survival comparing to those who ended up in juvenile institutions. In most cases juveniles in adult prisons mostly adopt violence as a way of living on the other hand juvenile prisons to give life a second chance. In juvenile detention facilities adopt and illustrate different strategies that can lead to juvenile behavior change. Juvenile counseling services in institutional settings can enhance responsibility, self-esteem, inherent skills, and positive mindset and reduce complexity and recidivism. The children who come to child development centers need to be placed in a compassionate and loving environment. The people in charge of taking care of the children at these centers must be kind and caring. Additionally, these child development centers need to establish an environment that promotes children's mental development. As per the Children Act 2013, any offenders who are under the age of 18 years should be sent to the CDCs.

According to the Ministry of Social Welfare, the CDC is responsible for caring, protecting and ensuring adequate supply of food, shelter clothing, medical care, education, vocational training, human development programs and counseling to all juvenile delinquent. As per the Children Act 2013, the National Children Policy, and in accordance with the provisions of the UN Convention of the Rights of the Child (UNCRC) total three correctional centers for children has been established.[23] Among the three correctional centers two correction centers are for boys and one correction center is for girls.

The Beijing Rules of 1985 specifically urges a separate and specialized juvenile justice system that guarantees children's rights to education and care while they are in detention. The efficiency of institutional crime control agencies is emphasized further in the Riyadh Guidelines of 1990 in order to deter juvenile offenders from committing crimes. Again, the United Nations Convention on the Rights of the Child (UNCRC) 1989 established a standard for the state parties to ensure that the juvenile has access to a range of dispositions including care, guidance, supervision

[23] Shohel Mamun and Tauhid Zaman, Juvenile development centres or torture cells? Dhaka Tribune, 19 August 2020. https://archive.dhakatribune.com/bangladesh/nation/2020/08/19/juvenile-development-centres-or-torture-cells

orders, counseling, probation, foster care, education, and vocational training programs and other alternatives to institutional care which are all necessary for their best welfare.[24]

In addition, the judicial role in counseling of juvenile delinquents is very important as it focus on the development of a new value system, improvement of self-awareness and maximizing employment opportunity for a child. In most cases children who have committed an unlawful act or anti-social act is often found in extreme pressure. Due to fear of unknown consequence of any unlawful act juvenile gets frightened and unable to cope up with a judicial proceeding. One of the main roles of a judicial counselor is to give confidential support to any accused juvenile. The judicial role in counseling allows reporting party to engage with someone with whom he or she can speak candidly.

In maximizing the impact judicial role in counseling of juvenile delinquents, children courts perform very significant roles which enable concern authority to adopt a distinctive approach to look into juvenile offenders as a part of judicial role. Children court in present times has emphasized more on ensuring child protection as children are not in a position to defend themselves. The judicial role in counseling of juvenile delinquents must be more reformative for juveniles rather than punitive. Juvenile justice systems across world are changing with time. The CRC along with other international instruments developed a comprehensive legal framework to protect the rights of children across globe within the justice delivery mechanism.

Just like other countries of the world, Bangladesh is also under a legal obligation to follow and maintain international principles in order to promote child right based justice system. The Bangladeshi juvenile justice system which is a derivative of British colonialism is slowly progressing towards development. Bangladesh government for the first time took initiative to enact the Children Act, 1974. With the guideline of CRC, the Children Act 1974 altered to the Children Act, 2013 (the 2013 Act) with a purpose to protect children using different measures and mechanism like diversions, restorative justice, the guarantees of a fair trial, support for

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24 CRC 1898, art 40.

social reintegration and establishment of a child friendly children's court.[25] The 2013 Act has the provision that allows a child to participate in person at all stages of a trial process. The Children Act provides for a number of alternative measures instead of confining juveniles in the remand home, a place of safety or in development centre.[26]

With the establishment of the Children Act 2013 along with the guideline of CRC aims to protect the best interests of the children in the juvenile justice system. The main objectives of such initiative of replacing Children act 1974 is to achieve juvenile justice in Bangladesh through transparent use of resources, CRC based policies and the collaboration of all stakeholders. Consequence to such steps result in separate court proceedings for juvenile, establishment of Child Development Center (CDC), counseling, skill enhancement programs and many more.

Since the establishment of the Children Act 2013, judicial system and law enforcement agencies had started to treat children in a different manner. Bangladesh has started separate court proceeding for juvenile that allows a minor to stay at Child development center and correctional home.[27] Following the guideline of CRC, the Children Act 2013 also had the provision of professional counseling and family counseling programs. Such counseling and development programs can bring a significant change in juvenile behavior and life living if carried on with proper guideline and time frame. In terms of counseling India stays far ahead of Bangladesh as it has already started counseling as a compulsory process in its schools and colleges as well.[28]

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25 Nahid Ferdousi, The Establishment of Children's Courts in Bangladesh: From Principle to Practice, Oxford University Commonwealth Law Journal, Vol. 15, No 2, 2015, 197-221.

26 Hussain Mohmmad Fazlul Bari, An Appraisal of Sentences in Bangladesh: Between Conviction and Punishment, Bangladesh Journal of Law, 2014, 14, 89.

27 M. Imman Ali, 'Justice for Children and the Law: The Past, Present and the Future', 2014, http://www.blast.org.bd/content/report/06-09-2014-jfc-and-law.pdf accessed on 18 May 2016.

28 Nahid Ferdousi, Reforms in Juvenile Justice Laws: Bangladesh Perspective, Rajshahi University Law Review, Department of Law, Rajshahi University, Vol. 10, 63-77.

## 5. Juvenile Diversion through Family Counseling

Juvenile diversion through family counseling is an important part of the rehabilitation process in the present world. Juvenile diversion and family services programs usually includes wide variety of services, like intervention, prevention, referral services, restorative justice, education, community awareness, relationship management. Family is always considered as a major determinant of behavior for child or a minor. Therefore, it is being observed if children grow up in a family having conflict and tensions, lack of familial love and support they tend to get affected by such environment. As a result, many of such juvenile becomes offenders. Juvenile diversion through family counseling supports child to reduce family and friends related conflict, trauma and hazards. There are two level of juvenile diversion counselor, one is the working professionals who are responsible for planning program activities and duties and the experienced one who have license and can plan and perform more complex program activities and duties through a high level of discretion and independent judgment.

The Act of 2013 has clearly mentioned about the provision of family counseling as per the guidelines of CRC. Apart from professional counseling family counseling has a significant impact on juvenile diversion. Unfortunately, the volume of family counseling is much lower in Bangladesh comparing to other countries like Malaysia, Indonesia, Vietnam, Thailand, India and Japan.[29] In terms of juvenile diversion family counseling plays a very significant role due to the age and experience constraints of any individual juvenile. Social acceptance, recognition and family counseling are one of the most impactful mechanisms used in many developed countries as an alternative approach. The purpose of juvenile diversion programs is to redirect juvenile delinquent from the justice system through programming, supervision and supports. Juvenile counseling aims to help a child in coping up with life tragedy and offers them concrete advice for dealing with problems. Family counseling provides their child with the opportunity to associate deeply at

[29] Thi Thanh Nga Pham, The Establishment of Juvenile Courts and the Fulfilment of Vietnam's Obligations under the Convention on the Rights of the Child, Australian Journal of Asian Law, Vol. 14, No. 1, 2013, p.4.

a personal level and redirect troubled juvenile to follow a more positive course in life.

## 6. Challenges of Juvenile Counseling

Juvenile delinquents' volume is increasing in different parts of the world which turns it into a burning issue for many developed and developing nations. Bangladesh has no exception to that. The percentage of juvenile delinquency cases is increasing rapidly which also influence the changing pattern of crimes. On an average approximately five hundred juvenile delinquency cases are filed every year. Most of major cities of Bangladesh are facing a huge challenge due to rapid increasing of juvenile delinquency. Increasing rate of juvenile delinquents in Dhaka city is very alarming comparing to other cities.[30] As per law enforcement agencies approximately forty percent of the total criminal activities across Dhaka are performed or accompanied by juvenile.

Only three CDCs as correctional institutions are not sufficient to support all juvenile delinquents across the country. The main objectives of the correctional institutions are to provide different types of treatment through a process involving social work, motivation, counseling, education and vocational training to rehabilitate and reintegrate juvenile offenders.

Developing and maintaining their casework, providing direction and counseling, training in skills, delivering religious instruction, providing access to proper medical care, entertainment, and sports facilities are all activities oriented towards implementing these services. Additionally, follow-up on their case studies in accordance with the need or/and treatment plan, preservation, and evaluation. Children who are physically or mentally challenged should also receive intensive counseling and motivational sessions. Even Nevertheless, there have been a number of reports in recent years in national dailies about the terrible management and conditions of these centers.

The primary objective of these centres is to improve children's mentality and develop their technical skills so that they can go back to the society as

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30 Abdul Hakim Sarkar, Juvenile Office in Dhaka City: A Socio-Economic Perspective, Institute for Social Welfare and Research, Dhaka University, 1988.

productive beings in accordance with the directives of the court. But in reality these centres are not provided with adequate support. The children's lives have already been scarred, but lack of meaningful and effective steps from the state continues to fall short of the expectations. It is high time to address the issue properly for long due redress of the problems faced by children whom we fondly call the future generation.[31]

The root cause of any juvenile crime needs to be uprooted in order to halt any future unlawful activities. Counseling option in Bangladesh is not as popular as needed due to absence of proper counselors and lack of necessary resources. Often giving less priority on uprooting the real cause for any juvenile crime can turn them into a professional criminal. Juvenile delinquency cannot reduce or control by showing fear or punishment. To correct behavioral issues of any juvenile delinquent there is no other option than counseling.[32]

Children are not adults therefore counseling approach, process and outcomes of juvenile is quite unique from any other counseling especially from adult counseling. In the world, children and teens usually develop a wide range of complexity that is mainly concern with behavioral and mental health. Most of such behavioral and mental complexity is highly influenced by class mates, peers, relatives and ignorance of parents. Therefore, it becomes tremendously challenging for most juvenile counselor to process results-oriented counseling. There are number of challenges that create a blockage in delivering best counseling for juvenile who performed any unlawful act or anti-social behavior.

Social case worker or counselor has an important role to play in the correction and prevention of delinquent children. The role of a psychologist is counseling and motivational for behavioral correction, psycho-social and human development, socialization and re-integration of

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31 Kazi Farzana Sharmin, Child Development Centres Should Rise to the Occasion, The Daily Sun, 14 April, 2021.

32 Shibly Noman, Treatment of Juvenile Delinquency under the Criminal Justice System in. Bangladesh: An Overview' BiLD Law Journal, 3(2) 2018.

the offenders.[33] But one of the major constraints to incorporating the counseling approaches is lack of clear legal provision. Present Children Act 2013 does not consider the offender as a person who have has love, pain, feelings, emotions, sorrows, suffering, happiness and possibility of improving their future life. There is no direct counseling practice for reducing delinquent behavior and recidivism. In addition, none of the three CDCs have psycho-social counselors for counseling, behavioral modification and human development, socialization, or reintegration of criminals. According to the newspaper article, insufficient counseling and motivation frequently cause inmates in CDCs around the nation to commit suicide.[34]

None of them had encountered child-friendly probation officer for their counseling when they were in the custody of police or law enforcers. Even though the Children Act 2013 was passed many years ago, its rules are no longer applied by the legal system. Instead of CDCs, even some kids were sent to the central jail with adults.[35] Moreover, there is no effective steps in CDCs that can reduce juvenile delinquency such as proper counseling, moral development, improve family bonding, right education, religious sharing, healthy recreation, sports and physical exercise.[36] However, there are no direct legal provisions regarding the child behavior and mental development for motivating, inspiring and set life objective of the delinquent children. Existing programs of CDCs and the approach of children court unable to reduce aggression, depression and bad behavior issues of any juvenile.[37]

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33 Nahid Ferdousi, Best Practice in the Institutional Treatment of Juvenile Delinquents in Bangladesh: An Appraisal, The Chittagong University Journal of Law, 2014, 19, 75.

34 Sohel Mamun and Tauhid Zaman , Juvenile Development center or Torture Cell? , Dhaka tribune, august 19, 2020, Jashore.

35 Sultana Razina and Shilpi Rani Dey, Children of the Tongi Child Development Centre (CDC): their experiences before detention. Social Science Review: Dhaka University Studies Part D, 37(1), 2020, 255-275.

36 Afsana Islam, Social Inclusion and aftercare need of care leavers at the Juvenile Correction Centres in Bangladesh, Thesis, October, 2021, 16.

37 Abu Noman Mohammad Atahar Ali, Zafrin Andalleb and Abu Saleh Md. Tofazzel Haque, 'Towards a Proper JJS in Bangladesh from a Cluttered One: An Analytical Overture on Focusing Human Rights Perspective', Journal of Human Rights Summer School, 2008, pp. 241, 251.

In CDCs, there are no adequate probation offices and counselors to maintain individual plan for exploring all possible destructive emotions of a delinquent and emphasize more on positive feelings and thoughts. The present Children Act 2013 are not working to introduce counseling approaches to eliminate damaging behaviors of juvenile offenders and replace them with creativity, productivity and positive mindset by counseling approach.[38]

## 7. Recommendations

Juvenile offenders are different from any adult criminal in terms of age, life experience, stable thinking pattern, crime pattern and in understand consequences of an action. As a result, juvenile should be treated differently with special laws and rehabilitation system. Juvenile delinquents are not hard coding criminal therefore their wrong direction can be revised into the right one.

Bangladesh should take initiatives to adopt many international techniques to reduce juvenile offender rate by adopting techniques like Cognitive Behavioral Therapy Like, Restructuring, Graded Exposure, Activity Scheduling, Successive Approximation, Mindfulness Practice and Skill Training. Apart from that some of programs which has already been adopted but in very optimal level can be used more effectively like Meditation, Yoga and Discipline.

To prevent juvenile delinquent from further performing any unlawful act or anti-social behavior to correction approaches can be adopted. Two correction approaches are:

**Correction Programs:** Unique correction programs can be designed for an individual juvenile delinquent. Clinical programs, educational programs, Maintenance program on physical and psychological hygiene, education program for juvenile and their parents, skill enhancement programs, recreation programs and reduction of complexity programs can be designed and delivered under correction programs.

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38 Nahid Ferdousi, 'The establishment of children's courts in Bangladesh: from principle to practice', Oxford University Commonwealth Law Journal, Vol. 15, No. 2, 2015, pp. 197-221.

**Social or Environmental Programs:** Social or environmental programs can be designed and delivered to reduce the bad influence on any juvenile delinquent with community programs, family love and affection programs, public and peer acceptance programs and employment opportunity programs.

**Specific Course of Action:** A few initiatives that must be required for the growing number of juveniles across Bangladesh are:

a) Establishment of National, District and Upazila Child Welfare Boards.

b) Establishment Child Affairs Desk at the police station.

c) Number of children courts has to be increased.

d) Government should take initiatives to establish juvenile courts in most of the districts.

e) Judge, magistrates, law enforcement agencies and lawyers should be trained and developed as a specialist to deal with juvenile cases with much more delicately instead of following the Code of Criminal Procedure.

f) Restorative justice system should be implemented in minor offence.

g) Adequate number of correction center and rehabilitation center should be established.

h) Adequate number of counselors should be appointed.

i) Juvenile counseling programs should introduce as a part of country's education system.

j) Supervision and restorative justice can be put in rather than sanctions involving imprisonment.

k) Designate a sufficient number of criminologists, psychologists, and probation officers, and place them in charge of a certain child.

Traditionally, juvenile justice system follows either a punitive or a justice nature, but the counseling programs can meet all the relevant mental requirements as well as future development of the minor child offender. In

counseling approach, the juvenile justice staff/personnel are an essential part of the treatment.

In this context it is needed to incorporate counseling program in juvenile justice settings, particularly in the police station, children courts and CDCs. In addition, children court can create child-oriented environment and focuses on fearless approaches for helping the offenders. Because punishment oriented programs are not effective for reducing re-offense. So, it requires a comprehensive assessment that would serve as the basis for an individualized treatment plan.

Rehabilitation is a driving force in correctional systems and can easily help to create new trauma-informed approach. CDCs can rely upon counselors, clinicians, and psychiatrists to provide mental health services. Services typically include group therapies, individual counseling, and medications. It grows values, positive thinking, human dignity and wide views to address crime and social change. It does not focus solely on removing symptoms or negative behaviors, it also teaches positive self-regulation skills.[39]

Moreover, the 2013 Act prohibits the use of the word 'offender' when dealing with child offender. The law also provides diversion programs, family conferencing and restorative justice as an institutional-based approach. So, one kind of justice model and also welfare model has been incorporated in the new children law. Both models do not treat the juvenile offender as a criminal rather it defines the delinquent as misguided. It is highly important to introduce counseling program by amending the Act 2013 or enacting the new rules regarding modern rehabilitation programs with living guidance especially for trauma victims, psychological cases and drug or alcohol addicts to restore the delinquent back to normal living and develop their personality.

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[39] Md. Abdul Kader Miah, Mahmuda Akter and Md. Kamruzzaman, 'The Effectiveness of Restorative Justice Practice in Bangladesh: An Analysis', Humanities and Social Sciences, Vol. 5, No. 5, 2017, pp. 176-183.

## 8. Conclusion

Juvenile discipline cannot be ensured only with punishment and treatment. It is extremely important to identify the root cause of any juvenile delinquent and design both prevention and protection programs. Bangladesh juvenile delinquent amount can be in control only if the government initiates both prevention and protection programs for the juvenile delinquent. Prevention programs will identify all possible causes of a juvenile delinquent and will work for eliminating such causes from society or reduce the impact of such causes. Protection programs will emphasize more on individuals who have accused or turned into juvenile delinquent. Protection programs will protect juvenile delinquent from any further crimes or offense. At the concluding statement it can be said that it's a matter of great challenge to ensure the proper development and protection of a huge volume of juvenile around us. Government proactively has to develop juvenile management program which may include arranging adequate space and opportunity for spots, source of amusement, adequate attention and care, parental affection and easy education programs in order to keep juveniles in the right track. Furthermore to reduce juvenile delinquent number across country, government must emphasize on setting up adequate number of correction and rehabilitation center, design and develop counseling programs and counselor who can closely monitor such juvenile offender.

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# Recording of Evidence and Confessional Statement: The Role of an Oath.

Mahedi Hasan Mondal*

**Abstract**

Almost every trial culminates in a judgment after crossing several steps. During trial, oral evidence of the witnesses is taken and at the time of judgment, that oral evidence along with other matters are considered. What a witness says upon oath standing at the dock is a substantive piece of evidence and a conviction based on such a substantive piece of evidence is quite legal in a criminal trial. Before recording the oral evidence of a witness, oath is administered to him but before recording the confessional statement of the accused, no such oath is administered but still a confessional statement, if found voluntary and true, can form the basis of a conviction. Therefore, a query peeps inside one's mind that why is a confessional statement recorded without administering an oath and does oathlessness have any relation with the acceptability of a confessional statement. In this article I would try to explain the relation among oath, oral evidence of a witness and confessional statement of an accused.

## 1. Introduction

In a criminal case an accused is convicted only if the case is proved. What is to be proved in a case is a 'fact'. To speak plainly, if a fact is proved, a case is said to be proved. The way of proving a 'fact' and what things are to be taken into consideration in proving a 'fact' is elaborately explained in the Evidence Act, 1872.

Generally, ***evidence*** is adduced to prove a fact and to reach a judgment, the courts depend on evidence. The expression 'evidence' as defined in section 3 of the Evidence Act, 1872 is as follows:-

> "Evidence"– means and includes
> (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;

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(2) all documents produced for the inspection of the Court, such documents are called documentary evidence.

The expression 'document' as defined in section 3 of the Evidence Act, 1872 is as follows:- "'Document' means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter."

Therefore, the word 'evidence' means instruments by means of which relevant facts are brought before the court viz., witnesses and documents by means of which the court is convicted of these facts.[1] Therefore, matters other than the statements of the witnesses and documents produced for the inspection of the Courts, e.g., a confession of a co-accused[2], statements made by parties when examined otherwise than as witnesses, demeanor of witnesses[3], the result of local investigation or inspection[4] and material objects other than documents such as weapons, tools, stolen property, etc., are *not* "evidence" according to the definition given in the Act. These are, however, matters which the court may legitimately take into consideration. The definition of "evidence" must, therefore, be read together with the definition of "proved".

According to section 3 of the Evidence Act, 1872-

> A fact is said to be proved when, after considering the *matters* before it, the Court either believes it to exist, or considers it's existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

It is to be noted here that here the word '*matter'* has to be used instead of the word '*evidence'*. Therefore, in order to decide whether a fact of criminal case has been proved, the Court is to consider not only the *evidence* but also the *matter* before it.

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1 Page 41 Law of Evidence by M.Monir 17th Edition.

2 Lutfun Nahar Begum vs State 27 DLR (AD) 29; Ustar Ali vs State: 3 BLC (AD) 53.

3 Or 18 rule 12 CPC and Sec 363 of the Cr.P.C.

4 Joy Commar v. Bundhoo Lal, ILR 9 Cal 363: Order 26 rule 9 and Order 18 rule 18 CPC, Sec 539(B) Cr.P.C.

The combined result of these two definitions in that "evidence", as defined by the Act, is not the only medium of proof and that in addition to it, there are a number of other "matters" which the Court has to take into consideration when forming its conclusion.[5]

The term *matter* includes evidence which might be oral, documentary, or material evidence. Proof is the effect of evidence;[6] in other words, evidence differs from proof as cause from effect.[7] Proof is not the result of evidence alone. Evidence is one of the media of proof and in addition to evidence, the court, when forming its conclusions, has to take into consideration a number of other matters which are not evidence in the sense given to this term by the Evidence Act, e.g., admissions of the parties, the result of local inspection, the presumptions arising in the case and facts of which Courts take judicial notice.[8] In addition to evidence, the term *matter* includes some other things like pleading of guilt under section 243 of the Cr.P.C. 1898 which contribute to the proving of a particular fact and the accused may be convicted on it's basis. This provision is independent of the provisions of the Evidence Act, 1872. Besides this, an accused person may be convicted even solely on the basis of his confessional statement. If a confessional statement is found inculpatory in nature and also true and voluntary, it can be used against it's maker and conviction can solely be based on it without any corroborative evidence.[9] Even a conviction of the confessing accused based on a retracted confession even if uncorroborated cannot be said to be illegal if the court believes that it is true and voluntary.[10]

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5 Bhaironprasad v. Laxmi Narayan Das, 79 IC 609:1924 N 385 found at Page 41 Law of Evidence by M.Monir 17th Edition.

6 Woodroffe Evidence, 9th Edn., p.116. Referred to at page 65, Law of Evidence by M. Monir 17th Edition.

7 Page 65, Law of Evidence by M.Monir 17th Edition.

8 Page 65, Law of Evidence by M.Monir 17th Edition.

9 Jhumur Ali and others Vs. State: 7 BLC 62(HC); State Vs Sukur Ali: 68 DLR 155; Zakir Hossain and another vs. State 55 DLR 137.

10 State vs Fozu Kazi alias Kazi Fqazlur Rahman and others: 29 DLR (SC) 271; Bakul Chandra Sarkar Vs. The State: 45 DLR 260; State vs Rafiqul Islam: 55 DLR 61.

**2. Procedure of Recording Evidence**

Chapter XXV of the Cr.P.C. deals with the "Mode of Taking and Recording Evidence in Inquiries and Trials" and section 355 & 356 specifically describes the procedure for recording evidence of a *witness.*

Section 355 reads as under:

> **355. Record in trials of certain offences by first and second class Magistrates:**
>
> (1) In cases tried under Chapter XX or Chapter XXII] by a Magistrate of the first or second class and in all proceedings under section 514 (if not in the course of a trial), the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.
>
> (2) Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record.
>
> (3) If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same, and such memorandum shall form part of the record.

Section 356 reads as under:

> **356. Record in other cases:**
>
> (1) In all other trials before Courts of Session and Magistrates and in all inquiries under Chapter XII the evidence of each witness shall be taken down in writing in the language of the Court by the Magistrate or Sessions Judge, or in his presence and hearing and under his personal direction and superintendence and shall be signed by the Magistrate or Sessions Judge.
>
> (2) XXXXXXXXXXX.
>
> (2A) XXXXXXXXXXX.
>
> (3) XXXXXXXXXXX.
>
> (4) XXXXXXXXXXX.

There is no provision for administration of oath to the accused in these sections, rather it is said in the Oath Act, 1873. Section 5 of the Oath Act, 1873 says that-

> Oath or affirmations shall be made by the following persons:–
> (a) all *witnesses*, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence;
> (b) XXXXXXXXXXXXXXX
> (c) XXXXXXXXXXXXXXXX:
>
> Provided that ……..

Therefore, whenever the evidence of any witness is recorded under section 355 and section 356 of the Cr.P.C., oath has to be administered to the witness.

**3. Procedure of Recording the Admission of Guilt of the Accused**

Section 243 of Cr.P.C., which prescribes the procedure of recording the pleading of guilty of an accused person reads as under:

> If the accused admits that he has committed the offence with which he is charged, his admission shall be recorded as nearly as possible in the words used by him; and, if he shows no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly.

It is quite clear that no provision for administration of oath, before recording the accused's admission, is made here.

**4. Procedure for Recording Statement of the Accused**

Section 164(2) prescribes the procedure for recording the statement of an accused, that is, the confessional statement of an accused person. It runs as under:

> Such ***statements*** shall be recorded in such of the ***manners*** hereinafter prescribed for ***recording evidence*** as is, in his opinion best fitted for the circumstances of the case. Such ***confessions*** shall be recorded and signed in the ***manner*** provided in ***section 364***, ...

In fact, section 164(2) provides for the procedure for recording the statement of a ***witness*** and the statement of an ***accused*** which is known as

confessional statement. As regards the recording of the statement of a witness, this section indirectly indicates the procedure described in section 355 & 356 of Chapter XXV of the Cr.P.C. that deals with the "Mode of Taking and Recording Evidence in Inquiries and Trials" and it has been explained earlier that administration of oath is necessary before recording such statement of a witness. On the other hand, as regard the recording of a confessional statement, this section indicates the procedure described in section 364 of the Cr.P.C. which prescribes the manner of recording the examination of accused; but nowhere in this section is it said that an accused be administered an oath before recording his statement. In fact, neither section 164 of the Cr.P.C. nor section 364 of the Cr.P.C. nor the Evidence Act, 1872 prescribes for administration of oath before recording the confessional statement of an accused person.

It is worth mentioning that section 364 just prescribes the manner for recording the examination of the accused but that this section does not empower the court to examine an accused person. Rather section 342 of the Cr.P.C. authorizes the Courts to examine an accused person but this section does not prescribe the procedure for such examination. A combined reading of these two sections would makes it evident that section 342 of the Cr.P.C. creates the empowerment, and section 364 prescribes the procedure, for examination of an accused person. When an accused person is examined under section 342 of the Cr.P.C., he is not administered any oath because section 342(4) clearly says "No oath shall be administered to the accused". The legislature has intentionally not said anything about oath in section 364 as they (the legislature) knew that section 342(4) prohibits its administration and that mentioning it again in section 364 would have been a redundancy. Therefore, when the legislature has stated in section 164(2) that "… Such ***confessions*** shall be recorded and signed in the ***manner*** provided in ***section 364***, …", it knew that no provision for administration of an oath is in section 364 in line with the prohibition of section 342(4). Had the legislature intended the accused to be administered an oath while recording a confession, it would have stated that clearly.

It is clear …. that there is no provision for administering oath to an accused who is making a confessional statement before a Magistrate. When this specific provision is made, the other provisions of the Evidence

Act etc., regarding recording of statements will not operate. Therefore, no question of administering oath arises, and in fact if oath is administered, it will be contrary to the provisions of section 281* of the Cr.P.C.[11].

In Taylor v. Taylor: (1875)1 Ch D 426, it has been observed:

> When a statutory power is conferred for the first time upon a Court, and the mode of exercising it is pointed out, it means that no other mode is to be adopted.

Applying this principle, in Nazir Ahmed v. King Emperor,[12] the Privy Council made the following observations:

> ... where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.

It is also observed that-

> The rule adopted in Taylor v. Taylor: (1875) 1 Ch D 426, is well recognized and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted.[13]

A Magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in Section 164.[14] The requirement of adherence to the provisions of section 164(3) of the Code of Criminal Procedure is not a mere matter of form but of substance.[15] Therefore, no oath can be administered to the accused while recording his confessional statement.

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* This section corresponds to section 364 of the Cr.P.C. 1898.

11 Philips v. State of Karnataka reported in 1980 Cri LJ 171.

12 AIR 1936 PC 253(2): (1936-37 Cri LJ 897).

13 State of Uttar Pradesh v. Singhara Singh & Ors. AIR 1964 SC 358.

14 See Footnote 13.

15 Zahed Bewa vs State: 1985 BLD 9 = 37 DLR 66.

In fact, if oath is administered, it is an illegality and as a such the confession statement loses it's evidentiary value.[16] Moreover, Section 5(a) of the Oath Act, 1873 prescribes administering of oath to a witness. This Act nowhere prescribes administration of oath to an accused at any stage of investigation, inquiry or trial. Rather, the last paragraph of section 5 of the Oath Act, 1873 prohibits administration of oath to an accused person. It reads as under:

> Nothing herein contained shall render it lawful to administer, in a criminal proceeding, an oath or affirmations to the *accused* persons,…

To describe in the other way, the very section that has made oath for the witness mandatory has made oath for the accused prohibitory. So, non-administering of oath to an accused person is not a violation of law rather it is compliance of law and, therefore, even though no oath is administered to an accused person while his pleading of guilty or making a confessional statement, the accused can be convicted on it's basis and non-administering of an oath to the accused would not reduce their value.

**5. Reasons**

Now the question is why does the Oath Act, 1873, which prescribes for administering oath to a witness, prohibit administration of oath to an accused person? Generally, a confessional statement is basically against the maker of it; on the other hand a witness testifies against the accused/some other person. It is quite unnatural that a person would say anything against himself and invite punishment and for that reason, no oath is needed if an accused desires to confess or plead guilty; on the other hand, an oath is a must if a person stands at the witness box and says anything against the accused/ other persons.

The confessions are considered highly reliable because no rational person would make admission against his interest prompted by his conscience to tell the truth[17] and for that reason a confessional statement of an accused

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16 Philips v. State of Karnataka: 1980 Cri LJ 171.

17 State (NCT of Delhi) v. Navjot Sandhu Alias Afsan Guru (2005)11 SCC 600.

can be the sole basis for finding him guilty of the charges brought against him,[18] provided the confessional statement is ***true* and *voluntary***.

It may be asked that what is test of truth. If the accused confess supporting the prosecution story, it is said to be true. Say for example, the prosecution story is that the deceased was sleeping inside his room bolting his door from inside and some unknown person broke through the window, looted some valuable articles and in that process killed the deceased by stabbing and fled through the window; that the police being informed went to the house and broke the door and after getting inside the room found the window already broken. If the accused confesses to the effect that he broke through the window and killed the deceased, it is true but if the accused says that he broke through the door and killed the deceased, it is not true because the prosecution story was that the door was locked from inside. Then the accused cannot be convicted solely on the basis of his Confessional Statement and some sort of corroboration is needed. Anyway, this is not the sole test of truth and a confessional statement has to be taken as true or untrue depending on the facts and circumstances of an individual case. To determine whether a confessional statement is true or not, "it would be necessary to examine the confession and compare it with the rest of the prosecution evidence and the probabilities of the case".[19]

The next condition for a confessional statement to be relied upon is it's voluntariness and it has a magical relation with oath. To ensure voluntariness, section 164(3) provides that-

> A Magistrate shall, before recording any such confession, explain to the person making it that ***he is not bound to make a confession*** and that if he does so it may be used as evidence against him ***and no Magistrate shall record any such confession unless***, upon questioning the person making it, ***he has reason to believe that it was made voluntarily***.

In this connection, it is very pertinent to refer section 14 of the Oath Act, 1873 which reads as under:

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18 Zillur Rahman @ Zillur & Ors Vs. The State: 16 BLT (HC) 335.

19 Sarwan Singh vs The State of Punjab: AIR 1957 (SC) 637; this decision was referred to in Mizazul Islam Vs. State: 41 DLR 156 para 24.

> Every person giving evidence on any subject before any Court or person hereby authorized to administer oaths and affirmations shall be bound to state the truth on such subject.

It is quite clear that the main purpose of administering of oath is to render persons who give false evidence liable to prosecution and further to bring home to the witness the solemnity of the occasion and to impress upon him the duty of speaking the truth.[20] If a person tells a lie in spite of his having taken an oath, he is liable to be punished under section 181 of the Penal Code, 1860. To administer an oath to a person is to put that person under pressure to speak the truth. So, if one says anything upon oath, it is not voluntary rather under pressure to speak the truth. If an accused is administered an oath and he speaks the truth, it can be argued that the statement might be true but it is definitely not voluntary, it is made under pressure of speaking the truth; and that had an oath not been administered to the accused, he would not have confessed. The reason why oath is not to be administered to a person coming forward to make a statement in the nature of confession is that there should be no kind of pressure either of oath or of affirmation or of any other kind operating on the mind compelling him to disclose something which ordinarily that person would not disclose or state.[21]

It is a settled principle that a confession, which may be true but not voluntary, is not admissible in evidence at all.[22] An oath acts as a threat to disclose the truth. Actually, administering an oath would work as a double edged knife against the accused. If the accused makes a true statement on the pressure of an oath, he will be convicted in judgment; on the other hand, if the accused makes a false statement in spite of taking an oath and subsequently it transpires during the trial or afterwards that the confession was false, still the accused would be punished for violating his oath. For this very reason, an accused is not administered any oath. Therefore, non-administering of an oath ensures the quality of a confessional statement, that is, the voluntariness of it.

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20 Rameshwar v. State of Rajasthan [AIR 1952 SC 54: 1952 Cri LJ 547].

21 Atmaram Namdeo vs State Of Maharashtra: AIR 1969 Bom 189.

22 Mohar Ali Vs. The Crown: 7 DLR 633.

It is worth mentioning here that Sec. 161(2) and 175 of the Cr.P.C. make it mandatory for a person to disclose any information to the Investigating Officer during investigation except those "which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture". As the Investigating officer is not empowered to administer oath, the person is not bound to disclose any information that goes against him. On the other hand, a Court is empowered to administer oath to a witness and section 132 of the Evidence Act, 1872 makes is mandatory for a witness to answer every question that will criminate, or may tend directly or indirectly to criminate him, or will expose, or tend directly or indirectly to expose him to a penalty or forfeiture of any kind. It reads as under:

> **132. Witness not excused from answering on ground that answer will criminate**: A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:
>
> Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

As a witness takes an oath before his examination in chief, he is bound to answer everything even though the answer goes against his interest. But there is no harm in answering that question. Because, the proviso to this section makes a safeguard by providing that 'no such answer, ……, shall subject him to any arrest or prosecution, or to be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer'. This safeguard is an encouragement for speaking the truth and a threat against giving false evidence simultaneously. As he has taken an oath, he is bound to answer everything and if he gives false answer he will be prosecuted; on the other hand, if he says anything against himself because of the pressure of the oath, it is not voluntarily and therefore, he is safeguarded and cannot be prosecuted. Without this safeguard, he would have been bound to give evidence against himself and would have faced prosecution.

The voluntarily nature of the confession depends upon whether there was any inducement, threat or promise and its truth is judged on the basis of the entire prosecution case.[23] Administration of an oath to the accused by a person in authority before taking a statement is by itself a concealed threat[24] because by such oath, the accused might entertain a genuine belief that he might be prosecuted if the statement was found to be false.[25] Threat in any form be it concealed or otherwise directly affect voluntariness of the confession and render the same inadmissible in evidence.[26]

According to Art. 35(4) of our constitution, "No person accused of any offence shall be compelled ***to be a witness*** against himself." ***"To be a witness"*** means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation.[27] The prohibitive sweep of protection against self-incrimination goes back to the stage of police interrogation and is not confined to court proceedings.[28] The fact of administering oath at the recording of confession virtually means that the maker is compelled to give evidence against him, placing him in the status of a witness at the stage of investigation in violation of the constitutional provision that "No person accused of any offence shall be compelled to be a witness against himself".[29] Administering oath for recording confession will only mean the recording of evidence of the maker for use in subsequent stage against the maker and which is prohibited in law.[30] Such confession is bad in law, and is inadmissible in evidence.[31] Administering of oath on the accused before recording his confessional statement is illegal.[32] "Administering oath on the accused would amount to

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23 Babubhai Udesinh Parmar v. State of Gujarat (2006) 12 SCC 268.
24 Brijbasi Lal Shrivastava vs State Of Madhya Pradesh: AIR 1979 SC 1080.
25 See Footnote 24.
26 See Footnote 24.
27 State of Bombay v. Kathi Kalu Oghad: AIR 1961 SC 1808.
28 NandiniSatpathy v. P.L Dani: A.I.R. 1978 S.C. 1025.
29 Akanman Bora (In Jail) vs State Of Assam: 1988 CriLJ 573.
30 See Footnote 29.
31 See Footnote 29.
32 N. Senthil @ Senthilkumar v. State Rep. by the Inspector of Police, South Gate Police Station, Madurai City https://indiankanoon.org/doc/133606203/

compulsion, which is unconstitutional, as the same would amount to testimonial compulsion. On this score alone, the judicial confession made by the ….. accused could be rejected."[33] Administration of oath on an accused while recording his confession is unconstitutional, prohibited, unlawful and illegal. Section 164 of Cr.P.C. has been meticulously designed in great detail to ensure voluntariness and truthfulness.[34] A positive act of the Magistrate to administer oath to an accused while recording his confession may lead to an inference that the accused being compelled to state the facts which are self-incriminatory by a method prohibited by law made the self-incriminating statement. This lingering doubt troubles the judicial mind to accept the confession as voluntary.[35] Before a Court acts upon a confessional statement, it has to affirmatively satisfy that the statement is voluntary and true. In this regard the judicial authorities always insist on the meticulous observance of all the necessary formalities and precautions provided in section 164(3) of the Cr.P.C. with minute particularity so as to ensure that the confession is absolutely free from the slightest tinge or taint of extraneous influence.[36]

When any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman (a person in authority) for obtaining information from an accused strongly suggestive of guilt becomes "*compulsion testimony*".[37] The same act by a Magistrate who also is a person in authority for obtaining self-incriminatory information from the accused is also "*compelled testimony*".[38] When a Magistrate takes the chair to record the confession, the mandate of the law prescribes the Magistrate to ensure that the mind of the accused is free from any external pressure. While doing so, if the Magistrate goes on to administer oath upon the accused it cannot be said that the said Magistrate complied with the statutory requirement of the law to ensure the voluntariness of the confession.[39]

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33 See Footnote 32.

34 State of Sikkim v. Suren Rai, https://drive.google.com/file/d/18YbQ-_JTxaXOdzD9b1WbczlYkhETKSwo/preview (visited on 07.02.21).

35 See Footnote 34.

36 State vs Aiyenuddin: 15 BLC 151 para 83

37 See Footnote 28.

38 See Footnote 34.

39 See Footnote 34.

Therefore, if a person says anything against him upon oath and it is used against him, it is a complete violation of his fundamental right guaranteed in our Constitution. Keeping this in mind, the Oath Act, 1873 had scientifically prohibited taking of an oath by an accused person. So, non-administering of oath to the accused ensures the voluntariness of his Confessional Statement and makes it more reliable.

There is another important aspect. Section 164(3) says-

> A Magistrate shall, before recording any such confession, explain to the person making it that ***he is not bound to make a confession*** and that if he does so it may be used as evidence against him ***and no Magistrate shall record any such confession unless***, upon questioning the person making it, ***he has reason to believe that it was made voluntarily***.

The object behind this provision is that the concerned accused should not be made to feel that he is bound down to a particular statement, and if he later stated something contrary to that, he would be incurring the wrath of law.[40] Apparently this was considered necessary because the accused has the liberty to ***retract*** the confession either at that time itself or at the trial and the prosecution has to prove the confession by giving evidence that the accused had made it voluntarily. Oath is meant to bind down the maker of statement. Therefore if a Magistrate administered the oath before recording confession; it would not be open to the accused to retract at that time or even subsequently before the trial court, because in that case he would be subject to the consequences of his oath/solemn affirmation.[41] Administering oath for recording confession will only mean the recording of evidence of the maker for use in subsequent stage against the maker and which is prohibited in law. Such confession is bad in law, and is inadmissible in evidence."[42] The provision of section 164 of the Cr.P.C. must be complied with not only in form, but in essence. It is a settled principle of law that where a power is given to do a certain thing in a

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40 Philips v. State of Karnataka reported in 1980 Cri LJ 171.

41 Akanman Bora (In Jail) vs State Of Assam: 1988 CriLJ 573.

42 Gauhati High Court in Akanman Bora v. State of Assam, 1988 CriLJ 573.

certain manner, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.[43]

**6. Whether This Defect Curable**

Section 533 provides provision for curing any irregularity in recording the confessional statement of an accused. However, not only administration of oath to an accused while recording his confession is prohibited, unlawful and illegal but also that the said act cannot be cured under the Cr.P.C.[44] Administration of Oath upon an accused while recording confession has a direct bearing on the voluntariness of the confession and voluntariness is sacrosanct.[45] Therefore, administration of oath while recording statements of accused is prohibited and there should be strict compliance of the provision of section 164 of the Cr.P.C.[46]

**7. Exception**

Under the scheme of the Cr.P.C. the accused has a right to remain silent[47] and it is only at the stage of examination of an accused under Section 342 of the Cr.P.C., an accused is asked to explain any circumstance appearing in evidence against him by the Court.[48] Even at that stage, sub-section (4) of section 342 of the Cr.P.C. requires that no oath shall be administered to the accused when he is examined and under sub-section (2) thereof it has been provided that the accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court may draw such inference from such refusal or answers as it thinks just.

Therefore, at no stage of a criminal trial can an accused be compelled to be a witness against himself. The narrow area within which an accused may be a competent witness is provided in section 340 of the Cr.P.C. Section 340(3), Cr.P.C. reads as under:

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43 Babubhai Udensinh Parmar v. State of Gujarat (2006) 12 SCC 268.

44 State of Sikkim v. Suren Rai, https://drive.google.com/file/d/18YbQ-JTxaXOdzD9b1WbczlYkhETKSwo/preview (last visited on 07.02.21).

45 See note 44.

46 Babubhai Udensinh Parmar v. State of Gujarat (2006) 12 SCC 268.

47 See Footnote 40.

48 See Footnote 40.

> Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial.

Further, section 340(3)(a), Cr.P.C. 1898 provides that the accused shall not be called as a witness except on his own request in writing. In view of Section 340 of the Cr.P.C., an accused can waive his right under Article 35(4) of the Constitution and tender himself as a witness if he so chooses. In fact, during his examination under section 342 of the Cr.P.C., an accused person is not administered oath because what he says is not *evidence* and for that reason section 342(4), Cr.P.C. says that 'No oath shall be administered to the accused'. But being an accused does not disentitle a person to be witness for himself and section 340(3) guarantees that right of an accused person. This very section provides for the provision of taking oath by the accused person. As soon as an accused person decides to give evidence as a witness he takes the status of a witness for the time being and then he is bound to take oath. Then he decides to say not against himself but against the prosecution and is, therefore, bound to take oath. In addition to that, whenever an accomplice is tendered pardon and he accepts the said pardon, he decides to say against his co-accused. Section 337(2), Cr.P.C. provides that-

> Every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any.

At that time the accused takes the status of a witness and is bound to take oath as he deposes against his co-accused. The Oath Act, 1873 has prohibited oath for an accused person and not for a witness, be he a prosecution witness, or an accused-cum-defence witness, or an approver.

**8. Underlying Rationale of the Right against Self-Incrimination**

The doctrinal origins of the right against self-incrimination is traced back to the latin maxim *"nemo tenetur seipsum prodere"* (i.e. no one is bound to accuse himself) and the evolution of the concept of *"due process of*

*law"* enumerated in the Magna Carta.[49] "The right against self-incrimination is now viewed as an essential safeguard in criminal procedure. Its underlying rationale broadly corresponds with two objectives— firstly, that of ensuring reliability of the statements made by an accused, and secondly, ensuring that such statements are made voluntarily. It is quite possible that a person suspected or accused of a crime may have been compelled to testify through methods involving coercion, threats or inducements during the investigative stage. When a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being false. False testimony is undesirable since it impedes the integrity of the trial and the subsequent verdict. Therefore, the purpose of the 'rule against involuntary confessions' is to ensure that the testimony considered during trial is reliable.

The premise is that involuntary statements are more likely to mislead the judge and the prosecutor, thereby resulting in a miscarriage of justice. Even during the investigative stage, false statements are likely to cause delays and obstructions in the investigation efforts".[50]

## 9. Conclusion

A judicial confession, can in law validly form the basis of conviction of it's maker but, as a matter of prudence and caution, which has now become virtually a rule of law, the Court does not generally consider it safe to base a conviction on confession alone without corroboration in material particulars.[51] But recording of confession of the accused by administering oath or affirmation to him is illegal and, therefore, inadmissible. An oathless confession is admissible in evidence and non-administering of oath to an accused person while recording his confessional statement fortifies the voluntariness of it.

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49 [Leonard Levy, "The Right against Self-Incrimination: History and Judicial History" [84(1) Political Science Quarterly 1-29 (March 1969)] referred to in State of Sikkim v. Suren Rai, https://drive.google.com/file/d/18YbQ-JTxaXOdzD9b1WbczlYkhETKSwo/preview

50 Selvi & Ors vs State Of Karnataka & Anr: (2010) 7 SCC 263.

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# The Role of Police Investigation in the Criminal Justice Administration of Bangladesh: Challenges and Way Out

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**Abstract**

Expected criminal administration of justice is global challenge which is highly enrooted in the developing countries such as Bangladesh whereof we are witnessing multifaceted rapid changes though all are not sustainable for the discourse of justice, good governance and rule of law. Having record of substantial number of acquittal rate in criminal cases, the criminal administration of justice, based on multidimensional other state machineries particularly the faulty police investigation, has been substantially failing to meet public expectation. So, it is high time to delve into the pivotal challenges of police investigation frustrating expected criminal administration of justice via multi stake holders' combined and deliberate efforts for the superior goal- justice not only be done but seems to be manifestly done.

## 1. Introduction

The struggle for achieving a society for economic and social justice is an unending human endeavor. In the Preamble of our constitution we have pledged to realize an exploitation free society-a society in which rule of law, fundamental human rights and freedom, equality and justice in terms of political, economic and social reality will be secured for all citizens. We have host of problems to face and solve in criminal administration of justice. It is to be remembered that the courts of justice and police administration are the creation of sovereign authority and their majesty rest in public confidence which is eroding due to plethora of causes whereof defective police investigation most often takes a pivotal role. It is an urgent need to devise some more effective mechanisms for justice seems to be done eradicating the prevailing shortcomings of police investigation. In fact, justice is what justice does, and the people, being the consumer of justice, are appropriative of critics, having reasonable

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findings. Accountability is the social essence of the power process rendering its dues to its true masters i.e. the sovereign people.

**2. Expectation of Commonalty from Judiciary**

Justice is one of the central themes of all Constitutions of the world. In a democratic polity like ours, the judiciary plays a vital role. Today, the judiciary is called upon to enforce the fundamental rights and basic human rights of the poor and deprived section of the people and this new development has made the judiciary a more dynamic and important institution of the State than ever before. The people of Bangladesh nourish the dream of judiciary with 'justice seems to be done', speedy disposal with quality, accountability, transparency and cost effectiveness which would be devoid of corruption, undue influence, profligacy, rampancy of illegal money, unnecessary delay, pettifoggers, humiliation of humanity and crying of the illegally deprived. The whole nation is a skylark with the envisage that if the serene and tranquil enjoyment of life and property are the only flavor of human surviving that should be protected by the law and legal system by hook or by crook. To uphold the pleasure/ taste of independence, the function of the judiciary is to ensure rule of law and justice as the alternative is neither available nor foreseeable. The whole nation is bloomed with the dreams that the judiciary will be a real watchdog of the constitution achieved through gulf of blood shedding.

**3. Pole to Pole Gap between Expectation and Attainment**

Expected justice is still mirage to the millions of downtrodden justice seekers in Bangladesh. Millions of cases are pending to resolve without knowing destination. It is the grandsons /daughters have to handle the case filed by grandfather. There are multifaceted overt and covert reasons to hinder justice culminated in indescribable and inhumane sufferings of the poverty stricken strata as the decaying feudalism and cupid capitalistic state reality are controlled by social elite against have-nots. The people who have minimum experience about disposition of formal justice delivery system will lose their confidence in court and court system as last resort of ensuing security of their lives and properties. The present decoration of court atmosphere and legal leverage is the surname of pauperization as reflected in the age-old maxims 'do not show the palm to witch and do not show the house to the advocate', 'even the soil and grass of court stead want money', etc. Today, to follow legal recourse is a

synonym of wasting time, strength and property which ultimately causes colossal national wastage and prevents sustainable development of the nation. The alarming number of indisposed of cases are increasing in a gigantic figure. However, while there are a huge number of cases pending and the rate of filing cases is greater than the rate of disposal because of shortage of judges indicating increase of caseload every year, it is certain that judiciary will have to bear the huge backlog of cases on its shoulder for an uncertain period of time unless special steps are taken to heal the cancer of the judiciary. Huge number of back-logs of cases is waiting for disposal for over a decade, sometimes to observe silver/golden jubilee of its filing and the litigant public are living in the age of uncertainty when and where they will get justice. In this connection Chief Justice Burger has noted that the people come to believe inefficiency and delayed justice drains out even a just judgment of its value[1]. In the language of Justice VR Krishna Iayer it also can be said "Delayed justice is means of inflicting injustice through judicial process[2]." In the criminal cases, it is the state itself who is an aggrieved party on behalf of the individual, as modern welfare state is the symbol of protector and preserver of collective interest, but we have an alarming rate of acquittal rate in substantial number of criminal cases due to multifaceted reasons which is shaking the very basis of our civilized existence.

## 4. Outline of Police Investigation

A police case which is also popularly known as General Register (GR) case is set in motion by filing a First Information Report (FIR) concerning commission of cognizable offence to the officer-in-charge of a police station[3]. A police officer may investigate any cognizable offence without the order of the Magistrate[4].

After recording the police case, officer-in-charge may himself investigate the case or instructs a police officer not below the rank of Sub-Inspector to

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1 Burger, "What's Wrong With the Courts: The Chief Justice Speaks Out", U.S. News & World Report (vol. 69, No. 8, Aug. 24, 1970) 68, 71 (address to ABA meeting, Aug. 10, 1970).

2 Justice V.R. Krishna Iyer- A Constitutional Miscellany" p.271, 2nd edn. Eastern Book Company, Lucknow.

3 Section 154 of Code of Criminal Procedure (CrPC), 1898.

4 Section 156 of Code of Criminal Procedure (CrPC), 1898.

investigate the same. In practice, investigating officer inspects the place of occurrence, prepares the sketch map along with the index of the spot, records the statements of the witnesses who are supposed to be acquainted with the facts and circumstance of the occurrence[5], seizes the seized articles (alamat) and thus prepares the seizure lists in presence of witnesses[6]. Then arrests or tries to apprehend the accused and suspects and forwards them to the nearest Magistrate within 24 (twenty four) hours of their arrest[7], detains and interrogates them in his custody, prays for detention in his custody[8] (remand), produces the accused or victim before the Magistrate to have his confession/ statement recorded[9]. Sometimes they conducts the inquest of the deceased victim (Section 174 of the Code of Criminal Procedure, 1898), sends the deceased for autopsy, collects medical certificates & expert reports, maintains diary of proceedings of investigation[10], and submits the police report[11].

The Police Act 1861, Police Regulations 1943, Code of Criminal Procedure 1898, or concerned special laws, Evidence Act 1872, Constitution and precedents are the authority and guidelines to which the investigating officers should accomplish their investigating activities[12].

## 5. Role of Police Investigation in Criminal Justice Administration of Bangladesh

Criminal cases generally start by the very hand of police and its finality is also depended on police. Police investigation is part and parcel of the criminal administration of justice in Bangladesh. The disposition of criminal administration of justice substantially depends on police investigation. Expected criminal administration of justice is not possible at

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5 Section 161 of Criminal Procedure (CrPC), 1898.

6 section 103 of Criminal Procedure (CrPC), 1898.

7 Article 33 of Constitution of Bangladesh.

8 Section 167 of Criminal Procedure (CrPC), 1898.

9 Section 164 of Code of Criminal Procedure 1898, section 22 of the Nari o Shishu Nirjaton Domon Ain 2000.

10 Section 172 of Criminal Procedure (CrPC), 1898.

11 Section 173 of Criminal Procedure (CrPC), 1898

12 The Police Act, 1861, Police Regulations 1943, Code of Criminal Procedure 1898, or concerned special laws and Evidence Act, 1872 are the byproduct of British colonial authority whereof ruling by law for vested interest instead of public welfare oriented justice was the prime consideration.

all if the police investigation is not up to the mark in consonance with law and changing phase of science and technology as the crime has taken multifaceted neo-dimension challenging law and order situation which is the pivotal promise of modern welfare oriented nation state as germinated from Treaty of Westphalia[13]. The prime object of investigation is to detect the accused persons who have committed the offence. In this way investigating officer is to collect evidence to be used during trial. Therefore, a faulty investigation leads to miscarriage of justice when there is faulty evidence. It is worth mentioning that investigation is the basic substratum upon which trial of criminal cases is founded. It could be axiomatically inferred that reforms in the criminal justice system should be initiated first at the investigation stage. In this regard Hon'ble High Court Division observed that-

> We have come across many cases in which due to faulty investigation accused get benefit of reasonable doubt in spite of consistent and uniform evidence of prosecution witnesses about the occurrence. As a result, people of our country have been loosing faith in the present system of administration of criminal justice mainly due to the failure of the police to properly investigate the case and collect the evidence. It is high time that the system of the investigation of the criminal cases by the police alone should either be abandoned or completely reformed.[14]

## 6. Outline of Lacunae of Police Investigation Impeding Criminal Administration of Justice in Bangladesh

Apart from maintaining law and order by engaging themselves in prevention of crime and enforcement of laws in some petty offences, detection and investigation of crime, arrest of accused and collection of evidence are one of the major duties of the police force. In absence of separate investigating agency, the police who are rather busy in a plethora of issues investigate the criminal offences in a lackadaisical manner. Though separate judicial magistracy started its journey twelve years ago, delayed and defective investigation of crimes is one of the major stumbling blocks that haunt our crippling criminal justice system. Herein

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13 Clodfelter, Michael (2017). Warfare and Armed Conflicts: A Statistical Encyclopedia of Casualty and Other Figures, 1492–2015. McFarland. p. 40. ISBN 978-0786474707.

14 Md. Ali Akbar vs State, 4 MLR (HC) 1999, Page 87, Para 12&14.

below, there would be an effort to sketch out the common shortcomings pertaining to police investigation.

### 6.1 Motivated Investigation

Sometimes, it is found in some cases, if the informant side is found not stronger and solvent in that case the names of the principal or vital offenders are found to have been dropped from police report or in other words, charge-sheet compelling the informant complainant to file naraji application. Sometimes, after submitting multiple naraji petition, the Investigating Officer failed to submit a report that satisfies the informant leading to the case being deadlocked. Besides, in some other cases the connected or FIR named accused are found to have been filing hajira for years together but no report is submitted by the investigation officers out of being biased or enigmatic reason.

### 6.2 Archaic Pattern of Investigation

The ensuing pattern and maneuver of police investigation are highly antique and outdated devoid of present reality of innovative form, shape and size of crime. The application of modern science and technology for criminal investigation is remarkably absent. Sir Richard Mayne (quoted in Johnston, 2000; 36) briefly described police function as prevention of crime protection of life and property and preservation of public tranquility which is still universally agreed. It gives core functions of police very briefly but police organization has to translate the functions into many processes, systems, operations, skills, strategies and tactics to carry out those in each unique territorial or non-territorial jurisdiction.[15]

### 6.3 Faulty Statements Recording under Section 161, Cr.P.C.

The traditional pattern of recording 161 statement of the witness has substantially failed to meet the need of 21st century criminal administration of justice. Sometimes, investigating officers do not record the statements while examining the witnesses, but subsequently make a summary of what the witnesses said at the time of examination and they prepare the record of those statements at their 'free time'. As a result, many vital points are found to be missing in their recorded statements. The statements of

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[15] Johnston, L. (2000) Policing Britain: Risk, Security and Governance. London: Longman.

witnesses thus recorded cannot be used by the prosecution, but can be used by the defence under section 162 of the Cr.P.C. to contradict a prosecution witness in the manner provided by section 145 of the Evidence Act 1872[16]. Most of the investigating officers has very little idea about the importance of statements made under section 161.[17]

### 6.4 Extraction of Confession

"Who knows the truth better than the person who did it?" Confession through creation of inner sanction, modern technological or any other device devoid of undue influence and torture is a milestone for the criminal administration of justice. A confession free from suspicion and recorded in consonance with law is a valuable piece of evidence which possesses a probative force as it emanates directly from the person committing the offence.[18] In the modern welfare state, negation of justice through confession in its present milieu is neither expected nor desirable. There are multidimensional causes behind ramshackle/ illegal reality of confession. When police officers are poorly trained about the dangers of interrogation and false confession and when they are rarely instructed regarding how to avoid torturous mechanism of eliciting confessions, how to understand what causes false confessions, or how to recognize the forms false confessions take or their distinguishing characteristics, then these are great problem. Ignorance/ lackadaisical reality of them also take place a big role. Lack of profound training in this regard is also a tremendous problem. The complex and nuances of form (M-84) is itself a problem as even sometimes, we face difficulties to work with it. Keeping the accused for long in police custody before being forwarded to the Magistrate for recording his confession under section 164 obviously destroys the veracity of such confession.

### 6.5 Defective Search and Seizure List

Having defective search and seizure list, it is not possible to ensure win-win justice for all the stakeholders, culminated in, the geometrical increase of acquittal rate though crime rate has increased ventilating the flood gate

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16 The Evidence Act 1872 is the main evidence related enacted which is launched by the then British Colonial authority.

17 Section 161 of Criminal Procedure (CrPC), 1898

18 State vs Babul Miah 63 DLR (AD) 2011.

of culture of impunity. Due to faulty search and seizure list, the whole criminal proceeding of a particular case becomes nugatory and vitiated. Though there is no concrete research findings as per how many seizure listed witnesses depose before the court as per seizure list, but it is glaring from day to day experience that substantial number of seizure listed witness depose which is contradictory with the ejahar, deposition of informant and seizure list, culminated in, the colossal negligence towards law begetting culture of impunity.

**6.6 Heterogeneous Engagement**

This is an undeniable fact that the police force spends their huge time on VIP duties which sometimes hampers serving the general masses in need. As members of an important agency of state and criminal justice system, they are under lawful compulsion to provide proper service to all types of people of the society. Proper space should be created for them at this end.

**6.7 Defective Sketch Map and Index**

Preparing accurate and authentic sketch map and index through direct inspection of the relevant places are part and parcel of reliable charge sheet. Sometimes sketch map and index of the place of occurrence are prepared without clear specification sitting at some other places other than the relevant place of occurrence based on hearsay evidence/speech causing inevitable fatal damage to the whole case causing prospective acquittal of the accused based on the sufferings of the victim side.

**6.8 Improper Seizure of Alamat**

Sometimes, it is found that alamat are seized in the police station long after the occurrence which is produced by the informant. It is the duty of the police officer to seize alamat at the place of occurrence or hospital or any other place in situ immediately after the occurrence. Delayed seizure at some other places other than the relevant place of occurrence surely invites doubt. Sometimes, it is also surprisingly discovered that all the seized items are not presented in the seizure list as a part of plot or embezzlement by the related persons.

### 6.9 Undue Delay

The Code of Criminal Procedure does not provide for any specific time limit within which investigation is to be completed. However, there is a statutory indication in section 167(1) of the Cr.P.C. that investigation is to be completed within 24 (twenty four) hours[19]. Further, section 167(5) empowers the cognizance taking Magistrate or Judge to grant bail to the accused if investigation is not completed within 120 (one hundred and twenty) days[20]. Police Regulations also state that even most difficult criminal investigation should not take more than 15 (fifteen) days if the investigation goes at stretch[21]. Sometimes, it is surprisingly found that criminal investigating department or detective branches and rapid action battalion take longer period in completing their investigation than the regular police force take. There is no need of recording the statement of informant during investigation. However, in many cases, investigating officers record the statement of informant who himself is the victim. There is also delay in collecting medical certificates and other expert reports.

### 6.10 Torture During Police Remand

The term remand has not been defined in section 167(2) of the Cr.P.C, 1898 though it has been used in some other places (Bangladesh Supreme Court Digest, p155).[22] Section 167 of the Cr.P.C, 1898 allows the Magistrate to grant police remand in custody beyond 24 hours for a total period of 15 days on request from the police after she/he satisfied that there are grounds for believing that the accusation or information is well founded.[23] Remanding the accused may be of three types: remand on bail, remand in police custody and remand in prison custody or jail. Theoretically, remand does not have any relation with torture as remand connotes to put the accused in police custody for the interest of investigation though remand has been turned into nomenclature of torture and degrading treatment. In the era of organized criminality where "give life, but does not impart any information" is the core motto of criminals, the application of torture at remand to find out the fact has proven its futility. Torture during police remand is a menace for the individual first

19 Section 167(1) of Criminal Procedure (CrPC), 1898.
20 Section 167(5) of Criminal Procedure (CrPC), 1898.
21 Regulation 261 of Police Regulations 1943.
22 1 BSCD 155.
23 Sec. 167.1 of the Cr.P.C, 1898.

time or general offender or doubted accused who are agreed to tell even false or fictitious as dictated or taught by police to save the immediate jeopardization of life and property though ventilates the venue of long time sufferings of trial with its consequential judgment.[24] Sometimes it is seen that remand in our country is the surname of torture with all its kinds and degrees by the very hand of state machineries for mere power based politics, politicization of fundamental state institutions, for wrongful gain[25], ignorance, lack of right based approach, accountability, transparency, rule of law and good governance wherein human rights have been turned into paper tiger with mockery and jiggery-pokery. In the modern welfare state, the denial of justice and due process of law by state machineries through torture during police remand though prohibited by national and international law along with good conscience is neither expected nor desirable. Torture, according to the United Nations Convention Against Torture (an advisory measure of the UN General Assembly) is-

> ... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions (UN Convention Against Torture).[26]

For many years, torture has been the most widespread by crime investigation agencies in our country but has been routinely ignored by successive governments (Amnesty International's Report, 2003).[27] It is mentioned that as proper action is taking by the government and the honourable Supreme Court of Bangladesh against the person committing torture during police custody, the present situation regarding torture is

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24 Ibid, Chapter XXVI "Of the Judgment" Sections 366-373.

25 S.23 of the Penal Code, 1860.

26 The text of the Convention was adopted by the United Nations General Assembly on 10 December 1984 and it came into force on 26 June 1987

27 Amnesty International's Report on Bangladesh 2003.

improving in our country. Human rights are infringed with impunity from the moment of suspicious arrest until the end of the remand period.[28] The accused has to be presented before a Magistrate within 24 hours of his arrest. In court, the police may ask for anywhere between 3 to 15 days remand in order to 'question' the arrestee. Remand is what all detainees fear. It is said during that time that they are beaten, intimidated, given electric shocks, kicked and verbally abused in order to extract a statement that may lead to a confession and a quick solution of the crime. In the eyes of law enforcement, it seems to be vital that an overworked, under-resourced and badly paid force resort to torture and degrading treatment in order to hasten their investigation. There are multifaceted inhumane and degraded "methods of torture" published by the Amnesty International which is beyond description.[29] Cruel and inhuman treatment and torture are also used by law enforcement to demoralize, scare and stop the activities of specific groups of individuals, such as journalists, political activists and even human rights defenders. There have been times, especially during the State of Emergency, when newspaper offices have been monitored and their reports closely censored and journalists threatened and tortured for exposing flaws in law enforcement or for criticizing government actions. It is a guarantee ensured by the Constitution that every arrested person must be produced before the nearest Magistrate within 24 hours and he must not be kept in police custody without an order of a Magistrate. Why is this guarantee provided? The avowed aim is to check and control arbitrary executive power exercised by the police. The Transparency International of Bangladesh (TIB) mentioned in its report that about 600 people have been killed in custody by the law enforcing agencies in last two and half years. In some cases, the government even played a negative role.[30] The crime investigation officer feels comfort and convenience[31] to wind up the

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28 Islam, Md. Rafiqul and Solaiman, S. M "Torture under police remand in Bangladesh: a culture of impunity for gross violations of human rights" Asia-Pacific journal on human rights and the law, Vol. 4, Issue 2, p.1-27.

29 Amnesty International's Report on Bangladesh, 2003

30 The New Nation, 19 August, 2011 Friday.

31 Is laziness, as seen by the senior civil officer and endorsed by Sir James Fitzjames Stephen, Member, Viceregal Council for India, an English legal luminary and the architect of the Indian Evidence Act, 1872, the major factor responsible for torture or is there something more to it?

investigation through extraction of illegal and unlawful confession via torture. Moreover, investigating officers sometimes do not send a case diary along with remand prayer. As a result, accused is sent to the jail custody pending hearing of the remand prayer for some other date. In this way accused becomes acquainted with hardened criminals in jail custody and makes deliberate attempt to dodge the investigating officer even he is in remand in a subsequent date.

### 6.11 Miscellaneous Loopholes

Sometimes investigating officer submits final report on the plea of allibi of the accused. Informant and investigating officer being the same officer is also fatal to the prosecution case. There is no pre-trial conference of the investigating officer and the public prosecutor, and most of the investigating officers have poor knowledge on law of evidence. Investigating officers sometimes also feel reluctant or not found present to give testimony during trial though Court issues all possible processes. Sometimes, during trial it is difficult to trace of investigation officer who has been transferred to some other places.

## 7. Reasons Behind Defective Police Investigation

### 7.1 Lack of Logistics and Manpower

Bangladesh police lacks seriously human resources. The latest statistics tell us that the national police to population ratio is 1:755.[32] Consequently they need to work 13-18 hours a day, which is almost double than the working hours of the government employees of other professions. On an average officer in charge of a metropolitan police station works 18 hours a day, while an officer in charge of district and thana level works 15 hours. But the salary and allowances they get in return can be called so meager in amount that they are simply living a sub-human lives. Still the force seriously lacks in exercising oversight mechanism. For instance, police is the largest state agency to investigate criminal cases and finally provide charge-sheet for the prosecution or final report for release of the accused. Police officers do not get sufficient time for controlling crime and investigating criminal cases. On an average every Sub-Inspector of district (sadar) police stations has to investigate 7.5 cases in a month, Sub-Inspector of thana police stations 4 cases. They do these investigation

[32] Front Page of The Daily Star on January 23, 2019.

activities in addition to their duties. Hence they remain reluctant to take up new cases. Metropolitan police spent 40.6% time of a month for keeping law and order, 32.7 times for ensuring the security of VIPs, and 18.4 times for works relating to criminal cases. Police officers of districts and thanas take half of the time of a month for securing the VIPs.[33] In addition, police is always confronted with the problem of inadequate logistic support. On an average 5-6 police staff sit in each room of a police station. In most of the police stations there is no room for conference or meeting. Police stations of districts and thanas have no prison van. Metropolitan police stations though have prison vans, but those are old and obsolete. Malkhanas of metropolitan and district police stations are not up to the mark. Most of the police stations do not have sufficient number of cars, and the available cars are old. Police requires modern and light arms in view of the fact that criminals are now off and on using modern arms like Chinese rifle, AK-47 rifle, SMG, LMG etc. whereas some levels of our police is equipped with Chinese shoot gun.

### 7.2 Legislative Defect

The police force of Bangladesh has inherited their legacy from the British who mobilize their police force on the basis of a single police act enacted in the year of 1861. The ultimate objective of this particular act was to ensure the upper-hand of the British rule everywhere. Rather than focusing on the professional aspect of crime control, this Act overemphasized on the constabulary functions of the police. The inherent ingredients of this particular act are still very much active. Our police owes its creation to the Police Act, 1861, principal purpose of which was to maintain the status quo. The Act puts major emphasis on maintenance of order. Rather than focusing on the professional aspect of crime control, the Act overemphasizes the constabulary functions of the police. Despite the fact that the Police Act, 1861 provides for internal discipline and/or magisterial oversight, or even that the Bangladesh Police has proactively strengthened its internal oversight procedures, the failure to institute some form of independent and external review of police misconduct is a glaring

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[33] Working Paper on Police Station, Transparency International Bangladesh, March 4, 2004.

omission for any police organization seeking to become democratic in orientation and practice (Section 7 of The Police Act, 1861).[34]

### 7.3 Lack of Expertise and Integrity

The concerned crime investigating agencies do not have enough skill, expertise and commitment to find out the fact for justice seems to be done. Modern technology provides new opportunities for criminals– such as use of the Internet– and challenges for crime control practitioners (such as data management, protection and control across global policing networks). While the advent of DNA or biometric surveillance technology adds to the investigator's arsenal, the dangers of 'surveillance creep'[35] (Nelkin and Andrews 1999) become all too real[36] (Marx 1988). They actually lack in proper training and motivation (Dhaka Tribune 2018).[37] In its report the

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[34] Section 7 of the Police Act, 1861: Appointment, dismissal, etc. of inferior officers - Subject to such rules as the Government may from time to time make under this Act, the Inspector-General, Deputy Inspectors-General, Assistant Inspectors-General and District Superintendents of Police may at any time dismiss, suspend or reduce any police-officer of the subordinate ranks whom they shall think remiss or negligent in the discharge of his duty, or unfit for the same; or may award any one or more of the following punishments to any police-officer of the subordinate ranks who shall discharge his duty in a careless or negligent manner, or who by any act of his own, shall render himself unfit for the discharge thereof, namely:-

(a) fine to any amount not exceeding one month's pay;

(b) confinement to quarters for a term not exceeding fifteen days with or without punishment-drill, extra guard, fatigue or other duty;

(c) deprivation of good-conduct pay;

(d) removal from any office of distinction or special emolument.

[35] Nelkin, D. and Andrews, L. (1999) 'DNA identification and surveillance creep', Sociology of Health and Illness, 21: 689–706

[36] Marx, G.T. (2002) 'What's new about the new surveillance? Classifying the change and continuity', Surveillance and Society, 1: 9–29

[37] https://www.dhakatribune.com/bangladesh/court/2018/01/30/conviction-rate-cyber-crime/ (as visited on 06/05/2019 at 11:30 pm) sketched out that "The repeated failure of the prosecution and law enforcement agencies to prove allegations of cybercrime has resulted in a paltry conviction rate of only 5% over the past five years, according to the records of the Cyber Tribunal (Bangladesh) in Dhaka. There have been only 16 successful convictions across 12 of the 236 cases heard before the tribunal since its inception in February 2013. In 129 of the other cybercrime cases, the accused were cleared of all charges in the final report submitted before the tribunal by police. The tribunal discharged the accused in a further 59 cases without taking charges into cognizance, while the defendants in 36 cases were acquitted as the prosecution failed to prove the charges during the trial. Experts claimed the main reason the prosecution has been failing to prove allegations is their lack of knowledge on Information

Fraser panel (Fraser Commission, 1902) made some essential observations on the police force for its corrections or reforms. "The Police is far from efficient, it is defective in training and organization, it is inadequately supervised, it is generally regarded as corrupt and oppressive and it has utterly failed to secure the confidence and cordial cooperation of the people," said AHL Frase[38].

### 7.4 Lack of Public Trust and Professionalism

Trust in police depends both on individual police officer as well as an institution. Maintaining the legacy of British and Pakistani regimes, the police of Bangladesh remain busy with suppressing and prosecuting the opposition but this situation is developing gradually in our country. Because of political use police fails to develop professionalism. Lack of public trust and professionalism of police in some cases create huge conundrum for feasible existence.

### 7.5 Diversification of Work

Police officers do not get sufficient time for controlling crime and investigating criminal cases. On an average every Sub-Inspector of district police stations has to investigate 7.5 cases in a month, and Sub-Inspector of thana police stations four cases. They do these investigating activities in addition to other duties, hence police officers remain reluctant to take up new cases. Metropolitan police spend 40.6 percent time of a month for maintaining law and order, 32.7 percent for ensuring the security of VIPs, and 18.4 percent for works relating to criminal cases. Police officers of districts and thanas take half of the time of a month for securing the VIPs.

### 7.6 Institutional Defect

Police organization of Bangladesh suffers from insufficient accountability, both internal and external. Although Bangladesh is a democratic state, retention of the Police Act, 1861 and its coercive elements, have made it

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Communication Technology (ICT) and negligence. In addition, sources from among lawyers also alleged that the high acquittal rate was due to the prosecution being weak in the handling of cybercrime cases. Qazi Zahed Iqbal, a lawyer who has dealt with a number of cybercrime-related cases, told the Dhaka Tribune that investigation officers are submitting faulty probe reports due to their poor knowledge about ICT."

38 http://bit.ly/1Q0oJyy Myths and Realities of Police Reforms in India; Indian Police Journal; pp4 (Last visited on Nov. 26, 2015)

difficult for democratic policing to take root. Whether since Independence or as East Pakistan or under the British Raj, "police organization [in Bangladesh] was designed not to attract better talent, but to ensure built-in subservience of the police to the executive administration regardless of the resulting corruption, lack of professional competence, police highhandedness and police-public estrangement (Muhammad Nurul Huda, 2009)[39]." Internal accountability can enhance competence, and prevent corruption, whereas external accountability can ensure people-oriented service. Law prescribes the mode and manner how the police officers will dispose of their duties. If there is insufficient departmental mechanism, and no neutral body of the state to scrutinize whether the police officers are doing their duties properly will create widespread human sufferings, and violation of citizens' rights.

### 7.7 Lack of Accountability and Transparency

Police is the largest state agency to investigate criminal cases, the outcome of which may be a charge-sheet for the prosecution or final report for release of the accused. This reality places police in an advantageous situation which they can manipulate extensively for their personal gain. If the authority is not serious to monitor the investigating activities of police and in the absence of a supervising authority investigation officers can easily include or delete names from the charge-sheet, or give final report where charge-sheet should be given, or vice versa.

### 7.8 Lack of Independence

The people of Bangladesh have acknowledged the problems associated with illegitimate interference in operational policing matters and have expressed their desire for reform. A baseline survey on people's perception of the Bangladesh Police, conducted by the Police Reform Programme of the United Nations Development Programme, revealed that the public believes police performances are obstructed by outside interference, influence or pressure, including political and social

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[39] Muhammad Nurul Huda, October 2009, "Conceptualizing Police Reforms," NIPSA Newsletter, Commonwealth Human Rights Initiative, October 2009: http://www.nipsa.in/conceptualising-police-reforms-muhammad-nurul-huda/ (accessed on 13 June 2011).

pressure.[40] In addition, Safer world also conducted a people's perception survey and found that 58 percent of respondents said that there was too much political interference in the work of the security services and 62 percent said that politicians have too much say over how the police perform their duties. Several respondents also argued that political interference is the most serious obstacle to police reform in Bangladesh.[41]

## 8. Probable Way Out

### 8.1 Launching Pre-trial Conference & Monitoring Committee

There shall be pre-trial conference in which the Public Prosecutors and Investigators shall discuss the questions relating to leading evidence in a case, conducting the case, attendance of witnesses, the defense case, the weak sides of the prosecution case, the points on which the defense is likely to assail the prosecution case, etc. In this meeting, strategy would be determined to conduct the case most efficiently and effectively. Such meeting shall be held at least fifteen days prior to trial date of a case. There shall be monitoring committee in each district comprising of Public Prosecutors, Chief Judicial Magistrate, supervising officers of the investigators, investigators, one representative each of the district administration and police administration. All the police officers and the investigating officers should be clearly instructed not to torture the accused either physically or mentally or otherwise. Investigation shall be started within twenty-four hours of receipt of the first information report or order of the Magistrate Court.

### 8.2 Enacting Time-befitting Legislation

Since its enactment in 1861, commission after commission has concluded that the Police Act should be significantly amended or completely replaced. This ancient police Act should be replaced with a new one focusing on the elevation of police force into a people-oriented and professionally devoted neutral law and order enforcing agency. The new Act should keep several provisions for transparency and accountability which are indispensable for modern and neo-police management. It will, in

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40 United Nations Development Programme – Bangladesh, "External interference obstructs police performance: Public Attitude Baseline Survey," Press Release, 14 February 2007.

41 Saferworld, Security Provision in Bangladesh (Executive Summary), March 2010, pp. iii-iv.

turn, pave the avenues of ensuring human security and proper justice to all. For regular monitoring and supervision, and to ensure pro-active peoples participation police-public joint consultative committees should be constituted in most of the stages of police functioning. We require a new Police Act, which will focus on professional aspect of crime control and clearly define police role and responsibility. The new Act needs to ensure police professionalism, accountability and modern police management, the proper functioning of which seeks to improve human security and access to justice. It should provide the basis for establishing police as a public-friendly service-oriented organisation, which will be monitored by police-public consultative committees.

**8.3 Application of Modern Science and Technology**

Modern scientific equipment shall be provided to the investigators and special laboratories including a laboratory for DNA test shall be set up in every districts without any delay. Investigators shall be given special training in criminal investigation which is considered as an art and science because of the increase in number of organized crimes and globalization of crime.

**8.4 Independent Investigation Commission**

There shall be a separate independent Investigation Commission and the investigators and other officers shall be appointed by the Public Service Commission. Chairman and two other members shall be appointed by the Government for a fixed period of 4/5 years. Provisions should be made so that they may work independently.

**8.5 Controlling Haphazard Remand and Preventing Extraction of Confession**

Intellectual maneuver with various techniques and arts for remand are hyper active than bygone practice of inhumane torture for police investigation. To alleviate though expected to eliminate, the devastating denial of justice through extraction of confession the following areas should be pondered over and taken dynamic initiatives. There should be launched a torture free criminal administration of justice system. In this

regard the guidelines of BLAST vs. Bangladesh[42] should be mulled over and materialized on the basis of priority. At remand or just after remand, confession should not be taken. The aforesaid guideline for remand should be followed without any exception. Easily understandable Form for recording confession should be introduced and it should be inevitably written in Bengali language as it is explicit from experience that many recording officers faces difficulties to understand the Form itself. Magistrates should be justice oriented with the accountability to self sanction, to the people through constitution. The concerned Magistrates should be properly trained in this regard. He would make sure that the confessing accused had no marks of violence on his person nor was he be under threat or duress of any kind. There should be explicit framework to dispose of retraction petition and a confessional statement cannot be the overwhelming reason to convict an accused person. The Magistrate should be very cautious and keep away from acting mechanically in recording the confessional statements as it is the legal and solemn duty of Magistrate to strictly follow the provisions of sections 164 and 364 of the Code of Criminal Procedure, 1898 for avoiding the possibilities of causing injustice. It is important that the procedure and manner followed by the recording Magistrate must be reflected in the prescribed Form so that the trial court/ appellate court can see whether the recording Magistrate has made real endeavor for ascertaining voluntary nature of the confession. Any kind of popular pressure from other agencies to record confessional statement out of legal matrix should be set at naught emphatically focusing on justice and rights of all concerned. No element of way out casualness should be allowed to creep in and the Magistrate should be fully satisfied that the confessional statement which the accused wants to make is in fact and in substance voluntary.[43] Civil society, experts, human rights NGOs and other stake holders should come forward with the advocacy to have a resolution regarding the aforementioned obstacles pertaining to confession and recording of confessional statement.

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42 55 (2003) DLR 363, 23 BLD (HCD) 2003 Bangladesh (Md. Hamidul Haque, J) 115 Bangladesh Legal Aid & Services Trust (BLAST v. Bangladesh (Md. Hamidul Haque, J) 115.

43 Supra, note 2.

## 8.6 Ensuring Accountability and Transparency

National and international legal prohibitions on torture derive from a consensus that torture and similar ill-treatment are immoral, as well as impractical (Amnesty International. 2005).[44] The direct or indirect state sponsorship of torture, violence and ill treatment towards its citizens has grave implications for state-societal relations, as well as for individual well being. In fact, the majority of countries where torture is prevalent are facing numerous political and social crises, including ineffective rule of law, instability and poor realization of basic human rights. Justice and free from any kind of torture is a constitutional right and flavor of freedom fight[45] as also reflected in international human rights regime which should be protected and preserved at any cost as a sine qua non of welfare state (Sping-Andersen, Gøsta 1999).[46] Instituting legal and judicial reform to halt torture, and ending impunity for it, should be a matter of priority for the government of Bangladesh and for all parties interested in human rights and the security and stability of the region. It is crucial for public authorities, civil society groups, professionals, academics and ordinary citizens to understand the radical nature of the fight against torture, if other social ills are to be effectively addressed. All the stakeholders should come forward to eradicate the malpractices prevailing pertaining to extract the confessional statement through torture and improper record of it for the sake of upholding rights preventing frustration of constitutional and human rights.

## 8.7 Positive Political Will

In the late eighteenth and early nineteenth centuries "science of police" was flourished as a branch of political economy. Good law and order situation presupposes the establishment of a professional police force. An

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44 "Torture and Ill-Treatment in the 'War on Terror'". Amnesty International. 2005-11-01.http://www.amnesty.org/en/library/info/ACT40/014/2005/en. Retrieved 2008-10-22

45 The People's Republic of Bangladesh achieved independence through heavy blood shed and chastity of thousands of mothers and sisters finally on 1971 as legacy of historical struggle against injustice, oppression and discrimination from the then west Pakistan's semi colonial and diabolical policy.

46 Esping-Andersen, Gøsta (1999). Social Foundations of Postindustrial Economies. Oxford: Oxford University Press. ISBN 0-19-874200-2.See also Rice, James Mahmud; Robert E. Goodin, Antti Parpo (September–December 2006). "The Temporal Welfare State: A Crossnational Comparison" (PDF). Journal of Public Policy 26 (3): 195–228. doi:10.1017/S0143814X06000523. ISSN 0143-814X

environment should be created where police will serve the purpose of the people. Their prime concern will be crime control and maintenance of social order. Recently people are more conscious than ever about the role of police in ensuring law and order. Bangladesh police since last more than one hundred and fifty years has been struggling very hard to perform all the aforesaid functions. Simultaneously they are trying their level best to make a paradigm shift from colonial policing system to a democratic policing (David Bayley, 2001)[47]. But they are frequently encountering resistance from many vested interest entities. This kind of resistance can hardly be tackled without strong political will. Political will is the one and only driving force that can replace the antiquated Police legal regime by a new dynamic one.

## 9. Concluding Remarks

To attain sustainable development goal, there is no alternative but to have vibrant criminal administration of justice supported by remaining state machineries whereof standard police investigation is a sine qua non. The reasons causing failure of criminal administration of justice via faulty police investigation which have been discussed and identified on the basis of nitty-gritty as above deduced and drawn from experience are not free from any dissent and discordant opinion though these are crucial fact need to be realized by the policy makers to have sustainable resolution for the superior goal of justice not only be done but seems to be manifestly done. We should not be oblivious that the ideal police investigation for smooth criminal administration of justice is highly imbedded with overall reality of institutionalized democracy, rule of law and good governance as David Bayley (2001) relevantly observed that-

> Democratic government is more important for police reform than police reform is for democratic government. Police reform is a necessary, but not a sufficient, condition for democratic government.[48]

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47 David Bayley, Democratising the Police Abroad: What to Do and How to Do it, National Institute of Justice, Office of Justice Programmes,US Department of Justice: Washington D.C. (2001), pp. 13-15.

48 David Bayley, Democratising the Police Abroad: What to Do and How to Do it, National Institute of Justice, Office of Justice Programmes, US Department of Justice: Washington D.C. (2001), p. 13.

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1 BSCD 155.

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# Appropriate Punishment in Criminal Cases: The Guiding Factors to be Considered

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**Abstract**

Where there is crime or offence, there is punishment. No criminal or offender should go unpunished. The main object of punishment is to prevent the commission of offences and to reform the criminals. There are four different theories of punishment, viz., deterrent, preventive, retributive and reformative. Deterrent theory aims at deterring people from committing crime by inflicting punishment on the criminals. The infliction of punishment serves as a check on others who are evil minded. Preventive theory aims at preventing a repetition of wrong-doing by disabling the offender. According to retributive theory the criminal should be made to suffer in proportion to the injury caused to the victim, viz., a tooth for a tooth, an eye for an eye. Reformative theory aims at reforming the criminal by prescribing proper treatment so as to prevent him from committing further crime. In our criminal justice system there are myriad of offences, the punishments, to which offenders are liable to suffer, range from serving the social welfare activity to death sentence. Sentencing discretion on the part of a Judge is the most difficult task to perform. There is no system or procedure in the Criminal Justice administration method or Rule to exercise such discretion. There is no guidance to the Judge in regard to selecting the most appropriate sentence of the cases. The absence of sentencing guidelines is resulting in wide discretion which ultimately leads to uncertainty in awarding sentences. So, a statutory guideline is required for the sentencing policy. This article purports to analyze guiding factors to be considered in selecting the most appropriate sentence of the cases through study of case laws.

## 1. Introduction

Crime or offence is a violation of the law. 'Offence' means any act or omission made punishable by any law for the time being in force.[1] The law must be upheld to maintain order in society. So, crime/offence and punishment are the two sides of the same coin. To punish criminals is a

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1 Section 4(o) of the Code of Criminal Procedure, 1898

recognized function of all civilized states for centuries.[2] The legislature defines the offence with sufficient clarity and prescribes the outer limit of punishment and a wide discretion in fixing the degree of punishment within that ceiling is allowed to the Judge.[3] The term punishment is defined as, "pain, suffering, loss, confinement or other penalty inflicted on a person for an offence' by the authority to which the offender is subjected to." Punishment is a social custom and institutions are established to award punishment after following the criminal justice process, which insists that the offender must be guilty and the institution must have the authority to punish. It has been mentioned in AIR 1951 Orissa 259 that the object of punishment is to make the offender suffer either in person or in purse or in both so that he may not follow his errant way in future and at the same time to make others understand that they will be similarly dealt with if they commit any offence against the society.

H.L.A. Heart with Mr. Bean and Prof Flew has defined punishment in terms of the following five elements. (i) It must involve pain or other consequences normally considered unpleasant. (ii) It must be for an offence against legal rules. (iii) It must be to an actual or supposed offender for his offence. (iv) It must be intentional, administered by human beings other than the offender. (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed. In our country there are myriad of offences, the punishments to which offenders are liable to suffer are death, imprisonment for life, rigorous imprisonment for a certain period, simple imprisonment for a certain period, forfeiture of property, fine either limited or unlimited, whipping, detention in reformatories or certified institutes, cancellation or suspension of the licence and serving in the social welfare activity. Murder by a life convict is the only offence for which death sentence must be inflicted/ awarded under section 303 of the Penal Code, 1860.

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2 Paranjape, Dr. N.V., ''Criminology and Penology'', 10th edition, reprinted 1999, Central Law Publications, Allahabad, p.148

3 Ataur Mridha alias Ataur Vs. The State, 15 SCOB [2021] (AD)1=73DLR(AD) 298(Judgment of Review)


The existing laws of our country defines the offence with sufficient clarity and prescribes the maximum term of imprisonment. There are many offences for which the minimum term of imprisonment is not prescribed but there are some offences for which the minimum term of imprisonment is prescribed. Where the minimum term is not prescribed, the imprisonment may be of any term not exceeding the maximum limit. But where the minimum term is prescribed, the term of imprisonment cannot be less than the lowest limit. It may be of any term within the lowest and the maximum limit. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence.[4] The presiding judge has a wide discretion in selecting the most appropriate punishment of the offence which he tries. The legislature in its wisdom has conferred this discretion on the Judge who is guided by certain rational parameters, regard been had to the factual scenario of the case. The guiding considerations would be that the punishment must be proportionate. The unguided sentencing discretion led to an unwarranted and huge disparity in sentences awarded by the courts of law. In the case of Syed Sajjad Mainuddin Hasan Vs. State 70 DLR (AD) (2018) 70 and Ataur Mridha alias Ataur Vs. the State [15 SCOB (2021) (AD) 1, Criminal Review Petition No. 82 of 2017] honorable Appellate Division applied some modern sentencing tools such as Aggravating Circumstances, Mitigating Circumstance, Rarest of the Rare Test and Comparative Proportionality Test in disposing murder cases.

4 Gopal Singh V. State of Uttarakhand, (2013) 7 SCC 545; AIR 2013 SC 3048; 2013 AIR SCW 4455

## 2. The Guiding Factors to be Considered in Selecting the Most Appropriate Punishment

Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment fitting to the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment. The measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenseless and unprotected state of the victim.

In the case of Gopal Singh Vs. State of Uttarakhand reported in (2013) 7 SCC 545; AIR 2013 SC 3048; 2013 AIR SCW 4455, the Supreme Court of India has elaborately stated what should be the appropriate punishment and what should be considered in selecting the just punishment. The Supreme Court of India has observed as follows:

> 18. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attract ability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. Needless to emphasize, these are certain illustrative aspects put forth in a condensed manner. We may hasten to add that there can neither be a strait-jacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalized judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For

> every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a Court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment." **(Underlines provided for emphasis)**

In the same case the duties of the Court while fixing the punishment have been stated as follows:

> 19. A Court, while imposing sentence, has to keep in view the various complex matters in mind. To structure a methodology relating to sentencing is difficult to conceive of. The legislature in its wisdom has conferred discretion on the Judge who is guided by certain rational parameters, regard been had to the factual scenario of the case. In certain spheres the legislature has not conferred that discretion and in such circumstances, the discretion is conditional. In respect of certain offences, sentence can be reduced by giving adequate special reasons. The special reasons have to rest on real special circumstances. Hence, the duty of Court in such situations becomes a complex one. The same has to be performed with due reverence for Rule of Law, the collective conscience on one hand and the doctrine of proportionality, principle of reformation and other concomitant factors on the other. The task may be onerous but the same has to be done with total empirical rationality sans any kind of personal philosophy or individual experience or any a-priori notion.

In the case of Rokia Begum Vs. The State reported in 4 SCOB [2015] AD 20, honorable Appellate Division of our Supreme Court has observed as follows:

> 50. Sentencing discretion on the part of a Judge is the most difficult task to perform. It is, also, not possible to lay down any cut and dry formula for imposition of sentence but the object of sentence should be to see that crime does not go unpunished and the victim of crime as, also, the society has the satisfaction that Justice has been done. It will be mockery of Justice to permit the accused to escape the extreme penalty of law when faced with such evidence and cruel act perpetrated by the

> offenders. To give lesser punishment to the condemned prisoners who stood convicted in a shocking and revolting crime would render the Justice System of the country suspect. Under sympathy to impose inadequate sentence would do more harm to Justice System to undermine public confidence in the efficacy of law.''

In the case of State Vs. Raj Kumar Khandelwa reported in (2009) 164 DLT 173, The High Court of Delhi has held that the following 6 circumstances have to be considered or followed in fixing the appropriate punishment:

> 80. The circumstances can be listed under six different heads:
>
> I. Circumstances personal to the offender.
>
> II. Pre-offence conduct of the offender and in particular the motive.
>
> III. Contemporaneous conduct of the offender while committing the offence.
>
> IV. Post-offence conduct of the offender.
>
> V. Role of the victim in commission of the crime.
>
> VI. Nature of Evidence.

In the case of Goswami Vs. Delhi Administration reported in (1974)3 SCC 85, The Supreme Court of India has stated the purpose of punishment which is as follows:

> ... The main purpose of the sentence broadly stated is that the accused must realise that he has committed an act which is not only harmful to the society of which he forms an integral part but is also harmful to his own future, both as an individual and as a member of the society. Punishment is designated to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence; it is also designed to reform the offender and reclaim him as a law-abiding citizen for the good of the society as a whole. Reformatory, deterrent and punitive aspects of punishment thus play their due part in judicial thinking while determining the question of sentence. **In modern civilized societies, however, reformatory aspect is being given somewhat greater importance. Too lenient as well as too harsh sentence both loose their efficaciousness. One does not deter and the other may frustrate thereby making the offender a hardened criminal." (*Emphasis provided).**

In the case of Syed Sajjad Mainuddin Hasan Vs. State reported in 70 DLR(AD)(2018)70, the Appellate Division of our Supreme Court has stated what should be the just punishment if the offence is a gruesome murder and the offender becomes a beast and menace to the society. The Appellate Division has observed as follows:

> 5. It is not possible to catalogue the reasons which may justify the pass of death sentence. But, when the murder has been committed in a **brutal manner on a helpless child**, the same may be awarded. **It is a crime against society and the brutality of the crime shocks the judicial conscience that the court has the duty to impose the death sentence.** The petitioner was servant of the PW-1 whose duty was to defend and protect the family members instead he, out of his sexual lust, did not bother to kill a child of 15 years old assaulting mercilessly. **It was gruesome murder. So, dilution of sentence would be a misplaced sympathy and gross miscarriage of justice. The crime committed by petitioner was grotesque, diabolic and revolting.** Since heinous crime was committed in cruel and diabolic manner, death sentence is justified sentence. It is true death for death may be, to some extent, inhuman. ***But it is equally true that when a man becomes a beast and menace to the society, he can be deprived of his life. The nature of the crime reveals that the petitioner is a menace to the society and sentence of imprisonment would be altogether inadequate. (Emphasis Provided).***

The direction given in the case of Bacchan Singh Vs. State of Punjab reported in (1980) 2SCC 684 is as follows:

> While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence.

According to this case, at the time of imposing sentence for the offence of murder under section 302 of the Penal Code, 1860, the Court must consider every relevant circumstance relating to the crime and the criminal. If the Court finds that the offence is of an exceptionally depraved

and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the Court may impose the death sentence.

In the case of Dhananjoy Chatterjee Vs. State of West Bengal reported in (1994) 2 SCC 220, it was held as follows:

> 4. In recent years, the rising crime rate-particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished, thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration. (**Underlines provided for emphasis)**

In the case of Monir Ahmed Vs. The State reported in 16 SCOB [2022] AD page 51-61, Para 45 honorable Appellate Division of the Supreme Court of Bangladesh mentioned the following observation of their Lordships U.U. Lalit and two other honorable Judges of the Supreme Court of India made in the case of Arvind Singh Vs. The State of Maharastra, AIR 2020 SC 2451, Para-98:

> (i) The extreme penalty of death need not be inflicted except in gravest case of extreme culpability. (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'. (iii) Life imprisonment is the Rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only, the option

> to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances. (iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weight and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In Criminal Appeal No. 127 Of 2014 with Jail Appeal No. 26 of 2014 and Jail Appeal No. 29 of 2014 (From the judgment and order dated 11.05.2014 passed by the High Court Division in Death Reference No.07 of 2009 with Criminal Appeal Nos.616, 670 and 698 of 2009 with Jail Appeal Nos.155-159 of 2009) reported in 16 SCOB [2022] AD 62-76 as the case of Md. Shukur Ali and others Vs. The State, honorable Appellate Division has observed as follows:

> In this regard it is pertinent to mention the observation of his Lordship H.L. Dattu former Honorable Chief Justice of India & two other honorable judges of the Supreme Court made in the case of Mofil Khan Vs. State of Jharkhand, (2015) 1 SCC 67, Para-20 that "Sentences of severity are imposed to reflect the seriousness of the crime, to promote respect for the law, to provide just punishment for the offence, to afford adequate deterrent to criminal conduct and to protect the community from further similar conduct. It serves a threefold purpose–punitive, deterrent and protective.

Regarding appropriate punishment and sentence his Lordship Mr. Justice P. Sathasivam, J. in the case of Ahmed Hussain Vali Mohammed Saiyed Vs. State of Gujarat, (2009) 7 SCC 254, Paras 99 & 100 observed that-

> Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the victim of the crime but the society at large while considering the imposition of appropriate punishment. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which both the criminal and the victim belong.

We are of the view that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence on the judiciary. It is the duty of the Court to award appropriate sentence considering the gravity of the offence.

In the case of The State Vs. Abul Kalam & others reported in 3 SCOB [2015] HCD 74, honorable High Court Division of The Supreme Court of Bangladesh has observed as follows:

> **96.** With regard to the sentence imposed upon convict-appellant we are of the view that sentencing discretion on the part of a Judge is the most difficult task to perform. There is no system or procedure in the Criminal Justice administration method or Rule to exercise such discretion. In sentencing process, two important factors come out- which shall shape appropriate sentence **(i) Aggravating factor and (ii) Mitigating factor**. These two factors control the sentencing process to a great extent. But it is always to be remembered that **the object of sentence should be to see that the crime does not go unpunished and the society has the satisfaction that Justice has been done and court responded to the society's cry for Justice.** Under section **302** of the Code, though a discretion has been conferred upon the Court to award two types of sentences, death or imprisonment for life, the discretion is to be exercised in accordance with the fundamental principle of criminal Justice. ***(Emphasis and underline provided)***

In the case of historic Ataur Mridha alias Ataur Vs. The State reported in 15 SCOB [2021] (AD)1=73DLR(AD) 298(Judgment of Review) honorable Appellate Division of The Supreme Court of Bangladesh has enunciated guidelines to be followed by all trial Courts in selecting the most appropriate punishment. The Appellate Division has stated as follows:

> 149. There is no guidance to the Judge in regard to selecting the most appropriate sentence of the cases. The absence of sentencing guidelines is resulting in wide discretion which ultimately leads to uncertainty in awarding sentences. A statutory guideline is required for the sentencing policy. Similarly, a properly crafted, legal framework is needed to meet the challenging task of appropriate sentencing. The judiciary has enunciated certain principles such as deterrence, proportionality, and rehabilitation which are needed to be taken account while sentencing.

> **The proportionality principle includes factors such as mitigating and aggravating circumstances. The imposition of these principles depends on the fact and circumstances of each case. The guiding considerations would be that the punishment must be proportionate.** The unguided sentencing discretion led to an unwarranted and huge disparity in sentences awarded by the courts of law. The procedure prescribed by law, which deprives a person of life and liberty must be just, fair and reasonable and such procedure mandates humane conditions of detention preventive or punitive. The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided. **While deciding on quantum of sentence as accused getting away with lesser punishment would have adverse impact on society and justice system. Sentencing for crimes has to be analysed on the touchstone of three tests viz. crime test, criminal test and comparative proportionality test.**
>
> 150. The legislature defines the offence with sufficient clarity and prescribes the outer limit of punishment and a wide discretion in fixing the degree of punishment within that ceiling is allowed to the Judge. **On balancing the aggravating and mitigating circumstances as disclosed in each case, the Judge has to judiciously decide what would be the appropriate sentence. In judging an adequate sentence, the nature of the offence, the circumstances of its commission, the age and character of the offender, the injury to the individuals or to the society, whether the offender is a habitual, casual or a professional offender, affect of punishment on the offender, delay in the trial and the mental agony suffered by the offender during the prolonged trial, an eye to correction and reformation of the offender are some amongst many factors that have to be taken into consideration by the Courts. In addition to those factors, the consequences of the crime on the victim while fixing the quantum of punishment because one of the objects of the punishments is doing justice to the victim.** A rational and consistent sentencing polices requires the removal of several deficiencies in the present system. An excessive sentence defects its own objective and tends to undermine the respect for law. ***(Emphasis supplied)***

According to the guideline of the honorable Appellate Division sentencing for crimes has to be analyzed on the touchstone of three tests

viz. crime test, criminal test and comparative proportionality test. Punishment must be commensurate with the offence committed. In fixing the punishment, the nature of the offence, the circumstances of its commission, the age and character of the offender, the injury to the individuals or to the society, whether the offender is a habitual, casual or a professional offender, affect of punishment on the offender, delay in the trial and the mental agony suffered by the offender during the prolonged trial, an eye to correction and reformation of the offender and the consequences of the crime on the victim have to be taken into consideration by the Courts.

**2.1 Crime Test (Aggravating Circumstance)**

Crime Test is totally related to the offence committed. In this test only the offence and the victim etc. are to be considered. The first aggravating circumstance of criminal case is the offence itself. The honorable Supreme Court of our country and that of India have considered the following circumstances as aggravating circumstances in awarding death sentence or imprisonment for life till natural death, imprisonment for life i.e., the highest punishment.

- ✓ The nature and gravity of the offence[5]
- ✓ Committing murder for money as hired murderer[6]
- ✓ Place of the offence: Mosque, temple, public place, isolated place, open place, restricted area
- ✓ Time of the offence: Morning, Noon, afternoon, evening, night, mid night
- ✓ Cruelty, Atrocity, brutality etc. of the offence[7]
- ✓ Attempt to cause disappearance of the evidence of the offence, attempt to cause disappearance of the dead body[8]

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5 Bacchan Singh Vs. State of Punjab (1980) 2SCC 684, Gopal Singh Vs. State of Uttarkhand (2013) 7 SCC 545, Santa Singh Vs. The State of Punjab (1976) 4SCC 190

6 Maku Rabi Das Vs. State 65 DLR(AD)(2013)240

7 Syed Sajjad Mainuddin Hasan Vs. State 70 DLR (AD)(2018)70 , Laxman Naik Vs. State of Orissa AIR 1995 SC 1387, Molai Vs. State of Madhya Pradesh AIR 2000 SC177, Sunder Singh Vs. State of Uttaranchal (2010) SCC 611

8 Laxman Naik Vs. State of Orissa AIR 1995 SC 1387, Gopal Singh Vs. State of Uttarkhand (2013) 7 SCC 545, Santa Singh Vs. The State of Punjab (1976) 4SCC 190

- ✓ Commission of another offence while committing an offence: Dacoity with murder, Rape with murder. Committing murder of a driver at the time of snatching away the car[9]
- ✓ Behavior of the offender at the time of the offence and subsequent thereto[10]
- ✓ Helplessness of the victim[11]
- ✓ Fiduciary Relation between the victim and the accused[12]
- ✓ Being trusted with the victim(maid servant)[13]
- ✓ Having no relationship with the victim[14]
- ✓ Causing repeated hurt, Giving repeated blow[15]
- ✓ The nature of the weapon used
- ✓ Causing hurt on the vital part of the body
- ✓ Habitual offender
- ✓ Committing offence with conspiracy, premeditation etc.[16]
- ✓ Being proud of the offence committed[17]
- ✓ Not being repentant or remorseful for the offence[18]
- ✓ Previous conviction for the same or any other offence[19]

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9 Shahid Ullah @Shahid & ors Vs. The State, 4 SCOB [2015] AD11, Bacchan Singh Vs. State of Punjab (1980) 2SCC 684, Gopal Singh Vs. State of Uttarkhand (2013) 7 SCC 545, Santa Singh Vs. The State of Punjab (1976) 4SCC 190

10 Syed Sajjad Mainuddin Hasan Vs. State 70 DLR (AD)(2018)70, Laxman Naik Vs. State of Orissa AIR 1995 SC 1387, Molai Vs. State of Madhya Pradesh AIR 2000 SC 177, Gopal Singh Vs. State of Uttarkhand (2013) 7 SCC 545, Santa Singh Vs. The State of Punjab (1976) 4SCC 190

11 Syed Sajjad Mainuddin Hasan Vs. State 70 DLR (AD)(2018)7, Laxman Naik Vs. State of Orissa AIR 1995 SC 1387, Molai Vs. State of Madhya Pradesh, AIR 2000 SC 177, Bacchan Singh Vs. State of Punjab, (1980) 2SCC 684

12 Laxman Naik Vs. State of Orissa AIR 1995 SC 1387

13 Syed Sajjad Mainuddin Hasan Vs. State 70 DLR (AD)(2018)70

14 Maku Rabi Das Vs. State 65DLR(AD)(2013)240

15 Syed Sajjad Mainuddin Hasan Vs. State 70 DLR (AD)(2018)70, Ankush Maruti Shinde Vs. State of Maharastra 2009 6SCC 667, Prajeet Kumar Singh Vs. State of Bihar 2008 SCC 434

16 Iftekhar Hasan @ Al Mamun and others Vs. State 59DLR (AD)(2017) 36- (Two judge murder case), Sunder Vs. State AIR 2013 SC 777, Vikram Singh Vs. State of Punjab 2010 SCC 56, Sonu Sarder Vs. State of Chhattisgarh 2012 SCC 97

17 Iftekhar Hasan @ Al Mamun and others Vs. State 59DLR (AD)(2017) 36- Two judge murder case.

18 Ibid.

19 B.A. Umesh Vs. Registrar General, High Court of Karnataka, 2011 3 SCC 85, Gopal Singh Vs. State of Uttarkhand (2013) 7 SCC 545, Santa Singh Vs. The State of Punjab (1976) 4SCC 190, Shankar Kisanrao Khade Vs. State of Maharastra, (2013) 5 SCC 546

- ✓ Financial corruption
- ✓ Intellectual offence
- ✓ Perverted sexuality
- ✓ Heinous offence
- ✓ Age of the victim[20]
- ✓ Commission of offence without provocation[21]
- ✓ Having direct evidence
- ✓ Offence against the state[22]
- ✓ Offence for political reason
- ✓ Misuse of the bail[23]
- ✓ Being absconding after getting bail[24]
- ✓ Having previous record (PR) of offence[25]
- ✓ Becoming unworthy or incapable of correction and reformation[26]
- ✓ Becoming a menace to the society[27]
- ✓ Becoming continuing threat to the state and the society[28]
- ✓ Becoming a threat to law and order and a menace to the society[29]
- ✓ Possibility of commission of offence again[30]

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20 Syed Sajjad Mainuddin Hasan Vs. State 70 DLR (AD)(2018)70, Laxman Naik Vs. State of Orissa AIR 1995 SC 1387, Molai Vs. State of Madhya Pradesh AIR 2000 SC 177, Gopal Singh Vs. State of Uttarkhand (2013) 7 SCC 545, Santa Singh Vs. The State of Punjab (1976) 4SCC 190

21 Abdul Bashir@Bashir Vs. State 56 DLR(AD) (2004)207

22 Iftekhar Hasan @ Al Mamun and others Vs. State 59DLR (AD)(2017) 36- Two judge murder case.

23 Akbar Ali Lalu Vs. State 66 DLR(2014)134

24 Ibid.

25 Kamal alias Exol Kamal Vs. State 10 SCOB [2018]AD 6

26 Kamal alias Exol Kamal Vs. State, 10 SCOB (2018)AD 6, Shankar Kisanrao Khade Vs. State of Maharastra, (2013) 5 SCC 546

27 Iftekhar Hasan @ Al Mamun and others vs State 59 DLR (AD)(2017) 36-, Kamal alias Exol Kamal Vs. State,10 SCOB [2018]AD, Shahid Ullah @Shahid & ors Vs. The State, 4 SCOB (2015) AD11, Syed Sajjad Mainuddin Hasan vs State 70 DLR(AD)(2018)70

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30 Kamal alias Exol Kamal Vs. State 10 SCOB [2018] AD 6, Shahid Ullah @Shahid & ors Vs. The State, 4SCOB (2015) AD11, Gopal Singh vs State of Uttarkhand (2013), 7 SCC 545, Santa Singh Vs. The State of Punjab, (1976) 4SCC 190

## 2.2 Criminal Test (Mitigating Circumstance)

Criminal Test is totally based on the criminal. In this test different things in respect of the criminal are considered. It has no relation with the crime test. The honorable Supreme Court of our country and that of India have considered the following circumstances as mitigating circumstances in awarding imprisonment for life instead of death sentence i.e., the lesser punishment.

- First offence[31]
- Youth of the offender[32]
- Old age[33]
- Child, female or transgender (third sex) offender.[34]
- Sudden provocation, or provocation of the victim
- Exceeding right of private defense
- Offence committed for the wrong of moment[35]
- Losing self-control
- Taking revenge[36]
- Continuous physical and mental provocation, doubt of having affairs or intimacy with another[37]
- Bitter conjugal life[38]
- The offender being the only earning member of the family
- Good relationship with the neighbours[39]
- Not being habitual offender[40]

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31 Nalu Vs. The State 32 BLD (AD) 247, Abdul Khaleque Vs. Hazera Begum 58 DLR (2006)322, Md. Moti Matbor vs The State, Criminal Revision No.1651 of 2017

32 Nalu Vs. The State 32 BLD (AD) 247, Mehedi Hasan Vs. State 66 DLR(AD)(2014)111(Trisa Murder Case), Nazrul Islam Vs. State 66 DLR(AD)(2014)199, The State Vs. Abul Kalam & others 3SCOB[2015] HCD 74, Blast Vs. Bangladesh 68DLR(2016)(AD)1

33 Zakir Khan and others Vs. State 3 SCOB [2015] HCD 122, Hasan Ali Vs. State 47 DLR (AD)(1995)69, Mulla Vs. State of Uttar Pradesh,2010 3 SCC 508

34 State Vs. Saiful 56 DLR (2004) 376

35 Nalu Vs. The State 32 BLD (AD) 247

36 Mohinder Singh Vs. State of Punjab 2013 3SCC 294

37 State Vs.Azam Reza 62 DLR(AD)(2010)406, Shahjahan Vs. State 51DLR(1999) 373, Zahiruddin Vs. State 47 DLR(AD)92, Nazrul Islam Vs. State 66DLR(AD)(2014)199

38 Nawsher Ali Sarder Vs. State 39 DLR(AD)196

39 Abdul Khaleque Vs. Hazera Begum 58 DLR (2006)322

40 State Vs. Azam Reza 62DLR(AD)(2010) 406, Abdul Khaleque Vs. Hazera Begum 58 DLR (2006)322, Bacchan Singh Vs. State of Punjab (1980) 2SCC 684

- Having no record of previous offence[41]
- Having no record of previous conviction[42]
- Physical illness
- Physical states-Crippled, dumb, deaf[43]
- Offence committed without premeditation[44]
- Having no direct evidence of the incident i.e., the offence being proved by circumstantial evidence[45]
- The case remaining pending for an unduly long time[46]
- Having been behind the bar for a long time[47]
- Having been in the condemn cell for a long time[48]
- Obeying the provisions of Jail Code while staying in jail[49]
- Regular appearance before the Court[50]
- Being repentant or remorseful for the offence committed[51]
- Seeking opportunity of correction or reformation
- Being incapable of committing further offence due to old age
- Having possibility of correction or reformation[52]

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41 Nalu Vs. The State 32 BLD (AD) 247, State Vs. Azam Reza 62 DLR(AD)(2010)406, Md. Nasir Mia Vs. The State 12 SCOB (2019) HCD, Sham Vs. State of Maharastra 2011 10SCC 389, Abdul Khaleque Vs. Hazera Begum 58 DLR (2006)322

42 Nalu Vs. The State 32 BLD (AD) 247, Abdul Khaleque Vs. Hazera Begum 58 DLR (2006)322, Gopal Singh Vs. State of Uttarkhand (2013) 7 SCC 545, Santa Singh Vs. The State of Punjab (1976) 4SCC 190, Shankar Kisanrao Khade Vs. State of Maharastra (2013) 5 SCC 546

43 Absar Alam Vs. State of Bihar AIR 2012 SC 968

44 Nalu Vs. The State 32 BLD (AD) 247, Nazrul Islam Vs. State 66DLR(AD)(2014)199, Akhtar Vs. State of Uttar Pradesh 1999 6 SCC 60, Abdul Khaleque Vs. Hazera Begum 58 DLR (2006)322

45 Hazer Ali Mandal and others Vs. The State 37 DLR (AD) 87, Sikha Rakshit Vs. Paritosh Rakshit 70 DLR (AD) (2008) 1**,** Rokia Begum@Rokeya Begum Vs. State, 4 SCOB [2015] AD 20

46 Zakir Khan and others Vs. State 3 SCOB [2015] HCD 122

47 Nazrul Islam Vs. State 66DLR(AD) (2014) 199

48 Nalu Vs. The State 32 BLD (AD) 247, Mehedi Hasan vs State 66DLR(AD)(2014)111, Nausher Ali Sarder vs The State 39DLR(AD)(1987)194, Rokia Begum@Rokeya Begum vs State 4 SCOB [2015] AD 20, Blast Vs. Bangladesh 68 DLR (2016) (AD) 1

49 State Vs. Om Prakash, Death Sentence Ref. No.5 of 2012 and Crl.Appeal No.288 of 2013, Decided by Delhi High Court on 17 April, 2014

50 Md. Moti Matbor Vs. The State

51 Abdul Khaleque Vs. Hazera Begum 58 DLR (2006)322

52 Nalu Vs. The State 32 BLD (AD) 247, Mahesh Dhanaji Shinde Vs. State of Maharastra 2014 4 SCC 292, Sandesh @ Sainath Kailash Abhang Vs. State of Maharastra 2013 2 SCC 479, State of Uttar Pradesh Vs. Sanjay Kumar 2012 8SCC 537

- Confessing the offence under section 164 of the Code of Criminal Procedure, 1898[53]
- Pleading guilty at the time of charge hearing or any time thereafter[54]
- Not being a dreadful offender [55]

**2.3 Comparative Proportionality Test**

In the case of Ataur Mridha alias Ataur Vs. The State, reported in 15 SCOB [2021] (AD)1= 73DLR(AD) 298 the honorable Appellate Division has divided imprisonment for life into two types. If the convict is sentenced to suffer imprisonment for life, it shall be deemed equivalent to imprisonment for 30 years and he will get the benefit of section 35A of the Code of Criminal Procedure. In that case sections 45, 53, 55 and 57 of the Penal Code, 1860 and section 35A of the Code of Criminal Procedure, 1898 have to be read together. If the convict is sentenced to suffer imprisonment for life till his natural death, he will not get the benefit of section 35A of the Code of Criminal Procedure, 1898. The majority view of the honorable Appellate Division is as follows:

> 207. In view of the facts and circumstances, the discussion made above the review petition is disposed of with the following observations and directions:
>
> 1. Imprisonment for life prima-facie means imprisonment for the whole of the remaining period of convict's natural life.
> 2. Imprisonment for life be deemed equivalent to imprisonment for 30 years if sections 45 and 53 are read along with sections 55 and 57 of the Penal Code and section 35A of the Code of Criminal Procedure.
> 3. However, in the case of sentence awarded to the convict for the imprisonment for life till his natural death by the Court, Tribunal or the International Crimes Tribunal under the International Crimes (Tribunal) Act, 1973 (Act XIX of 1973), the convict will not be entitled to get the benefit of section 35A of the Code of Criminal Procedure.

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53 Rokia Begum@Rokeya Begum Vs. State 4 SCOB (2015) AD 20

54 Abdul Khaleque Vs. Hazera Begum 58 DLR (2006)322

55 The State Vs. Abul Kalam & others 3SCOB[2015]HCD74

So, in fixing punishment for the offence of murder punishable under section 302 of the Penal Code the sentencing Court has the following three options:

1. Sentence of death,
2. Imprisonment for life till natural death and
3. Imprisonment for life (Meaning imprisonment for 30 years with the benefit of section 35A of the Code of Criminal Procedure, 1898)

It is pertinent to mention here that in our country the normal punishment for murder is death sentence and it is now an established principle of law that when there are any or more extenuating circumstances, sentence of imprisonment for life may be awarded instead of death sentence.[56] In this regard the following observation of the honorable Appellate Division made in the case of Kamal alias Exol Kamal Vs. State reported in 10 SCOB [2018] AD page 6-11 is worth mentioning:

> It is by now established that in Bangladesh the sentence for the offence of murder is death which may be reduced to one of imprisonment of life upon giving reasons. It has been the practice of this Court to commute the sentence of death to one of imprisonment for life where certain specific circumstances exist, such as the age of the accused, the criminal history of the accused, the likelihood of the offence being repeated and the length of period spent in the death cell.

Thus, the death sentence is the rule and imprisonment for life is an exception. Section 367(5) of the Code of Criminal Procedure, 1898 provides that if the accused is convicted of an offence punishable with death or in the alternative, with imprisonment for life or imprisonment for a term of years, the Court shall in its judgment state the reasons for the sentence awarded.

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56 Haque, Justice Mohammad Hamidul, "Trial of Civil Suits and Criminal Cases", 3rd edition, February 2019, Dhaka, p. 489

**3. What should a trial Court do if the punishment which, such Court thinks, will be appropriate is more severe than that which such Court is empowered to inflict?**

There are some offences which are triable by Magistrates but the maximum term of imprisonment that can be inflicted for such offences is beyond their jurisdiction. So, there arises a question as to what a trial Court should do if the punishment which, such Court thinks, will be appropriate is more severe than that which such Court is empowered to inflict. Sections 347 and 349 of the Code of Criminal Procedure, 1898 deal with the procedures to be followed by the trial Court when such Court is of opinion that the appropriate punishment that should be inflicted upon the offender is more severe than that which such Court is empowered to inflict. The provisions of sections 347 and 349 are reproduced below:

> Section 347. Procedure when higher punishment should be inflicted on accused.- Notwithstanding anything contained in this Code, whenever a Magistrate of the first class is of opinion, after recording the evidence for the prosecution, that if the accused or, where more accused than one are being tried together, any of such accused is convicted, he should receive a punishment more severe than that which such Magistrate is empowered to inflict, he may record his opinion and submit his proceedings, and forward the accused, or all the accused, to the Court of Sessions to which he is subordinate, whereupon the Court of Sessions shall try the case as if the case were exclusively triable by it under this Code.
>
> Section 349. Procedure when Magistrate cannot pass sentence sufficiently severe.-(1) Whenever a Magistrate of the second or third class, having jurisdiction, is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or that he ought to be required to execute a bond under section 106, he may record the opinion and submit his proceedings, and forward the accused, to the Chief Judicial Magistrate or a Magistrate of the first class empowered in this behalf by the Chief Judicial Magistrate to whom he is subordinate.
>
> (1A) When more accused than one are being tried together and the Magistrate considers it necessary to proceed under sub-section (1) in regard to any of such accused, he shall forward all the accused who are

> in his opinion guilty to the Chief Judicial Magistrate or a Magistrate of the first class empowered in this behalf by the Chief Judicial Magistrate.
>
> (2) The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law:
>
> Provided that he shall not inflict a punishment more severe than he is empowered to inflict under sections 32 and 33.

So, whenever a trial Court is of opinion, after recording the evidence for the prosecution, that if the accused or, any of the accused persons tried jointly is convicted, he/she should receive a punishment more severe than that which such Court is empowered to inflict, the Court may record his/her opinion and submit his/her proceedings, and forward the accused, or all the accused-

i) to the Court of Sessions to which he/she is subordinate if he/she is a Magistrate of the first class, or

ii) to the Chief Judicial Magistrate or a Magistrate of the first class empowered in this behalf by the Chief Judicial Magistrate to whom he/she is subordinate, if he/she is a Magistrate of the second or third class.

Thus, the provisions of sections 347 and 349 of the Code of Criminal Procedure imply that punishment of an offence must be just and appropriate and it must be commensurate with the offence committed.

**4. Concluding Remarks**

While imposing a sentence, it is the duty of courts to see that the sentence is not excessive because an excessive sentence defects its own objective and tends to undermine the respect for law. At the same time sentence should not be so lenient because lesser punishment would have adverse impact on society and justice system and it will compel the injured person to resort to violence. The Magistrate or the Judge should exercise a judicial discretion in each case and pass an adequate sentence after taking

into consideration all the pertinent circumstances of the case such as youth, sex, illness, motive, insanity or ignorance of law of the accused. The punishment varies with the evil consequences of criminal act, motive and character of the offender. Circumstances which aggravate an offence such as the manner in which the offence is committed, the number of previous convictions to the credit of the offender necessitates the infliction of a longer term of imprisonment, while circumstances, such as the minority or old age of the offender, provocation, absence of bad intention, self-defense, absence of previous criminal record etc. call forth for a lenient view. It is imperative that every conviction of an offence shall be followed by the prescribed punishment while, in case no minimum is prescribed, to reduce it to something nominal is completely within the discretion of the Court. This discretion is not arbitrary. It is judicious. Whatever punishment the Court awards, it should give reason therefor.

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# Judging the Judges: Inside the Mind of a Judge-Watcher

Shamsul Arefin*

**Abstract**

The concept of judicial temperament is often debated, with varying opinions on its definition and significance. It is not what the Bar thinks it is; It is not what the bench thinks it is; judicial temperament is in whose lack one sees what one fears. Some scholars argue it is a sociological construct that is built on one's personality and character while others consider it a psychological construct. Despite its enigmatic nature, scholars agree on certain qualities that judges should possess or avoid. This paper aims to uncover these elusive qualities and analyze their importance in the judiciary. The article concludes that maintaining a good temperament is vital for judges to use the law justly and effectively. Furthermore, to be a successful judge, one must value the importance of judicial temperament. This paper aims to address the gap in the current literature on this category in the context of Bangladesh, making it a valuable contribution to the field. This paper employs a qualitative methodology to examine numerous pieces of literature, both primary and secondary, and conduct a thorough critical analysis for that specific objective. However, a limitation of this study is that it is not based on empirical research, and conducting such research would be a valuable addition to further strengthen the findings.

## 1. Introduction

The phrase "*Salus populi suprema lex*" is a Latin phrase that means "The welfare of the people is the highest law."[1] The origin of this phrase can be traced back to the *Roman Republic*, where it was first used by the Roman statesman and philosopher *Cicero* in his book *De Legibus* (*On the Laws*). The phrase has since been used by many thinkers and statesmen throughout history to express the idea that the well-being of the people should be the ultimate goal of any legal system.[2] In every legal system, justice is the blend of men and mechanisms where men count more than

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1 Jon R. Stone, The Routledge Dictionary of Latin Quotations, 202 (2005).

2 Geoff Baldwin, Reason of State and English Parliaments, 1610–42, In History of Political Thought, Winter 2004, Vol. 25, No. 4 (Winter 2004), pp, 620-641

machinery.[3] A wide range of behaviors helps judges effectively decide a case. Those encompass consideration of which version of factual reality gives credit to, whether to define legal questions broadly or narrowly, how to exercise discretionary power, and which law to apply in a given situation. These different aspects of judging have independent value and they are intertwined with the decision-making process.[4] Even modernization of court procedure with sophisticated use of techniques cannot guarantee justice except for the personality of the judge. This quality of judges indicates the quality of our justice.[5]

The idea of a judicial officer, whether referred to as a "magistrate" or a "judge," is a symbol of a long-standing tradition based on the principles of ethical behavior and fairness. Maintaining an equitable and impartial society requires a judicial officer to possess good moral character. A judge's responsibility is to serve justice, and therefore, they must not only understand their role within the judicial system but also comprehend the meaning of justice according to their own values.[6] The exemplary conduct of a judge is guided by logical principles and reverence for the law, which helps to bolster the public's trust in the judiciary's impartiality and maintain judges' crucial independence in making judicial decisions. Developing such a character demands self-imposed limitations on both personal and professional behavior.[7]

Bangladesh has a key agency called ‘Bangladesh Judicial Service Commission’ that assesses the suitability of persons for appointments at the subordinate judiciary while it does not have any independent Judicial Appointments Commission like the union of India. Secondly, when the responsibility of judging is thrust upon them, the quality of judges’ performance improves over time from their own studying. The quality of judging not solely depends on their further self-study but upon the quality

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3 Ehrlich Eugen, Freedom of decision in Modern Legal Philosophy Series-9, 65-66, (1917)

4 Jeffrey Rosen, The Supreme Court: The Personalities and Rivalries That Defined America, 6-7, 2007.

5 Leflar Robert, The Quality of Judges, Indiana Law Journal: Vol. 35: Issue. 3, Article 1, (1960)

6 Robert S. Walker, The Stoic Ethos of Law & Equity: Good Faith, Legal Benefaction, and Judicial Temperament, Rutgers Journal of law & religion [VOL.22.2] 372

7 Ibid, 373

of the bar that produced them. There may be many standards to determine if a judge is doing 'good' and one of such qualities is the judicial temperament which is the key to everything else that one does on the bench.[8] When someone lacks a judicial temperament, what one observes is precisely what one is afraid of. Judicial temperament is notoriously hard to define because it is elusive but a very important quality for judges.[9] In this article, I will begin by defining the term "judicial temperament" and outlining its various components. I will then explore the ways in which a judge can develop this quality and the factors that can cause it to deteriorate in the context of Bangladesh's Judiciary. Finally, I will draw conclusions based on these observations.

## 2. Comprehending the Concept of Judicial Temperament

The concept of temperament has been in existence since ancient times. As early as the fifth century B.C.E., Greek physicians espoused the idea that good health was contingent on a balanced blend of the four "humor." Galen later expanded on this notion by proposing that the dominance of particular humor resulted in a distinct emotional style or temperament, which formed the foundation of four primary personality types. In fact, the word 'temperament' originates from the Latin term "to blend," highlighting the belief that differences in the combination of humors were equivalent to variations in temperament.[10] Current theories of temperament retain two fundamental elements from this ancient formulation: (1) Observable characteristics are rooted in biological factors, and (2) emotions serve as the core and defining features of temperament. Throughout much of the 20th century, American personologists diverged from developmentalists and European temperament researchers in their lack of interest in investigating temperament as a biologically-based concept. Instead, they directed their attention towards structural analyses, aiming to develop comprehensive trait taxonomies to describe behavior, often disregarding the origins of the identified dimensions.[11]

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8 Terry A. Maroney, (What We Talk About When We Talk About) Judicial Temperament, 61 Boston College Law Review. 2085 (2020)

9 Jeffrey Rosen, The Supreme Court: The Personalities and Rivalries That Defined America, 7-8, 2007.

10 Richard W. Robins and Oliver P. John (Eds), Handbook of Personality Theory and Research, The Guilford Press (2021)

11 Ibid, 147

In his 1798 publication, Anthropology, Immanuel Kant put forth a theory of temperament that incorporated the biological components of the bodily constitution and humor, as previously proposed by Galen. Kant's view held that temperament, as a psychological phenomenon, comprised of psychic traits that were determined by the composition of blood. In this way, he echoed Aristotle's notion from the 4th century B.C. that blood was the fundamental component underlying temperament.[12] In the recent past, the demeanor of Judge Kavanaugh in his Supreme Court confirmation hearings raised questions about his neutrality and temperament and threatened the already fragile reputation of the US Supreme Court.[13] Although he was declared to be temperamentally unfit by many detractors[14] but did not debar his confirmation making the term 'temperament' a fundamentally mysterious quality that one does or doesn't have.

Aristotle's account of the virtue of good temper or '*proates*' is found in his famous work, Nicomachean Ethics[15] Specifically, it is discussed in Book III, Chapter 7, where Aristotle describes the various virtues that fall under the category of 'moderation.' In this chapter, he explains that a good temper is a mean between the vices of irascibility (quick-temperedness) and impassivity (lack of emotion). He argues that a good temper involves having the right amount of anger or indignation in response to the right things and in the right way.[16] Some people are interested in using temperament concepts to understand how children develop specific socially relevant characteristics, like behavior disorders or intellectual

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12 Jan Strelau, Temperament - A Psychological Perspective, Springer US (2002), 3

13 A Bitter Nominee, Questions of Neutrality, and a Damaged Supreme Court, available at <https://www.nytimes.com/2018/09/28/us/politics/kavanaugh-testimony-supreme-court.html>, accessed 13 February 2023

14 Opinion, The Senate Should Not Confirm Kavanaugh: Signed, 2,400+ Law Professors, N.Y. TIMES (Oct. 3, 2018) <https://www.nytimes.com/interactive/2018/10/03 /opinion/kavanaugh-law-professors-letter.hml> accessed 11 February 2023

15 The Nicomachean Ethics is a philosophical work by Aristotle that was originally written in Greek. It is one of Aristotle's most important works and deals with the subject of ethics or the study of human morality and behaviour.

16 <https://plato.stanford.edu/entries/aristotle-ethics/> at 5.1, see also <http:// classics. mit.edu/Aristotle/nicomachaen.3.iii.html> at Book III, Chapter7. accessed 10 February 2023.

abilities. These individuals tend to be more clinically focused and interested in the practical applications of temperament measures rather than their theoretical underpinnings.[17]

In the state of New Jersey, the evaluation program for judges evaluates their temperament, which encompasses various measures such as attentiveness, courtesy, open-mindedness, patience, absence of arrogance, listening skills, decisiveness, fair treatment of attorneys, and promoting a sense of overall fairness. The program also considers relevant knowledge and decision-making skills within the broader context of a judge's temperament. Additionally, the program examines a judge's ability to remain impartial and free from biases related to race, gender, ethnicity, religion, or social class.[18] While the evaluation program for judges in Hawaii incorporates the same measures as the New Jersey program, with an additional focus on ensuring even-handed treatment of litigants.

In Nova Scotia, the evaluation program is comparable to that of New Jersey but with additional measures, including demonstrating courtesy towards staff, maintaining dignity, and being sensitive to the impact of their demeanor on those involved in the proceedings.[19] The American Bar Association adopted the guidelines for evaluating judicial performance in 1985, which included measuring a judge's temperament under the category of preparation, attentiveness, and control over proceedings. The guidelines require judges to demonstrate courtesy towards all parties and participants and show a willingness to allow anyone legally involved in a proceeding to be heard, except when prohibited by law or court rules.[20]

The way judges behave is unquestionably a crucial aspect of ensuring justice is served.[21] To ensure that judges meet the highest ethical standards, there are established guidelines that prescribe ethical conduct

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17 Arnold H. Buss, Robert Plomin (Ed)- Temperament - Early Developing Personality Traits, Lawrence Erlbaum Associates (1986)

18 Stephen Colbran, Temperament as a Criterion for Judicial Performance Evaluation, 62 University of Tasmania Law, (2002) 21(1).

19 Ibid, 63

20 Ibid, 64

21 John Doyle, Judgment writing: are there needs for change? Australian Law Journal 73.10 (1999): 737-742.

for judges to follow. These guidelines primarily focus on regulating judges' character and managing public perceptions, with the overarching aim of upholding the integrity and independence of the judiciary.[22] Maintaining a calm and composed demeanor is essential for judges as it helps to assert their authority over those under their control and reinforces a steady disposition that is impervious to external factors such as partisan interests, public clamor, or fear of criticism.[23] On the other hand, to uphold the fair and impartial administration of justice, it is recommended that lawyers continue their traditional efforts to defend judges and courts against unwarranted criticism.[24] Bangladesh Supreme Court, for example, has formulated forty instructions to be followed by the judges to maintain a deliberate and self-disciplined character.[25] Thus effective administration of the judicial office requires the judge's behavior and conduct should uphold the public's trust in the judiciary's integrity.

Judicial temperament can get strained against four bad instruments: firstly, there are some individuals who are known to initiate numerous lawsuits, causing both the courts to become overwhelmed and the country to suffer. Secondly, People who engage in disputes over jurisdiction and falsely present themselves as 'friends of the court' can actually end up being 'parasitic friends of the court', who seek to gain personal benefits by inflating the court's importance beyond its proper limits.[26] Thirdly, Individuals who may be considered as the 'dark side' of the legal system are those who are adept at using sly and underhanded tactics to subvert the straightforward and honest proceedings of the courts, thereby causing justice to become tangled in convoluted and confusing paths and finally, there are those who aggressively demand and collect fees, which supports the common comparison of the court of justice to a thorny bush where, while seeking protection, those in need are certain to suffer a loss of their

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22 Code of Conduct for United States Judges, 28 USCS, Canon 1.

23 Code of Conduct for United States Judges, 28 USCS, Canon 3.

24 Model Rules of Professional Conduct, Rule 8.2 <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_2_judicial_legal_officials/ > accessed 12 February 2023

25 Md. Idrisur Rahman V. Government of Bangladesh, 13, ADC at 220; See also Government of Bangladesh and others V Advocate Asaduzzaman Siddiqui and others, ADC (CIVIL APPEAL NO.06 OF 2017.)

26 Mary Augusta Scott (Ed), Of Judicature in The Essays of Francis Bacon, (Published by Charles Scribner's Sons 1908).

resources.[27] Unless carefully handled, these individuals could become a threat to the functioning of good judicial temperament. However, sometimes a seasoned clerk who possesses expertise in legal precedents, is cautious in court proceedings and has a comprehensive understanding of the court's operations, can be a valuable asset to the court, often providing guidance to the judge himself.[28]

## 3. Qualities and Flaws of a Judge

While referring to 'judicial virtues', this write-up is not making any claims about their underlying nature being fundamentally different from virtues in general. It is possible that the psychology of judicial virtues is similar to that of other virtues, and the unique characteristics of judicial virtues may be due to the specific contexts in which they are practiced. As judges occupy a unique role and encounter situations that differ from those experienced by the general public, the virtues they embody can be described in a distinct manner. The following list of judicial virtues is not intended to be comprehensive but rather serves as an illustrative example.

### 3.1 The Absence of Bias

Establishing a positive image of judges is crucial because it fosters respect for both the judiciary and the principles of the rule of law.[29] Judicial temperament must presume one negative quality which is the absence of bias. While progressing in society, human beings certainly acquire prepossessions and antipathies throughout their life. That is why an unbiased mind is considered the rarest of endowments.[30] It is believed that a human being retains a good stock of prejudices, for otherwise, he would be a totally flimsy and deadly dull creature. As an attribute of mortality, a judge should not be blamed to have his share but he must not be incapable of leaving them behind while judging. The power of separating a turbid mixture such as bias requires supreme intellectual honesty.[31]

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27 Ibid, 256

28 Ibid, 257

29 American Bar Association Guidelines for the Evaluation of Judicial Performance, (1985), 15

30 Ibid, 214

31 John Buchan, Homilies and Recreations, Chapter- IX. The Judicial Temperament, 209, [September 1926]

Of the many others forms, political bias is the most common one and religious prejudice is the next. Unless a sitting judge constantly guards against his prepossessed political views or his antipathies towards any social or religious groups of people, his judicial works will surely be colorized. A teetotaler, for example, would press hard on drunkenness/ addictions and hand down disproportionate punishment in Narcotics cases.[32] If a judge is biased towards a particular gender, they may find it difficult to handle certain types of crimes that involve that gender. This bias could cause the judge to become emotionally compromised and potentially unfit to preside over such cases.[33] It is important for judges to remain impartial and objective in order to ensure fair and just trials.

Appraisal tendencies or biases can lead to a systematic inclination towards a particular group of people, resulting in an intensified or distorted assessment of the evidence. One well-known example of such biases is the tendency to attribute responsibility for outcomes to oneself rather than to external circumstances or other individuals, which arises from the appraisal of civil or criminal evidence. Similar biases may also exist for other major types of evidence appraisal cases, such as those involving violent crime, financial crime, or family disputes.[34] Optimists and pessimists may exhibit different biases when it comes to valence appraisal, while individuals who are shy or bold may differ in their appraisals of certainty and control. Empirical research would be instrumental in demonstrating that differences in performance goals, motivational styles, causal attribution, and control beliefs can all impact evidence appraisal and associated dispute settlements.[35]

Judges should refrain from showing any bias towards either party by meeting the cause halfway and should ensure that all counsel and evidence presented in the case are given a fair hearing to avoid any accusations of partiality. On the other hand, once a judge has pronounced a sentence,

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32 Ibid,215

33 Ibid,217

34 David Sander, Klaus Scherer (Eds.), Oxford Companion to Emotion and the Affective Sciences, Oxford University Press (2009)

35 Ibid,73

lawyers should not attempt to manipulate the situation by engaging in further argumentation or trying to influence the judge's decision.[36]

### 3.2 Avarice or Corruption

As a sacred place, the halls of justice must be safeguarded against any form of scandal or corruption to maintain its sanctity.[37] Another characteristic, that is considered a real danger for judges, is avarice or corruption. It can be either soliciting or accepting bribes and in more subtle financial conflicts of interest. A judge can do it, for instance, by setting a precedent that will benefit a certain group of people or companies in which one owns stock or interest; or he/she can exchange/trade on advance knowledge of the outcome of judicial proceedings.[38] This judicial vice is particularly bad because they hold a position of trust, and it leads to grave injustice to other sides to which they are due as a matter of law. Judicial decisions often involve a degree of discretion, such as determining the appropriate number of witnesses to call. Unfortunately, corruption can taint even those who do not withhold anything to which they are rightfully entitled.

The prevalence of corruption in the judiciary of Bangladesh is heavily influenced by political factors, regardless of the form it takes. To effectively address this issue, the government must adopt a comprehensive approach and implement significant reforms without delay. Despite being separated from the executive branch, the Subordinate Judiciary of Bangladesh has yet to develop into an effective institution and remains severely neglected with limited resources. To ensure the rule of law is upheld, fundamental human rights are protected, and a robust system of checks and balances is established within state organs, urgent action is required to rescue the judiciary from its current state of vulnerability.[39]

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36 Mary Augusta Scott (Ed), Of Judicature in The Essays of Francis Bacon, (Published by Charles Scribner's Sons 1908). 257

37 Frank Thompson Jr. and Daniel H. Pollitt, Impeachment of Federal Judges: An Historical Overview, 49 North Carolina Law Review 87 (1970).

38 Lawrence B. Solum, Virtue Jurisprudence: A Virtue-Centered Theory of Judging, 34 Metaphilosophy 178-213 (2003), 186

39 Md. Shariful Islam, Politics — Corruption Nexus in Bangladesh: An Empirical Study of the Impacts on Judicial Governance, Available at <http://repository.library.du.ac.bd:8080/handle/123456789/1453> accessed 12 February 2023

The High Court stated that accountability must be enforced for corruption and irregularities, which cannot be permitted to persist any longer.[40]

### 3.3 Judicial Cowardice

Judicial cowardice does not solely mean just the physical danger but sometimes getting death threats, such as the judge of the *Women and Children Repression Prevention Tribunal,* through a letter.[41] The more common fear in many legal cultures is the loss of office or the threat of such action,[42] or certain prestigious positions may require the avoidance of unpopular decisions regarding matters of public interest. A judge may frequently experience apprehension regarding the views of both the public and those in positions of power, as well as the potential repercussions of these views on their social standing. The absence of courage in judicial decision-making is not only morally wrong but also unjust, as it can result in the denial of defendants' rightful entitlements.[43] A judge's decision, even if legally correct and within their discretion, can still be rightfully criticized if it is made out of cowardice. The pursuit of good judging necessitates reaching the right decision for the right reasons.

Judges who have a tendency to become easily angered or hold onto resentments, which may occasionally result in inappropriate outbursts, have the potential to harm the judicial process. Their anger could impair their judgment, leading them to make erroneous decisions or utilize their discretion in a biased manner.[44] In criminal cases, for instance, the complainant, accused, and concerned lawyers are likely to disagree with the decision and then criticize or even disrespect a presiding judge. Even if

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40 Corruption cannot be allowed to continue: HC <https://www.tbsnews.net/ bangladesh/court/corruption-cannot-be-allowed-continue-hc-474962> accessed 20 February 2023

41 Judges get death threats from 'militant groups'< https://www.thedailystar.net/news/ bangladesh/crime-justice/news/2-judges-get-death-threats-militant-groups-2162456>, also Tangail judge receives death threat <https://www.newagebd.net/ article/147519/ tangail-judge-receives-death-threat> assessed at 13/02/2023.

42 Karnataka high court judge says threatened of transfer over remarks on ACB <https://www. industantimes.com/cities/bengaluru-news/karnataka-high-court-judge-says-threatened-of-transfer-over-remarks-on-acb-101656960896621.html> accessed 12 February, 2023

43 Lawrence B. Solum, Virtue Jurisprudence: A Virtue-Centered Theory of Judging, 34 Metaphilosophy, 178-213 (2003)

44 Ibid, 187

inappropriate anger does not have a direct impact on the outcome of judicial proceedings, it can still erode the trust of those involved and the public in the judge's ability to be impartial.[45] This erosion of trust can, in turn, diminish the efficacy of the judicial process as a means of resolving disputes in a manner that garners acceptance and support from those who are affected.

### 3.4 Judicial Wisdom

An intellectual deficiency can impact a judge's performance. A judge may exhibit foolishness due to an inability to discern between what is feasible and what is impractical. And related failure is the inability to distinguish between significant and trivial aspects of a dispute.[46] Furthermore, judges who struggle to assess character may struggle to differentiate between honest and dishonest witnesses or discern the difference between aggressive advocacy and unethical conduct. Even judges with extensive theoretical knowledge of the law may make poor decisions if they lack common sense and practical judgment.[47] Thus, it is crucial for judges to possess sound judgment skills, in addition to legal knowledge, to make informed and fair decisions in court.

One essential virtue that helps to prevent bad judgment is judicial wisdom. This refers to a judge's possession of the intellectual virtue of phronesis or practical wisdom. A good judge must have practical wisdom to make wise decisions in selecting the appropriate legal goals and means. Practical wisdom is the virtue that enables individuals to make good choices in specific circumstances.[48] A person with practical wisdom possesses knowledge of which particular goals are worth pursuing and which means are best suited to achieve those ends. They have the ability to evaluate the situation at hand and make sound judgments based on their experience and knowledge of relevant legal principles.[49] Therefore, for judges to make

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45 Ibid

46 Lawrence B. Solum, The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection, Southern California Law Review [Vol. 61:1735]

47 Ibid, 1753

48 Lawrence B. Solum, Virtue Jurisprudence: A Virtue-Centered Theory of Judging, 34 Metaphilosophy, 178-213 (2003) 192.

49 Ibid,193

excellent decisions, it is crucial that they possess practical wisdom to determine the most appropriate legal goals and means in particular cases.

Judicial wisdom can be defined as the application of the intellectual virtue of practical wisdom to the choices that judges must make. A judge with practical wisdom possesses excellence in identifying which legal goals are worth pursuing in a particular case and choosing the most appropriate means to achieve those objectives.[50] In other words, a judge with practical wisdom has developed the ability to make wise decisions about the legal goals and means necessary to resolve a particular case. By utilizing their experience, knowledge of legal principles, and sound judgment, judges can exercise practical wisdom to make just and equitable decisions in court.[51] Therefore, practical wisdom is a crucial virtue for judges to possess to ensure that justice is served in the legal system.

### 3.5 Judicial Temperance

The vice of bad temper corresponds to an unsuitable judicial temperament. Maintaining a good temper is a balance between excessive and insufficient emotional responses to a situation that provokes anger. An excessive or deficient display of anger by judges can erode public confidence in the fair administration of justice. However, being slow to express outrage is also a negative judicial trait. Failing to demonstrate an appropriate level of anger in response to misconduct can be equally detrimental.[52] A courtroom that is unruly is almost as problematic as one where defendants are silenced and restrained. The virtue of good temper demands that judges express their outrage in an appropriate manner, at the right time, and for the right reasons.[53]

It is essential for a good judge to have their desires in order. This is evident when comparing a temperate judge, who can regulate their impulses, to a judge who lacks the ability to control their appetites. Judges who are excessively focused on their own pleasures are vulnerable to

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50 Lawrence B. Solum, The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection, Southern California Law Review [Vol. 61:1735]

51 Ibid,1734

52 Lawrence B. Solum, Virtue Jurisprudence: A Virtue-Centered Theory of Judging, 34 Metaphilosophy 178-213 (2003), 189

53 Ibid, 191

temptation and may be easily led away from a rational and just course of action by the lure of indulgence.[54] Therefore, the ability to manage one's desires is a crucial aspect of a judge's character and is essential for maintaining impartiality and fairness in their decisions. It is our belief that judges should uphold the law and administer justice in all cases, regardless of their significance. Even minor harms inflicted upon ordinary individuals should be considered significant and deserving of attention from judges.[55]

It is true that a judge with a good public reputation can perform their judicial duties effectively. However, recklessness in civic matters should be avoided as it is a negative trait. Judges should not compromise their reputations by making inappropriate decisions or acting for wrong reasons or on unsuitable occasions. Judges may involve themselves in non-judicial activities, but they should be cautious about making unpopular decisions that may lead to public disapproval.[56]

A judge who indulges excessively in pleasures may find that it interferes with the rigorous intellectual demands of their position. This is why the expression "sober as a judge" is commonly used to signify that excessive indulgence in hedonistic pleasures would hinder a judge's ability to perform with excellence in their judicial role.[57] Therefore, it is important for judges to maintain a level of sobriety and discipline in their personal lives, in order to remain impartial and make sound judgments.

While asceticism may impede a flourishing human life, it is not entirely evident that it would interfere with the unique demands placed on judges. While it is essential for judges to regulate their personal desires and maintain a level of sobriety, it is not necessary for them to live an ascetic lifestyle.[58] Asceticism, in particular, does not appear to have any discernible impact on a judge’s ability to fulfill their responsibilities in a distinctive manner. Rather, it is more important for judges to maintain a

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54 Lawrence B. Solum, The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection, Southern California Law Review [Vol. 61:1735]

55 Ibid,1735

56 Lawrence B. Solum, Virtue Jurisprudence: A Virtue-Centered Theory of Judging, 34 Metaphilosophy 178-213 (2003),190

57 Ibid

58 Ibid,

balanced and focused approach, utilizing their skills and virtues to make impartial and just decisions.[59]

### 3.6 Judicial Courage

Judicial courage can be seen as a type of civic courage, which differentiates it from courage in the face of physical danger. A judge who exhibits courage in the judicial context is willing to take risks, even at the cost of their career and reputation, in order to uphold justice. This form of courage involves the ability to make difficult decisions, even when they are unpopular or may invite criticism. In contrast to physical courage, which involves facing physical harm, judicial courage requires the willingness to withstand potential social and professional consequences in the pursuit of justice.[60]

Courage is often considered a prime example of Aristotle's doctrine of the mean, as it involves finding the proper balance between two extremes. Courage is a mean with regard to the morally neutral emotion of fear, meaning that it involves striking a balance between an excess and a deficiency of fear. The disposition to exhibit excessive fear is cowardice, while a deficiency of fear is recklessness or foolhardiness.[61] Therefore, the virtue of courage lies in finding the appropriate middle ground between these two extremes, and it represents a prime example of the doctrine of the mean.

A coward is someone who is easily intimidated and lacks the courage to take worthwhile risks. On the other hand, a rash person fails to accurately assess genuine danger and is therefore more prone to injury due to reckless risk-taking. While the coward excessively fears danger and avoids risks altogether, the rash person underestimates danger and takes unnecessary risks without proper consideration.[62] Both of these tendencies represent extremes that fall short of the virtue of courage, which involves taking appropriate risks with a sober assessment of the potential consequences.

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59 Ibid,191

60 Ibid

61 Lawrence B. Solum, The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection, Southern California Law Review [Vol. 61:1735]

62 Ibid, 1741

### 3.7 Judicial Intelligence

Excellence in comprehending and theorizing about the law is known as judicial intelligence. A competent judge must possess comprehensive knowledge of the law and must possess the capacity to engage in complex legal reasoning. Judicial intelligence is linked to theoretical wisdom in a general sense, although the two are not necessarily synonymous.[63] The abilities that generate theoretical wisdom in the law may differ from those that produce similar intellectual virtues in other fields, such as physics, philosophy, finance, accounting, and so on. While there may be some overlap between the intellectual qualities required for judicial intelligence and those necessary for other fields, there are also likely to be differences in the specific talents and skills required.[64] For example, a judge may need to possess a deep understanding of legal precedents and the ability to apply them to novel situations, whereas a physicist may require advanced mathematical skills to formulate and test theoretical models. Therefore, it is essential to recognize that the specific intellectual qualities required for judicial intelligence may vary depending on the field of knowledge and expertise involved.

For judges to perform their duties effectively, they must be knowledgeable in two aspects of the law. Firstly, they must possess a comprehensive understanding of the relevant laws and regulations applicable to their jurisdiction. This knowledge is crucial to ensure that they can interpret and apply the law correctly in their decisions. Secondly, judges must possess the cognitive abilities, skills, and experience necessary to acquire legal knowledge continuously. While being learned in the first sense may not necessarily be an intellectual virtue, being learned in the second sense is undoubtedly an intellectual virtue.

It is worth noting that being learned in the first sense is often a prerequisite for being learned in the second sense. A judge who lacks knowledge of the relevant legal principles will struggle to acquire new legal knowledge effectively. Therefore, it is essential for judges to continually update their knowledge of the law, ensuring that they possess the necessary intellectual qualities to make well-informed and sound decisions in court. By doing so,

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63 Ibid, 1745

64 Ibid,1750

judges can uphold justice and ensure the fair and equal treatment of all parties involved in legal disputes.

### 3.8 The Power of Interpretation

The ability to reason soundly, analyze complex legal issues, and apply the law fairly and impartially are essential intellectual qualities for judges. Judges may sometimes struggle to understand subtle or complex aspects of the law, which can lead to unjust decisions. When a judge lacks the necessary understanding of intricate rules or distinctions, they are unable to reliably arrive at a legally correct outcome.[65] While it is possible for an incompetent judge to arrive at a correct decision by chance, this is not sufficient when a written opinion is required to justify the decision. In such cases, luck cannot produce a well-reasoned opinion on a complex legal issue. In a system that relies on stare decisis, a poorly written opinion can result in unjust outcomes for numerous other cases, even if the decision in the case at hand was correct.[66] Deficiencies in these areas can also lead to negative outcomes and affect the overall integrity of the judicial system. Therefore, a judge's intellectual abilities must be taken into account when evaluating their performance and ensuring that justice is served effectively.

Llewellyn argues that the study of law should be grounded in a practical understanding of the social, economic, and political contexts in which legal decisions are made. He suggests that law students should develop a sense of the "life of the law" and that judges should possess a "situation sense" in order to make decisions that are responsive to the needs of society.[67] Llewellyn discusses the importance of understanding the social, economic, and political context of legal decisions and argues that judges must have a sense of the particular situation in which they are making decisions. He suggests that situation sense is developed through a variety of sources, including legal education, practice, and engagement with the broader community.[68]

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65 Lawrence B. Solum, The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection, Southern California Law Review [Vol. 61:1735]

66 Ibid,1748

67 Karl N. Llewellyn, The Bramble Bush, published by Quid Pro Books, (2008), page 3

68 Karl N. Llewellyn, Some Realism about Realism: Responding to Dean Pound, Harvard Law Review, Vol. 44, No. 8 (Jun. 1931), pp. 1222-1264

The most obvious positive quality is the power to interpret the written words of a statute or a judgment. An Act is quite often hastily drafted with unrecognizable mistakes by their draftsmen. The judge has to interpret that Act and its supplementary legislation.[69] Take the example of *Nari O Shishu Nirjatan Daman Ain (Women and Children Repression Prevention Act)* 2000, the Supreme Court interpreted a provision of the said Act thereby directing the government to amend Section 11 (Ga) compoundable.[70] Thus, before deciding on an issue a judge sometimes have to search through volumes of past decisions which are held by the Supreme Court. On the other hand, a quick-witted advocate can find a paragraph that supports his case but the judge needs the capacity for subtlety to meticulously choose from shades of meaning and nuances of the atmosphere. If the topic is intricate, a mind that insists on oversimplifying may not be sharp enough to handle the task effectively.[71] Similarly, an Axe, for instance, is a more valuable instrument to someone than a Razor, but no one would use it to shave oneself off.

When judges lack sound practical judgment, it can have severe consequences. Their responsibility goes beyond merely interpreting the law correctly and applying it to uncontested facts. One example of the risks associated with poor judgment is the issuance of a complex injunction. A judge's decision to grant an injunction can have far-reaching implications for the parties involved, as well as the broader community.[72] The terms of the injunction must be carefully crafted to ensure that they are effective, enforceable, and do not cause unintended harm. If a judge's practical judgment is flawed, the injunction may prove ineffective or cause more harm than good.[73] Therefore, it is critical for judges to possess both legal expertise and sound practical judgment to make well-informed and

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69 John Buchan, Homilies and Recreations, Chapter IX. The Judicial Temperament, 209, [September 1926]

70 Nari O Shishu Nirjaton Daman Act: HC releases full text of its judgment <https://www.thedailystar.net/country/news/nari-o-shishu-nirjaton-daman-act-hc-releases-full-text-its-judgement-1742548> accessed 12 February 2023

71 John Buchan, Homilies and Recreations, Chapter IX. The Judicial Temperament, 211, [September 1926]

72 Lawrence B. Solum, Virtue Jurisprudence: A Virtue-Centered Theory of Judging, 34 Metaphilosophy 178-213 (2003),

73 Ibid

effective decisions that uphold justice and protect the interests of all parties involved.

### 3.9 The Sense of Reality

The sense of reality is more valuable than the power of interpretation. This corrective quality is better known as common sense. Law is not just "a dead corpus of black-letter wisdom" but "an elastic tissue which clothes the living body of society". The test of its value depends on "its applicability to, and its usefulness in our everyday life". A judge has to strike a balance between opposing arguments considering the spirits of the law, before reaching a conclusion by the sense of reality which is more than a mere debating triumph.[74] In other words, the law is not simply a set of rules or theories, but it is shaped and influenced by real-world experiences, including social, cultural, economic, and historical factors. The way the law is interpreted and applied in practice is often a reflection of the collective experiences and values of society and can change over time as those experiences and values evolve.[75]

For example, consider the way that legal systems have evolved to address issues related to discrimination, such as race or gender discrimination. While the underlying principles of equality and fairness have been present in legal systems for centuries, the way that these principles are applied in practice has changed as a result of the experiences and struggles of marginalized groups who have fought for their rights over time. In this sense, the law is not simply an abstract system of logic, but a living, evolving entity that is shaped and influenced by the experiences of real people in society.[76]

Karl Llewellyn was a prominent legal scholar who believed that judges must possess a keen sense of the particular situation in which they are making legal decisions. He coined the term 'situation sense' to describe this ability. According to Llewellyn, a judge with situation sense can comprehend the social, economic, and political factors that influence the

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74 John Buchan, Homilies and Recreations, Chapter IX. The Judicial Temperament, 209, [September 1926]

75 Ibid

76 Lawrence B. Solum, Virtue Jurisprudence: A Virtue-Centered Theory of Judging, 34 Metaphilosophy 178-213 (2003),

case before them. They can consider how the case relates to prior legal precedents and how it may affect future legal decisions.[77] Llewellyn argued that judges develop situation sense through a variety of sources. These sources include their own experiences, legal education, legal practice, and engagement with the broader community. For example, judges who have practiced law in a particular area may have a better understanding of the practical implications of legal decisions in that field. Judges who engage with their communities may be more attuned to the social and political factors that impact legal decisions.[78] Llewellyn's concept of situation sense highlights the importance of judges having a comprehensive understanding of the legal and social contexts in which they are making decisions. By developing situation sense, judges can make better-informed decisions that are more responsive to the needs of society.[79]

### 3.10 Lucidity of Judgment

One of the best endowments of a judge is his lucid and graceful speech. Lucidity of judgment is necessary to understand the massage accurately while a smooth and effortless way of expressing ideas is remembered for a long. A wide cultural knowledge, for example, would be of inestimable advantage while putting down exact and precise meaning lucidly so that no one can misconstrue it. The case of McCulloch v. Maryland is one such landmark decision by the United States Supreme Court that established among others the doctrine of implied powers by John James Marshall otherwise known as a master of style.[80] In Bangladesh, the meaning of imprisonment for life has been interpreted in light of international law by the apex Court in this leading case.[81]

To Buchan, a perfect judicial writing style must combine both wit and humor. Unless you have a preposterous contrast of life, you will not have

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77 Karl N. Llewellyn, Some Realism about Realism: Responding to Dean Pound, Harvard Law Review, Vol. 44, N. 8 (Jun. 1931), pp. 1222-1264

78 Ibid

79 Karl N. Llewellyn, The Bramble Bush, published by Quid Pro Books, (2008), pages 3-4

80 <https://www.archives.gov/milestone-documents/mcculloch-v-maryland#:~:text=The%20court%20decided%20that%20the,involves%20the%20power%20to%20destroy.%22> accessed 18 February 2023

81 Ataur Mridha vs State, Criminal Review Petition No. 52 of 2021, 73 DLR (AD) 298

an eye for reality. How to assess the value of a present undertaking, for instance, based on the calculation (reality) of past and future profit.[82] This judgment is a great example of lucidity, wit, and reality – '…time is exhaustively divided into past and future, and that the present is merely an imaginary line between that two. That is, of course, a profound and impressive truth, but there are times and places for everything…'[83]

Francis Bacon opined that 'Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident'. In other words, judges should prioritize their knowledge over their wit, their dignity over their persuasiveness, and their prudence over their overconfidence. Showing great patience and gravity during hearing the advocates and counsel are an essential part of justice.[84] In the hearing, judges have to moderate the length, repetition, and irrelevancy of speech; direct the evidence; select and recapitulate in order to collate the material points that have been forwarded; and finally give the decision, the rule, or the sentence.[85] Where causes are well handled and fairly pleaded, the judges should give some commendation and grace to the advocates.

## 4. Conclusion

The fundamental duty of a judge is to suppress fraud and force. A fraud is pernicious when it is close and disguised while force is more deleterious if it is open. Consequently, injustice happens to make a judgment bitter, and delays make it sour. The virtue of the judge is tested when he ought to prepare a just sentence or make inequality equal against the combination of violent prosecution and cunning counsel that comes with great power. In causes of life and death, for instance, judges must be on their guard against hard constructions and strained inferences because 'there is no worse torture than the torture of laws.'[86] In a sensational parricide case, the life histories of the accused and the specific circumstances of the case

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82 < https://www.casemine.com/judgement/uk/5a8ff81a60d03e7f57eba123> accessed 19 February 2023.

83 Ibid, as per Lord President, para, 05

84 Mary Augusta Scott (Ed), Of Judicature in The Essays of Francis Bacon, (Published by Charles Scribner's Sons 1908).

85 Ibid, 217

86 Mary Augusta Scott (Ed), Of Judicature in The Essays of Francis Bacon, (Published by Charles Scribner's Sons 1908).

were taken into account when the death sentence was commuted to life imprisonment.[87] This judgment exemplifies how to cast a severe eye upon the crime, but a merciful eye upon the accused.

The idea of justice being an impersonal oracle is a myth because the court certainly is a human institution. The judicial system utilizes quarks of personality and their temperaments in shaping the law. Hence success on the bench depends not only on their judicial philosophies but also on their judicial temperaments.[88] Some authors explain temperament as a psychological construct. To them, temperament refers to enduring individual differences in emotional patterns that underlie how people react to and manage similar situations. These emotional habits are relatively stable and represent trait-level variations among individuals.[89] These traits involve habitual patterns of emotional experience which may either be positive such as compassion and satisfaction or negative like anger or fear.[90]

Judicial temperament is supposed 'to be the fine flower of legal training' and 'one of the rarest things on earth'. To Buchan, it means the union of both the mind and the character.[91] A man having a perfect judicial mind may become a bad judge only because of defects of temper or character.[92] Judicial temperament encompasses desirable qualities such as courtesy, compassion, and appropriate behaviors that reflect positive personality traits and character when engaging with others. One may have a wide and profound book-learning experience throughout one's life, but he/she need not be a great scholar in legal matters to be a good judge. Rather, one needs to have a good understanding of the hard realities of life of the

87 The State Vs. Oyshee Rahman, HCD,2015

88 Jeffrey Rosen, The Supreme Court: The Personalities and Rivalries That Defined America – p. 8-9, 2007.

89 Jan Strelau, Temperament: A Psychological Perspective, Springer US, 2002; David Sander, Klaus Scherer (eds.) Oxford Companion to Emotion and the Affective Sciences, Oxford University Press,2009

90 Theodore D. Wachs, Geldolph A. Kohnstamm, Temperament in context, L. Erlbaum Associates (2001)

91 John Buchan, The Judicial Temperament, an address delivered to the Ellesmere Law Society at Oriel College, Oxford, March 1922

92 Ibid

common people in the society to which they belong.[93] Take the example of the greatest Chief Justice in US history. Dr. Johnson once said that "Mansfield was not a mere lawyer… he was the friend of Pope". Buchan viewed that "Mansfield was a scholar, a wit, a man of fashion, a statesman… a great judge must be also a great man".[94]

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3. Md. Idrisur Rahman V. Government of Bangladesh, 13, ADC at 220;
4. McCulloch v. Maryland, 17 U.S. 316,
5. The State V Oyshee Rahman, HCD,2015

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93 Mary Augusta Scott (Ed), Of Judicature in The Essays of Francis Bacon, (Published by Charles Scribner's Sons 1908).

94 Ibid,

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# Can the Judiciary Alone be the Saviour of the Environment and Protect Environmental Rights?

Masrur Salekin PhD*

## Abstract

This is a doctrinal and comparative analysis examining the role of the courts of Bangladesh and India in environmental matters. A critical examination of the role of the courts in environmental issues in Bangladesh and India (the selected jurisdictions) demonstrates that despite an exemplary effort by the courts environmental protection has not been a success story in the South Asian countries and environmental justice is suffering from distributive injustice and lack of recognition. *Although the courts of the selected jurisdictions by relaxing the traditional barriers to access to justice and through exhibiting judicial activism have attempted to ensure the procedural right,* access to environmental information, public participation, and access to environmental justice has been restricted due to bureaucratic inertia and cumbersome procedure. Judicial pronouncements in public interest environmental litigation cases have been unable to sensitize the executive or the legislature to act with greater enthusiasm on environmental issues. A critical examination of the judicial decisions and the status of their implementation demonstrates that the judiciary alone cannot resolve multi-faceted environmental problems by pronouncing judgments. Implementation of judicial decisions in many environmental cases has been delayed or broadly disregarded. Due to a lack of coordination and cooperation from the other organs, it is difficult for the judges to reach sound, sustainable, and effective decisions to tackle interdisciplinary and complex environmental problems. This paper recognizing the importance of the role of the courts as an independent organ to perform a meaningful supervisory role vis-à-vis the other organs of the state proposes that the courts should adopt a proactive role and a collaborative approach to reach a sustainable, effective, implementable, and robust decision.

**Keywords**: Court, Environment, Environmental Right, Judicial Pro-Activism, Collaboration.

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## 1. Introduction

Protection of the environment and environmental rights, especially protecting the rights of the poor and disadvantaged and maintaining a healthy ecosystem, are the biggest contemporary challenges.[1] As many governments have failed to tackle these challenges,[2] they fall to the judiciary, who have the delicate task of promoting the rule of law, protecting human rights, and ensuring effective compliance of environmental laws and regulations.[3] The central role of the judiciary in legal and constitutional systems due to its independence and capacity to ensure accountability to and fairness in the application of the law places it in an important position.[4] The importance of the judiciary has increased by an unprecedented surge in legal claims for both human rights and the environment.[5] Responding to the task, judges are increasingly emerging as an important actor in environmental protection in several jurisdictions around the world by handing down a series of landmark decisions requiring governments and industries to address various environmental

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1 Stuart Bell, Donald McGillivray, and Ole W. Pedersen, Environmental Law (Oxford University Press 2013) 3.

2 Gitanjali Nain Gill, Environmental Justice in India: The National Green Tribunal (Routledge 2017) 39; Dublin City University (DCU), School of Law and Government, Environmental Justice in Ireland: Key Dimensions of Environmental and Climate Injustice Experienced by Vulnerable and Marginalized Communities (2022) 5; Thomas Andersson, 'Government Failure - the Cause of Global Environmental Mismanagement' (1991) 4 Ecological Economics 215.

3 Kenneth J. Markowitz and Jo J.A. Gerardu, 'The Importance of the Judiciary in Environmental Compliance and Enforcement' (2012) 29 Pace Environmental Law Review 538; Nick Robinson, 'Expanding Judiciaries: India and the Rise of the Good Governance Court' (2009) 8 (1) Washington University Global Studies Law Review 1.

4 Christina Voigt and Zen Makuch, 'Courts and the Environment: An Introduction' in Christina Voigt and Zen Makuch (eds), Courts and the Environment (Edward Elgar 2018) xii.

5 Michael R. Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan E. Boyle and Michael R. Anderson (eds), Human Rights Approaches to Environmental Protection (Claredon Press 1996) 1; Oliver A. Houck, Taking Back Eden: Eight Environmental Cases That Changed the World (Island Press 2009); Elizabeth Fisher, Bettina Lange, and Eloise Scotford, Environmental Law: Text, Cases & Materials (Oxford University Press 2019).

issues including climate change and to safeguard the environmental rights of the citizens.[6]

But, at times, judges find it difficult to craft a balance between basic rights and the right to a healthy environment and face several challenges in dealing with environmental issues.[7] Not being sufficiently scientifically informed, a lack of expertise and information before the courts also restrict judges to reach to a scientifically sound comprehensive solution to an environmental problem.[8] A critical examination of the role of the courts in environmental issues in Bangladesh and India (the selected jurisdictions)[9] demonstrate that despite an exemplary effort by the courts environmental justice is suffering from distributive injustice and lack of recognition. The status of public participation, access to information and access to environmental justice is also poor, elitist, and personalized.[10]

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6 Emeline Pluchon, 'Leading from the Bench: The Role of Judges in Advancing Climate Justice and Lessons from South Asia' in Tahseen Jafry (ed), Routledge Handbook of Climate Change (Routledge 2019) 139.

7 James R. May and Erin Daly, Global Judicial Handbook on Environmental Constitutionalism (3rd edn, UNEP 2019) 49.

8 George Pring & Catherine Pring, 'The Future of Environmental Dispute Resolution' (2012) 40(1-3) Denver Journal of International Law and Policy 482.

9 Bangladesh and India both have written Constitutions and follow a similar format with constitutional supremacy, separation of powers, rule of law, democracy, independence of the judiciary and the fundamental rights incorporating a bill of rights. The unenforceable state principles known as the directive principles of state policy in India, and fundamental principles of state policy in Bangladesh guide the legislature and social, economic and political aspects of the countries. The judiciaries of these two South Asian countries have used judicial activism as a means of social progress. Venkat Iyer, 'The Supreme Court of India' in Brice Dickson (ed), Judicial Activism in Common Law Supreme Courts (Oxford University Press 2007) 126; Jona Razzaque, Public Interest Environmental Litigation in India, Pakistan, and Bangladesh (Kluwer 2004) 58. In Subhash Kumar v State of Bihar [1991] AIR 420 (SC), the Supreme Court of India declared the right to live in a healthy environment as a fundamental right; the Supreme Court of Bangladesh also recognized the right to the environment in Dr. M. Farooque v Bangladesh [1997] 49 DLR 1 (SC).

10 Lavanya Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19 (3) Journal of Environmental Law 293; Md. Saiful Karim, Okechukwu Benjamin Vincents, and Mia Mahmudur Rahim, 'Legal Activism for Ensuring Environmental Justice' (2012) 7 (1) Asian Journal of Comparative Law 13.

In many environmental cases the judgments and their implementation has been delayed or broadly disregarded.[11] Due to lack of coordination and cooperation from the other organs it is difficult for the judges to reach sound, sustainable, and effective decisions to tackle multifaceted 'environmental problems. This paper recognizing the importance of the role of the courts as an independent organ to perform a meaningful supervisory role vis-à-vis the other organs of the state[12] and by applying doctrinal and comparative legal research methods argues that, although the judiciary has been acting as a vanguard of the environment, judges alone cannot be the saviour of the environment. There needs to be a collaborative effort by all the organs to tackle hot'[13] environmental problems.

## 2. Importance of the Judiciary in Environmental Protection

On the eve of the World Summit on Sustainable Development around 120 judges from around 60 countries met at the UNEP Global Judges' Symposium in Johannesburg. The judges adopted the 'Johannesburg principles on the role of law and sustainable development', containing the following statement:

> We affirm that an independent judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with and the implementation and enforcement of international and national environmental law.[14]

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11 Rohit Prajapati, 'Environment Crimes and Compensation: Are We Concerned about the Survival of the System or Human Beings?' in Vipin Mathew Benjamin (ed), Has the Judiciary Abandoned the Environment? (Human Rights Law Network 2010) 91; 'Worrying Delay in Implementing HC Order On Air Pollution' The New Age (Dhaka, 03 March 2022).

12 Aileen Kavanagh, 'The Role of Courts in the Joint Enterprise of Governing' in Nicholas Barber, Richard Ekins and Paul Yowell (eds), Lord Sumption and the Limits of the Law (Hart 2016) 121.

13 The term 'hot' has been used to describe how environmental problems include 'socio-political conflict, polycentricity, interdisciplinarity, and scientific uncertainty'. Elizabeth Fisher, 'Environmental Law as "Hot" Law' (2013) 25(3) Journal of Environmental Law 347.

14 'The Johannesburg Principles on the Role of Law and Sustainable Development' (2003) 15(1) Journal of Environmental Law 107.

The above statement shows the importance of the judiciary in environmental protection. There have been recurrent debates about the role of judges. Until recently, this has been largely influenced by the view expressed by Hamilton[15] that the court is the weakest of the three organs of the state. According to him, the only role of a judge is to pronounce judgment on a dispute without any power to take any active resolution. A similar role for judges has also been put forward by legal positivists.[16] However, the state's functions have expanded post-World War II. With the developing concept of the welfare state[17] and the expanded size and scope of administration and legislation, the scope and meaning of adjudication have also been expanded. As a consequence, in addition to the traditional civil and criminal matters, the courts are now involved in many new areas of law and public policy such as constitutionalism, environment, and climate change.[18]

Courts in a number of countries started to participate openly in the constitutional and political process in an attempt to control and monitor the actions and inactions of the executive and the legislature.[19] This helped the courts to become a key branch of the state in shaping the general direction of society. With this new prestige and powers, the courts also have to cope with growing caseloads and more complex questions of law and public policy.[20]

In an attempt to ensure access to justice to the poor and disadvantaged, the courts also started opening their doors by adopting various procedural

15 Alexander Hamilton, 'The Federalist, No. 78: The Judiciary Department' in Alexander Hamilton, John Jay and James Madison (eds), The Federalist Papers (1778), Ian Shapiro (ed) (Yale University Press 2009).

16 Ridwanul Hoque, Judicial Activism in Bangladesh: A Golden Mean Approach (Cambridge Scholars Publishing 2011) 1.

17 In a welfare state not only the basic rights of the citizens are ensured rather the minimum conditions of well-being such as education, health are also protected by the state along with the protection from the consequences of other social risks.

18 Shimon Shetreet, 'Judging in Society: The Changing Role of Courts' in Shimon Shetreet (ed), The Role of Courts in Society (Martinus Nijhoff 1988) 467.

19 Torbjörn Vallinder, 'The Judicialization of Politics' (1994) 15(2) International Political Science Review 91.

20 Hector Fix-Fierro, Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication (Hart 2003) 15.

mechanisms.[21] The courts become a means of addressing legal, political, and even moral demands. All these have increased the powers of the courts across the world.[22] However, this new role for the courts, especially in environmental cases, entails various challenges including maintaining constitutional balances,[23] crafting a balance between conflicting rights,[24] delay in implementation or non-implementation of orders,[25] and striking a balance between judicial over-activism and judicial passivity resulting into injustice.[26] All these challenges make this paper significant as it demonstrates that other organs should collaborate with the judiciary in accomplishing their roles in ensuring environmental justice while maintaining constitutional mandates.

In addition to a growing number of environmental cases, the importance of this paper has increased with the growing 'explosion'[27] of climate change litigation all over the world. More than a thousand lawsuits (total 1547 at time of writing) have been filed for ensuring government and corporate responsibilities regarding climate change.[28] A complaint has been lodged

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21 Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) 4 (6) Third World Legal Studies 107.

22 Carlo Guarnieri and Patrizia Pederzoli, The Power of Judges: A Comparative Study of Courts and Democracy (Oxford University Press 2002).

23 Shubhankar Dam and Vivek Tewary, 'Polluting Environment, Polluting Constitution: Is A "Polluted" Constitution Worse Than A Polluted Environment?' (2005) 17 (3) Journal of Environmental Law 383.

24 Michael R. Anderson, 'Individual Rights to Environmental Protection in India' in Alan E. Boyle and Michael R. Anderson (eds), Human Rights Approaches to Environmental Protection (Clarendon Press 1996) 199.

25 Geetanjoy Sahu, 'Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence' (2008) 4(1) Law, Environment and Development Journal 1.

26 Maria Cahill and Seán Ó Conaill, 'Judicial Restraint can also Undermine Constitutional Principles: An Irish Caution' (2017) 36 (2) University of Queensland Law Journal 259; Hoque, Judicial Activism in Bangladesh (n 16) 2.

27 Jacqueline Peel & Hari M. Osofsky, Climate Change Litigation: Regulatory Pathways to Cleaner Energy (Cambridge University Press 2015) xi.

28 Climate Change Litigation Databases, <http://climatecasechart.com> accessed 03 March 2022.

before the United Nations (UN) Committee on the Rights of the Child[29] and cases have been filed before regional[30] and national courts.[31]

## 3. Role of the Courts and other State Organs in Environmental Protection

In examining the role of the court in environmental matters to see if the courts can alone protect the environment and environmental right this paper examines the judicial decisions given by the apex courts of the selected jurisdictions. An examination of judicial decisions shows that a host of litigation has been brought before the apex courts of the selected jurisdictions and in many cases the courts have responded to complex legal issues with novel treatment.[32] The domestic courts have to repeatedly step in to ensure the implementation of the right to a proper environment or to determine a number of points of interpretation regarding the relevant

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29 A Complaint has been launched by 16 young people, including Greta Thunberg, before the United Nations (UN) Committee on the Rights of the Child, 23 September 2019 <https://earthjustice.org/sites/ default/files/files/CRC-communication-Sacchi-et-al-v.-Argentinaet-al.pdf> accessed 03 March 2022.

30 Case T-330/18 Armando Ferrão Carvalho and Others v The European Parliament and the Council [2018] ECLI:EU:T:2019:324 (People's Climate Case).

31 Urgenda Foundation v State of the Netherlands NL:HR:2019:2007; Friends of the Irish Environment v Ireland [2020] IESC 49; Lliuya v RWE AG, Higher Regional Court of Hamm, 30 Nov. 2017; Ridhima Pandey v Union of India Original Application No. 187/2017; Indian Council for Enviro-legal Action v MoEFCC & Others, Application No. 170/2014; Ashgar Leghari v Pakistan [2015] Writ Petition No. 25501/201.

32 A robust jurisprudence of public interest litigation has been developed by the South Asian judiciaries to champion the rights of the poor and marginalized sections of the society. Parvez Hassan, 'Good Environmental Governance: Some Trends in the South Asian Region' (2016) 18 Asia Pacific Journal of Environmental Law 169; The courts in India have expanded the ambit of constitutional provisions to incorporate concerns of environment, created unique environmental principles and adopted international legal principles to balance environmental protection and development. Stellina Jolly and Zen Makuch, 'Procedural and Substantive Innovations Propounded by the Indian Judiciary in Balancing Protection of Environment and Development: A Legal Analysis' in Christina Voigt and Zen Makuch (eds), Courts and the Environment (Edward Elgar 2018) 142; The Judiciary in Bangladesh has stressed the need of harmonious interpretation of unenforceable state policies to accommodate environmental protection and granted injunctive relief to protect the environmental right. Jona Razzaque, 'Access to Environmental Justice: Role of the Judiciary in Bangladesh' (2000) 4(1&2) Bangladesh Journal of Law 1.

legislation.[33] However, a critical examination of the status of the implementation of judicial decisions shows various environmental injustices both in the global south and north resulting from executive inertia and lack of collaboration between the state organs. Interestingly, despite the social, economic, and political differences, access to environmental justice and participation are suffering from restricted access in the selected jurisdictions.

## 4. Environmental Judicial Activism and Poor Implementation of Court Directions

Over the last few decades the Supreme Court of Bangladesh has been the vanguard against any environmental pollution and has handed down several important judgments including injunctive reliefs, directions to set up committees. The apex court has also adopted both a legislative as well as a policy-making role[34] and set out time limitations for the implementation of orders.[35] The Supreme Court of India in the past three decades, have not only opened its doors to public-spirited citizens and expanded the meanings of fundamental rights but also have transformed itself, by exercising its public interest jurisdiction, into an arena that hosts political, social, and economic battles. The judges of the apex courts have adopted an activist approach and liberalized the rule of *locus standi*, permitted wide use of epistolary jurisdiction, designed innovative solutions, direct policy changes, catalyzed law-making, reprimand officials, and enforce orders.[36]

The general rule is that once a judgment is passed, it is the responsibility of the executive to implement the judgment so as to give effect to it. Case studies from the selected jurisdictions show that in several instances the enforcement agencies have not implemented court directions or have delayed the implementation under one excuse or another.[37] The following

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33 Shibani Ghosh, 'Procedural Environmental Rights in Indian Law' in Shibani Ghosh (ed), Indian Environmental Law: Key Concepts and Principles (Orient BlackSwan 2019) 55.

34 Bangladesh Environmental Lawyers Association (BELA) v Bangladesh 2008] Writ Petition No. 7260 HCD.

35 Bangladesh Environmental Lawyers Association (BELA) v Bangladesh and others Writ Petition No. 1430 of 2003.

36 Rajamani (n 10) 293.

37 Sahu (n 25) 1.

discussion includes environmental cases where the courts of the selected jurisdictions have shown keen interest in protecting the environment but did not achieve the desired goal due to lack of coordination among the state organs and executive inertia.

Considering the threat posed by ship breaking industries to the coastal area, the health hazards of the workers working in the ship yards, and in the absence of necessary environmental clearance to operate, the High Court Division (HCD) of the Supreme Court (SC) of Bangladesh in *BELA v Bangladesh*[38] directed the Government to set up a committee to ensure the impartial supervision of the shipbreaking industry and asked the Government to comply with the requirements under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989 (the Basel Convention).[39] The HCD also ordered the authorities to restrict entry of any ship without pre-clearing certificate. Interestingly, the Department of Environment (DoE) has on 10 October 2021 downgraded the status of the harmful shipbreaking industry from red to orange. As a result of that no Environmental Impact Assessment (EIA) would be required to be carried out for ship breaking and the yard owners can continue without having to take stock of the impact on the environment created by their business.[40] This shows that although the courts are taking the initiatives the executives have the tendency to bypass the implementation of the orders of the courts.

In *Bangladesh Environmental Lawyers Association (BELA) v Bangladesh and others*,[41] the HCD in June 2009 directed the tannery owners to move the tanneries from Hazaribagh to Savar to protect the life and environment of Dhaka City. The relocation of factories started in 2017 and caused high unemployment because the factory owners lay off thousands of workers. To add to the misery, almost all the workers were denied financial

38 [2008] Writ Petition No. 7260 (HCD).

39 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (adopted 22 March 1989, entered into force 05 May 1992) 1673 UNTS 57.

40 Mostafa Yousuf, 'Shipbreaking Industry Status: Orange from Red; Green Overlooked' The Daily Star (Dhaka, 14 November 2021).

41 Writ Petition No. 1430 of 2003 (HCD).

compensation during, and after the relocation.[42] Although on 30 June 2021, the Ministry of Industries declared the completion of the Tannery Industrial Estate Project, which took decades to implement and the project cost is gone up by six times the tannery owners still find the tannery industrial city to be incomplete and environmentally unfriendly. The tannery estate project in Savar is termed as the best example of project mismanagement.[43] According to a recent newspaper report, due to environmental pollution done by the Savar Tannery Project, the parliamentary standing committee of the Ministry of Environment, Forest and Climate Change has recommended and is going to serve a notice to the Ministry of Industries to shut down the Project.[44] If this is done, thousands of workers will lose their livelihood. This mismanagement shows that to achieve the real benefit of an environmental order, it is not sufficient if one organ only works by itself and pronounces judgments because of how far the judiciary might go with the orders the real objective of ensuring environmental justice would never be achievable. One instance of this is the dire situation of Bangladesh's rivers. Despite the declaration by the Supreme Court of Bangladesh that the rivers are a legal entity,[45] the water quality of the river system has worsened resulting in ecological harm and health risks.[46]

In India, since independence, several large dams have been built causing an estimated 40 million people to be displaced.[47] What is alarming is that

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42 Mohammed Monirul Alam, 'Relocation of Tanneries Imperil Workers' Dhaka Tribune (Dhaka, 21 July 2019).

43 Abul Kashem and Rafiqul Islam, 'Savar Tannery Estate: Complete Yet Incomplete After 19 Years' The Business Standard (Dhaka, 19 July 2021).

44 Rashidul Hasan, 'Shut Down Savar Tannery Estate' The Daily Star (Dhaka, 24 August 2021).

45 The High Court Division of the Supreme Court of Bangladesh in the Writ Petition No. 13989 of 2016 (HCD) filed by the Human Rights and Peace for Bangladesh (HRPB) challenging the legality of earth-filling, encroachment and construction of structures along the banks of river Turag, declared the river Turag as a 'living entity'. The Court also said that the status will be applicable for all the rivers of the country.

46 Rebecca Peters, 'Protecting Rights of Rivers: Turning Intention into Action' The Daily Star (Dhaka, 20 November 2020).

47 The Government of India undertook the construction of Sardar Sarovar Project which includes the construction of 30 large dams, 135 medium dams, and 3000 smaller dams along the Narmada River. An estimated 248 towns and villages were scheduled to be submerged. Thomas R. Berger, 'The World Bank's Independent Review of India's

less than a quarter of those displaced persons have been resettled. Despite several directions by the Indian Supreme Court, such an executive failure has also caused human trauma due to forced relocation, delayed or no resettlements, loss of employment, and lack of compensation.

In the *Delhi industrial relocation case*,[48] compensation for relocation to the workers was ordered by the Court while giving directions to close down industries or to locate outside Delhi. The direction of the Court, however, has not been implemented by the government on the ground of non-availability of land to shift the industries and also workers' right to compensation appeal has not been given due attention in the subsequent Court hearings.

The above discussion shows that although the judiciaries have come up with path-breaking judgments on a number of litigations in public interest, the misery and suffering of people and environmental degradation, to ameliorate which the Court was approached, continued unabated. Reluctant approach by the enforcing agencies to environment and human problems continued without much perceivable change, notwithstanding great judgment.[49]

## 5. Procedural Elements of Environmental Justice, Role of the Courts and Bureaucratic Inertia

The three procedural elements identified as prerequisites for environmental justice by scholars and activists following the Stockholm Declaration 1972[50] are access to environmental information, public participation in environmental decision-making and access to justice.[51] An examination of the role of the courts of the selected jurisdictions in guaranteeing the three procedural elements of environmental justice demonstrates that they have been very active in ensuring the procedural

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Sardar Sarovar Projects' (1993) 9(1) American University International Law Review 33.

48 M.C. Mehta v Union of India and Others [1996] AIR 2231 (SC).

49 Sahu (n 25) 1.

50 1972 UN Conference on the Human Environment, Declaration of Principles, UN Doc. A/CONF.48/14/Rev.1.

51 Dinah Shelton, 'Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?' (2006) 35 Denver Journal of International Law and Policy 129.

rights to environmental justice. However, the discussion also shows that although the courts have attempted to extend the scope of access to information and public participation in environmental decision making, cumbersome proceedings, bureaucratic inertia, and cost are hindering the effective exercise of these rights.

### 5.1 Access to Environmental Information

The right to environmental information, along with the two other procedural rights can perform an instrumental role in securing the substantive right to the environment and improving the environmental justice situation.[52] Although the Indian Supreme Court in State of *Uttar Pradesh v Raj Narain and others*[53] recognized the right of people to know 'every public act, everything that is done in a public way, by their public functionaries' as a constitutional right and have attempted to extend the scope of access to environmental information by the citizens,[54] burdensome proceedings and bureaucratic inertia are hindering the effective exercise of this right.

India has a Central Information Commission (CIC)[55] and State Information Commissions (SICs)[56] established under the Right to Information Act 2005 (RTI Act 2005). Observing a huge backlog,[57] the Indian Supreme Court passed an Order dated 15th Feb 2019 directing the Central and State governments to fill-up existing vacancies within 6 months and to start filling up a particular vacancy 1 to 2 months before the date on which the vacancy is likely to occur.[58] As a result of non-compliance, the Indian Supreme Court passed two subsequent orders dated

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52 Philippe Cullet, 'Definition of an Environmental Right in a Human Rights Context' (1995) 13 Netherlands Quarterly of Human Rights 25.

53 [1975] 4 SCC 428 para 74.

54 It was decided by the Bombay High Court in Bombay Environmental Action Group v Pune Cantonment Board [1987] Writ Petition No. 2733 of 1986 that an environmental action group is entitled to a restricted right to information and right to inspection provided the right is exercised bona fide. The concerned environmental action group has to pay the requisite fees also.

55 Section 12 of the RTI Act 2005.

56 Section 15 of the RTI Act 2005.

57 A total of 32,147 RTI appeals were pending with the CIC as of 06 December 2021. ('Over 32,000 RTI Appeals Pending With Central Information Commission: Govt' Hindustan Times (India, 16 December 2021).

58 Writ Petition (Civil) No. 436 of 2018.

16 December 2019 and 07 July 2021 directing the Central and State governments to appoint information commissioners in CIC and SICs without any effect.[59] This reflects NV Ramana CJ's statement, speaking extra-judicially, that there is a growing tendency by the executive to disregard and disrespect their orders.[60]

Article 39 of the Constitution of Bangladesh guarantees freedom of expression as a fundamental right. Although freedom of expression does not expressly include the right to seek and receive information, the Preamble of the Right to Information Act 2009 (the RTI Act 2009) declares the right to information as an inalienable part of freedom of expression.[61] A broad right to access to environmental information on request is recognized in national law.[62] In spite of all these provisions, there are instances of defying laws by public authorities who also chase general people for the alleged violation of the law just to justify their own development projects.[63]

Due to lack of sufficient notice and lack of providing information, in the *Slum Dwellers Case*[64] the Court intervened to protect the poor slum dwellers from being evicted without first being given notice as a matter of constitutional propriety. The Court also passed the following directives:

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59 Asian News International, 'SC Directs Centre, States to File Report Regarding Appointment of Information Commissioners in CIC' The New Indian Express (India, 07 July 2021).

60 Dhananjay Mahapatra, 'CJI: Executive's Tendency to Ignore Court Orders a Worry' The Times of India (India, 27 December 2021).

61 Supti Hosssain, 'Right to Access Information' The Daily Star (Dhaka, 10 November 2020).

62 It is required under the Forest Act 1927 to inquire and settle all private claims when restrictions are to be imposed when the status of a public forest is changed by means of reclassifying it as a reserved or protected forest. The Agricultural and Sanitary Improvement Act 1920 and the Embankment and Drainage Act 1952 guarantees the rights of local populations and interested parties in the areas of the proposed project to examine and raise objections to the project under consideration

63 A.T.M Afzal, 'Country Representation: Bangladesh' (The Regional Symposium on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development, Colombo, July 1997).

64 Aio o Salish Kendro (ASK) v Bangladesh [1999] 19 BLD 488 (HCD).

- A master guideline or pilot projects should be developed by the government for resettlement;
- Slum-dwellers can be evicted only in phases and in accordance with the ability of individuals to find alternative accommodation;
- Reasonable notice has to be served before eviction and the government should clear up slums beside railway-tracks upon resettlement of the slum dwellers.

However, despite the order of the High Court Division of the Supreme Court of Bangladesh, the Government evicted 14,674 families (approximately 88,044 individuals) from 8 to 11 August 1999[65] showing executive inertia in complying with judicial decisions.

### 5.2 Public Participation in Environmental Decision Making

Effective participation is the condition precedent to ensure equal recognition and effective distribution.[66] Exercising the procedural environmental rights give citizens a sense of empowerment because it would allow them to have some engagement with the decision-making which would eventually affect them.[67] Although there are statutory laws guaranteeing the right to participate in environmental decision-making, implementation of this right has a poor status in the selected jurisdictions. The courts have also intervened to ensure the right but in many cases not much participation can be ensured due to executive inertia.

In the absence of any express provision guaranteeing the right to participate in the Indian Constitution, the right to public participation has been declared as an inalienable part of Article 21 of the Constitution of India by the Supreme Court of India.[68] The importance of public hearing

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65 ESCR <https://www.escr-net.org/caselaw/2006/ain-o-salish-kendra-ask-v-government-and-bangladesh-ors-19-bld-1999-488>.

66 David Schlosberg, 'Reconceiving Environmental Justice: Global Movements and Political Theories' (2004) 13(3) Environmental Politics 517.

67 Joshua C. Gellers and Christopher Jeffords, 'Procedural Environmental Rights and Environmental Justice: Assessing the Impact of Environmental Constitutionalism' (2015) Human Rights Institute University of Connecticut Economic Rights Working Paper No. 25 <https://media.economics.uconn.edu/working/HRI25.pdf> accessed 30 December 2021.

68 Research Foundation for Science Technology and Natural Resources Policy v Union of India and Ors [2005] 10 SCC 510, Para 42.

has been described by the Indian Courts in several decisions.[69] In addition to being a constitutional right recognized by the Indian Courts, the right to participate in environmental decision-making is also a statutory right.[70]

The Indian Courts not only recognized the importance of public participation in environmental decision-making but also has emphasized and laid down detailed directions to ensure effective participation. Showing judicial activism, detailed directions regarding the publication of notice,[71] holding of public hearings,[72] and the place of holding a public hearing[73] have been pronounced by the Indian Courts. However, despite consistent guidelines, instructions, and directives, the procedures have not yet been followed fairly and adequately.[74] As a result, there have been orders for holding post-decisional public hearings over the failure to follow the guidelines provided by the Gujarat High Court and Delhi High Court of India.[75] There are several cases where the National Green Tribunal (NGT) has struck down the proposed project's environmental clearance or kept it in abeyance because public consultation was not carried out properly.[76]

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69 Ministry of Information and Broadcasting v Cricket Association of Bengal [1995] 2 SCC 161; Alaknanda Hydro Power Co Ltd v Anuj Joshi [2013] Civil Appeal No. 6736 (SC); S. Nandakumar v The Secretary to Government of Tamil Nadu Department of Environment and Forest and Ors [2010] SCC OnLine Mad 3220.

70 The two principal avenues for public participation in environmental regulation in India are provided under the Environment (Protection) Act 1986 (the EP Act) and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 (the Forest Rights Act). The EIA Notification 2006 also requires public consultation in certain categories of projects. Very limited opportunities for public participation are provided under the Water Act and the Air Act. C.M. Abraham and Armin Rosencranz, 'An Evaluation of Pollution Control Legislation in India' (1986) 11 Columbia Journal of Environmental Law 101.

71 Centre for Social Justice v Union of India [2000] AIR Guj 71 (HC); Samarth Trust v Union of India [2009] WP (Civil) No 9317 of 2009 Del (HC).

72 Osie Fernandes v Ministry of Environment & Forests (Judgment 30 May 2012).

73 Utakrsh Mandal v Union of India [2009] WP (Civil) No 9340 of 2009, High Court of Delhi.

74 M.P. Ram Mohan and Himanshu Pabreja, 'Public Hearings in Environmental Clearance Process; Review of Judicial Intervention' (2016) 51(50) Economic and Political Weekly 68.

75 Padmakar Vinayak Deshmukh v Union of India [2010] PIL 78/2010 Bom (HC).

76 Debadityo Sinha and Ors v Union of India and Ors Appeal No. 79/2014 (Judgment 21 December 2016); Save Mon Region Federation and Ors v Union of India and Ors (Judgment 14 March 2013).

Although there are several statutes providing the right to participate in environmental decision-making,[77] Public participation in development projects in Bangladesh permits very restricted access for public participation.[78] The poor status of public participation in environmental decision-making can also be seen in the implementation of judicial pronouncements. In *Dr Mohiuddin Farooque v Bangladesh (FAP 20 case)*,[79] although the High Court Division of the Supreme Court of Bangladesh directed the concerned authorities to involve and consult local people in important development decisions and laid down instructions to ensure that no serious damage be caused to the environment by the project, the decision was not implemented.[80]

The above discussion shows that although the courts have shown activism in ensuring access to information and public participation in environmental decision-making, executive inertia has caused environmental injustice and violation of constitutional principles.

### 5.3 Access to the Courts

The right to have adequate access to justice for enforcing environmental law or seeking redress in resolving environmental disputes allows individuals, affected communities, environmental activists, and non-governmental organizations (NGOs) to challenge decisions by public authorities violating environmental rules and regulations.[81] Environmental

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77 The Forest Act 1927, the Agricultural and Sanitary Improvement Act 1920, and the Embankment and Drainage Act 1952.

78 Research shows that one of the tribes, the Garo communities living in the District Madaripur, was not given an opportunity to participate in the decision-making process of the Forest Department (FD) eco-park project. However, later due to strong opposition by Garos, the government agencies decided to engage Garos in the process of revising the original eco-park plan. The FD did not follow a fair procedure in the selection of participants which resulted in the continuity of the movement by the Garo community. Non-recognition of participation rights and resistance of the Garos ultimately forced the government to abandon the project for an indefinite period of time. Farid Ahmed, 'Exploring Avenues of Public Participation for Environmental Justice in the Context of Bangladesh' (2018) 63(1) Journal of the Asiatic Society of Bangladesh 1.

79 [1996] Bangladesh Supreme Court Report 27.

80 Ridwanul Hoque, 'Taking justice seriously: judicial public interest and constitutional activism in Bangladesh' (2006) 15(4) Contemporary South Asia 399.

81 Bell, McGillivray and Pederson (n 1) 336.

justice can only be ensured if there is an effective way of accessing justice to enforce the right to access to environmental information and participation in decision-making.[82] The courts are the only institution in the state machinery that allows people to hold government, agencies, corporations, and individuals accountable for any violation of their fundamental rights guaranteed under the constitution.[83] However, the path to court is never easy and is strewn with hurdles making it difficult for individuals to access the forum to defend their rights. Difficulties have been faced by citizens to prove a violation of right, damage caused and the causation link between the breach of the duty to perform and the damage done. Considering these difficulties, judges have emerged as a protector of the environment. In an attempt to expand access to environmental justice, the judges have relaxed several procedural norms to ensure easy access to the court, introduced the concept of public interest litigation (PIL),[84] and enhanced the power of the citizens over the public authorities.[85]

In the absence of any express provision in the constitutions recognizing the right to the environment, the judiciaries of the selected jurisdictions have contributed to environmental constitutionalism. Indian courts have been proactive in promoting the right to a healthy environment by broadly

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82 Madhuri Parikh, 'Public Participation in Environmental Decision Making in India: A Critique' (2017) 22(6) Journal of Humanities and Social Science 56.

83 Gitanjali Nain Gill, 'Access to Environmental Justice in India: Innovation and Change' in Jerzy Jendroska (ed), Procedural Environmental Rights: Principle X in Theory and Practice (Intersentia 2018) 209.

84 PIL originated in the USA and was initiated by a few judges of the Indian Supreme Court as a method to redress public grievances. The concept has been accommodated in India, Pakistan, and Bangladesh differently taking into account the socio-economic aspect of the notion. Razzaque, Public Interest Environmental Litigation in India, Pakistan and Bangladesh (n 9) 35-36; In the language of Bhagwati J in People's Union of Democratic Rights v Union of India [1982] AIR 1473 (SC) 'Public Interest Litigation is essentially a co-operative effort on the part of the petitioner, the State or public authority, and the Court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable section of the community and to reach social justice to them.'; The four characteristics of PIL identified by Jamie Cassels are: i) Liberalization of locus standi; ii) Procedural and remedial flexibility; iii) Continuous judicial supervision and; iv) Creative and active interpretation of legal and fundamental rights. Jamie Cassels, 'Judicial Activism and Public Interest Litigation: Attempting the Impossible?' (1989) 37 The America Journal of Comparative Law 493.

85 Pluchon (n 6) 139.

interpreting its powers under Articles 32[86] and 226[87] of the Constitution of India. The Bangladesh judiciary has also assumed an impressive role through liberal interpretations of procedural rules regarding standing.[88]

### 5.3.1 Access to Courts in Environmental Matters in India

In the absence of any prescribed test on the standing issue in the Indian Constitution the 'aggrieved person' test was followed by the Indian Courts till the 1970s. This approach was dependent on the individual's own injury or legal grievances. Subsequently, the Indian Courts adopted the liberal 'sufficient interest' test.[89] The liberal approach to the standing rule was first adopted by the Supreme Court of India in *S.P. Gupta and Ors v President of India and Ors*.[90] Since then cases have been brought before the Supreme Court and the High Courts on a variety of issues involving social, economic, political, and environmental relevance. It was stated by the Supreme Court in *Bandhua Mukti Morcha v Union of India*[91] that standing has been enlarged to allow access to justice to large sections of the public to whom so far it had been a matter of despair. In India, PIL was encouraged to lend voice to the marginalized and disadvantaged communities and individuals who were finding the formal judicial process difficult to navigate.[92]

The question of citizen standing was involved in most of the leading environmental cases in the 1980s and the Supreme Court of India took the leading role in widening *locus standi* in the closure of limestone quarries in the Dehradun region of India,[93] in the installation of safeguards at a chlorine plant in Delhi.[94] At the behest of public-spirited individuals and to

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86 The fundamental right to approach the Supreme Court of India for the enforcement of fundamental rights is recognized in Article 32 of the Constitution of India.

87 Article 226 recognizes the constitutional right to approach High Courts for the enforcement of fundamental rights or any other legal rights.

88 Muhd. Rafiqauzzaman, 'Public Interest Litigation in Bangladesh: A Case Study' (2002) 6 (1&2) Bangladesh Journal of Law 127.

89 Razzaque, Public Interest Environmental Litigation in India, Pakistan and Bangladesh (n 9) 286.

90 [1982] AIR 149 (SC).

91 [1984] AIR 803 (SC).

92 Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) 4 Third World Legal Studies 107.

93 R.L. & E. Kendra, Dehradun v State of U.P. [1985] AIR 652 (SC).

94 M.C. Mehta and v Union of India [1987] AIR 1086 (SC).

protect the Taj Mahal from air pollution in *M.C. Mehta v Union of India (Taj Trapezium Case)*[95] the Court has passed a series of directions spanning over two decades including banning coal-based industries in the vicinity of Taj Mahal, closing 230 factories, requiring 300 factories to install pollution control devices. The Supreme Court was moved by public-spirited citizens to pass orders to address the air pollution in Delhi including mandating the conversion of public transport in Delhi from conventional fuel to Compressed Natural Gas.[96] The Court also took up the task of protecting the forests and wildlife of India.[97]

### 5.3.2 Access to Courts in Environmental Matters in Bangladesh

The first case where PIL in Bangladesh was formally allowed involved an environmental issue. The case was *Dr. Mohiuddin Farooque v Bangladesh*[98] also known as the *FAP Case.* In that case, Bangladesh Environmental Lawyers Association (BELA) was granted standing to challenge an ongoing flood-control project. Initially, standing to BELA was refused by the High Court Division (HCD) of the Supreme Court (SC) of Bangladesh.[99] However, on appeal, the Appellate Division (AD) allowed standing to BELA to proceed with the case and sent back the Case to the HCD. Although the HCD refused to interfere with the ongoing project as the project involved foreign aid, by this case the judges of the apex court of Bangladesh revealed their consciousness that the Constitution of Bangladesh has not resulted from a negotiated settlement with a former colonial power.[100] Following the development brought through the FAP Case,[101] the number of PIL cases began to rise after 2000 in Bangladesh. In most of these PILs right based claims have been made concerning environmental justice issues. The Court declared the conversion of open space into housing plots,[102] occupation of public parks,[103] and construction of commercial buildings[104] to be unlawful on the

95 [1997] 2 SCC 353
96 M.C. Mehta v Union of India (Delhi Vehicular Pollution Case) [2001] 3 SCC 756.
97 In TN Godavarman Thirwnulkpad v Union of India [1997] AIR 1223 (SC).
98 [1997] 49 DLR 1 (SC).
99 Dr. Mohiuddin Farooque v Bangladesh [1994] Writ Petition No. 998 of 1994.
100 Hoque, Judicial Activism in Bangladesh (n 16) 143.
101 Dr. Mohiuddin Farooque v Bangladesh and others [1997] 49 DLR 1 (AD).
102 M. Saleem Ullah v Bangladesh [2003] 23 BLD 58 (HCD).
103 Giasuddin v Dhaka City Corporation [1997] 17 BLD 577 (HCD).
104 Sharif Nurul Ambia v Dhaka City Corporation [2007] 15 BLT 305 (AD).

ground of violation of fundamental rights of the people living in the vicinity and causing harm to their health. In *Dr. Mohiuddin Farooque v Bangladesh (Vehicular Pollution Case)*,[105] the Court issued an eight-point directive to improve the air pollution situation prevailing in Dhaka City. In *Dr. Mohiuddin Farooque v Bangladesh* (Industrial Pollution Case),[106] the Court directed the relevant state officials to adopt sufficient anti-pollution measures within a stipulated period.

The growing trend of judicial environmental activism in Bangladesh has stimulated legal and environmental activists to challenge various government actions and inactions under the umbrella of the flourishing right to the environment.

However, PIL does not work in isolation. It is much needed for the success of PIL to have a collaborative effort between various actors. There is a necessity for dedicated and specialist lawyers, time, commitment, and capacity to work on such issues by judges, legal aid, and legal support from the government. To make PIL successful, strong networking and consultation among civil society organizations, constant interaction between the organs of the state, a collaboration between the government agencies, a trained judiciary, and supportive media are important.[107]

## 6. The Need to Adopt a Collaborative Effort in Environmental Matters

The examination of judicial decisions pronounced in environmental cases in the selected jurisdictions shows that the Courts of the selected jurisdictions by relaxing the traditional barriers to access to justice and through judicial activism have attempted to ensure access to information, public participation, and access to justice. Although in some instances the courts were successful there are several instances where the decisions were ineffective, unsustainable, and not implemented. The decisions given in the public interest environmental litigation (PIEL) cases have been

105 [2003] 55 DLR 613 (HCD).
106 [2003] 55 DLR 69 (HCD).
107 Rafiqauzzaman (n 88) 127.

criticized for being unable to sensitize the executive or the legislature to act with greater enthusiasm in environmental issues.[108]

The foregoing case studies from the selected jurisdictions raise several questions from legal, institutional, theoretical, and practical perspectives. It is evident that on many occasions the overenthusiasm or apathetic role of the courts in environmental matters has severely dented the constitutional requirement of separation of powers and infringed the independence of the judiciary resulting in violation of rule of law. This trend has also contributed to a polity that is becoming consistently reliant on the judiciary for remedying not only environmental but also all kinds of problems.[109] The Indian and Bangladeshi courts have gone far in protecting the right to the environment and handed down judgments dealing with air, water, climate change, and education as well as implementation issues.[110]

Considering the extent of judicial novelty, it would have been preferable to say that the environments in India and Bangladesh are well protected and the right to the environment is well guarded. Unfortunately, the performance of India and Bangladesh is relatively poor on almost all metrics in protecting the environment.[111] According to the 2022 Environmental Performance Index, India ranks at the bottom and Bangladesh is ranked 177 out of 180.[112]

The multifaceted, polycentric, and complex technical nature of environmental problems makes it difficult for judges to understand the

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108 Shubhankar Dam, 'Green Laws for Better Health: The Past that Was and the Future that May Be– Reflections from the Indian Experience' (2003-2004) 16 Georgetown Environmental Law Review 593.

109 Hans Dembowski, Taking the State to Court: Public Interest Litigation and the Public Sphere in India (Oxford University Press 2001).

110 The HCD in Bangladesh has directed the government authorities to demolish all illegal brick kilns situated in four districts within 15 days. 'HC Orders Demolish of Illegal Brick Kilns in 5 Dists' The Daily Sun (Dhaka, 02 March 2022).

111 Aarti Betigeri 'Choking Points: India's Environmental Crisis' <https://www.lowyinstitute.org/the-interpreter/choking-point-india-environment-crisis> accessed 01 October 2019.

112 Environmental Performance Index 2022 <https://epi.yale.edu/downloads/epi2022report06062022.pdf> accessed 15 June 2022.

problem and reach a robust decision.[113] The Supreme Court of India has also expressed a similar view.[114] Compared to the courts, the regulators possess an informational advantage, and intervention by the court may be effective only to the extent they act as a remedy to executive apathy. The Indian and Bangladeshi experience in PIEL cases shows that the judiciary does not have adequate expertise and information to set cost-effective environmental standards. It is up to the executive to come up with more sustainable solutions in the long run. The judiciary alone is not enough and legislative, regulatory, and enforcement mechanisms are required to achieve sustainable environmental solutions.[115] To have a lasting impact on the orders given by the apex court, political will along with budgetary allocation at the local, municipal, and national levels is necessary.[116] Although a successful day in a court is very likely to prompt a political response, it is important to have a political strategy to ensure that response is favorable to the litigant.[117]

## 7. Conclusion

In order to protect the environment, it is crucial that there be a balance and equally felt need for the cooperation and dependence amongst the three distinct organs of governance. Therefore, this paper proposes judicial pro-activism in adopting a collaborative approach as methods that can best capture the process towards realizing rights.[118] Judicial pro-activism requires judges to be proactive and at the same time to adopt a balanced

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113 Fisher (n 13) 347.

114 In judgments given in M.C. Mehta v Union of India [1986] 2 SCC 176, the Indian Council for Enviro Legal Action v Union of India [1996] 3 SCC 212 and in AP Pollution Control Board v M V Nayudu [1999] AIR 812 (SC) the Supreme Court of India acknowledging the complexities and uncertainties underpinning the scientific evidence presented before the court in environmental cases emphasized the necessity of establishment of an environmental court in India where environmental experts and technically qualified persons are embedded in the judicial process.

115 Michael G. Faure and A.V. Raja, 'Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables' (2010) 21 Fordham Environmental Law Review 239.

116 Mahajan Niyati, 'Judicial Activism for Environmental Protection in India' (2015) 4(4) International Research Journal of Social Sciences 7.

117 Garry F. Whyte, 'The Efficacy of Public Interest Litigation in Ireland' in Tiyanjana Maluwa (ed), Law, Politics and Rights: Essays in Memory of Kader Asmal (BRILL 2013) 252.

118 Ioanna Tourkochoriti, 'What is the Best Way to Realize Rights?' (2019) 39(1) Oxford Journal of Legal Studies 209.

approach between over-activism and over-conservatism avoiding encroaching into the domains of other organs or undermining constitutional principles. Collaboration complements judicial pro-activism allowing judges to act as a facilitator engaging other organs of the state in participatory decision making to reach sound, sustainable, and effective decisions to tackle multifaceted environmental problems.

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# Institutionalizing Mediation as a Mode of Court Sponsored Alternative Dispute Resolution in Bangladesh: Implications, Problems and Prospects

Md. Amirul Islam*

**Abstract**

The judiciary of Bangladesh is suffering from a huge backlog of suits and cases. Slow-rate disposal of cases resulting in a backlog is detrimental to the rule of law which is damaging the economic growth of the country. In these circumstances, adoption of alternative dispute resolution methods under sections 89A, 89B and 89C of the Code of Civil Procedure, 1908 has brought a useful breakthrough reducing the backlog of cases. Mediation as a mode of court sponsored alternative dispute resolution being much cheaper and speedier than that of the traditional adjudication system can greatly mitigate the sufferings of litigants. ADR mechanisms are working as complementary consensual systems in parallel to the existing adversarial systyem for reduction of backlog of cases. But mere adoption of ADR tools in the legislation is not enough; rather, the Government will have to institutionalize mediation to get best harvest from it. Institutionalizing mediation requires establishing mediation centers and providing it with all administrative support. In this article I would like to show the necessity of institutionalizing mediation as a mode of court sponsored alternative dispute resolution in Bangladesh for reduction of backlogs and ensuring access to justice for all: its implications, problems and prospects. I would like to make some recommendations as to how mediation as a mode of court sponsored alternative dispute resolution can be institutionalized throughout the country to achieve one of the vital Sustainable Development Goals(SDG) i.e. ensuring access to justice for all.

## 1. Introduction

Court sponsored ADR[1] or court based ADR (CBA) is a process by which a court redirects certain cases to any of the forms of ADR (negotiation,

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1 ADR stands for alternative dispute resolution and court sponsored ADR sometimes also referred to as judicial ADR.

mediation, arbitration, reconciliation) rather than by way of trial. In the legal system of most countries of the world court based or court annexed ADR mechanisms are functioning very well reducing backlog of cases[2]. Court annexed ADR arises where after parties have presented their case to the court, the same is referred by the court to one of the ADR mechanisms for resolution. ADR may either be freestanding or court based. When the process is connected to the suits or court cases, it is called court annexed ADR or judicial ADR. Salish is the common example of freestanding ADR[3]. Mediation takes two forms: court-annexed mediation undertaken by a private mediator and judge-led mediation undertaken by a judge[4]. The court annexed mediation as a mode of alternative dispute resolution refers to a process where both parties meet with a mediator, under the direction of the competent court, who will help the parties to focus on their situation and consider the appropriate options for settlement available to them in their suits. The court annexed ADR programs or practices are authorized and used within the court system and their procedures are controlled by the court[5]. An agreement arising out of the ADR program is reduced into writing and the agreement is enforceable as court order. Generally, after filing a suit or court case a judge or court employee examines the dispute and suggests or orders as a matter of course, the parties to attempt to resolve their differences through ADR in forms of mediation, negotiation, conciliation or mini-trial etc. In every approach the judge himself or a neutral third person tries to get the disputants to reach an amicable settlement of the dispute. If they succeed, the case is dismissed which saves time and expenses of litigation[6]. The concept of court annexed mediation came into light with the insertion of sections 89A, 89B and 89C

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2 For example see section 89 and order x rules 1A,1B and 1C of the code of civil procedure 1908 of India.

3 Halim, Md Abdul, ADR in Bangladesh: Issues and Challenges CCB Foundation Dhaka (2011) p.32.

4 https://www.semanticscholar.org/paper/Court-annexed-and-judge-led-mediation-in-civil-the-Wahab-Gramberg/6eb95b90215cec23f18869fe14fc99d84f15b238

5 The World Bank in its "Alternative Dispute Resolution Guidelines" used the term court annexed ADR as an alternative to court based ADR. The Guidelines simultaneously used the term "court connected ADR. See World Bank ADR Guidelines,p.21, available at: http:// siteresources.worldbank.org/INTECA/Resources/15322_ADRG_web.pdf, accessed on 27 Feb 2015.

6 Mahbub, SK. Golam, Alternative Dispute Resolution through Civil Courts in Bangladesh page-211.

through Amendment of the CPC 1908 to diminish the backlog of cases. Even Amendment 2017 of the CPC makes the referral of civil suits for mediation mandatory. According to amended section 89A civil court referred mediation may be undertaken either by legal aid officer or by court itself or by litigating parties or by engaged pleaders of parties or by mediator appointed by a court or panel mediator. Still having legal provisions of referral for mediation smooth referral suits for mediation culture are yet to be established. Court referred mediation as per section 89A of Code of Civil Procedure is not working properly due to not having any statutory mediation center to perform and monitor total mediation mechanisms across the country. Mediation is a culture and its growth and development depends upon some indicators such as institutional approach of mediation, research to develop mediation technique, training and monitoring to develop quality of mediation, faith of litigants, assistance from lawyers etc. An approach regarding institutionalizing mediation can help to develop a smooth and healthy mediation cultural revolution in Bangladesh as is taken in different countries of the world. In this study I would like to show how an institutional approach regarding mediation can bring a revolution in the adjudication system diminishing the backlog of cases that the legislature intended during amendment of the CPC 2012.

## 2. Institutional Approach of Mediation in Different Legislations of Bangladesh

### 2.1 The Family Court Ordinance, 1985

Bangladesh for the very first time accommodated the concept of court based or court connected formal dispute resolution mechanisms into the Family Court Ordinance 1985 under section 10 at pre-trial stage and section 13 at post trial stage. But the ADR mechanisms under the FCO remained dysfunctional until the early 2000. Family Courts of Dhaka and Gazipur were however brought to life under a pilot project by former Chief Justice Mustafa Kamal. Later on, observing the tremendous success of the family courts in resolving disputes as specified in section 5 the legislature felt the impulse for incorporating ADR provisions into the CPC in 2003[7].

[7] The Code of Civil Procedure 1908 also went through another amendment in 2006 and the latest.

### 2.2 The Code of Civil Procedure, 1908

The ADR methods come into the civil matters with the insertion of sections 89A and 89B by the Civil Procedure Code (Amendment) Act 2003. The amended sections speak for mediation of civil suits that can be undertaken by mediator referred by the court. Later on, the amendment of CPC 2017 kept provisions of sending civil suits to Legal Aid Officer for mediation but this only one Legal Aid Officers in a district are packed with different administrative functions of legal aid services. However, institutionalized structure in the field of court based mediation for the purpose of its functioning and monitoring is badly needed to make the ADR system effective.

### 2.3 The Legal Aid Services Act, 2000

Section 21A of this Act empowers the Legal Aid Officer to mediate a case through ADR which is referred from a court or tribunal of respective jurisdiction. This Act is the only legislation where there is a Legal Aid Officer who is the entrusted forum to settle disputes. This Act has provisions of the court sponsored alternative dispute settlement approach. Amended section 21A of the Act has introduced a new era of institutional mediation approach undertaken by Government officers. But the District Legal Aid Officer is mediating a lot of pre-case dispute matters under section 21A of the Legal Aid Services Act, 2000. So, rendering services of legal aid such as legal counseling, mediating pre-cases, operating legal aid cases, appointing panel lawyers, conducting legal aid expansion campaigns etc., it is practically very difficult for only one District Legal Aid Officer to entertain the huge bundle of civil suits coming for mediation from all civil courts. There is no check and balance on court appointed mediators. Even having no monitoring authority regarding ADR activities even the court based mediation is not functioning properly in district level civil courts, which manifestly ignores statutory compulsory mediation mandate! That means institutional approach regarding mediation is not sufficient in the amended section 89A. At present the ADR system in Bangladesh seems to be without a guardian.

### 2.4 The Artha Rin Adalat Ain, 2003

Sections 22, 23, 24 and 25 of the Ain describes mediation as one of the modes of dispute settlement. It keeps provisions under section 38 as to settlement of disputes by mediation even at the execution stage. Even section 44A provides provisions of mediation at the appeal or revision stage. The CBA approach is not sufficient because there is no mention of a mediation forum to perform court order as mediator in the Act.

### 2.5 The Legal Aid Services (Legal Advice and Alternative Dispute Resolution) Rules, 2015 under the Legal Aid Services Act, 2000

Rules 4 to 16 provide for procedures as to how the Legal Aid Officer will mediate the dispute through ADR mechanisms. These Rules have procedures as to how the legal aid officer will settle disputes. These Rules have provisions of a court sponsored alternative dispute resolution approach.

### 2.6 Legislations Regarding Informal Alternative Dispute Resolution

Above mentioned legislations contain formal/court based mediation procedures with specific provisions as to who will undertake mediation activities. There are some other enactments which contain provisions out of court quasi-formal ADR mechanisms. Status of ADR mentioned in The Conciliation of Disputes (Municipal Area) Board Act, 2004, the Village Court Act, 2006, the Arbitration Act, 2001, the Income Tax Ordinance, 1984, the Value Added Tax Act, 1991, the Customs Act, 1969, the Muslim Family Law Ordinance, 1961, the Labour Act, 2006. The ADR mechanisms are quasi-formal conducted by local Government representatives, arbitration tribunal and third party facilitator. There are some NGOs conducting mediation or moderate salish on civil matters; those are informal ADR.

So we see ADR mechanisms have been incorporated into the civil courts of Bangladesh with a view to ensuring speedy settlement of disputes reducing backlog of cases and providing litigants with low cost and easy access to justice[8]. But still now the judiciary could not bring any

[8] 2004, ADR: 'Recent changes in the civil process' The Dhaka University Studies Part F, vol. 1 pp. 37-58

remarkable change in providing quick and inexpensive justice to the litigants. Besides normalizing the case, backlogs are far cry. Though there are legal provisions in support of ADR, even the legislators have kept provisions of ADR as a mandatory stage for civil suits but the presiding judge seldom sends or directs to send suits for ADR initiative. One of the reasons is learned lawyers' reluctance to settle their clients' disputes through ADR. Reduction of income poses the lawyers to be disinclined towards ADR. So mandatory provision of referring civil suits for mediation initiative is failing at a very rudimentary stage. With a view to reducing the backlog of cases and ensuring access to justice for all there is no alternative to make court based mediation functional and countrywide operational.

**3. Classification of Court Sponsored Mediation**

According to the provisions section 89A of the Code of Civil Procedure 1908, the Family Court Ordinance 1985, the Artha Rin Adalat Ain 2003, the Legal Aid Services Act 2000 we get two types of court sponsored mediation in Bangladesh. While referring civil cases for mediation the trial court is supposed to determine the forum of mediation as it deems fit. The said two types of court sponsored mediation are as follows:

1. Court sponsored mediation undertaken by a judge
2. Court Sponsored mediation undertaken by private mediator

**4. Present Condition of Court Sponsored Mediation in Bangladesh**

The concept of court annexed mediation came into light with the insertion of sections 89A, 89B and 89C through Amendment of the CPC 1908 to diminish the backlog of cases. Even Amendment 2017 of the CPC makes the referral of civil suits for mediation mandatory. According to amended section 89A civil court referred mediation may be undertaken either by legal aid officer or by court itself or by litigating parties or by engaged pleader of parties or by a mediator appointed by a court or panel mediator. Still having legal provisions of referral for mediation smooth referral suits for mediation culture are yet to be established. Court referred mediation as per section 89A of Code of Civil Procedure is not working properly due to not having any statutory mediation center to perform and monitor total mediation mechanisms across the country. Trial courts are overburdened with thousands of cases. Hence operating mediation sessions by trial

judges themselves become impossible. 64 District Legal Aid Officers are also entrusted with the functions of mediation. This is the only officer in a district mediating disputes of cases referred from different civil courts. But being busy with various administrative duties, applying judicious mind during meditation sessions has become a hardship for him. Mediation is a culture and its growth and development depends upon some indicators such as institutional approach of mediation, research to develop mediation technique, training and monitoring to develop quality of mediation, faith of litigants, assistance from lawyers etc. An approach regarding institutionalizing mediation can help to develop a smooth and healthy mediation cultural revolution in Bangladesh as is taken in different countries of the world.

## 5. Rationales of Establishing Mediation Centers under an Exhaustive Legal Framework

If we go through the legal systems of the USA, UK, Canada and India, we will see that those countries have adopted an institutional approach for smooth functioning of ADR under their own legal framework. So far as court based alternative dispute resolution is concern in UK we see the ADR scheme known as the Court of Appeal Mediation Scheme (CAMS) established in 1996 which is administered by the Center for Effective Dispute Resolution (CEDR). Even the courts have the widest possible discretion to award costs (cost sanctions) against a party who has failed to comply with the directions of the court regarding ADR[9]. In 1998 the US Congress passed the ADR Act where there is unique system called the ADR Multi- Option program administered by all district courts to provide litigants in all civil cases with at least one ADR process[10]. The Local Rules for Alternative Dispute Resolution in the United States District Court for the Northern area. The District of California laid down the Jurisdiction in ADR cases[11]. The court adopts these ADR Local Rules to make available to litigants a broad range of court-sponsored ADR processes to provide quicker, less expensive and potentially more satisfying alternatives to continuing litigation without impairing the quality of justice or the right to trial. In Canada court based ADR is adopted to run through separate ADR

9 Available at www.cand.uscourts.gov, last assessed on 25 February 2015.
10 ibid.
11 Available at www.cand.uscourts .gov, last accessed on 20 February 2015.

divisions or ADR centers of the court. In India different forms of ADR such as mediation, conciliation, arbitration, Lok Adalats etc. are being exercised by the court itself[12].

But in Bangladesh except the Legal Aid Services Act, 2000, there is no legislation providing the provision statutory body or office to be entrusted with the holy duty of mediation. It is pertinent to mention here under section 21A of the Legal Aid Services Act, 2000 the District Legal Aid Officer (DLAO) is entrusted with the holy job to arrange a mediation session with the litigants of a suit referred from the trial court. No other substantive or procedural law provides for mediation centers. There is no office for management of mediation. Even section 89A of the Code of Civil Procedure 1908 does not have provision of mediation authority to execute mediation, arbitration or conciliation sessions as the developed countries like the UK, USA, Australia and Canada have under their ADR related legislative framework. Besides, there is no superior authority to monitor and supervise mediation activities of mediators. We see provisions of mediation are present in the Act but mechanisms for the executive body to perform dispute settlement work and their monitoring authority is absent in the Act.

So, what is lacking? An exhaustive legal framework containing provisions of office of district dispute settlement officer or mediation officer, office of superior authority, directorate of mediation to provide logistics to district dispute settlement office, arranging training for officer and staffs, monitoring and supervising mechanisms, procedural aspects of ADR, finding out new techniques of dispute settlement though research is lacking. Besides, a procedural enactment for ADR, namely the Code of ADR Procedure is needed to be enacted to guide the mediator, judge or mediation officer. Settling disputes through alternative dispute resolution is not only a service but also ensures easy access to justice for all people of the country. With a view to providing people with the service of mediation

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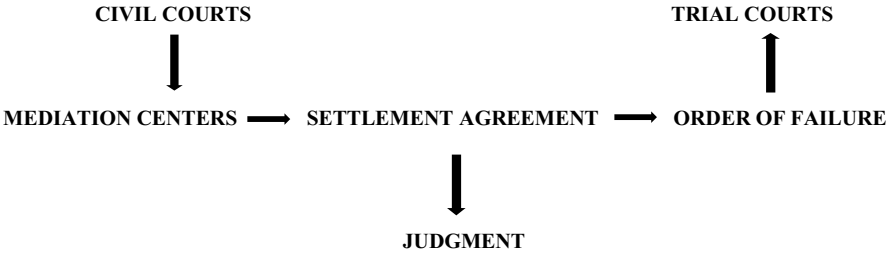
12 Dutta, A, Origin of Alternative Dispute Resolution System in India, p. 12

at the grass-root level following institutional approach could be taken by the Government of Bangladesh.



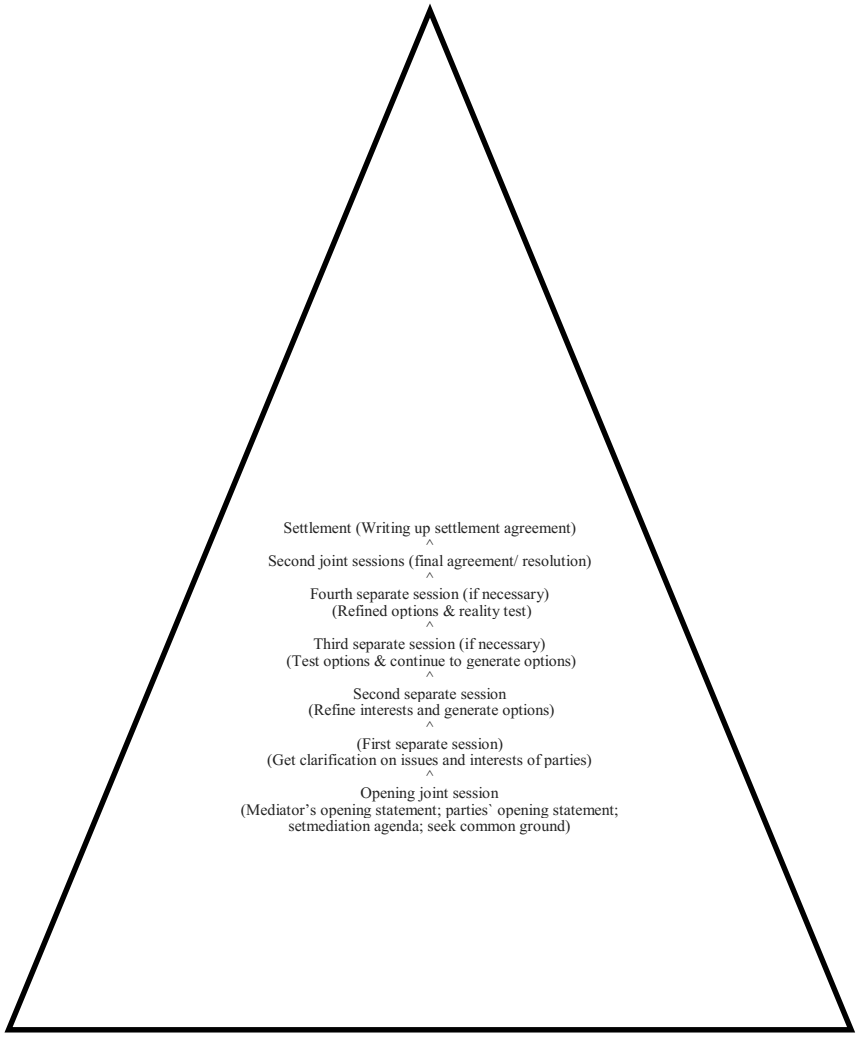

**Mediation Cycle of Court Sponsored Mediation**

So institutionalizing ADR mechanisms in the adjudication system of Bangladesh is a demand of time. In this situation research work is necessary on- "how the statutory compulsory mandated court-annexed Alternative Dispute Resolution system can be institutionalized and to find out the ways that make the system effective".

## 6. Rationales of Formulating Alternative Dispute Resolution Procedure

In adjudication of the civil justice system of Bangladesh the civil courts are guided by substantive and procedural laws. The Code of Civil Procedure 1908 provides for the procedure as to how the civil courts will run. It indicates the guidelines for judges, civil practitioners, litigants, teachers and students as to how a civil dispute can be adjudicated before civil court. Also at the same time, the criminal courts are guided by the Code of Criminal Procedure 1898. Apart from formal adjudication system alternative dispute resolution (ADR) is also a process where disputes are settled amicably bringing the litigating parties in a same round table and hearing matters of dispute both joint and individual sessions and finding out best alternative options for them. If they succeed to come to a consensus or concordance, the settlement conditions are reduced into writing. It makes a form of agreement between or among the litigants. Litigating parties, witnesses and mediators put their signature on mutually agreed agreements. Then comes the compliance aspect of agreement. The mentioned procedural formalities are followed by the District Legal Aid Officer (DLAO) while working as mediator or alternative dispute

settlement officer. As there is no procedural law for ADR, procedural formalities are followed in a scattered manner by the mediators. So for smooth functioning of ADR and bringing uniformity among mediation works of mediators, formulation of an exhaustive alternative dispute resolution procedure is urgent in Bangladesh. Presently the district legal aid officers are following the below mentioned mediation process in mediating disputes in both pre-case and post-case mediation.




**Mostly followed Mediation Process pyramid**

## 7. Writing Up Settlement Agreement

Mediation, negotiation, arbitration, conciliation, mini-trials etc are different modes of alternative dispute resolution. There are no hard and fast rules of procedure to be followed by a mediator or arbitrator in arranging dispute settlement sessions. Generally mediators in Bangladesh arrange private caucus and joint sessions for dispute settlement. If parties successfully come to a concordance the terms of settlement are reduced into writing. Both parties' witnesses and mediators put their signature on the settlement document. As soon as a settlement agreement is executed, the parties are under an obligation of complying with the terms and conditions to it. Settlement agreement is a piece of evidence and enforceable as a court order.

## 8. Objectives and Justification for Establishing Mediation Office

"Right to fair trial" and "access to justice" have been recognized as an inalienable right in both domestic and international Instruments. The right to access to justice has been emphasized in different articles of the Constitution of Bangladesh which is the supreme law of the land[13]. Even access to justice is one of the Sustainable Development Goals (SDG) that the Government of Bangladesh has mandated to achieve for all its citizens within 2030. But because of huge backlog of cases, inadequate number of judges in terms of pending cases, exorbitant costs of litigations owing to long delay and formalities, unequal standing of the litigants in terms of money and literacy amongst others, the formal adjudication system all over the world including Bangladesh has miserably failed to ensure speedy disposal of cases resulting in less access to justice. It is also evident that the development of the ADR system is not a recent phenomenon in this subcontinent. With a view to providing people with quick inexpensive justice, legislators of Bangladesh have felt the urgency for incorporation of ADR programs in the civil adjudication system. The amending provisions of CPC makes a mandatory requirement for civil court to refer to every civil suit for mediation. But this mandate is not followed rather by- passed. So with a view to obtaining maximum benefit from ADR a separate well

[13] Articles 7, 11, 26, 27, 31 and 44 of the Constitution of People's Republic of Bangladesh indicate about "access to justice".

organized forum (mediator judge, mediation center, office room, skilled office staff) is needed to be established. In every district headquarter there shall be an office of District mediation Officer. A number of Upazila dispute resolution officers or circle officers will work under District Alternative Dispute Officer. Under the ministry of law, justice and parliamentary affairs a directorate of ADR will monitor and supervise total mediation practices in the country. There shall be a divisional office of mediation in every division to monitor and supervise the ADR activities in different districts.

## 9. Advantages of Establishing Mediation Centers at Alternative Dispute Resolution Office

An institutional approach regarding ADR may bring the following positive outcome to ease the adjudication System of Bangladesh that may help to upgrade the standard of justice delivery services of the Bangladesh judiciary. Mediation process as a mode of alternative dispute resolution helps the litigants to participate, to understand, to make a decision, to come into agreement. Even compliance with terms of settlement agreement also becomes easy for the litigants which reduces workload of the judiciary and brings harmony in the society. Some advantages of mediation are given below:

### 9.1 Easy Access to Justice for All

Courtyards under the present adjudication system of Bangladesh are mostly located at district headquarters. So distance location and costly transport hinder poor or low income people from bringing their legal rights/ actionable claims before court resulting in rightful claims remedy less. It is true that access to justice for all people is not easy. Right to access to justice has been recognized as one of the Sustainable Development Goals (SDG) and the Government of Bangladesh has taken the mandate to obtain this goal within 2030. If the Government establishes the Upazila Dispute Settlement Office empowering judicial powers, easy access to justice for all people will be ensured. The Government of Bangladesh will be able to achieve the mentioned Sustainable Development Goal (SDG) perfectly.

### 9.2 Filtration of Cases/Suits before Institution in Court

Central filing system of cases is not working. Besides there is a method of filtration of cases as to its maintainability. So meritless suits and vexatious cases are being filed before court resulting in huge backlogs of cases. Upazila level Alternative Dispute Settlement Office will entertain disputes at primary level and most of the disputes will be addressed and settled there. A very few unsuccessful attempts will come before court for adjudication.

### 9.3 Direct Participation of Parties in Dispute Settlement

Apart from the formal adversarial system, alternative dispute resolution system is totally an informal dispute settlement system. Parties to the disputes directly appear before alternative dispute settlement officers and present documents or necessary evidence. In the whole dispute settlement process parties are directly involved and in the absence of advocate total control on the mediation process remains in the hands of parties. Besides from the discussion on legal opinion about disputes parties understand the merits of disputes as a result no middleman can falsely misguide the parties.

### 9.4 Evaluation of the Case

In the mediation system parties will settle their dispute before an alternative dispute resolution officer. Parties usually present their relevant papers and documents before the alternative dispute resolution office for evaluation. It helps the parties to find out whether they have a weak or strong case. Normally the weaker party will try to settle the dispute mutually, without going to court. It increases the chances of settlement outside of the courtroom.

### 9.5 Decentralization of Adjudication System

If we look present court structure of lower judiciary we see except a few number of Upazila (Chowki) courts most of the civil courts and magistrate courts are situated at court building of District judge. This centralization of judiciary prevents the right of access to justice of poor people who live in far remote Upazila and Union level. Establishing Upazila mediation centers as mode of Alternative Dispute Resolution Office as a part of institutional approach of ADR will definitely decentralize the adjudication

system of Bangladesh that will ensure justice close to the door of general people resulting in easy access to justice for all.

### 9.6 High Abidance Leads to Better Social Harmony

In litigation one party loses and another party wins. It creates differences between the parties. In most cases litigants go for appeal or revision against court order. It costs much and disposal of suits does not remove hostility between the parties. But in the mediation system the parties choose their own remedy in an amicable manner which helps them to maintain their peaceful future relations. Therefore the rate of abidance to the decisions of ADR is higher.

### 9.7 Reduction of Backlog Cases and Reducing Workload of Judiciary

It is already an established fact that the courts are overburdened with a huge backlog of cases which results in a long delay in disposal as well[14]. Mediation mechanisms if properly utilized can help reduce the workload of the judiciary by expediting the pace of disposal and also by discouraging people to institute litigation. A settlement agreement generated from mutually agreed parties in the mediation process does not give rise to future dissatisfaction. Generally higher abidance of result of mediation decreases the chances of further litigations leaving the judiciary free from a huge workload. The court will be free from work load and will be able to deal with more serious issues.

### 9.8 No Middleman Ship Reduces Cost of Litigation

People resort to the court as a last resort to get redressed of their actionable claim and rights. In the formal adjudication system litigants are bound to hire and pay lawyers for consultation and for presenting an argument before court. Generally litigants have to bear lawyer fees, Mohrar fees, other middleman fees etc. Sometimes court staff demand for illegal charges in rendering official services. These fees and unusual charges create a huge burden on the shoulders of justice seekers. On the other hand dispute settlement through the Mediation system helps litigants save

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[14] For example, there are 2.3 million cases pending before the lower judiciary of Bangladesh as on 31 December 2012. See http://aechive. Thedailystar.net/ bete2/news/ backlog- of-cases/, last visited January 2015.

middleman fees and charges. An well organized mediation centers can help to establish a well mediation culture expediting mediation service.

## 10. Impediments and Problems of Mediation Mechanisms

- Absence of supervisory institutions to monitor functioning of mediation in the country;
- Concern exists around the enforceability of a mediation agreement;
- All parties must agree to a resolution as the result is not guaranteed;
- Success in mediation can be difficult if either party are withholding information;
- Mediation may not be appropriate if one of the parties required public disclosure;
- Utilizing the services of an unskilled mediator can contribute to an unproductive resolution;
- An unwillingness of one or both of the parties to cooperate can make the whole process waste of time, effort and money;
- No cheek and balance on mediator as there exists no institutional backup and setup of mediation center;
- During the mediation process either party can withdraw from proceeding at any time;
- There is the possibility that information may be given away to the other party during the mediation process that could benefit the other party;
- Not compulsorily referred for mediation from trial courts;
- Non-cooperation of advocates;
- Absence of penal consequences of parties in negligent use of mediation;
- Reluctance of advocates to act as mediator;
- Inactiveness of panel of mediators to act as mediator;
- Ignorance about refund of court fees;
- Influence of touts.

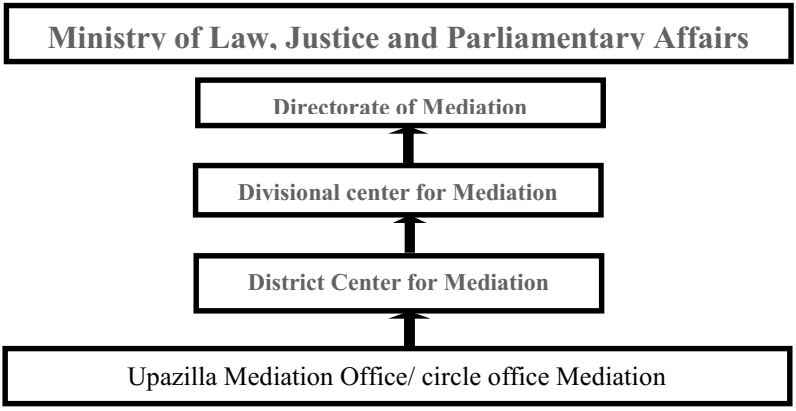
## 11. Recommendations to Make Mediation System Effective

From the introduction of mediation provisions in the Code of Civil Procedure through Amendment 2003, almost 20 years have elapsed. But

provisions of amendment could not reduce the backlog of cases as expected by the legislature. Current scenario of mediation practice in civil courts is not satisfactory. In order to make the mediation provisions in the CPC and some other special laws truly functional, some specific challenges need to be addressed immediately. In this connection I would like to put forward the following recommendations:

### 11.1 Establishing National Directorate for ADR

At present there is no institution to monitor and supervise the functioning of the entire ADR practice of the country. In the absence of a watchdog body the formal and the informal ADR forums have become ornamental leaving no contribution in the administration of justice in Bangladesh. So, a special directorate in the name of 'National Directorate for ADR' (NDA) under direct supervision of the Ministry of Law, Justice and Parliamentary Affairs is needed to be established which will be responsible for the functioning of ADR in the country. The Directorate will report about the functioning of ADR in the country before the ministry. It will conduct research, advise the Government on policy decisions regarding ADR, initiate awareness building programs. In order to facilitate the establishment of NDA a comprehensive law needs to be enacted specifying the organogram of the Directorate, its powers and functions, provisions for ensuring its accountability, budgetary allocation etc. Under the directorate there will be mediation centers as many as necessary in district level and Upazila level.




**Proposed Mediation Office Hierarchy**

### 11.2 Establishing Mediation Centers

With a view to ensuring people with the services of mediation and access to justice for all, the Government will have to establish mediation centers as much as possible so that people have availability and easy access to justice. People approach courts to have their disputes settled. Adjudication does not matter to them. They want an easy solution to their litigation. Formal adjudication has become lengthy due to inadequate number of judges and slow disposal rate of cases creates a huge backlog of cases. In these circumstances mediation centers can bring a breakthrough ensuring quick disposal of cases by pre-case and post-case mediation.

### 11.3 Adopting Institutional Setup for Mediation Centers

As the courts are situated in district headquarters there should have establishments of more than five mediation centers under a district mediation officer. A district judge will supervise and monitor the mediation activities undertaken by the subordinate mediation officers. A divisional office for mediation and a directorate for ADR will work to this effect under the Ministry of Law, Justice and Parliamentary Affairs. Institutionalizing mediation and establishing mediation centers require the Government patronization and policy making decisions.

### 11.4 Research for Development of Mediation Technique

Alternative dispute resolution is not a recent phenomenon in the field of adjudication. Mediation as a mode of alternative dispute resolution is getting more familiar and popular day by day. Development of everything needs research and finding out new ideas for the benefit of mankind. For the development of mediation technique and improvement of mediation culture in Bangladesh the Government can establish research centers under the Ministry of Law, Justice and Parliamentary Affairs. New innovation techniques regarding mediation are needed to be introduced to meet new challenges of the time. A research center will run for this purpose under the Directorate of ADR to develop new techniques for mediation in different types of cases.

### 11.5 Institutionalizing the Effort of District Legal Aid Officer in both Pre-case and Post-case Mediation

The Senior Assistant Judges are being posted as District Legal Aid Officers on deputation under the National Legal Aid Services

Organization. Generally DLAOs have both experiences of civil and criminal adjudication. Empowering DLAOs with the power of mediation in pre-case and post-case mediation is working as a double sword blade for reduction of backlog of cases. In this connection my suggestion is that the Government can take an institutional approach appointing more than four Legal Aid Officers under the DLAOs.

### 11.6 Aggregation of Formal and Informal Mediation Activities under District Mediation Officer

It is evident that mediation and local Salish are also settling disputes in a traditional way. Local representatives, village headmen, activists of civil society organizations are also settling local petty civil and criminal disputes and preparing settlement agreements. In this connection my suggestion is that all mediation and Salish will be done with the intimation form District Mediation Officer. That means all kinds of meditations will be centering the District Mediation Officer. In that case the DMO office will have record as mediation has been attempted. The DMO will be able to give certificates to this effect. It will help the Government to legislate regarding mandatory mediation certification for certain types of petty civil and criminal cases before their presentation in court. It will reduce the backlog of cases conveniently.

### 11.7 Development of Separate Code of ADR

Separate ADR Code may be prepared with all different rules and regulations that are required to run ADR. For example, as is done in Australia, the National Alternative Dispute Resolution Advisory Committee (NADRAC) sets many standard rules, which are applicable to all kinds of ADR, the required expertise and training for practitioners, what practitioners should or should not do while practicing different basic forms of ADR, duties and responsibilities of parties and practitioners (NADRAC 2007). A clear definition of such rules and regulations would help to standardize the process and allow disputants to make an informed choice between what they may or may not expect by exercising ADR. Such kind of clear knowledge on rights and duties on different ADR processes is important for the parties before making a comparison between ADR and the trial process.

## 11.8 Development of Mediation Curriculum and Training

It is true that still no sufficient training and educational curriculum is developed for the promotion of mediation practices in Bangladesh. Therefore, it is necessary to include ADR in the educational curriculum so that people can be more familiar with the practice of mediation and how practice of ADR may affect their life. Training programs on mediation for lawyers is also very important to make them more capable to convince themselves and also the parties on why they should resolve their cases through mediation first. Further, training of judges, especially judges of family courts and judges of civil courts can also enhance their capability to resolve the cases more effectively through mediation when they have sufficient theoretical knowledge in this field.

## 11.9 Awareness Building among Litigants, Court Employees, Lawyers and Judges

In the domain of the formal adjudication system, mediation is taking its space as a parallel dispute settlement forum. Lack of knowledge about the benefits of mediation and lack of publicity of advantages of mediation are also a great impediment in the development of mediation culture in Bangladesh. So, in order to raise the level of awareness of litigants, court employees, lawyers and judges about the novelty of mediation a massive awareness building programme should be launched, which may include the following:

a. Mass media like radio, TV, newspaper and periodicals should be utilized for disseminating the concepts and advantages of mediation to the grass root level.
b. Judges, advocates, local leaders, NGO officials and members of civil society organizations are to be brought under the umbrella of the National Directorate on ADR which will do everything to make the concept of ADR to the masses.
c. The National Directorate on ADR will arrange country wide awareness building programs like seminars, symposiums and workshops.

## 11.10 Arranging Training and Sensitization Meeting among Court Staffs, Lawyers, Judges, Local Leaders and Mediators

One of the important matters is to arrange training and sensitization meetings among the court staff, lawyers, local leaders, judges and

mediators. To have success in ADR, it is a prerequisite to have a pool of well experienced and trained mediators. The mediators should be oriented with necessary legal and technical knowledge related to mediation. Specialized training in mediation should be provided to the mediators on a regular basis. The mediators should be given training on behavioral management, the technique of achieving efficiency with the changing trends of the society, legal system of the country, the land management of the country. Besides, to get assistance from court staff, lawyers, judges and local leaders in mediation programmes all these stakeholders should be sensitized about the knowledge and advantages of mediation throughout the country.

### 11.11 Appointing a Judge for Mediation

I have mentioned above that there are two modes of court sponsored mediation in Bangladesh. One is court sponsored mediation undertaken by a judge and another is court sponsored mediation undertaken by a private person. From my point of view, mediators should be appointed by judges because they have experience in adjudication of cases. They have both judicial and administrative knowledge. Besides, when a judge sits as a mediator the mutually settled agreement coming out of his order has positive and persuasive value among the litigants.

### 11.12 Ensuring Advocates' Participation

As a District Legal Aid Officer I have one year experience to work as a mediator. It is seen that the advocates sometimes play a negative role in the way of the ADR process. At times, advocates show their reluctance to go for mediation process on the apprehension that if cases are settled through mediation, it may reduce their income level. As a result, despite the provision of mandatory referral of mediation under the CPC, the success rate of resolution through ADR is not satisfactory. Therefore, to make the mediation functional in Bangladesh, following measures are to be taken to increase the involvement of the advocates with the ADR system:

1. The parties should pay reasonable fees to the mediators before or at the earlier stage of mediation. There should be a standard criteria for fixing fees of the mediators setting out a minimum amount to be paid in every case.

2. The Government should provide the advocates with some incentives for every successful disposal of a case through mediation. Local bar associations may declare some monetary reward and token awards for the lawyers who have shown efficiency and facilitation in mediation.
3. The advocates who are successful in disposing cases through mediation proceedings should be given social recognition and national awards. If necessary these advocates should be facilitated with more intensive training in home and abroad.

## 12. Conclusion

Mediation as a mode of alternative dispute resolution technique has become popular among the people of all ages throughout the world in modern days. With the development of modern human civilization people realized that the long established justice dispensation system through formal institutions like courts or tribunals become unreasonably formalistic, time consuming, complex, cumbersome and hence, costly in terms of money, and causing physical and mental sufferings. It is pertinent to mention here if people do not get desired justice from the judiciary they will select alternative avenues to get justice. So, the judiciary should come up with alternative dispute resolution techniques for litigants. People tried to find solutions to long practiced informal dispute resolution techniques. Soon ADR technique gained statutory recognition everywhere in the world including Bangladesh. In spite of getting statutory recognition in 2003 mediation techniques in civil courts in Bangladesh virtually failed to bring about any remarkable change in reducing the backlog of cases. At present, the institution of ADR is dysfunctional. A well established infrastructure institution based district mediation centers and Upazila mediation centers having its monitoring body is needed to set up in order to reap the maximum benefits out of the mediation tools. The sooner we will be able to establish such strong mediation centers the better situation will be noticed positive change in the administration of justice in Bangladesh.

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# Women's Empowerment and Marriage Registration in Bangladesh: A Critical Appraisal of Existing Laws and Practices

Murad Jahan Chowdhury*

**Abstract**

Women's empowerment is universally acknowledged to be a part and parcel of all kinds of development for a nation, including sustainable development goals. In Bangladesh, it substantially relies on the enforcement of women rights generating from marriage since most of the women lead their lives unemployed after wedlock, while documentary proof of marriage plays a significant role to establish such rights. Marriage registration is considered to be the best suited strategy of yielding a legal document to that effect. But, loads of marriages are still not being registered in Bangladesh and the women are facing extreme hardships on account of lack of document to establish their rights, for illustration right to maintenance, dower, and inheritance over deceased husband's property. Hence, women's empowerment falters in Bangladesh. This article has investigated the background of registration of marriages, legislations with regard to registering a marriage, correlation of such registration with sustainable development goals, and factors behind such non-registration. It has also proposed the ways out of the present situation to boost marriage registration, which will supplement women's empowerment in Bangladesh and deliberately evaded suggesting any radical change to the existing stipulations, such as, uniform civil code.

**Keywords:** Marriage, Personal Laws, Marriage Registration, Marriage Registrar, Women's Empowerment, Nikahnama.

## 1. Introduction

Marriage is a legal relationship between two individuals who are married to each other[1], which is generally solemnized in accordance with the

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1 see Oxford Learners Dictionary https://www.oxfordlearnersdictionaries.com/definition/english/marriage#:~:text=%5Bcountable%5D%20the%20legal%20relationship%20between,are%20married%20to%20each%20other accessed on 24 December 2022

personal laws[2] of the parties. On the other hand, marriage registration[3] is a secular concept rendering a documentary proof to that relationship. There is no unique normative structure of registration for marriages under different personal laws in Bangladesh, although marriage has always been one of the most vital and universal events throughout the nation.

Marriage has naturally its footprint on both of the parties, but women are generally disproportionately impacted by a greater magnitude since most of the women in Bangladesh stay at home as house-wife after marriage.[4] Accordingly, women's empowerment is massively influenced by the availability of their rights during that period. Against this backdrop, marriage registration is globally deemed to be an effective tool for women's empowerment because it yields legal proof to protect women's rights originating from the wedlock. To promote universal respect, human rights and fundamental freedom arising out of marriage, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages[5] explicitly provided that,

> All marriages shall be registered in an appropriate official register by the competent authority.[6]

In spite of being so crucial, marriage registration has not yet been made compulsory for all kinds of marriages in Bangladesh, though Bangladesh is a party to this Convention[7]. As a consequence, marriages are being left out of the periphery of registration owing to multifarious reasons including legal, social, cultural, economic, and religious grounds. Besides, there is

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2 Personal laws are the laws applicable to a particular person(s). It is generally based on religious belief in Bangladesh.

3 Marriage registration is the process of registering a marriage as per the concerned legal provisions.

4 Huda, Dr. Shahnaz, 'Marriage and Divorce Registration in Bangladesh', p. 4, <https:// pdf.usaid.gov/pdf_docs/pnace153.pdf > accessed on 17 December 2022.

5 It was adopted on 07 November 1962 by UN General Assembly Resolution 1763 A (XVII).

6 The Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages 1962, art. 3.

7 Bangladesh ratified it on 5 October 1998<https://treaties.un.org/ pages/ ViewDetails. aspx?src=IND&mtdsg_no=XVI-3&chapter=16&clang=_en > accessed on 19 December 2022.

no codified legislation for registering marriages solemnized following a faith other than Islam, Hinduism, and Christianity. Whatever the hindrances bring about the failure to register a marriage, women and girls, almost in all cases, disproportionately face the downfalls of non-registration of marriages and divorces.[8] Women have to go through enormous hardships to establish their rights in many spheres of life in absence of legal proof of marriage, for example, a claim for maintenance, inheritance to deceased husband's property, and children's custody etc. Even in many instances, they simply fail to prove these rights. Accordingly, women's empowerment is being severely hit by the non-registration of marriages. If the impediments deterring marriage registration can be mitigated, this mechanism will effectively bolster women's empowerment as well as achieve sustainable development goals (SDGs), particularly goal number 5.[9]

## 2. Evolution of Marriage Registration in Bangladesh

Marriages had been traditionally conducted in accordance with customs and personal laws of the parties for ages and had stayed unregistered in Bangladesh before the enactments regarding marriages were introduced by the erstwhile colonial ruler during the 19th century[10]. The evolution of stipulations concerning marriage registration can be illustrated as below:

### 2.1 British Period

The earliest legislation yielding provisions for marriage registration was the Special Marriage Act, 1872[11], which provided provisions for registering marriages between persons from different religions. In the same year, the Christian Marriage Act, 1872[12] was enacted for regulating Christian marriages. But, these two statutes only covered a scanty number of marriages since the population formalizing those marriages was meager and absence of any legislation regulating marriages of the vast majority of Muslim and Hindu people. The Bengal Mohammadan Marriages and

8 Huda, P. 4.

9 SDG 5 is achieving gender equality and empowering all women and girls.

10 Gandhi, Abdul Hafiz, 'Compulsory registration of marriage from legal perspectives: The Indian Context' <https://archive.thedailystar.net/law/2007/12/04/analysis.htm> accessed on 17 December 2022

11 Act No. III of 1872, Bangladesh Code, Volume II

12 Act No. XV of 1872, Bangladesh Code, Volume II

Divorces Registration Act, 1876[13] was the ever-first stipulation to facilitate the registration of Muslim marriages, while registration of marriages and divorces was made voluntary. On the other hand, no statute for registering Hindu marriages was enacted in that period.

**2.2 Pakistan Period**

The Muslim Family Laws Ordinance, 1961[14] was promulgated on the recommendation of the Family Laws Commission[15], whose purpose was to protect and enhance Muslim women's rights when registration for all Muslim marriages was made compulsory for the first time. But, the ordinance lacked provision for the registration of divorces. Again, Hindu marriages were left out of the legal framework since there was no development of statutes as to Hindu marriage registration.

**2.3 Bangladesh period**

The Muslim Marriages and Divorces (Registration) Act, 1974[16] was the first statute relating to marriage after Bangladesh had become an independent nation in 1971. This statute rendered provisions for Muslim marriages as well as divorce registration, wherein marriage registration remained mandatory and divorce registration was made voluntary. The Muslim Marriages and Divorces (Registration) Rules, 1975 was made by the Government exercising the authority under section 14 of this Act. Later, the Muslim Marriages and Divorces (Registration) Rules, 2009[17] was made by the Government repealing the previous one of 1975 and it is in existence today.

The Hindu Marriages Registration Act, 2012[18] is the first of its kind in the history of Bangladesh providing provisions for registering Hindu marriages. Registration of Hindu marriages is left at the will of the parties to a marriage under this law. The Government made the Hindu Marriages

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13 Bengal Act No. I of 1876

14 Ordinance No. VIII of 1961, Bangladesh Code, Volume XII

15 "Report of the Commission on Marriages and Family Laws" , The Gazette of Pakistan, Extraordinary, Karachi, 20 June 1956, 1197

16 Act No. LII of 1974, Bangladesh Code, Volume XIX

17 It was made in Bangla and came into force on 10 August 2009

18 Act No. XL of 2012 and it was passed in Bangla

Registration Rules, 2013[19] by dint of the power under section 15 of the Act of 2012 which is currently in force.

## 3. Marriage Registration Laws in Bangladesh

Concept of marriage registration is not an ancient one in the subcontinent, including Bangladesh. There had been no codified regulations concerning the registration of marriages before the enactments were made by the then-colonial power in the 19th century. Ceremonies of marriages are usually dominated by the parties' religion, custom, and usage and marriage is normally solemnized observing the personal laws of the parties in Bangladesh. Moreover, there is no uniform law concerning the registration of all marriages irrespective of personal laws, though registration of marriages is entirely a secular issue and ruled by the provisions of laws enacted by the legislature. As almost 98% of the population hails from Muslim (91.04%) and Hindu (7.95%) communities[20], provisions regarding the registration of marriages of Muslims and Hindus have been mostly demonstrated here. Existing marriage registration provisions and practices are, in a nutshell, explained below:

### 3.1 Provisions Pertaining to the Registration of Muslim Marriages

At present, the Muslim Marriages and Divorces (Registration) Act, 1974 along with the Muslim Marriages and Divorces (Registration) Rules, 2009 regulates the arena of Muslim marriage and divorce registration. This stipulation is the mother statute in Bangladesh with regard to registration and divorces of Muslim marriages which came into force on 24th July 1974 repealing the Muslim Marriages and Divorces Registration Act, 1876 (Bengal Act No. I of 1876)[21]. This act also amended the concerned marriage registration provisions contained in sections 3, 5 and 6 of the Muslim Family Laws Ordinance, 1961 by way of omissions and substitutions.[22] The Muslim Marriages and Divorces (Registration) Rules, 2009 came into effect on 10 August 2009 and repealed the Muslim

19 It came into force on 27 January 2013

20 Bangladesh Bureau of Statistics (BBS), 'Population and Housing Census 2022', p. 16 < https://drive.google.com/file/d/1Vhn2t_PbEzo5-NDGBeoFJq4XCoSzOVKg/view> accessed on 18 December 2022

21 Muslim Marriages and Divorces (Registration) Act 1974, s 16

22 Muslim Marriages and Divorces (Registration) Act 1974, s 15

Marriages and Divorces (Registration) Rules, 1974.[23] Example of the Act and the Rules in a brief is as follows:

### 3.1.1 The Muslim Marriages and Divorces (Registration) Act, 1974

This legislation applies to all Muslim citizens of Bangladesh wherever they are[24] and requires that all Muslim marriages must be registered irrespective of custom or usage[25]. It provides punishments for non-compliance which may extend to 2 years of imprisonment or to three thousand taka or both[26]. The Government is empowered to grant licenses for marriage registration to Nikah Registrars (Marriage Registrars)[27], but not more than one license for an area defined under Rule no. 13 of the Muslim Marriages and Divorces (Registration) Rules, 2009 and to extend, curtail or otherwise alter the territory of an area.[28] Previously, Nikah Registrars licenses would be issued under the Muslim Family Laws Ordinance, 1961 and the licenses granted under this statute were deemed to have been granted under the existing provisions.[29] If a Marriage Registrar formalizes a marriage, he is ordained to instantly register it and his failure to do so is a violation and the same is punishable.[30] The government is also authorized to revoke or suspend a Marriage Registry License on the ground of misconduct, unfit or physically incapable to discharge the duties upon providing a reasonable opportunity of showing cause.[31]

### 3.1.2 The Muslim Marriages and Divorces (Registration) Rules, 2009

This Rules renders detailed procedures for the appointment of Nikah Registrars[32]. Under the Rules, an applicant who wants to obtain a licence must be from 21 to 45 years old, a resident of the concerned area, and

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23 Muslim Marriages and Divorces (Registration) Rules 2009, r 41
24 Muslim Marriages and Divorces (Registration) Act 1974, s 1
25 Muslim Marriages and Divorces (Registration) Act 1974, s 3
26 Muslim Marriages and Divorces (Registration) Act 1974, s 5
27 Nikah Registrar are the marriage registrars licensed under Muslim Marriages and Divorces (Registration) Rules 2009
28 Muslim Marriages and Divorces (Registration) Act 1974, s 4
29 Muslim Marriages and Divorces (Registration) Act 1974, s 17
30 Muslim Marriages and Divorces (Registration) Act 1974, s 5
31 Muslim Marriages and Divorces (Registration) Act 1974, s 11
32 Muslim Marriages and Divorces (Registration) Rules 2009, r 6

holding an Alim certificate[33] and the validity of a license lasts until the Nikah Registrar reaches the age of 67.[34] Before registering a marriage, the Nikah Registrar is to be satisfied that a marriage has been solemnized.[35] This Rules specifies the fees for registration of marriages which vary according to the amount of dower money.[36] A Muslim marriage is to be registered by a Nikah Registrar within whose jurisdiction the marriage takes place.[37] The Nikah Registrar must not register a child marriage and be ensured about it based on the documents bearing proof of age.[38] The Nikah Registrars are required to maintain the prescribed registers, catalogues, and index books.[39] The schedule to the Rules provides 10 stipulated forms for different purposes, for example, Nikahnama, Divorce Registration, and Receipt for fee payment. The Government is authorized to revoke, and suspend a license on the grounds elucidated in section 15 of the Act upon serving a show cause notice of 15 days.[40]

### 3.2 Provisions Pertaining to the Registration of Hindu Marriages

The Hindu Marriages Registration Act, 2012[41] is the first-ever statute with regard to registering Hindu marriages in Bangladesh which was given effect on 27 January 2013[42].

The Hindu Marriages Registration Rules, 2013 made by the Government came into operation on the same date. These two stipulations govern Hindu marriage registration in Bangladesh. A precise demonstration of the Act and the Rules is as below:

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33 Muslim Marriages and Divorces (Registration) Rules 2009, r 8

34 Muslim Marriages and Divorces (Registration) Rules 2009, r 12

35 Muslim Marriages and Divorces (Registration) Rules 2009, r 22

36 Muslim Marriages and Divorces (Registration) Rules 2009, r 21

37 Muslim Marriages and Divorces (Registration) Rules 2009, r 25

38 Muslim Marriages and Divorces (Registration) Rules 2009, r 23A

39 Muslim Marriages and Divorces (Registration) Rules 2009, r 27

40 Muslim Marriages and Divorces (Registration) Rules 2009, r 11

41 Act No. 40 of 2012, <http://bdlaws.minlaw.gov.bd/act-1105.html> accessed on 13 December 2022

42 Statutory Rules and Orders (SRO) No. 30-Law/2013, 27 January 2013, <http://bdlaws.minlaw.gov.bd/act-details-1105.html > accessed on 13 December 2022

### 3.2.1The Hindu Marriages Registration Act, 2012

The explicit motivation of this Act is to safeguard documentary evidence of Hindu customary marriages.[43]

This enactment is applicable to all Hindu persons residing in Bangladesh irrespective of their citizenship.[44] Registration of marriages is not mandatory under this stipulation and the validity of Hindu marriages is not subject to registration.[45] The Government may grant a license for marriage registration to a person for a territory determined under Rule No. 10 of the Hindu Marriages Registration Rules, 2013.

The government may revoke or suspend a Marriage Registry License on the ground of misconduct, unfit or physically incapable to perform the prescribed functions upon providing a reasonable opportunity of showing cause.[46]

### 3.2.2 The Hindu Marriages Registration Rules, 2013

It contains extensive provisions regarding the appointment of Marriage Registrars[47], while a person to be licensed must be from 25 to 50 years old, a resident of concerned area, follower of the Sanatan Religion, and holding Higher Secondary Certificate (HSC)[48]. A license is valid until the Marriage Registrar's age is 67-year-old.[49] A marriage can only be registered by the Marriage Registrar upon being satisfied with regard to the solemnization of Hindu marriage and on an application submitted by both of the bride and bridegroom.[50] The fee for marriage registration is 1,000/- (one thousand) taka and a certified copy fee is 100/- (one hundred) taka.[51] A Hindu marriage can only be registered by a marriage Registrar within whose area the marriage takes place.[52] Marriage Registrars are required to duly preserve the prescribed registers, catalogues, and index

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43 Preamble to Hindu Marriages Registration Act 2012
44 Hindu Marriages Registration Act 2012, s 1
45 Hindu Marriages Registration Act 2012, s 3
46 Hindu Marriages Registration Act 2012, s 14
47 Hindu Marriages Registration Rules 2013, r 3
48 Hindu Marriages Registration Rules 2013, r 5
49 Hindu Marriages Registration Rules 2013, r 9
50 Hindu Marriages Registration Rules 2013, r 18
51 Hindu Marriages Registration Rules 2013, r 17
52 Hindu Marriages Registration Rules 2013, r 21

books.[53] It bears a schedule which contains 7 types of forms for respective usages, for instance, Marriage Registration, and Receipt for fee payment. The Government may revoke, and suspend a license on the grounds elucidated in section 14 of the Act upon serving a show cause notice of 15 days.[54]

### 3.3 Provisions Pertaining to the Registration of Christian Marriages

The Christian Marriage Act, 1872 is the enactment, which regulates Christian marriages throughout Bangladesh[55]. The Government may appoint one or more Christian Marriage Registrars in a particular district.[56] Registration of marriages is obligatory under this legislation.[57]

### 3.4 Provisions Pertaining to the Registration of Special Marriages

The Special Marriage Act, 1872 came into force to provide a form of marriage for the persons not professing Christian, Jewish, Hindu, Muslim, Parsi, Buddhists, Sikh or Jaina religion, and for the persons professing the Hindu, Buddhists, Sikh or Jaina religion as well as to validate the marriages the legality of which is ambiguous.[58] If neither of the persons admits to any of the above religions, their marriage can also be registered under this Act.[59] The Government is empowered to grant a license to one or more Registrars for any part of the territory subject to its administration and such Registers are termed as Registrar of Marriages.[60] Special marriages must be solemnized in presence of the Registrar of Marriages, three witnesses and registered.[61] The fee for registration of Special Marriages is not specified in the Act, but the Government is to ascertain it.[62] Generally, the maximum amount is 5000/- (five thousand) taka.[63]

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53 Hindu Marriages Registration Rules 2013, r 22
54 Hindu Marriages Registration Rules 2013, r 8
55 Christian Marriage Act 1872, s 1
56 Christian Marriage Act 1872, s 7
57 Christian Marriage Act 1872, s 27
58 Preamble to the Special Marriage Act 1872
59 Special Marriage Act 1872, s 2
60 Special Marriage Act 1872, s 3
61 Special Marriage Act 1872, s 10
62 Special Marriage Act 1872, s 14
63 As per a Special Marriage Registry license granted on 31 May 2022 < http://old.lawjusticediv.gov.bd/static/go_section_seven.php> accessed on 19 December 2022

### 3.5 Other Marriages

There is no codified law for the registration of marriages other than above-named marriages in Bangladesh. For instance, Buddhists, Shikhs, and tribal people do not have any legislation to register their marriages[64]. Whenever there is a marriage, the parties have option to register it.

## 4. State of Women's Empowerment in Bangladesh

Empowerment is commonly understood to be a process combination of different social, economic, religious, and political factors which ameliorate individuals' choice-making capacity. In a more material sense, empowerment denotes the expansion of assets and capabilities to participate in, negotiate with, influence and control institutions that affect their lives.[65] It is the expansion in the abilities of individuals to make strategic life choices in a context in which this ability was previously denied.[66]

Bangladesh had aimed at empowering and ensuring the equal participation of women[67] in all arenas of the state since its birth in 1971. Accordingly, the Constitution bears provisions for gender equality and empowering women by removing all kinds of discrimination[68] as well as to materialize its commitment, Bangladesh has been a party to several international instruments regarding women's rights, for instance, Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)[69], and International Convention on the Elimination of All Forms of Racial Discrimination[70].

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64 Plan International, 'Marriage Registration: A Pathway to Protection and Empowerment', P. 40 https://www.plan.org.au/wp-content/uploads/2022/03/Marriage-Registration_Bangladesh_Final-Report.pdf Accessed on 20 December 2022

65 Narayan, Deepa, 'Empowerment and Poverty Reduction: A Sourcebook', World Bank, Washington, 2002, p.14

66 Kabeer, Naila, 'Gender Equality and Women's Empowerment : A Critical Analysis of the Third Millennium Development Goal', Gender and Development, Vol. 13, No.1, 2005, pp. 13-14

67 Constitution of the People's Republic of Bangladesh, art. 28.

68 Constitution of the People's Republic of Bangladesh, art. 29.

69 Bangladesh ratified it on 6 November 1984 <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=14&Lang=en> accessed on 18 December 2022

70 Bangladesh ratified it on 11 June 1979

Following the Constitutional mandate and pledge to the international instruments, Bangladesh has already taken initiatives to protect and promote women's rights, for example, the National Women Development Policy, 1997 and the National Plan of Action to implement National Women Development Policy. Apart from their traditional roles such as mother, daughter, and others, Bangladeshi women are working in various characters of a wide range of professions including judges, politicians, doctors, teachers, researchers, police, bureaucrats, high commissioners, journalists and international peacekeepers nowadays. According to the Global Gender Gap Report 2022, Bangladesh topped the South Asian nations in terms of gender parity for the consecutive 8th time.[71] Bangladesh has brought about substantial progress in the last 2 decades in flourishing the lives of women and girls, while gender equality and empowering women are part and parcel of achieving sustainable development goals.[72]

Despite all the progress and developments, the number of women working in different sectors is too minimal and serious obstacles before women's empowerment are in existence[73]. Consequently, women's empowerment remains heavily dependent on the implementation of their rights after marriage since most women stay at home at that time. As all the marriages are not registered, the women whose marriages are not registered have to pass their lives unprotected due to lack of proof of their marriages.

Moreover, Bangladesh is an epicenter of child marriage, while child marriage is universally deemed to be a severe threat to human rights and it deprives the victims of their liberties and future prospects. Girls are the primary victims of child marriage, where marriage registration can work

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71 As per Annual Report by the World Economic Forum (WEF) <https://www.weforum.org/reports/global-gender-gap-report-2022/?DAG=3&gclid=CjwKCAiA7vWcBhBUEiwAXieItkUK7bqYr6uSbaawqHgwDi15hd7Zep6QsAOugvbdUMzXRec3hsLQ-xoCbWcQAvD_BwE> accessed on 18 December 2022

72 Haque, Habibul for USAID, 'Gender Equality and Women's Empowerment'< https://www.usaid.gov/bangladesh/gender-equality-and-womens-empowerment> accessed on 28 December 2022

73 Adams, Nathaniel, 'Rligion and Women's Empowerment in Bangladesh', P. 1 https://berkleycenter.georgetown.edu/publications/religion-and-women-s-empowerment-in-bangladesh accessed on 25 December 2022

as legal protection against it[74]. Hence, it is one of the worst barriers to women's empowerment in Bangladesh. In addition, a higher rate of child marriage adversely impacts the country's economy.

Flaws in marriage registration framework are aggravating the situation and as a result, the process of empowering women stumbles down.

Ensuring registration of all marriages can protect and promote women's rights as well as stop child marriages which will drastically accelerate women's empowerment in Bangladesh.

## 5. Gravity of Marriage Registration for Women's Empowerment and Sustainable Development Goals

Sustainable Development Goals (SDGs) are the agenda adopted by the member states of the United Nations to fight against global challenges, for instance, inequality, climate change, and poverty, where the goals are 17 in number. Goal 5 is achieving gender equality and empowering all women and girls, which is a stand-alone goal and inextricably connected to all of the other 16 sustainable development goals.

All of these 17 goals have been destined to be achieved by 2030[75], while implementation of 16 other goals is virtually unattainable without materializing goal number 5 since a whopping number of women across the globe is at a substantially disadvantaged position in terms of gender parity and empowerment.[76] Rather, the vulnerability of women in Bangladesh is more acute as most of the women stay unemployed after marriage as this emerges as the most viable option for them thanks to

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74 Pryor, Emily Courey, 'How marriage registration data can boost gender equality', P. 2 https://www.devex.com/news/how-marriage-registration-data-can-boost-gender-equality-88568 accessed on 25 December 2022

75 United Nations, 'Transforming Our World: the 2030 Agenda for Sustainable Development',<https://sdgs.un.org/2030agenda#:~:text=We%20resolve%2C%20between%20now%20and,protection%20of%20the%20planet%20and> 20 December 2022

76 UN High Level Political Forum (HLPF) 2022, 'SDGs in Focus: SDG 5 and interlinkages with other SDGs-Gender equality' < https://hlpf.un.org/2022/programme/sdgs-in-focus-sdg-5-and-interlinkages-with-other-sdgs-gender-equality> accessed on 21 December 2022

religious, social, and economic perspectives of the country.[77] Bangladesh is also a hub of child marriages, which deprives a girl of her rights to education, reproductive health, and a profession, undermines her potential in future, causes human rights violation, and makes her a burden for the concerned family. Child marriage still prevails as the worst barrier to women's empowerment in Bangladesh.[78]

If the rights of women, for example, right to inheritance, maintenance, custody, and others can be protected and child marriage can be prevented, then the process of empowering women can only flourish. Against this backdrop, marriage registration is deemed to be an effective tool for safeguarding women's rights, restricting child marriage and fostering women's empowerment.[79] Accordingly, ensuring registration of all marriages ameliorates women's empowerment as well as enhances the effort of achieving sustainable development goals.

## 6. Lacunae in Normative Framework of Marriage Registration Undermining Women's Empowerment

Though the significance of marriage registration as a mechanism of fostering women's empowerment is universally recognized[80], all the marriages are not being registered on account of flaws in the existing registration structure and such lack of registration deprives women of rights. Added to that, current marriage registration framework is not producing the desired fruit in many cases even after the registration due to the prevailing cavities in the normative framework. As a consequence, women's empowerment suffers. The factors impairing women's empowerment are multifarious, which are categorically and summarily elucidated below:

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77 Huda, P. 5

78 Akter, Shahin, 'Child marriage major barrier to women's empowerment', <https://www.newagebd.net/article/164770/child-marriage-major-barrier-to-womens-empowerment> accessed on 21 December 2022

79 Irina Dinacu, Deirdre Appel, Shaida Badiee, 'Marriage and divorce certidficates: Tools for women's empoerment'< https://www.idrc.ca/en/perspectives/marriage-and-divorce-certificates-tools-womens-empowerment> accessed on 21 December 2022

80 Huda, P. 5

### 6.1 Ignorance over Marriage Registration

People are commonly not well aware of their rights in Bangladesh. Especially, a substantial portion of women and girls does not know the importance of marriage registration and this ignorance as to marriage registration is the most decisive factor in not registering marriages.

### 6.2 Inadequacy of Statutory Provisions

There is no codified statute for registering the marriages held by persons of Buddhists, Shikh, and tribal societies. The brides are unable to produce documentary and legal proof of their marriages and proving their rights related to marriage turns into a herculean task, when the marriage itself is in question.

### 6.3 Disproportionate Number of Marriage Registrars

Only one Marriage Registrar, for each type of marriage e.g. for Muslim marriages, is granted a license for a given area irrespective of its size and population density. As a consequence, in some cases, a marriage registrar cannot be available when his/her presence is required for registration due to the volume of work or territorial length. Consequently, many of those marriages remain unregistered.

### 6.4 Marriage Registrars are not Government Employees

Marriage Registrars do not feel safe regarding the certainty of livelihood and tenure of their license, since they are not government employees[81] and do not have a fixed earning. As a result, they get engaged in other income generating-activities, which renders their registration duty less prioritized and they do not give their best effort to register all the marriages.

### 6.5 No Marriage Certificate for Muslim and Hindu Marriages

No sample form or provisions with regard to Marriage Certificate is available in registration laws for both of Muslim and Hindu marriages. Such absence is creating problems for the women to prove their marriage on many occasions. For example, when they apply for a spouse visa, they have to submit a marriage certificate.

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[81] Muslim Marriages and Divorces (Registration) Rules 2009, r 29 and Plan International, P 41

### 6.6 Distance and Bad Communication

Distance from the place of marriage to the marriage registry office is far away and communication is difficult as well in a vast segment of Bangladesh and marriage registrars show disinterest to go to register those marriages owing to such long distance and bad communication. Therefore, a significant portion of marriages at remote area, including char land, and haor land cannot get registered.

### 6.7 High Amount of Registration Fee

The fee for registering a Muslim marriage is a relative issue, which depends on the amount of dower money and consequently, it might be an indefinite quantity. Generally, it is a high amount and a significant number of unregistered marriages is the output of such a hefty fee.

### 6.8 No Guidelines with regard to the Registration of Old Marriages

According to the provisions, a Muslim marriage must be registered at once, if it is solemnized by a Nikah Registrar and within 30 days, if it is formalized by a person other than a Nikah Registrar.[82] Legal provisions are silent over how to register an old unregistered marriage and this vacuum yields in keeping a massive amount of unregistered marriages out of the purview of the registration.

### 6.9 No Procedure to Cure Clerical Mistakes in Nikahnama

If any error, whatever the magnitude is, occurs at the time of registration, there is no mode provided in the existing stipulations to correct it later on without intervention of the Court. This airtight position of legislation brings loads of suffering upon the women to utilize the benefit of marriage registration.

### 6.10 No Provision regarding Registration of a Marriage between a Citizen and a Foreigner

None of the stipulations concerning marriage registration provides any specific procedure for registering a marriage between a Bangladeshi citizen and a foreigner. This ambiguity is keeping these types of marriages out of registration.

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82 Muslim Marriages and Divorces (Registration) Act 1974, s 5

### 6.11 Lack of Training of the Marriage Registrars

When a person is granted a marriage registry license under the existing law, that person is allowed to start registering marriages without any prior experience or training. Even after issuance of a license, there is no formal training for marriage registrars. As a result, a marriage registrar might stay ignorant of marriage registration laws, other related statutes, and practices, while such ignorance would cause massive wrongdoings, including registration of child marriage.

### 6.12 Prolonged Vacancy of Marriage Registrar

When there is any vacancy in an area, another adjacent marriage registrar is handed over the charge in addition to his/hers for a certain period[83]. In many cases, such vacancy runs for an indefinite period of time. Reasons behind such vacancy are multifarious including the absence of an existing committee, and pending cases relating to the appointment or territorial dispute etc. Thus, marriage registration functions are disrupted, even though the presence of such an adjacent registrar because that registrar is usually occupied in its own area. Consequently, many marriages cannot be registered in that vacant area.

### 6.13 Marriage Registrars are Ill-Equipped

At present, marriage registrars are not well equipped with the necessary tools to categorically check the age of the bride and the bride-groom at the time of registration. Rather, they have to rely on the documents, for instance, Birth Certificates, provided by the parties, when the authenticity of which cannot be examined by the marriage registrars since they do not have access to the server of those documents. As a result, registration of child marriage cannot be prevented, if the parties dodge the marriage registrars by producing fake documents of age.

### 6.14 No Regular Research by the Authority

There is no regular research on the number of marriages, ratio of registration and non-registration of marriages, reasons behind the non-registration and required steps to raise the percentage of registration. Even, there is no statistics on the exact number of marriages solemnized in a

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[83] As per Muslim Marriages and Divorces (Registration) Rules 2009, r 6(10), duration of such charge will be a period of not exceeding 120 days.

given year. That lack of research is contributing to the status quo of an inefficient registration system.

### 6.15 Payment of Fee by the Bride Side

According to the present provisions, payment for marriage registration must be made by the bride-groom[84]. But, the bride side usually makes that payment in Bangladesh as the marriage is commonly held at the bride's place. Such violations are negatively impacting marriage registration.

### 6.16 Fake Marriage Registrars

Persons without licenses working as marriage registrars are a grave menace to women's rights after marriage. When a marriage is registered by such a person, the fake marriage registrars cannot be usually found for collecting Nikahnama. Even though Nikahnama is supplied, the same loses its validity and the woman adducing it as documentary proof fails to substantiate her claims. Hence, that woman faces setbacks.

### 6.17 No ID for Marriage Registrars

There is no identification number for a Marriage Registrar of any kind, which would be useful to verify whether a Marriage Registrar is genuine. In absence of such identity, unauthorized persons are functioning as Marriage Registrars, while the women are primary victims of such dubious registration.

### 6.18 No Women Nikah Registrar

More than 91% of the population is Muslim in Bangladesh, while half of them are women. Women are employed both in domestic and national spheres. Even women are working as Hindu Marriage Registrar and Special Marriage Registrar. But, there is no woman representation in the arena of Muslim Marriage Registrars[85], even though no express bar over appointing a woman as Nikah Registrar is provided in the concerned stipulations.[86] This is also inconsistent with the pledge of equality

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84 Muslim Marriages and Divorces (Registration) Rules 2009, r 21(4)

85 Rezwan, 'Why can't women be marriage registrars in Bangladesh?', <https://globalvoices.org/2021/01/25/why-cant-women-be-marriage-registrars-in-bangladesh/amp/> accessed on 21 December 2022

86 Act No. LII of 1974 and Muslim Marriages and Divorces (Registration) Rules 2009

enshrined in the Constitution[87] and non-discrimination on the basis of sex[88] as well as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[89].

### 6.19 Serial Number for Only Two Witnesses in Nikahnama

According to Islamic sharia law, women are eligible to be witnesses to a Muslim marriage and two female witnesses are equivalent to one male witness, while such marriage requires either of at least two male witnesses or one male witness and two female witnesses. Nikahnama[90] Form contained in the Muslim Marriages and Divorces (Registration) Rules, 2009[91] has a serial number for two witnesses only, while a Nikah Registrar is devoid of jurisdiction to edit or add another serial number for a witness in the Nikahnama. Hence, only two witnesses' names can be entered in the form and a third person cannot be a witness. Accordingly, no mention of serial number three for a witness in that form excludes the woman to be a witness to a Muslim marriage, which is violating the women's right to be a witness.

### 6.20 Hiding Second Marriage by Husband

If a Muslim man contracts a second marriage during the existence of wedlock without obtaining permission of the Arbitration Council[92], there is no pragmatic way in the present system for the bride of the second marriage to know about his husband's previous marriage, which could materially influence the bride's decision to or not to marry. Hence, the bride of the second marriage is placed in a disadvantaged position as being the second wife of a man, for instance, quarrelling is a common phenomenon in such a family and her rights arising out of marriage including conjugal rights are unprotected. A Hindu woman also faces the same issue in Bangladesh.

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87 The Constitution, art 27

88 The Constitution, art 28

89 Bangladesh ratified it on 6 November 1984

90 Nikahnama is the document of Muslim marriage registration containing the details of marriage

91 Form 'Gha' in the Schedule to the Rules 2009 as per r 27(1)(Ka)

92 Arbitration Council is formed as per Muslim Family Laws Ordinance 1961, s 6

## 7. Recommendations

Marriage registration is nowhere near perfection in Bangladesh, although the importance of marriage registration for women's empowerment is rife and recognized worldwide. The following steps, if duly executed, will boost the quantity of marriage registration, which will in turn amplify women's empowerment in Bangladesh.

a) Holistic approaches to raise awareness regarding marriage registration must be taken since ignorance is the primary reason behind non-registration. Religious preachers, teachers of different levels, village elders, civil society, and Non-Government Organizations (NGOs) are to be included in this campaign. The importance of marriage registration and related rights can also be introduced in the textbook as part of the awareness campaign.

b) Legislations for marriages without having statutes to register, for example, marriages of Buddhists, Shikh, and Tribal societies are to be enacted as soon as possible.

c) To prevent fraudulent registration and marriage registrars, a website is to be developed containing unique identification numbers for all marriage registrars, a brief description of their territory, functions, and related fees. Besides, the marriage registrars have to be ordained to upload information on the registration of marriages on that website. As a result, before registering any marriage, the marriage registrar can easily check whether any of the parties had previously married. It will prevent solemnizing unauthorized marriages from concealing the existing ones.

d) More than one person can be granted a marriage registry license in a registration unit considering the population density and/or size of the territory. This will offload the pressure upon one single marriage registrar as well as make him/her available for registering a marriage.

e) Since there is no explicit provision excluding women to be granted Nikah Registry licenses, they are to be appointed as Marriage Registrars. It will supplement women's empowerment.

f) Nikahnama form to be amended to add another witness serial, namely serial number three, which would allow the women to be a

witness to a Muslim marriage since the absence of such serial is restraining women from exercising their religious rights.

g) Nikah Registrars can be made government employees to remove the uncertainty over their income and livelihood. It will upgrade the quality of the marriage registration service and the quantity of registration.

h) To relieve the women from the hassle of proving their marriages on account of lack of certificate, a template of the marriage certificate is to be included in the concerned Rules for the Muslim and Hindu marriages. It will immediately get the women rid of those negative impacts.

i) Fee for registering a Muslim marriage can also be made a certain amount and it may be the same amount as Hindu marriages[93]. Such a fixed amount of fee will enhance the number of marriage registration, since a higher fee is a serious impediment before ensuring all the marriages get registered.

j) Though there is no recorded statistics regarding the number of unregistered marriages in Bangladesh, it is generally safe to presume that a significant portion of age-old marriages is unregistered today in Bangladesh. A specific and detailed procedure to allow such marriages to get registered can be introduced to the existing framework, which will bring those marriages under legal protection.

k) To err is human is true to marriage registration as well. There are many mistakes, which are clerical or nominal in nature. But the parties have to take resort to the Court for correcting them since the marriage registrars do not have any authority to correct a registered document. In such a case, the women have to go through loads of struggle to get those mistakes corrected. If the marriage registrars are authorized to do such nominal corrections, the women would be free from such sufferings.

l) Present stipulations must be amended to have a provision to register a marriage between a foreigner and a Bangladeshi citizen since such a marriage cannot be registered right now within the present framework. Hence, the women of those marriages will be able to exercise their rights generated from wedlock.

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93 1000/- (one thousand) taka as per Hindu Marriages Registration Rules 2013, r 17

m) To improve the skill of Marriage Registrars, they are to be provided with training upon the latest laws and practices pertinent to marriage registration. Training will equip the marriage registrars to avoid violation of any stipulations, including laws concerning preventing child marriages.

n) A vacant post of marriage registrar is to be filled within a stipulated time frame by granting a marriage registry license. A dedicated branch for handling the issues lingering the appointment process is to be introduced in the concerned section of the Ministry.[94]

o) Marriage registrars are to be allowed to have access to the birth registration and national identification card server of the government to verify the age of the parties to restrain themselves from registering a child marriage and to prevent it.

p) License may be granted for a certain period, for example, 3 years like a notary public license. An affidavit of not doing anything wrong like registering a child marriage is to be accompanied by the application for renewal and the authority must be satisfied with regard to the performance of the marriage registration to extend the validity of such the license. Hence, marriage registrars will cautiously execute their duties.

q) Non-Governmental Organizations (NGOs), civil societies, and experts are to be engaged and appreciated to provide exact data on registration and non-registration of marriages, which will help the government to formulate the policy to modernize the provisions to face the challenges of marriage registration.

r) Fine for per-day delay can be introduced for late registration. Such a late fee would compel the people to register a marriage in time.

s) Along with all other qualifications, a certificate on basic laws pertaining to marriage registration can be made a prerequisite to obtaining a marriage registration license. That certificate may be achieved through an examination held by a designated statutory body like Bangladesh Bar Council.

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94 Ministry of Law, Justice and Parliamentary Affairs, Law and Justice Division, Bichar Shakha-07 is vested with the responsibility of dealing with the matters of marriage registrars.

t) Generally, the parties of marriage are not aware of the fees for registering a marriage in Bangladesh and exploiting the parties for an excess fee is a common phenomenon. If the prescribed fee is collected through machine like value added tax collection device, harassment of paying an excessive fee can be prevented.

u) According to the present provisions, payment of marriage registration must be made by the bride-groom[95] irrespective of the place of solemnization of a marriage. A declaration is to be attached to the Nikahnama at the time of registration that the registration fee is made by the bride-groom. To perfectly materialize it, the concern Rule is to be amended by way of addition of a provision mentioning this point.

## 8. Concluding Remarks

Women's empowerment is the prerequisite to the advancement of a country and achieving sustainable development goals, while marriage registration is universally acknowledged to be one of the most effective strategies to ensure women's empowerment. But, the current marriage registration framework in Bangladesh is not accomplishing desired purpose by ensuring women's empowerment on account of the discussed obstacles deterring marriage registration. The proposed measures will uplift the prevailing situation and ameliorate its effectiveness by addressing the prevailing issues. As a result, women's empowerment will augment.

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# Protecting the Rights of Climate Induced Displaced People in Bangladesh: Necessity of a Human Rights Based Legal Framework

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**Abstract**

The Constitution of Bangladesh acknowledges the legal protection of life, liberty, body, reputation and property of any person as an inalienable right of every citizen. Hence, in accordance with the Constitution, the human rights of climate-induced displaced people should not go unprotected. However, at present, no coherent multilateral governance framework is available in the international and regional arena for Bangladesh to follow in order to determine the rights of climate-induced displaced people. Moreover, the existing regulation in Bangladesh is fragmented and disparate. In this backdrop, the paper argues for a new legal framework with principles and targeted solutions based on international human rights norms, aiming to protect climate-induced displaced people and to comply with Bangladesh's international commitments in connection with the protection of human rights. It is argued that the legal framework should not identify climate-induced displaced people as refugees; but rather their specific legal status with special measures by the State to ensure their human rights should be established. The framework should include provisions that would be widely accepted in the national and international framework relating to the rights of climate-induced displaced people. In doing so, simple yet effective human rights policy measures may be introduced in Bangladesh.

## 1. Introduction

Bangladesh is highly susceptible to natural disasters due to its low-lying deltaic topography and susceptible geographical locations.[1] It is affected almost every year by natural catastrophes that involve a large number of people and result in huge loss of lives and damage to property.[2] It is

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1 Climate Change Adaptation and International Development (Ryo Fujikura and Masato Kawanishi ed 2011) 25.

2 Ibid.

anticipated that Bangladesh might lose one-third of its landmass due to potential sea-level rise and other climate change complexities.[3] Nevertheless, Bangladesh's greenhouse gas (GHG) emissions are one of the lowest in the world, both aggregated and per capita.[4] Bangladesh is geographically vulnerable to a multitude of adverse effects of climate change because of its location in the tropics, extreme poverty problem and low adaptive capacity.[5] Natural disasters have become a common scenario in Bangladesh, and floods, tropical cyclones, storm surges and droughts are likely to become more frequent and severe in Bangladesh over the coming years.[6] Twenty million people could be displaced in Bangladesh by the mid-21st century. Practically, it is legitimate for the country to seek protection against the inevitable risk of climate displacement.[7] The movement of people in response to climate-induced events may even cause significant human rights concerns if the government of Bangladesh cannot resettle this large population through effective disaster response strategies and climate adaptation programs.[8] The proposal is to improve human rights protection regime for climate change displaced people through an effective legal framework.

## 2. Background behind the Legal Framework for Climate Induced Displaced People

The growing concern related to climate induced displaced people (hereinafter CIDP) in Bangladesh is the fragmentation and overlapping of existing policy measures, instead of drafting specific legislation. Unless immediate actions are taken, it will be very difficult for the government of Bangladesh to manage the current and potential future large numbers of CIDP.

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3 Rajib Shaw, Climate Change Adaptation and Disaster Risk Reduction: Issues and Challenges (M Pulhin and Joy Jacqueline Pereira ed. 2010) 336.

4 Siddiqur Rahman, 'Climate Change and Human Rights in Bangladesh' (2010) 51(6) Anthropology News 30.

5 Ibid.

6 Government of the People's Republic of Bangladesh, Bangladesh Climate Change Strategy and Action Plan xvii (2009) Ministry of Environment and Forests.

7 Allan Findlay and Alister Geddes, Migration and Climate Change (Etienne Piguet and Antoine Pécoud Paul de Guchteneire ed., 2011) 138.

8 Michelle Leighton, 'Climate Change Migration: Key Issues for Legal Migrants and Displaced People' (2010) Study Report, The German Marshall Fund of the United States, 1.

Though there are no clear data on the numbers of CIDP, the projected number of people to be displaced in Bangladesh is huge, especially in the coastal region.[9] The crisis relating to climate displacement has become a major problem for Bangladesh because of its potential threat to national peace and security.[10] A comprehensive legal framework is necessary in Bangladesh to manage the protection of CIDP systematically. Therefore, this study proposes a framework for CIDP, not only to manage the situation resulting from displacement, but also to identify gaps in establishing human rights protection for CIDP in Bangladesh. Human rights protection against violations from climate change is not guaranteed in any legally binding document; thus, this framework seeks to include CIDP matters in the binding instruments of the country.[11] The rights attributed to CIDP are protected under the ICCPR[12] and ICESCR,[13] and Bangladesh is a party to both of these conventions. Thus, a legal framework for CIDP would uphold Bangladesh's international commitments on the establishment of human rights.

The conflict among developed and developing countries over various issues—especially carbon dioxide emissions and the burden of the present numbers of refugees—hinder the framing of any separate international protocol. However, it is the legal obligation of the state to respond to legal gaps regarding human rights.[14] Thus, this study expects that this draft

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9 James Hansen, Storms of My Grandchildren: The Truth about the Coming Climate Change Catastrophe and our Last Chance to Save Humanity (Bloomsbury 2009) 258 'It is estimated that more than 40 million people living in coastal region in Bangladesh are at threat of being displaced. Thousands of people are already living in city slums. The condition of around 100 million people in Bangladesh, who are living within several meters of sea level, is too overwhelming.'

10 Mohammed Amjed Hossain and Md Gias Uddin Miah, 'Environment Disasters in History: Bangladesh Perspective' (2011)2(1) International Journal of Society Development Information Systems, 31.

11 The framework proposes including the human rights of CIDP under the NHRC Act, 2009, which is now a single binding instrument to enforce human rights in Bangladesh.

12 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

13 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3

14 Michel Prieur, 'Draft Convention on the International Status of Environmentally-Displaced Persons' (2010) 42/43 The Urban Lawyer 247, 248.

framework will appeal to academic commentators, and lead to pressure on the government to protect the human rights of CIDP. The adoption of the National Adaptation Programme of Action (NAPA), Bangladesh Climate Change Strategy and Action Plan (BCCSAP), *Disaster Management Act 2012*[15] and other policies of the government of Bangladesh are evidence of normative development; however, these initiatives do not include human rights protection for CIDP. The framework should have legal justification based on realistic foundations of law and human rights in Bangladesh. A framework is necessary for Bangladesh given the practical fact that, if large numbers of people are displaced without pre-planned and organized settlement options, inside and outside the country, this will create a disastrous situation for the country. If the legal framework is adopted and implemented, it will help create a positive image of the government, which may generate increased international support to protect CIDP legally, institutionally and financially. Importantly, the provisions of the framework should be designed in such manner that it would be easy to be implemented by the government.

## 3. Necessity of the Framework

1. The intention behind proposing this legal framework is to enable CIDP to enforce their human rights judicially. Moreover, the Government would be legally responsible for implementing the provisions if a legal framework was introduced in Bangladesh. The suggestions of this legal framework might generate significant implications for present and future law and policy measures in Bangladesh.
2. It is expected to provide future solutions for CIDP in Bangladesh. If a comprehensive legal framework is formed, the government of Bangladesh will be legally responsible to fulfill their obligations under customary international law and treaty law.
3. The major legal implications of this study can be considered from two different levels: the international level (including transboundary) and the national level. The major legal and policy implications include, firstly, international state responsibility for the human rights protection of global and international CIDP,

15 Disaster Management Act, Act No 34 of 2012.

including in Bangladesh, secondly, obligation under constitutional framework.

4. Considering the need for international and cross-border cooperation, the government of Bangladesh should determine their obligation to implement international laws and principles in their national legal system.
5. Article 11 of the *Constitution of Bangladesh* regarding democracy and human rights can assist the government to consider the human rights of CIDP and introduce legislation in this regard.
6. It is necessary to establish a legal relationship between climate change and human rights because climate change's effect on human rights is not addressed in the legal system of Bangladesh. Thus, the arguments stated in this study might be useful to the lawmakers if a comprehensive legal framework is introduced in Bangladesh regarding human rights and climate change.
7. This study has identified that the rights to life, water, food, housing and health of CIDP are mostly affected due to climate change. Additionally, it annotates that these rights are stated in core international conventions of which Bangladesh is a party. For this reason, the government of Bangladesh has domestic and international responsibility to enforce those rights.

## 4. Ambit and Extent of the Framework

The framework should have a human rights based approach while formulating its provisions. Generally, a human rights–based approach is a conceptual framework that is based on international human rights standards to enable the practice of human development.[16] It is normatively and operationally directed at promoting and protecting human rights.[17] The human rights approach analyses the inequalities that are central to development problems, and redresses discriminatory practices and unjust distributions of power that impede development progress.[18] This approach

16 United Nations Human Rights, 'Applying A Human Rights-Based Approach to Climate Change Negotiations, Policies and Measures' (2014)<http://www.ohchr.org/Documents/Issues/ClimateChange/InfoNoteHRBA.pdf> accessed on 01 October, 2022.

17 Office of the United Nations High Commissioner for Human Rights, Frequently Asked Questions on A Human Rights-Based Approach to Development Cooperation (United Nations, 2006) 15.

18 Ibid.

can be understood from the report of the Office of the UN High Commissioner for Human Rights.

Mere charity is not enough from a human rights perspective. Under a human rights based approach, the plans, policies and processes of development are anchored in a system of rights and corresponding obligations established by international law. This helps to promote the sustainability of development work, empowering people themselves—especially the most marginalized— to participate in policy formulation and hold accountable those who have a duty to act … A human rights-based approach identifies *rights holders* and their entitlements and corresponding *duty-bearers* and their obligations, and works towards strengthening the capacities of rights-holders to make their claims and of duty-bearers to meet their obligations.[19]

Climate change affects entire communities and subsequent displacement is likely to occur on a mass scale; thus, group human rights–based approaches are useful for defining the rights of CIDP. When a group rights approach is adopted, it is possible for CIDP (as aggrieved people) or any person on their behalf to enforce their rights under Public Interest Litigation.[20] A collective rights-based approach is also justified because, in the case of mass movement where an entire area becomes uninhabitable, individual protection measures are immaterial.

This framework is also limited to upholding the major human rights that are directly affected due to climate change displacement (the rights to life, water, food, housing and health). These human rights are closely

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19 A Human Rights-Based Approach to Programming<https://hrbaportal.org/faq/what-is-a-human-rights-based-approach/> accessed on 01 October, 2022.

20 Bangladesh did not encounter any proceedings on Public Interest Litigation on environmental matters before 1995. However, since 1995, a numbers of suits (writ) have been filed before the Supreme Court of Bangladesh regarding this issue, which has led to significant development in the area of public interest environmental litigation. SM Daud Hassan, 'Notes and Commentaries: Public Participation in Environmental Law in Bangladesh' (1999) 4(2) Asia Pacific Journal of Environmental Law 163, 167; BELA v Election Commission and Others 46 DLR 235; Dr Mohiuddin Farooque v Bangladesh (1996) 48 DLR 438; Dr Mohiuddin Farooque v Bangladesh and Others (1997) 17 BLD 189; National Board of Revenue and others Vs. Abu Saeed Khan and others (2013)18 BLC (AD) 116.

associated with people's livelihood. Therefore, this study argues that if the said human rights of the CIDP are protected through a legal framework, this would assist in improving both their lives and their livelihood. Moreover, it does not provide large-scale human rights protection because it would not be practically viable for Bangladesh to ensure complete human rights protection due to its resource constraints and weak economy. Despite, the scope of the framework being limited to providing immediate assistance and protection to CIDP, it is targeted at implementing selected human rights via legal means and build a foundation to enable complete human rights guarantees for all citizens in the future.

The normative framework for Internal Climate Induced Displaced People (ICIDP) is better developed than that for people displaced outside their country,[21] because ICIDP remain within the borders of their nation, which makes it easy to include them under the national legal framework. In the same way, CIDP who enter Bangladesh from another country may be given human rights protection under Bangladeshi law.[22] However, for External Climate Induced Displaced People (ECIDP), the local framework cannot provide human rights protection directly because these people are outside the jurisdiction of Bangladesh. However, the framework could provide an opportunity for the situation of the CIDP to be observed, and a negotiation process to be accelerated to ensure their safe return to their country of origin.

In brief, the provisions described in the legal framework can be identified as comprising a comprehensive normative structure based on the established and recognised principles of international law and human rights regarding climate change and CIDP.

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21 Khalid Koser, 'Gaps in IDP Protection' (2008) 31 Forced Migration Review 17, 17.

22 Universal Declaration of Human Rights, art 2. 'Everyone is entitled to all the rights … without distinction of any kind, such as … political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.' The principle of Lex Loci (law of the land) could be applied to CIDP who enter Bangladesh. The NHRC Act, 2009 might also apply to them because the Act does not state that it is only applicable to citizens of Bangladesh.

## 5. Nature, Feature and Operation of the Proposed Legal Framework

To address the specific needs of CIDP and ensure human rights protection, a target-oriented framework is necessary.[23] The framework must also consider the social and political benefits of CIDP. There should be provisions that CIDP will not feel insecure or compelled to leave their habitual place of residence due to climate change. The framework should operate by providing facilities to the human rights holders (CIDP) through the duty bearers (the government). It should establish a role for the Government of Bangladesh to manage international and regional cooperation. It also requires multifaceted collaboration with neighboring and other countries.

### 5.1 Relation and Recognition of Climate Change and Human Rights

This framework should acknowledge and define the relationship between climate change and human rights, keeping pace with the social and political situation of Bangladesh.[24] The provisions of the framework should consider the constitutional obligation of the State to uphold the human rights of its citizens.[25] The relationship between the State and CIDP should be considered in the framework under the constitutional guarantee in the *Constitution of the People's Republic of Bangladesh* that citizens can experience 'freedom of movement'.[26]

### 5.2 Enforcing Human Rights of Climate Induced Displaced People

Currently, the National Human Rights Commission of Bangladesh (NHRCB) is working as the sole national institution to protect human rights, yet it has no provision to protect the rights of CIDP. This study believes that the framework should give mandate to the NHRCB because it is already an established state organisation; thus, it would be convenient for the government to implement the human rights of CIDP under the

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23 The framework should fix a target to reduce the vulnerabilities and improve the human rights situation of CIDP by specific time.

24 Harun Rashid and Bimal Paul, Climate Change in Bangladesh: Confronting Impending Disasters (Lexington Books, 2014) 10.

25 The Constitution of Bangladesh preamble, art 12.

26 The Constitution of Bangladesh' art 36: 'every citizen shall have the right to move freely throughout Bangladesh, to reside and settle in any place therein and to leave and re-enter Bangladesh'.

purview of NHRCB.[27]

### 5.3 Typology of Climate Induced Displaced People

The framework should recognise and define CIDP so that their human rights can be established through the legal system of Bangladesh. The norms and provisions described in the framework would help develop consensus regarding a specific relationship between climate change and human rights, and determine the specific definition of CIDP.[28] International law does not recognise CIDP as either refugees or any climate-vulnerable group with a specific legal status. However, the Guiding Principle on Internal Displacement (GPID) indicates that States must formulate their own national framework to protect the rights of CIDP.[29] Thus, the framework should establish specific and clear recognition of CIDP to include them under national human rights jurisdiction. The framework should not consider them as refugees, but as the people most affected by climate change, who require special attention. The proposed framework should also include specific provisions regarding the status of ECIDP. The Government of Bangladesh could provide a special sign on the national identity card or provide a separate identification card to CIDP so that they can be identified easily. The categorisation of CIDP could be made based on their vulnerabilities, nature of displacement and climatic hazards. This categorisation is required to determine the scale of vulnerability of CIDP, and to provide protection measures based on the level of damage they have suffered.[30]

### 5.4 Necessity of Exclusive Human Rights Regime

The overall framework should be aimed at formulating a distinct human

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27 Strategic Plan of the National Human Rights Commission 2010-2015 (National Human Rights Commission, 2011) 7.

28 R Zetter, 'The Role of Legal and Normative Frameworks for the protection of Environmentally Displaced People' in Frank Laczko and Christine Aghazarm (eds), Migration, Environment and Climate Change: Assessing the Evidence (IOM, 2009) 387.

29 Examples are Economic and Social Council, Commission on Human Rights, Guiding Principles on Internal Displacement, , annex, 54th sess, Agenda Item 9(d), UN Doc E/CN.4/1998/53/Add.2; UNHCR, 'Summary of Deliberations on Climate Change and Displacement' (2011) 23(3) International Journal of Refugee Law 561.

30 The quantity of vulnerabilities could be determined based on physical injury, damage to property and financial loss.

rights regime for CIDP. It is very difficult to address CIDP's human rights and manage their vulnerable situation via any single and straightforward policy. An effective and distinct human rights regime should be formulated concerning the human rights of CIDP. The NAPA, BCCSAP, *National Plan for Disaster Management*, *Disaster Management Act 2012* could be revised to include specific provisions for CIDP. It has become a huge task for the government of Bangladesh to handle each aspect of climate change. Climate change–induced displacement should be considered as a special measure of the government, rather than as part of their regular functions for humanitarian assistance. Providing humanitarian assistance to CIDP is an inadequate response by the government because it neither gives CIDP the ability to claim their human rights, nor obliges the government to perform their duties towards CIDP. Thus, a separate human rights–based approach is required under a framework in Bangladesh to manage CIDP and displacement problems. This framework could help escalate the development of proactive principles and guidelines to protect the civil, political, economic, social and cultural rights of CIDP in Bangladesh.[31]

The framework should include the nature and basic characteristics of climate change– induced displacement and its effects on human rights. Thus, recognition of CIDP and enforcement of human rights through State mechanisms should be the goal of the framework.[32] There should be specific provisions regarding the accountability of the government to ensure that the government or its concerned authorities can be held responsible in the case of non-enforcement of the human rights of CIDP. The framework should also direct the government to ensure equality and non-discrimination while conducting its plans, programs and projects on climate change. It should further address the concerned authority to give priority in its activities, plans and programs to focus on human rights issues.

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31 Roger Zetter, Protecting Environmentally Displaced People: Developing the Capacity of Legal and Normative Frameworks (Refugee Studies Centre, Research Report, 2011) 56.

32 Md Abdul Awal Khan, 'Impacts of Climate Change on the Human Rights of Displaced People: Bangladesh Perspective' (A thesis presented for the degree of Doctor of Philosophy, Western Sydney University, Australia 2015) 176. [Awal].

### 5.5 Right to Life and Climate Induced Displaced People

The framework should give guidelines to the government to uphold the right to life of CIDP by providing safe and adequate residence, and relocating them to areas where they can earn a living in another part of Bangladesh during and after the natural disaster.[33] It should impose strict liability on the government to prevent and safeguard against threats to the right to life due to climate change or environmental hazards.[34] The right to life is guaranteed in the *Constitution of Bangladesh*[35] generally; however, the constitution does not offer any protection or guarantee if the right to life is affected by a natural event, such as climate change. Thus, the framework should outline the detailed responsibility of the government to protect the right to life of CIDP, while a separate body (such as the NHRCB) could be given authority to monitor and take action to protect the lives of CIDP. The existing protection measures of the right to life should be strengthened under the framework, and the local government should take appropriate measures to protect the lives of CIDP.[36] A special life insurance scheme (either government or non-government) could also be launched for CIDP.[37]

### 5.6 Social Safety Net and Climate Change Displaced People

The Social Safety Net Program (SSNP)[38] is one of the appreciable

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33 Human Rights Committee, Addendum: General Comment No 27 (67): Freedom of Movement, art 12, UN Doc CCPR/C/21/Rev.IIAdd.9 (2 November 1999) 7.

34 Fatma Zohra Ksentini, Report of the Special Rapporteur on Human Rights and the Environment, UN Doc E/CN.4/Sub.2/1994/9 (6 July 1994) 47.

35 The Constitution of Bangladesh, art 32.

36 The measures of the government to protect the right to life of its citizens during natural disasters are not sufficient or effective.

37 Insurance might be an option to adapt to climate change. These sorts of proposals are gaining popularity gradually. Richard SJ Tol, 'Climate Change and Insurance: A Critical Appraisal' (1998) 26(3) Energy Policy 257, ¶257.

38 The SSNP is a set of public measures to protect people from economic and social hardships resulting from a substantial decline in income due to various issues, such as loss of cultivable land, crop failure, land and homestead loss due to river erosion, unemployment, sickness, maternity, invalidity, old age or death of an earning household member. Barkat-e-khuda, 'Social Safety Net Programmes in Bangladesh: A Review' (2011) 34(2) Bangladesh Development Studies 87, 88. The SSNP includes Food for Work, Test Relief Bridge and Culverts, Execution of Risk Reduction Programme, Relief and Rehabilitation programme, VGF and VGD, Food Security Enhancement Initiative and Programme Construction of Flood/Cyclone shelters. Department of Disaster Management, Ministry of Disaster Management and Relief, Social Safety Net

initiatives of the government of Bangladesh; however, this program may be insufficient if large numbers of people are displaced. Thus, the budget for the SSNP should be enhanced significantly. Corruption and misappropriation is one of the major problems of the SSNP.[39] To prevent corruption, misappropriation and pilferage in the SSNP, exemplary criminal action should be taken against people or authorities found guilty of these activities. As the SSNP is mainly conducted by a grassroots administration, close monitoring by the central authority should be ensured. Moreover, civil society, NGOs and the media should be involved in the SSNP to ensure its transparency.

### 5.7 Right to Health and Climate Induced People under the Framework

The framework should outline the comprehensive measures undertaken to protect CIDP from climate change–related health consequences, including physical injury and mental illness, guidelines to improve adaptive capacity to cope with health hazards, and guidelines to prevent health threats in accordance with international directions.[40]

### 5.8 Right to Adequate Housing and Climate Induced Displaced People

There should be compulsory provisions to ensure adequate accommodation for CIDP, including satisfactory conditions of nutrition,

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Program (30 January 2013) <http://www.ddm.gov.bd/socialsafetynet.php> accessed 30 September 2022; The World Bank, Bangladesh Safety Net Systems for the Poorest Project (30 January 2013) <http://www.worldbank.org/projects/P132634/bangladesh-safety-net-systems-poorest-project?lang=en> accessed 30 September 2022.

39 The safety net program involves VGF, employment schemes, Food for Work and test relief. These programs are appreciable initiatives of the government; however, corruption, political unfair influence and misappropriation are observed in these program.

40 Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary General, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, GA Res A/HRC/10/61 HRC 10th sess, Agenda item 2 (15 January 2009) 13 ¶34; CESCR General Comment No 14, The Right to the Highest Attainable Standard of Health, 22nd sess, E/C.12/2000/4 (11 August 2000) ¶43 (c); World Health Organization, Protecting the Health of Vulnerable People from the Humanitarian Consequences of Climate Change and Climate Related Disasters—Submission to 6th Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA 6, 1–2 June 2009) ¶8.

health and hygiene.[41] ICIDP should be assisted to voluntarily return to the place from which they were displaced and enjoy housing, land and property rights in their country of origin without discrimination.[42] At present, CIDP have no designated place for shelter. Therefore, the government should designate a suitable place for temporary and permanent settlement under the framework. The framework should contain provisions that prevent CIDP from being evicted from their shelter once they are resettled. The existing measures of the government on the right to housing should be improved to keep pace with international standards. In addition, current government policies on housing should incorporate special measures for CIDP.

### 5.9 Compliance with International Community

To maintain an international standard in responding to climate change displacement, Bangladesh's existing government policies should be revised to align with the latest international developments. Due to absence of any domestic guidelines, the Bangladesh government could adopt provisions from international documents to guide their legal responses to CIDP, including the:

- UN GPID[43]
- Hyogo Framework for Action 2005–2015[44]
- IASC Operational Guideline[45]
- London Declaration of International Law Principles on Internally Displaced Persons 2000

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41 Economic and Social Council, Commission on Human Rights, Guiding Principles on Internal Displacement, principle 7(2).

42 Ibid, principle 18.

43 Economic and Social Council, Commission on Human Rights, Guiding Principles on Internal Displacement.

44 World Conference on Disaster Reduction, Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters (18 October 2013) <http://www.unisdr.org/2005/wcdr/intergover/official-doc/L-docs/Hyogo-framework-for-action-english.pdf> accessed 30 September 2022.

45 IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters, The Brookings Bern Project on Internal Displacement (2011) (18 October 2013) <https://docs.unocha.org/sites/dms/Documents/Operational%20Guidelines.pdf > accessed 30 September 2022.

- African Union Convention for the Protection and Assistance of Internally Displaced Persons.

Priority should be given to internationally developed and accepted (especially under the auspices of the UN) laws and principles related to climate displacement, and to human rights instruments signed and ratified by Bangladesh in formulating the provisions of the framework. The framework should also take into account the findings of the Conference of the Parties (COP) under the UNFCCC so that it is in accordance with international standards.

### 5.10 Benchmark for Monitoring the Number of CIDP

It is difficult to attribute a migration decision to climate change because displacement is caused by a number of different factors; thus, it may be difficult to determine the proportion of migrants moving as a direct result of climate change.[46] Therefore, a monitoring authority could be established in Bangladesh under the proposed legal framework. The monitoring authority could assist CIDP by observing their human rights situation, bringing them back from the host country or area/s and resettling them to a suitable place of the country. The government of Bangladesh may consider specific places of the country where they will be able to provide more humanitarian assistance and population density of that place is less.[47]

The number of CIDP in Bangladesh is increasing significantly; thus, systematic and organised statistics are necessary. While determining the specific number of CIDP is very difficult, there should be an authority to track this as accurately as possible. It is also challenging to distinguish CIDP from other displaced people. Thus, a central database should be prepared to differentiate CIDP from other displaced people.

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46 Katrina Miriam Wyman, 'Responses to Climate Migration' (2013) 37(1) Harvard Environmental Law Review 167, 172.

47 It is the tendency of people to move from rural to urban areas. The government should consider this tendency and divide the country into sections according to social facilities. For example, the government should choose areas where public transport facilities are good and living costs are low. It is also necessary to consider the existing population density of areas. The population density in the northern and southeast (Chittagong Hill Tracts) areas of Bangladesh is low, thus, CIDP could be rehabilitated in this areas via necessary human rights assistance.

### 5.11 State Responsibility to Protect Climate Change Displaced People

Human rights and environmental matters are the constitutional commitment of the government of Bangladesh.[48] Thus, there should be a provision that the government should provide at least the minimum human rights standards for its citizens, especially CIDP. Although there are no specific criteria by which this standard could be determined, it depends on the overall social status of the people and signifies the minimum threshold approach, below which no person should have to live.[49] That standard should be ensured without any discrimination and without reasonable delay.[50] This minimum core obligation guarantees justice in the distribution of certain goods and benefits among individual groups within in a country.[51] Based on these principles the minimum living standards for CIDP may be determined.

### 5.12 Option of Adequate Consultation with CIDP

Adequate consultation with affected populations is key to ensuring the effectiveness of national, regional and international institutional arrangements.[52] The government of Bangladesh could assign local government authorities and NGOs to consult with CIDP to determine the degree to which the effects of climate change have affected their human rights. Adequate consultation with CIDP and other affected people is also required to establish temporary housing and health treatment for CIDP. A registered association or bargaining agent could be established for CIDP under the framework to ensure systematic consultation with the government regarding rights of the CIDP and to raise their demand to concerned authority formally. The framework should have specific guidelines for the government and CIDP in this regard.

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48 Constitution of Bangladesh, preamble, art 12, 18A,

49 Padraic Kenna, 'Can Housing Rights be Applied to Modern Housing Systems?' (2010) 2(1) International Journal of Law in the Built Environment 103,105.

50 A Chapman and S Russell, Core Obligation Building a Framework for Economic Social and Cultural Rights (Intersentia, Mortsel, 2002) 201.

51 S Skogly, 'Human Rights Reporting: The Nordic Experience' (1990) 12(4) Human Rights Quarterly 513, 526.

52 Roberta Cohen and Megan Bradley, 'Disasters and Displacement: Gaps in Protection '(2010) 1 Journal of International Humanitarian Legal Studies 63, 68.

### 5.13 Integrated Institutional Management and Participation

Climate displacement is the core problem of development policy because the consequences of failing to deal with the issue of CIDP are serious and may lead to a failure of national development policy.[53] If the human rights of CIDP are ensured, this may positively affect the overall development of the country. Thus, a systematic, holistic and integrated institutional approach is required at the government level to manage CIDP in an organised manner. A sophisticated institutional architecture should be established through the framework to integrate the complex issues of climate change and convert knowledge into decision making.[54] Strengthening institutional capacity building should also be prioritised.

### 5.14 Funding Scope and Procedure for CIDP

One of the major gaps in the existing policy instruments for climate victims, including CIDP, is insufficient and lack of proper management of funds.[55] If financial protection is ensured, it will enhance the capacity of CIDP to cope with climate change without being displaced.[56] Therefore, national and international fund management should be managed effectively to ensure financial support is provided to CIDP. Sufficient and effective management of funds should be ensured by government organisations and NGOs. The government should formulate specific and separate strategies to fund climate change projects.

The present Bangladesh Climate Change Trust Fund (BCCTF) in Bangladesh is overwhelmingly dominated by government officials.[57] If fund management is completely controlled by the government, there is

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53 Frank Biermann and Ingrid Boas, 'Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees' (2010) 10 Global Environmental Politics, 60, 74.

54 David Hodgkinson et al, 'Copenhagen, Climate Change "Refugees" and the Need for a Global Agreement' (2009) 4 Public Policy 155, 163.

55 Awal (n 32) 146.

56 W Neil Adger and Juan Pulhin, 'Human Security' in Paulina Aldunce and Robin Leichenko (eds), Climate Change 2014: Impacts, Adaptation, and Vulnerability Part A—Global and Sectoral Aspects Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press, 2014) 12.

57 All members of the trust are appointed by the government politically; thus, the government has exclusive control over managing the fund. Climate Change Trust Act, 2010, Act No 57 of 2010, sec 9.

greater chance of corruption, nepotism and bureaucracy. The BCCTF is mainly used for government projects; although, according to government policy, registered and experienced NGOs have limited access to that fund for climate change–related purposes.[58] The government process to release funds is lengthy and complicated; thus, for the proper and effective use of funds, affected communities, civil society and CIDP (as individuals or groups) should have access to that fund during emergency situations.[59] Moreover, if multi-sector participation is ensured in fund management, there will be greater accountability and transparency. The framework should outline a detailed policy and enable a quick and simple process for disbursing funds.[60] A bank could be established with the climate change trust fund and resilience fund so that CIDP or other climate-affected people may access that fund as a client of the bank. Given that there may be problems with bank staff determining CIDP, CIDP require an official identity.[61] In addition, the bank could conduct independent investigations through their resources and staff to determine the status of CIDP.

The proposed framework should include provisions regarding specific and autonomous funding for CIDP because there is no existing budget for the potential costs associated with climate displacement in the *Climate Change Trust Act*.[62] The funds received from national and international sources are targeted to reduce climate change–related vulnerabilities;[63] hence, a separate budget for CIDP is expected to assist more climate-

58 Government of the People's Republic of Bangladesh, 'Climate Change' (Bangladesh Gazette No 38/2009/196, Ministry of Environment and Forests, 9 March 2010).

59 This study proposes that even individuals should have access to the fund as climate change victims. The government should make concrete policy regarding how individuals gain access to a small or medium fund. CIDP, as individuals or groups, should be able to apply for the fund. Abdullah Al Faruque and M Hafijul Islam Khan, Loss & Damage Associated with Climate Change: The Legal and Institutional Context in Bangladesh (UK Department for International Development, 2013) 20.

60 The official process to access funds is very complex and bureaucratic. The government requires a lot of information and documentation for disbursement of funds. Moreover, corruption and misuse of funds is common in Bangladesh. The framework should consider all these barriers and outline provisions to access to the fund in a way that ensures transparency and fairness.

61 Awal (n 32) 192.

62 The Climate Change Trust Act, 2010 was established to manage the overall climate change situation of Bangladesh; however, this fund does not have any specific objective for CIDP.

63 Climate Change Trust Act, 2010, sec 15.

affected people. The BCCTF should additionally have a permanent and continuous income source. Beyond national and foreign donations, the government of Bangladesh could make a law for mandatory contributions to BCCTF from all earning citizens of the country based on their income ratio. The framework should have provisions to increase funds from suitable and alternative sources without relying only on the government or international donors.[64] The government of Bangladesh can impose taxes to increase the fund or provide climate change insurance to support CIDP financially. The transparency of the fund should be ensured by proving digital access to information via the websites of the relevant institutions.[65] An independent audit could also be conducted to ensure transparency. To ensure effective management of the fund, participation of the government and non-government stakeholders should be ensured.[66]

### 5.15 Recommendations for Settling CIDP

Human mobility is one adaptation strategy to address the effects of climate change, and can be an effective way to manage the risks associated with climate change when done voluntarily and with appropriate planning.[67] If displacement is not orderly and properly managed, it would be treated as a failure of adaptation policies.[68] Therefore, immediate/ temporary and permanent resettlement for CIDP should be managed based on social justice and free from any bias.[69] The government of Bangladesh should also consider resettlement for CIDP both inside and outside the country.

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64 The rich and industrialist community in Bangladesh could contribute a significant amount to increase the fund. Moreover, they could play a significant role in protecting the human rights of CIDP by providing employment opportunities.

65 To ensure transparency and accuracy, the framework should make provisions that detailed reports of fund usage should be available to the public in electronic or non-electronic formats.

66 This fund could be shared with the NHRCB if they also dealt with CIDP the later section of this chapter describes the potential contribution of the NHRCB to protect the human rights of CIDP.

67 Koko Warner, Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations (UNHCR, 2011) 18.

68 Ibid.

69 Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced, ICRC, Guiding principles on internal displacement, principle 1.

Planned relocation and voluntary labour migration with safety and dignity may be a good adaptation strategy to manage climate-induced risks.[70] In the case of temporary displacement, some CIDP may prefer to return to their home in the long term, and can begin to rehabilitate their livelihoods and reconstruct their houses when the event has ceased.[71] These CIDP are likely to require assistance to resume their normal lives. Hence, the nature of vulnerabilities should be considered before providing protection measures for CIDP. Generally, CIDP cannot resettle in any private places, except for government-free areas.[72] Therefore, when they relocate in Bangladesh, they are not welcomed by the society of that area. For this reason, CIDP require special care and human rights protection by the State.[73]

The government of Bangladesh should establish a national settlement policy for CIDP that should also consider the trends of people accepting low-income earners as neighbours, if there are spare lands available around the living area of higher-income earners.[74] The movement of people is most likely to be from rural to urban areas in Bangladesh; hence, when managing urban policies, a mixed neighbourhood approach based on mixing low-income earners in areas with higher quality housing and skilled jobs could be considered.[75] The framework should also ensure the resettlement of permanently displaced people to suitable parts of the country. The trend of movement of the ICIDP from rural to urban slums

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70 Koko Warner, Climate and Environmental Change, Human Migration and Displacement: Recent Policy Developments and Research Gaps (United Nations Secretariat, 2011) 5.

71 Matthew Walsham, Assessing the Evidence: Environment, Climate Change and Migration in Bangladesh (IOM, 2010) ix.

72 Awal (n 32) 129.

73 This study primarily focuses on the responsibility of the government towards CIDP because, if people become External climate change displaced people without any international or bilateral treaty obligations, the host state will not be responsible for protecting their human rights.

74 Leslie A Stein, 'Domestic Law for Resettlement of Persons Displaced By Climate Change' Michael B Gerrard and Gregory E Wannier (eds), Threatened Island Nations Legal Implications of Rising Seas and a Changing Climate (Cambridge University Press, 2013) 384–385.

75 J Uitermark, 'Social Mixing and the Management of Disadvanced Neighbourhoods: The Dutch Policy of Urban Restructuring Revisited' (2003) 40 Urban Studies 531, 531.

should be controlled. Long-term and short-term projects should be undertaken, guided by a definite policy or legislation regarding the settlement of CIDP. A permanent and long-term resettlement program is necessary so that CIDP do not suffer due to sudden and disorganised displacement.[76] The government should consider establishing an authority to change the planning of slum areas so that they can be transformed into semi-urban areas or rehabilitate them, with minimum support for their livelihood. ICIDP could be offered '*khas land*'[77] under the framework to manage their livelihood.[78] The framework should give priority to resettling people in circumstances in which they are likely to become displaced in the near future because their homes might become uninhabitable due to climate change.[79] The government of Bangladesh can exercise its constitutional power for the acquisition, nationalisation or requisition of

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76 Frank Biermann and Ingrid Boas, 'Protecting Climate Refugees: The Case for a Global Protocol' (2008), Environment (7 October 2013) <http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html> accessed 30 September 2022.

77 The category of khas is of Persian origin and means 'government owned,' thus, khas land is government-owned land. Khas land includes agricultural and non-agricultural land and water bodies. People have common rights over khas land; thus, it cannot be leased. Examples of this land include roads, tanks for drinking water, embankments, plots that are available for settlement and plots that are purchased, resumed or abandoned. These types of land are managed and controlled by the Ministry of Land, Bangladesh. Government land owned by other ministries and departments is not khas land. Abul Barkat, Shafique uz Zaman and Selim Raihan, Political Economy of Khas Land in Bnagladesh (Association for Land Reform and Development, 2001) 19, 20; The State Acquisition and Tenancy Act of 1950 (East Bengal Act, Act No XXVIII of 1951). Articles 86, 87, 90, 91 & 93.

78 The Land Reform Ordinance 1984 (Ordinance no X of 1984) gives priority to allocating government khas land to landless people, especially those affected by riverbank erosion. In the case of an alluvion in a river, it becomes the property of the state (or khas land), and only the government can distribute this. However, local influential and political people, along with corrupt officials, play a key role in making final decisions. If flooded land re-emerges within 30 years, the owner can claim his or her rights over the land. The provision for waiting 30 years is impractical and counterproductive. Mohammad Sajjadur Rahman, The Internally Displaced People of Bangladesh: A Background Paper (8 November 2013) <http://www.southasianrights.org/wp-content/uploads/2012/03/The-Internally-Displaced-People-of Bangladesh-Updatedl-Copy-15-August-2018.pdf> accessed 01 October 2022.

79 Daniel Paul Riva, A Place of Environmental Refugees: Adaptation to Climate and Environmental Change in South Asia (Master's Thesis, Columbia College of Arts and Sciences of the George Washington University, 2010) 96.

any property[80] to resettle CIDP. Therefore, resettlement in Bangladesh should consider every possible and viable option for CIDP. For example, CIDP could be resettled immediately within or close to the place from which they were displaced, so that they will be able to return to this place easily when it becomes habitable. However, if resettlement is not suitable or safe in their immediate area, rural and urban areas should both be considered.[81]

In the case of large numbers of CIDP, such as the predicted 20 to 30 million, Bangladesh will be unable to absorb this population within its small territory.[82] Hence, the planned relocation and resettlement of Bangladeshi CIDP will require international cooperation and international mechanisms for developing country relocation.[83] There should be an outline in the framework regarding how to negotiate with other countries for skilled, semi-skilled and non-skilled migration via an agreement, before the climate change disaster occurs. A comprehensive immigration plan with detailed criteria to identify present and future CIDP could be prepared for resettling in other countries.[84] If such an immigration plan exists, developed countries might be more willing to receive CIDP from a developing country, such as Bangladesh.[85] The government of Bangladesh should also generate employment and migration opportunities for CIDP as a priority, under the Ministry of Expatriates' Welfare and Overseas Employment and the Ministry of Labour and Employment.

### 5.16 Principle of Cooperation and Protecting CIDP

Regional and international cooperation is a key factor for managing internal and cross-border displacement. As CIDP are not responsible for

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80 The Constitution of Bangladesh art 42: 'this article shall provide for the acquisition, nationalisation or requisition with compensation and shall fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be assessed and paid; but no such law shall be called in question in any court on the ground that any provision of the law in respect of such compensation is not adequate'; The Disaster Management Act 2012, Act No 34 of 2012, sec 26.

81 Harun Rashid and Bimal Paul, Climate Change in Bangladesh: Confronting Impending Disasters (Lexington Books, 2014) 137, 138.

82 Awal (n 32) 177.

83 Ibid, 139.

84 Ibid, 146.

85 Ibid.

driving climate change, the countries emitting large amounts of GHGs should take some responsibility by accepting ECIDP migrants and assisting ECIDP under the principles of environmental law and customary international law.[86] High GHG-emitting countries should also be prepared to provide aid and support to Bangladesh to help manage the devastating situation of CIDP.[87] The government of Bangladesh should consider the possible relocation of its people to other countries of the world if significant portions of its territory become uninhabitable. For this reason, Bangladesh should maintain regional cooperation and understanding with neighbouring countries.[88] There should be specific provisions in the framework regarding how to negotiate with the regional and international community for the protection and relocation of CIDP. The government of Bangladesh should also implement regional and international understandings and agreements relating to climate change and CIDP into their national plans, policies and programs.

Without international support—both financial and technical—it will be difficult for Bangladesh to create an effective framework for CIDP. Thus, the framework should have specific provisions regarding how to ensure greater international and regional support and assistance, and to implement the provisions of the legal framework properly for CIDP. In response to global cooperation and responsibility to climate change, the government of Bangladesh should also be willing to receive some ECIDP, especially from a neighbouring country. Specific and effective provisions should be available in the framework regarding how to deal with that situation.

### 5.17 Protecting CIDP and NHRCB

Human rights protection for CIDP from a national human rights commission (in Bangladesh) is supported by academic commentators, Julien Betaille *et al*. and McAdam and Saul.[89] The aim of this section is to investigate whether the NHRCB would be able to give protection to CIDP under the present arrangement of the *National Human Rights Commission*

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86 Ibid, 116.

87 Ibid, 115.

88 Ibid, 152.

89 Julien Betaille et al, 'Draft Convention on the International Status of Environmentally-Displaced Persons' (2008) 4 Revue Europeenne de Droit de L'Environnement 395, article 12.

*Act (NHRC Act).*[90] Second, it considers what changes are required to the provisions of the NHRCB to cover CIDP.

The *National Human Rights Commission Act, 2009*[91] did not refer to climate-induced human rights violations at the initial stage of its formation; however, climate change and environmental issues were later included in the strategic plan of the commission.[92] However, the NHRCB does not have clear mandate according to the *National Human Rights Commission Act*[93] for protecting the human rights of CIDP. As a recently established institution, the NHRCB does not have sufficient experience to address climate change–induced human rights violations; however, this body could be given the authority to cover this area in the future, especially for CIDP. The human rights commissions of some countries in South Asia have already started to take responsibility for protecting the human rights of CIDP.[94] The proposed framework could develop guidelines for the NHRCB about the degree to which the human rights of CIDP should be protected.

## 6. Concluding Remarks

To handle global CIDP effectively, an international legal mandate is inevitable.[95] Therefore, an international protocol under the UNFCCC and an implementing mechanism is required for the human rights and management of CIDP globally. For effective implementation of the protocol and proper response to the human rights of CIDP, international cooperation and multilateral actions of the international community are crucial.[96] As there are ongoing negotiations at the international level under the COP of the UNFCCC, the government of Bangladesh should not only

90 National Human Rights Commission Act, 2009, Act No 53 of 2009.

91 National Human Rights Commission Act, 2009, Act No 53 of 2009.

92 Strategic Plan of the National Human Rights Commission 2010–2015 (National Human Rights Commission, 2011) 7.

93 National Human Rights Commission Act, 2009, Act No 53 of 2009.

94 The Sri Lankan National Human Rights Commission took up hundreds of cases regarding human rights problems after the Indian Ocean tsunami. A special rapporteur was sent by India's Human Rights Commission to look into the human rights concerns of those affected by natural disasters in Orissa and Gujarat. Roberta Cohen, 'An Institutional Gap for Disaster IDPs' (2009) 32 Forced Migration Review 58.

95 Awal (n 32) 195

96 Ibid, 103.

actively participate in this negotiations process, but should also convince the international community to take some responsibility for the management of CIDP inside and outside Bangladesh. The government of Bangladesh should create an extensive connection, targeted to encourage developed countries to accept CIDP from Bangladesh.

In addition, a combined transboundary agreement under the SAARC is required to resettle cross-border CIDP in the unaffected territory of the countries of those regions. Regional cooperation and understanding is of utmost importance as without bilateral or multilateral understanding, no countries will be able to resettle CIDP outside their territories and also opens the door for enabling an immediate response to cross-border displacement.[97] In the case of emergency situations relating to climate change, neighbouring countries should open their borders so that affected people can move immediately to the nearest safe place. Therefore, it is important to formulate law and policy measures in this regard.

A regional monitoring authority is necessary to oversee human treatment outside the home country of CIDP, and advise the concerned government regarding the safe return of CIDP, or negotiate with the host government for temporary or permanent resettlement within their territory. Based on regional understandings, the government of Bangladesh should determine their own foreign policy.[98]

Finally, the Government of Bangladesh should formulate a comprehensive legal framework to address the national climate change displacement situation. This framework could operate to fill the gaps in the law because there is no other option available to adequately protect the human rights of CIDP in the present legal system. The framework is also necessary for the organised resettlement of CIDP at home and abroad. The framework could be implemented by a fully funded government mechanism, while the provisions of the framework should be constructed on regional and international law and policy development and support.

The Government of Bangladesh should consider formulating a national

97 Ibid, 109.
98 Ibid, 111.

settlement policy to resettle existing and potential CIDP within the 64 districts of Bangladesh in an organised and planned manner. Small, medium and large-scale housing projects could be undertaken involving NGOs and international organisations within the territory of Bangladesh. A unique card could be provided to CIDP to access basic necessities at an affordable price from government organisations. Employment opportunities for CIDP should be prioritised so that they can return to their normal lives easily. The government should also educate and train CIDP properly in science, technology and other contemporary fields so that developed countries will be interested in accepting skilled CIDP from Bangladesh.

A minimum monthly financial subsidy could be provided to CIDP until they restore their normal lives. Climate change fund management should be transparent, impartial and quick. For this reason, more involvement of NGOs and international donors should be included in fund management. A climate change bank could be established with the climate change fund so that CIDP and other climate-affected people can access the fund individually as clients.[99] A registered union could be formed for CIDP so they can inform their human rights problem to the authority systematically. An autonomous institution could be formed which will be responsible for dealing with climate change displacement. Alternatively, an existing institutional structure could be rearranged to enable coordination and consistency among the various bodies of the government of Bangladesh to address displacement due to climate change.[100] Most importantly, the NHRCB could be given clear mandate to protect the human rights of CIDP. Above all, political will is the main factor to implement those suggestions. Therefore, public consciousness should be raised to include the human rights of CIDP under legal protection measures and subsequently reduce their present and future vulnerabilities.

99 Ibid, 213.
100 Ibid, 214.

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# Emergence and Development of Constitutional Tort through Judicial Activism in Bangladesh

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**Abstract**

Constitutional tort refers to the idea of vicarious liability of the State for the wrongful acts of its servants. Since the emergence of the law of tort, though less importance was put upon the liability of the State, in the course of time situations arose where the State was being sued and this led to the development of the idea of constitutional tort which generally imposes liability upon State for the tortious acts committed by its employees during the course of their employment giving an exception of it acting within its sovereign jurisdictions. In the context of Bangladesh, there mainly exist two categories of torts in our judicial system, i.e., private law tort and public law tort or constitutional tort. Since in Bangladesh the judiciary still lags behind in providing remedy in case of private law tort, in recent years a new idea of constitutional tort has been evolved as a viable opportunity to seek damages by the victims for the violation of fundamental rights guaranteed in Part III of the Constitution. This piece of academic research also intends to emphasize on how the doctrine of constitutional tort has emerged and being applied through the current landmark judgments delivered by the higher judiciary in Bangladesh. That is to say, this paper strives to analyze the theme with the real basis of present trends of constitutional torts in Bangladesh. The finding of this article implies that despite securing public law compensation through lodging the cases of constitutional tort has recently created a new horizon in the arena of constitutional remedy; it has yet to flourish entirely in the legal system of Bangladesh.

**Keywords:** Compensation, Constitutional Tort, Infringement, Reparation, Violation

## 1. Introduction

In Bangladesh, the violations of fundamental rights leave the victims without a rational remedy in private law due to the inaccessible tort laws

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and procedural barriers that are generally common to the money suit proceedings.[1] Consequently, the public interest litigation (PIL) lawyers, human rights bodies, human rights organizations, and activists, as well as the bar and bench have utilized Article 102(1) of the Constitution of the People's Republic of Bangladesh as an effective instrument for securing compensation to the remedy in violations of fundamental rights by the State or its officials.[2] This recent development has been treated as '*a public law model of torts*', with the Indian judiciary taking the lead.[3] This research intends to make a careful analysis on the emergence and development of constitutional tort through judicial activism in Bangladesh. It also strives to explore the extent to which the public law compensation functions as a redress for the violations of fundamental rights as has been guaranteed under the Constitution of Bangladesh. For this purpose, this article seeks to make a critical analysis of the reported landmark cases decided by the higher judiciary of Bangladesh on the public law compensation under Article 102(1) of the Constitution. In Bangladesh, the higher Courts are completely empowered under the Constitution to award pecuniary compensation as a constitutional remedy for the flagrant violation of the fundamental rights of the citizens. Thus, public law compensation has definitely opened a new avenue in the field of constitutional tort remedy in our country.

## 2. Research Methodology

This research is primarily based on the qualitative approach designed with the support of descriptive methods. Judgments of some landmark cases delivered by the higher judiciary of Bangladesh has been critically analyzed and referred to in completing this study. This paper mainly endeavors to conduct a subtle analysis on the theme with the genuine foundation of recent development on constitutional torts in Bangladesh. In conducting this research data have been collected from different primary and secondary resources, e.g. journal articles, reports, laws and policies, blog articles, newspaper articles, books, statutes and case laws where an

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1 Taqbir Huda, 'Fundamental Rights in Search of Constitutional Remedies: The Emergence of Public Law Compensation in Bangladesh' (2021) 21:1 Australian Journal of Asian Law 27.

2 ibid.

3 Rehan Abeyratne, 'Ordinary Wrongs as Constitutional Rights: The Public Law Model of Torts in South Asia' (2018) 54 Texas International Law Journal 1.

attempt has been made to create the contents coherent yet comprehensive. Since the idea of constitutional tort in the context of Bangladesh is still at the state of infancy, the area of research in this particular sector is also not so wide in this country. Although a little research works done by the domestic and foreign scholars are available, a little of them focus on the Bangladesh perspective. In spite of this, a wide range of legal literature on this particular area has been reviewed by the author in conducting this research.

## 3. Definition of Tort and Constitutional Tort

The word 'tort' has been derived from the Latin term 'Tortum', which means to twist. This branch of law consists of different 'torts' or wrongful acts whereby the wrongdoer violates some legal rights vested in another person.[4] Constitutional tort, on the other hand, implies the violation of one's constitutional rights by a government employee. It is one kind of vicarious liability[5] of the State for the wrongful acts committed by its servants. The government employees may cause damage to the persons in different manners. For example, when an official inflicts a physical harm, causes emotional distress, publishes defamatory statements, or initiates a malicious prosecution, the victim's traditional recourse is a tort suit brought under the common law or statutory principles.[6] This alleged violation creates a cause of action which is different from any other existing state tort remedy. However, an alternative to this ordinary tort may also be available.[7] Constitutional tort is mostly an academic term developing in the aftermath of the Supreme Court's decision in *Monroe v Pape*[8], which provides a separate federal remedy for the individuals suing the State government officials who have infringed their basic constitutional rights.[9] The development of damage remedies for the constitutional violations in the decades following *Monroe v Pape* has encouraged the litigants to frame their cases as violations of the

4 R. K. Bangia, Law of Torts (15th Edition, Allahabad Law Agency 2012) 7.

5 It is the liability which the employer endures due to any wrongful act or actionable conduct of his employee on the basis of a relationship between them.

6 Michael Wells, 'Constitutional Torts, Common Law Torts, and Due Process of Law' (1997) 72 Chicago-Kent Law Review 617.

7 ibid.

8 365 U.S. 167 (1961).

9 Legal Information Institute, Constitutional Tort (2021) accessed 15 July 2022.

Constitution.[10] Most legal commentators point to *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*[11] as the primary example where the Supreme Court directed that individual rights provisions in the Federal Constitution usually could give rise to the damages actions.[12] Though the term 'constitutional tort' was apparently coined six years prior to the *Bivens* case, it has become profoundly associated with the *Bivens* Court's recognition of a damages remedy springing directly from the Constitution.[13] As with the common law torts, the common remedy for the constitutional torts is pecuniary damages.

**4. Origin of the Doctrine of Constitutional Tort**

Constitutional tort is generally a judicial mechanism through which the State can be held vicariously liable for the acts of its servants. It is the legal action to get the legal remedy in the form of damages when any of the constitutional rights of any individual is violated.[14] The origin of constitutional law may be traced back to the time when the common medieval saying of *res non potest peccare*, i.e., 'the king can do no wrong' commenced mislaying its recognition in the eyes of the common people.[15] On the basis of this legal maxim the doctrine of crown immunity was prevailed and thus the king could have enjoyed the absolute immunity through bypassing the judiciary from all types of legal proceedings.[16] At that time the king could not be sued in tort either for the wrong actually authorized by it or committed by its servants, in the course of their employment.[17]

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10 Michael Wells (n 6) 617.

11 (1971) 403 U.S. 388, 395 - 397.

12 Robert Brauneis, 'The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law' (1999) 52 Vanderbilt Law Review 58.

13 ibid, 59.

14 Eric Williamson, 'Jeffries Makes Case for Reforming Constitutional Torts' (2012) <https://www.law.virginia.edu/> accessed 18 June 2022.

15 Ravi Shankar Pandey, 'Constitutional Tort: The Law that deals with Vicarious Liability of the State' (2019 iPleaders) accessed 20 July 2022.

16 Concept of Constitutional Tort in Bangladesh (7 July 2021) <https://lawlegum.com/constitutional-tort-concept-in-bangladesh/> accessed 20 July 2022.

17 ibid.

But after the 18th century, i.e., with the advent of democracy, this impugned doctrine of crown immunity commenced to lose its significance among the people and finally the judiciary became vigilant to scrutinize the functions of State officials in order to prevent their abuse of power and also to deliver the efficacious remedy to the victims of violation of human rights. In England, the position of this traditional common law maxim has been altered by the enactment of the Crown Proceedings Act, 1947[18] eroding the doctrine of sovereign immunity. The liability of State as had been done in England by the enactment of Crown Proceedings Act, 1947 and in USA by the enactment of Federal Torts Claims Act, 1946. In the meantime, the legal maxim *salus populi suprema lex,* i.e., "the welfare of the people shall be the supreme law" obtained reputation in the novel democratic world.[19] With the increasing functions of the State, this Act had been enacted, and at present the Crown is liable for the tort committed by its servants just like a private individual.[20] Making a distinction between sovereign and non-sovereign acts to preclude tort action in respect of the sovereign acts virtually amounts to application of the doctrine of act of State[21]; but there can be no act of State by a sovereign against its own citizens.[22]

In the context of Bangladesh, however, where the people are the ultimate sovereign[23] and its Constitution proclaims the rule of law, there is no justification for adhering to a doctrine developed countries before in a

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18 The Crown Proceeding Act, 1947 has been enacted by the Parliament of the United Kingdom that was come into force on 1 January, 1948. This Act allowed the civil actions against the Crown for the first time to be brought in the same manner as against any other individual of the State.

19 ibid.

20 Rakesh Kumar, 'Doctrine of Constitutional Tort: Evolution and Evaluation' (2004) <http://www.legalservicesindia.com> accessed 20 June 2022.

21 An act of a State is an act of a sovereign against another sovereign or an alien outside its territory which derives its authority not from the domestic law but from the ultra-legal means and is not subject to scrutiny of municipal courts. See East India Co. v Syed Ally (7 MIA 555); Secretary of State v Kamachee Boyee Sahaba (7 MIA 476); Eshugbaye Eleko v Nigeria (1931 AC 662).

22 Mir Ahmed Nawaz Khan v Superintendent, Lyallpur Jail [PLD 1966 (SC) 357, 360].

23 Article 7 (1) of the Constitution provides, "All powers in the Republic belong to the people, and their exercise on behalf of the people shall be affected only under, and by the authority of, this Constitution".

country ruled by the monarchs.[24] The doctrine actually does not serve any legitimate purpose.[25] On the other hand, it does incalculable harm in that if the government is not liable in tort for malfeasance of its employees, the government may not bother much about what its employees do to the citizens and in the ultimate analysis there remains no accountability on which success of democracy depends.[26]

## 5. Constitutional Tort under the Constitution of Bangladesh

In Bangladesh, there is no specific legislation, which governs the liability of the State for the tortious acts committed by its servants. Since in Bangladesh there exists the common law system, claims through the law of tort can be made for the infringements of human rights without any express statutory right to seek remedies.[27] Yet, this opportunity has mostly remained a theoretical one, without much practical enforcement, causing a severe tort law deficit. Moreover, the statutory rights to sue for reparation for certain forms of rights violations also exist, but these too are rarely enforced.[28] However, the Constitution of Bangladesh contains several provisions in this regard. Under Article 102 of the Constitution, the High Court Division exercises its power of judicial review through issuing writs in the nature of *habeas corpus*, prohibition, *mandamus*, *certiorari*, and *quo warranto* against the concerned public functionaries.[29]

Article 102(1) specifically deals with the doctrine of judicial review for infringements of fundamental rights of the citizens of Bangladesh and provides, "The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any

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24 Mahmudul Islam, Constitutional Law of Bangladesh (3rd edn, Mullick Brothers Ltd 2012) 1031.

25 ibid, 1032.

26 ibid.

27 Taqbir Huda, 'Bangladesh: A Constitutional Solution for a Tort Law Deficit?' in Ekaterina Aristova and Ugljesa Grusic (eds), Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions (Hart Publishing 2022) 67 - 85.

28 ibid.

29 M. Jasim Ali Chowdhury, An Introduction to the Constitutional Law of Bangladesh (Book Zone Publications 2021) 520.

of the fundamental rights conferred by Part III of this Constitution".[30] Thus, under Article 102(1) an aggrieved person[31] can file a writ petition against any person or authority inclusive of any person performing any function with regard to the affairs of the State for enforcing his fundamental rights which are guaranteed under Part III of the Constitution.[32]

Not only that, an aggrieved person can lodge a writ petition against both the private and public entities for the violation of his fundamental rights. As mentioned earlier, under Article 102 five types of writs are available and among these two types of writs, i.e., writ of *habeas corpus* and writ of *quo-warranto* can be invoked by any person in enforcing his or her fundamental rights. On the other hand, writ of prohibition, *certiorari* and *mandamus* can be invoked only by an aggrieved person.[33] But, under Article 102(1) what type of legal remedy will be provided to the victim of the violation of fundamental rights depends upon the discretion of the judiciary itself. That is to say, Article 102(1) itself leaves it undefined as to what remedy would be 'appropriate' in enforcing the fundamental rights. However, it is to be noted that though writ petition can be filed seeking compensation under the aforesaid provisions, compensation is not explicitly stated as a remedy for the violation of fundamental rights either in Article 102(1), or anywhere else in our Constitution.

The idea of public law compensation is a recently made-up tool by the judiciary that is delivered as a constitutional remedy for enforcement of fundamental rights to the citizens. The origin of public law compensation lies in the liberal interpretation of the expression 'appropriate' as has been contained in Article 102(1) of the Constitution. In the context of Bangladesh, public law compensation refers to the award of reparation

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30 Constitution of the People's Republic of Bangladesh, art 102(1).

31 A person is said to be aggrieved - (i) when he has suffered a legal injury by reason of violation of his legal right or interest; and (ii) when he has shown that he has a direct personal interest in the act which he challenges. See: S. P. Gupta v India [AIR 1982 (SC) 149] para 14 - 16; Tariq Transport v Sargodha-Vera Bus Service [11 DLR (SC) 140].

32 Concept of Constitutional Tort in Bangladesh <https://lawlegum.com/constitutional-tort-concept-in-bangladesh/> accessed 01 July 2022.

33 Md. Abdul Halim, Constitution, Constitutional Law and Politics: Bangladesh Perspective (Beacon Publications 2021) 389.

under Article 102(1) against the State or the public authority for their violations of these constitutionally guaranteed fundamental human rights.[34] Article 102(1) provides a wide range of authority to the higher judiciary in order to award pecuniary reparation to the victims of violation of fundamental rights.

The right to enforce the fundamental rights of a citizen is itself a fundamental right as has been guaranteed in Article 44 of the Constitution which provides, "The right to move the High Court Division in accordance with clause (1) of Article 102, for the enforcement of the rights conferred by this Part is guaranteed".[35] Actually, the 'fundamental character' of Article 44 essentially creates a corresponding obligation on the judiciary to develop the novel and effective judicial remedies for violations of fundamental rights, including the public law compensation.[36]

## 6. Emergence and Development of Constitutional Tort through Judicial Activism in Bangladesh

This portion of the research actually strives to focus on the emergence, development and application of the doctrine of constitutional tort through the current landmark judgments in Bangladesh. The question regarding constitutional tort and tortious liability of State for the acts of its servants has recently raised many interesting debates in the judicial arena because both the High Court Division and the Appellate Division of the Supreme Court of Bangladesh have recently delivered few substantially essential judgments that have explicitly been able to develop the laws relating to tortious liability in the jurisdiction of Bangladesh. Throughout this research, a number of those significant landmark judgments of our Supreme Court will be discussed with specific reference as to how those judgments are playing a key role in developing the tortious regime within the legal system of Bangladesh.

There exists a common fallacy among the common people of Bangladesh that there exists no application of law of tort in our country. This flawed

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34 Taqbir Huda (n 1) 27.

35 Constitution of the People's Republic of Bangladesh, art 44 (1).

36 Ridwanul Hoque, Judicial Activism: A Golden Mean Approach (Newcastle upon Tyne: Cambridge Scholars Publishing 2011) 233.

perception is essentially based on the fact that in Bangladesh we have lack of specific legislation concerning the law of tort.[37] However, we have got some statutes in our country that tacitly address different issues on the law of tort both in civil and criminal jurisprudence.[38] Apart from that, there are few substantial rulings of the Supreme Court of Bangladesh that have played a pivotal role in developing the law of tortious liability in the jurisdiction of Bangladesh. This article though mainly emphasizes on the cases on constitutional tort or public law tort in Bangladesh, but for the convenience of discussion in line with the title of the research, I have brought up the context of private law cases here. Now I will discuss some of those landmark judgments with specific references to explore as to how these judgments have been contributing to develop the regime of constitutional torts in the legal system of Bangladesh. In most of these cases, the Courts have vehemently applied the principles of strict liability, vicarious liability, negligence and *res ipsa loquitur*[39].

Before talking about the constitutional tort cases, several private law tort cases are discussed here at first. *Bangladesh Beverage Industries Ltd v Rowshan Akhter and Others*[40] is often treated as a landmark private law tort case where the assessment of damages in tortious claims has rightly been demonstrated in the context of Bangladesh. This case was originally lodged in the form of a money suit[41] by the widow and two minor kids of the deceased, who was a journalist, as plaintiffs where the deceased was killed in 1989 by the reckless driving of a mini truck driver hitting him from the wrong side while he was crossing the road. The Trial Court, i.e., the 3rd Joint District Judge Court, Dhaka in decreeing the suit in favor of the plaintiffs awarding damages worth Tk. 3,52,97,000/- found that the driver of the defendant was driving the vehicle negligently and recklessly in violation of law.[42] In this case the wife of the deceased fought the legal

37 Naima Haider, 'Development of the Laws of Tortious Liability in Bangladesh' (2021) Dhaka University Law Journal 196.

38 ibid.

39 Res ipsa loquitur (Latin for 'the thing speaks for itself') implies that mere taking place of some kinds of accident will be adequate to constitute the negligence. In the common law of torts, this doctrine infers negligence from the very nature of an accident or injury in the absence of direct evidence as to how any defendant behaved.

40 62 DLR (HCD) (2010) 483; 69 DLR (AD) (2017) 196.

41 Money Suit No. 3 of 1991 (Unreported).

42 Naima Haider (n 32) 196.

battle continuously for a period of 25 years in total, initiating from the trial Court prior to going to the High Court Division and finally the Appellate Division of the Supreme Court of Bangladesh.

Finally, in 2016 the Appellate Division awarded the pecuniary compensation against the defendant company thorough making them vicariously liable for the act of the driver. It is worth mentioning here that admittedly the cause of action in this case was negligence, the basis of which certainly lies within the ambit of the law of tort. This case subsequently went up to the High Court Division whereby the High Court Division had allowed the appeal-in-part and modified the judgment and decree, and eventually to the Appellate Division whereby the Appellate Division disposed of the leave petition with some crucial observations upholding the entitlement of the plaintiffs in the suit to get a decree worth Tk. 1,71,47,008/-. In this case, the apex Court of Bangladesh has rightly laid down the significant principles which would considerably assist the plaintiff in identifying the heads of damages and also in calculating the amount of compensation while the plaintiff is seeking relief from the Court of law under the cause of action for negligence.[43]

In *British American Tobacco Bangladesh Company Ltd v Begum Shamsun Nahar*[44] a female employee of the appellant company, who was the victim of sexual harassment and bullying, filed a money suit for damages against the appellate company when she was terminated from her service. The appellate company filed an application for rejection of the plaint before the Trial Court which was rejected and then the company lodged a civil revision before the High Court Division where the High Court Division finally discharged the Rule. Subsequently, the employer company moved a civil petition for leave to appeal before the Appellate Division. The Appellate Division after duly scrutinizing the judgments of the High Court Division and trial Court held the appellate company vicariously liable for the tort committed by its employees and also for its inaction when the victim complained against the employees who were harassing her for a long period of time. The Appellate Division awarded pecuniary

43 ibid.

44 66 DLR (AD) (2014) 80.

compensation of Tk. 2,50,038,000/- as damages together with 15% interest against the appellate company.

In this case the Appellate Division *inter alia* held that a person can be liable for tort as well and damages may be claimed against him for such wrong doing and against an organization or establishment if it fails to ensure the prevention of sexual harassment and bullying to a woman, where she can work with honor and dignity and without being harassed or disturbed by her male boss or other male colleagues. We know that the right to protection from sexual harassment comes within the ambit of the right to life which is guaranteed under Article 32 of the Constitution. So, in light of the above case it can be argued that at least for the time being, that whether or not the employee has committed the tort in the course of his employment is a matter of fact the ascertainment of which would definitely require the adducing of evidence before the trial Court.

A detailed analysis of the above two judgments on private law tort cases delivered by the apex Court of Bangladesh clarifies that the law of tort has its foundation at the common law or statutory torts and, therefore, the same would have to be developed through the precedents. It undoubtedly requires the judicial activism on the part of the judges and the recent approach of the judiciary, especially the higher judiciary towards such development evidently requires a subtle scrutiny in order to profoundly realize the judicial approach towards the law of tort in Bangladesh. Dr. Naim Ahmed also argued in the affirmative and stated in his book *Public Interest Litigation: Constitutional Issues and Remedies*[45], the right to claim compensation through a civil suit remains unaffected in our country. Justice Naima Haider also thinks that though compensation culture is somehow getting developed in our writ jurisdiction, the law of tort would have to be developed within the civil jurisdiction of our legal system as this is the case with all the advanced legal systems including India.[46]

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45 Naim Ahmed, Public Interest Litigation: Constitutional Issues and Remedies (BLAST 1999).

46 Naima Haider (n 32) 202.

*Catherine Masud and Others v Md Kashed Miah and Others*[47] is another glaring example of the private tort case in the context of Bangladesh where the concern with regard to the lack of the development of the law of tort was manifestly clarified by the High Court Division. In this case, the High Court Division emphasized on the notion of 'justice, equity, and good conscience' for recognizing and developing the law of tort in the jurisdiction of Bangladesh. Also, in this case, the High Court Division expressed its concern explicitly about the lack of rulings of the subordinate Courts on the matters of tort law because the High Court Division felt that the subordinate Courts do not feel empowered to determine a tortious claim.[48]

Meanwhile, the culture of public law compensation has been developed and gradually getting popularity in the writ jurisdictions of our country. Now, let us focus on the landmark judgments of several public tort cases. In *Bilkis Akhter Hossain v Bangladesh and Others*[49] the High Court Division formally introduced the public law compensation and awarded the same for the first time. In this case, a petition was lodged under Article 102(1) of the Constitution by the wife of a high-profile politician, an opposite party leader, challenging the validity of the arrest and detention of her husband under the Special Powers Act, 1974[50]. In the said petition, the petitioner claimed the arrest and detention to be 'illegal' and alleged that it was done only for the 'political victimization' of the victim with the intention of suppressing his planned political activities, thereby violating his fundamental rights to liberty and freedom of speech under the Constitution of Bangladesh. The High Court Division in this case found that there was 'no bar in awarding compensation to the aggrieved person under the writ jurisdiction'[51]. The Court also decided to pay 'exemplary lump-sum monetary compensation' of Tk. 100,000/- to the detenu.[52]

Immediately after two years of the earlier case, the Bangladesh Legal Aid and Services Trust (BLAST), a renowned national human rights based

47 (2015) 67 DLR 523.
48 Naima Haider (n 32) 202.
49 (1997) 17 BLD (HCD) 395.
50 Act No. XIV of 1974.
51 Bilkis Akhter Hossain v Bangladesh and Others (1997) 17 BLD (HCD) 395, para 33.
52 ibid, para 47.

organization, lodged a writ petition before the High Court Division questioning the validity of the detention of a boy, who was a minor, in the custody and also sought compensation for the violation of his fundamental rights in *BLAST v Bangladesh and Others*[53]. In this case the BLAST argued that the 'wrongful confinement' amounted to the violation of five fundamental rights, i.e., the right to protection of law; right to personal liberty; safeguards as to arrest and detention; safeguards as to trial and punishment and freedom of movement. The High Court Division launched a scathing critique on the enduring culture of police brutality and corruption, noting that the 'rampant misuse of power by Police causes gross violation of fundamental rights of citizens'[54]. In spite of that, the High Court Division finally decided to take 'a lenient view' concerning the claim of reparation 'with the hope' that the police would not violate fundamental rights of the citizens in future.[55]

The question of compensation under Article 102(1) of the Constitution arose again before the High Court Division in *Bangladesh Legal Aid and Services Trust (BLAST) v Bangladesh*[56] where the petitioners *inter alia* alleged that the police frequently violated the citizens' right to personal liberty and other fundamental rights by abusing their power of arrest and detention under sections 54 and 167 of the Code of Criminal Procedure, 1898[57] narrating several instances of such abuse, e.g., death of a student in the police custody. Therefore, the petitioners asked the Court to issue few directions consisting of proper measures and safeguards in order to make sure that the aforesaid power of arrest and detention under the Code is not exercised in an abusive manner.

In this case, the Court turned to the examples of custodial torture and death focused by the petitioners and contended that, as these cases are pending on appeal and 'the Writ Court' has not ruled on the legality of the arrest and detention, 'we do not think it proper to award any compensation in

53 (1999) 4 BLC (HCD) 600.
54 BLAST v Bangladesh and Others (1999) 4 BLC (HCD) 600, para 28.
55 ibid, para 31.
56 (2003) 55 DLR (HCD) 363.
57 Act No. V of 1898.

this present writ petition'.[58] Ultimately this case came before the Appellate Division on appeal in *Bangladesh and Others v Bangladesh Legal Aid and Services Trust (BLAST) and Others*[59] where regardless of recalling the petitioner's prayer for compensation for the victims of 'custodial torture, death and rape', and the High Court Division's confirmation of its power to award compensation in these cases, the Appellate Division, rather splendidly, does not address the petitioner's claim of compensation in its verdict. This is an extremely unfortunate omission by the apex Court of the State and exemplifies the legal conservatism that acts as a principal obstacle to the challenges to maintain the *status quo*.[60]

*Children's Charity Bangladesh Foundation (CCB Foundation) v Bangladesh and Others*[61] is another remarkable case where the Court embraced the comparative constitutionalism to establish the legality of public law compensation and to introduce tortious principles in order to amplify the scope of compensation under Article 102(1) of the Constitution.[62] The fact of this case in brief is that, on 26 December 2014, a four-year old child named Zihad fell into a sixteen-inch wide pipe nearby a children's playground in the Shahjahanpur Railway Colony situated in Dhaka, which was left uncovered and ran several hundred feet deep. However, his body was recovered on the same day by a group of volunteer rescue team members who mainly used a hand-made device, and moments after the respondents abandoned their rescue operation by saying there was 'no trace of human body inside the pipe'.[63]

Following this occurrence, a Public Interest Litigation (PIL) was lodged by Barrister Md. Abdul Halim for the Children's Charity Bangladesh (CCB) Foundation before the High Court Division under Article 102 of the Constitution seeking directions to the concerned authorities[64] and

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58 Bangladesh Legal Aid and Services Trust (BLAST) v Bangladesh (2003) 55 DLR (HCD) 363, para 27.

59 (2017) 69 DLR (AD) 63.

60 Taqbir Huda (n 1) 36.

61 (2017) 5 CLR (HCD) 278.

62 Taqbir Huda (n 1) 28.

63 Children's Charity Bangladesh Foundation (CCB Foundation) v Bangladesh and Others (2017) 5 CLR (HCD) 278, para 58.

64 Here, the concerned authorities were the Bangladesh Railway and Bangladesh Fire Service and Civil Defense.

claiming damages of Tk. 30,00,000/- for their grave negligence, payable to Zihad's family. On 7 October 2017, the High Court Division ordered the respondents to pay Tk. 20,00000/- as pecuniary compensation to Zahid's family. The respondents in the writ petition also filed a petition seeking leave to appeal before the Appellate Division of the Supreme Court of Bangladesh, but on 5 August 2018, the Apex Court rejected the said petition and upheld the verdict of the High Court Division.[65] Barrister Md. Abdul Halim, the PIL lawyer representing the CCB Foundation in this case, vehemently justified the claim for public law compensation through focusing that 'this is not a case of violation of ordinary right under any ordinary law; rather this is a case of violation of the fundamental right to life'.[66] He further argued that given the 'sheer negligence' apparent in the facts of this case, the tortious principle of *res ipsa loquitor* and principle of strict liability should apply to the respondents.[67]

## 7. Concluding Remarks

Awarding compensation for violation of fundamental human rights guaranteed under the Constitution has enormously been recognized and practiced by different jurisdictions in different parts of the world. Constitutional tort provides for the damages, especially the exemplary damages awarded to the victims of the violation of fundamental rights in a particular State. A careful scrutiny of the judicial stance towards the emergence and development of constitutional tort in our country reveals the importance paid by the Supreme Court of Bangladesh on the ascertainment of damages sustained by the plaintiffs in their constitutional tort claims. However, although it is admirable that in recent times the higher judiciary has embraced the judicial activism in order to regulate constitutional tort in our country, it is yet to be observed as to whether these key legal judicial precedents ultimately would sufficiently be applied in realizing compensation from the State for the long unheard victims of violations of the fundamental rights.

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65 The Daily Star 'SC Upholds Tk 20 Lakh Compensation' (6 August 2018) <www.thedailystar.net> accessed 10 June 2022.

66 CCB Foundation (n 57), para 25.

67 ibid, para 25, 28 - 30.

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# Addressing Workers' Rights Violation in the Garment Industry in Bangladesh

Md Razidur Rahaman*

**Abstract**

Bangladesh is the fastest growing economy in the world. Garment industry plays an important role to the economic development of Bangladesh. More than 4 million workers are employed in different active garments factories, among them more than 80% workers are women. Women are actively engaged in garment factories of Bangladesh. They are contributing in the economic development of Bangladesh. Despite the contribution of workers in the garment factories, workers' rights are being violated. Workers suffer from terrible conditions inside the factories while earning low wages and having imperfect benefits. They suffer physical and mental harassment, not getting of wages timely, due wages, non-payment of different benefits including maternity benefits, leave and holidays, non-payment of overtime work, and also denial to form Association and getting membership in Association. Women workers are exploited in the workplace, in some cases they are paid less than the male workers get, and are particularly vulnerable to abuse. Employer threats workers for organizing trade unions and act against those workers who are organizing to form trade union. The Government passed the Bangladesh Labour Act 2006 to protect labour rights. This Act was amended after the massive death and injury of the workers in the Rana Plaza factory building collapse in 2013. In that incident around 1100 garment workers died. This paper discusses the labour rights violation and offers some observations on ensuring labour rights in the garment industries of Bangladesh.

## 1. Introduction

Garment industries play an important role in the economic development of Bangladesh. Bangladeshi garment product has a good marketplace all over the world including the U.S, Canada and European Union. Bangladesh earns millions of U.S dollar per-year by exporting garment products. The workers are facing many problems in relation to the rights ensured both in

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the national and the international laws. The employer can easily violate labour rights because of the illiteracy of workers. As most of them are illiterate they are not aware of their rights. Some trade Union leaders maintain an illegal monetary relationship with the employers and enrich their own property. The concerned government officials also maintain illegal relationship with the employers and they do not give accurate report in relation to the violation of labour rights by the employers in the garment industry of Bangladesh. Nowadays, some garment employer such as, Ha-Meem and Windy group factories are giving the workers' rights. The workers of this factory get weekly holiday and also gets the payment for overtime works. The women workers also get the maternity leaves and benefits.[1]

In every year hundreds of workers are killed inside the garment factory by fire, building collapse etc. Firing is very common in the factories but the employers are not taking necessary action to prevent such incidents in the factory. Labour Laws are not that much strict to ensure labour rights in Bangladesh. Some initiatives have been taken by the Government, but that initiative is not sufficient to protect the rights of the workers. The main initiative was the amendment of the Bangladesh Labour Act in 2013 after the RANA PLAZA garment factory collapse. This amendment strengthens the fundamental rights with improvements in relation to the occupational safety and health of the workers. The Government eliminate the customs duties and other charges on import of fire resistance doors, sprinkler systems and equipment, and emergency light and steel materials for factory buildings in order to reduce the cost of compliance with fire safety standards.[2] Bangladesh should give more focus on ensuring labour rights. There are some laws in Bangladesh to protect labour rights including the constitution of Bangladesh. The constitution guarantees the rights of the labourer. Bangladesh ratified thirty-five ILO Conventions including seven

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1 Charles Kernaghan, "Garment workers in Bangladesh fight back and win", October 2014, Institute for Global Labour and Human Rights, http://www.globallabourrights.org/reports/document/1410-IGLHR-Bangladesh-UnprecedentedChanges.pdf, accessed date-28.01.2023

2 Staying engaged: for continuous improvements in labour rights and factory safety in the ready-made garment and knitwear industry in Bangladesh", Bangladesh Sustainability Compact – follow-up meeting 20 October 2014, Brussels, http://trade.ec.europa.eu/ doclib/docs/2014/october/ tradoc_152853.pdf.

fundamental Conventions. Bangladesh has also ratified several international human rights treaties and conventions. So, Bangladesh has some responsibilities to protect labour rights guaranteed under both the national and International laws.

## 2. Development of the Garment Industry in Bangladesh

Historically Bangladesh is an agricultural nation. In the first of 1971, some foreign buyers motivated Bangladeshi entrepreneurs to manufacture and export the apparels under some conditions. One of such garments named 'Reaz Store' as a small tailoring shop in 1960 in Dhaka.[3] In the beginning it was serving for domestic markets. It has changed its name to 'M/S Reaz Garments Ltd.' in 1973 and initiated export by shipping of 10,000 pieces of garments product (men's shirt) worth to 13 million Francs to Paris based firm in 1978.[4] Another important garment was 'Desh Garments Ltd.' established in 1977and set up in joint venture with 'Daewoo of South Korea'. It was the single largest and most modern garment manufacturing unit in the sub-continent. In the last of 1982, there was only 47 garment industries. The main development started from 1983. Bangladesh has taken a series of economic reforms to open up its economy under the patronage of the International Monetary Fund (IMF) and the World Bank. In 1982, a new import policy announced an export led growth strategy to be spear headed by the private sector. A number of direct export initiatives schemes were put in place while foreign direct investment was encouraged through the establishment of export processing zones (EPZ) outside Dhaka and Chittagong. In 1980, the government of Bangladesh modified the import policy for 100 percent export oriented garments industries to provide them with the scope of bonded warehouse facility instead of duty draw back system.

Due to prevailing anti-export bias in the policy regime, it was then restricted to import raw materials, but the modification permitted 100 percent export oriented RMG establishments to import fabrics. This policy

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3 Mohammad Yunus and Tatsufumi Yamagata, Chapter 6: The Garment industry in Bangladesh, "Dynamics of the Garment Industry in Low-Income Countries: Experience of Asia and Africa (Interim Report 2011)", http://www.ide.go.jp, accessed date- 27.12.2022

4 Mohammad Yunus and Tatsufumi Yamagata, Chapter 6: The Garment industry in Bangladesh, http://www.ide.go.jp, accessed date- 27.12.2022

modification added extra edge towards the industry's competitiveness as it readily removed the bottleneck for trade barriers in terms of bureaucratic hazards, rent-seeking power and effective lead time reduction of production.[5] The Multi-Fibre Agreement (MFA) is another important initiative for the progress of the garment industry. It was phased out in 2004 and Bangladesh exported the garment products to U.S market under this quota free agreement. With the removal of MFA quotas, there will be chances to increase market shares. The challenge is not to protect a special position, but to open up the markets and ensure that Bangladesh will be in a strong position to compete.[6] One of the main initiatives was that the Government of Bangladesh donated land to develop the garment industry in Narayanganj and Gazipur in 1982. In 2013, the Government again donated three hundred acres (300 acres) of land in Munshiganj of Gazipur to develop the village of garment industry. The Government also help to organise trade fairs in Bangladesh as well as in abroad. In the 1984-1985 fiscal year, it's became the number of 384, in 1985-1986 fiscal year it became 594 and finally in the 2013-2014 fiscal year it reached a record number garments industry (registered with BGMEA) and the number was 4,222 garment industries. The total number of garment industry is 5,600 till 2013.

## 3. Contribution of the Garment Industry in the Economic Development

Product diversification is very important for any garment industry to develop its market all over the world. There are product diversities in the garments industries in Bangladesh. There are two types of products, *woven and knit*, produced in the garments of Bangladesh. The 'woven' includes Shirts, T-shirts and trousers; and 'Knit' includes undergarments, socks, stockings, T-shirts, sweaters and other casual and soft garments. The 'Woven' products are being exported more than the 'Knit' products. The main export markets are U.S.A and Europe. In 2021-2022 the total RMG export was U.S $42,613.16 million dollar which was U.S $1,445.02 million only in the 1992-1993 fiscal year. The Garment industries now

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5 Mohammad Yunus and Tatsufumi Yamagata, Chapter 6: The Garment industry in Bangladesh [http://www.ide.go.jp]; accessed date- 07.02.2023

6 "End of MFA Quotas: Key Issues and Strategic Options for Bangladesh Readymade Garment Industry"; Bangladesh Development Series-paper No-2; The World Bank Office, Dhaka, 2005. [www.worldbank.org.bd/bds].Accessed date- 19.01.2023

contribute 13.5% of the total GDP of Bangladesh. Bangladesh is the fourth largest clothing exporter of the world with three percent (3%) share of the global market. Bangladesh has bilateral agreements with twenty-eight (28) countries and the Generalised System of Preferences (GSP) of the European Union for the access of the Bangladeshi Readymade Garment (RMG) cloths to world market. The GSP facilities started from January, 2009 to December, 2011. Bangladesh is exporting RMG product to the European Union under GSP. Bangladesh has been enjoying duty-free market access to Canada since 2003. The comparative statistics of the RMG and the total export of Bangladesh from 1983 to 2022 has given in the following table[7]:

**Table: Comparative Statement on Export of RMG and Total Export of Bangladesh**

| Year | Export of RMG (In Million US$) | Total Export of Bangladesh (In Million US$) | % of RMG'S to Total Export |
|---|---|---|---|
| 1983-84 | 31.57 | 811.00 | 3.89 |
| 1984-85 | 116.2 | 934.43 | 12.44 |
| 1985-86 | 131.48 | 819.21 | 16.05 |
| 1986-87 | 298.67 | 1076.61 | 27.74 |
| 1987-88 | 433.92 | 1231.2 | 35.24 |
| 1988-89 | 471.09 | 1291.56 | 36.47 |
| 1989-90 | 624.16 | 1923.70 | 32.45 |
| 1990-91 | 866.82 | 1717.55 | 50.47 |
| 1991-92 | 1182.57 | 1993.90 | 59.31 |
| 1992-93 | 1445.02 | 2382.89 | 60.64 |
| 1993-94 | 1555.79 | 2533.90 | 61.40 |
| 1994-95 | 2228.35 | 3472.56 | 64.17 |
| 1995-96 | 2547.13 | 3882.42 | 65.61 |
| 1996-97 | 3001.25 | 4418.28 | 67.93 |
| 1997-98 | 3781.94 | 5161.20 | 73.28 |
| 1998-99 | 4019.98 | 5312.86 | 75.67 |
| 1999-00 | 4349.41 | 5752.20 | 75.61 |
| 2000-01 | 4859.83 | 6467.30 | 75.14 |
| 2001-02 | 4583.75 | 5986.09 | 76.57 |

7 https://www.bgmea.com.bd/page/Export_Performance, Accessed date: 05/02/2023

| | | | |
|---|---|---|---|
| 2002-03 | 4912.09 | 6548.44 | 75.01 |
| 2003-04 | 5686.09 | 7602.99 | 74.79 |
| 2004-05 | 6417.67 | 8654.52 | 74.15 |
| 2005-06 | 7900.80 | 10526.16 | 75.06 |
| 2006-07 | 9211.23 | 12177.86 | 75.64 |
| 2007-08 | 10699.80 | 14110.80 | 75.83 |
| 2008-09 | 12347.77 | 15565.19 | 79.33 |
| 2009-10 | 12496.72 | 16204.65 | 77.12 |
| 2010-11 | 17914.46 | 22924.38 | 78.15 |
| 2011-12 | 19089.69 | 24287.66 | 78.60 |
| 2012-13 | 21515.73 | 27027.36 | 79.61 |
| 2013-14 | 24491.88 | 30186.62 | 81.13 |
| 2014-15 | 25491.40 | 31208.94 | 81.68 |
| 2015-16 | 28094.16 | 34257.18 | 82.01 |
| 2016-17 | 28149.84 | 34655.90 | 81.23 |
| 2017-18 | 30614.76 | 36668.17 | 83.49 |
| 2018-19 | 34133.27 | 40535.04 | 84.21 |
| 2019-20 | 27949.19 | 33674.09 | 83.00 |
| 2020-21 | 31456.73 | 38758.31 | 81.16 |
| 2021-22 | 42613.15 | 52082.66 | 81.82 |

**Source: Bangladesh Garment Manufacturers and Exporters Association (BGMEA)**

## 4. Violations of Labour Rights in the Garment Industries in Bangladesh

Despite all good contribution there are labour rights violations in the garment factories of Bangladesh. International Trade Union Confederation (ITUC) reported that Bangladesh is one of the top 10 worst countries in the world where labour rights are not guaranteed accordingly.[8] The Department of Inspection for Factories and Establishments (DIFE) identified labour rights violations. The DIFE categorized these violations under thirteen clusters including recruitment and job conditions, children and adolescent workers, maternity welfare benefits, occupational health, occupational safety, occupational accident, compensation and safety committee, welfare measures, working hours and holidays, wages and

[8] The Global Rights Index-2022, ITUC, https://www.globalrightsindex.org/en/2022/countries/ bgd, Accessed date: 06/01/2023

payment of wages, social security (group insurance, provident fund, profit sharing, etc.), discrimination, and violence at the workplace. The main challenges workers are facing have been explained below:

### 4.1 Appointment Letter and Identity Card

An appointment letter is basically a contract between the employer and the employee. It creates the status of a worker to entitle rights ensured under Bangladesh Labour Act, 2006.Bangladesh Labour Act, 2006 states that every employer shall issue a letter of appointment and identity card with photograph after employment.[9] A report conducted in 2008 by War on Want in partnership with the National Garment Workers' Federation, a Bangladeshi trade union, and they interviewed one thousand two hundred and three workers from forty-three factories in Bangladesh. Fifty-three percent of the interviewed workers responded that they didn't receive an appointment letter.[10] The employer takes this matter as advantage, because without appointment letter a worker has no legal right and the employer has no legal obligation. The employer sometimes issues identity cards which has less legal value.

### 4.2 Improper Working Environment

The maximum garment factories are not complying with the existing rules and regulations to ensure working environment. Workers are forced to work in unsafe, unhealthy, and overcrowded workplace.[11] The working environment of an establishment should not be so overcrowded that it is injurious to the health of workers. Section 56 of the Bangladesh Labour Act, 2006 stated that, nine and a half cubic meters of space should be provided for each single worker in a factory. Workers faces eyesight problem due to inadequate light in the workrooms.[12] Rule 58 of the

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9 Section 5 of the Labour Act, 2006

10 Ignoring the Law: Labour Rights Violations in the Garment Industry in Bangladesh, available at: https://waronwant.org/sites/default/files/Ignoring%20the%20Law%20-%20Labour%20Rights%20Violations%20and%20the%20Bangladeshi%20Garment%20Industry.pdf, Accessed date: 4/01/2023

11 "Problems of Garments Industry in Bangladesh", Conveylive.com, available at: http://www.conveylive.com/a/Problems_Of_Read_Made_Garments_Sector_In_Bangladesh

12 Hasnat M Alamgir, Knowledge gap on RMG Workers' occupational Health, September 02, 2022, The Financial Express, Available at: https://thefinancialexpress.com.bd

Bangladesh Labour Rules, 2015 provides that electricity supply lines and apparatus must be of adequate size and strength as not to pose a possibility of severe bodily harm to workers. Maximum garment factories are not properly ventilated though section 2 of the Bangladesh National Building Code, 2006 guaranteed ventilation.

### 4.3 Occupational Health and Safety

Government of Bangladesh adopted the National Policy on Occupational Health and Safety in 2013 considering the development of industrial productivity and to ensure safety of workers. Employers are not following the rules and regulations in relation to the occupational health and safety of the workers. Women are affected by different occupational diseases after starting work. Pratima Paul-Majumder has done a field visit to determine the health condition of the garment workers in 1996. To determine the health conditions of the garment workers she asked them whether they suffered more from illness now than before joining the garment industry.[13] The health conditions of the garment workers before and after they joining in the garment industry has given in the following table[14]:

**Health Conditions of Garment Workers Before and After Employment in the Garment Industry**

**(Figures in parentheses are percentages of column totals)**

| Illness Experienced | Male Workers | | Female Workers | | Both | |
|---|---|---|---|---|---|---|
| | Before Employment | After Employment | Before Employment | After Employment | Before Employment | After Employment |
| Often | 6 (2.4) | 32 (13.1) | 16 (3.8) | 96 (22.5) | 22 (3.3) | 128 (19.1) |
| Sometimes | 84 (34.3) | 154 (62.9) | 148 (34.7) | 252 (59.2) | 232 (34.6) | 406 (60.5) |
| Very Rarely | 133(54.3) | 37 (15.0) | 230 (54.0) | 46 (10.8) | 363 (54.1) | 83 (12.4) |
| Not Reported | 22 (9.0) | 22 (9.0) | 32 (7.5) | 32 (7.5) | 54 (8.0) | 54 (8.0) |

/views/knowledge-gap-on-rmg-workers-occupational-health-1662129795,Accessed Date: 12/01/2023

13 Pratima Paul-Majumder, " Health Impact of Women's Wage Employment: A Case Study of the Garment Industry of Bangladesh", Vol. 24:1/2 (March-June 1996), pp-61, The Bangladesh Development Studies, http://www.jstor.org/stable/40795546

14 Pratima Paul-Majumder, "Health Impact of Women's Wage Employment: A Case Study of the Garment Industry of Bangladesh", Vol. 24(1) (March-June 1996), pp- 62, The Bangladesh Development Studies, http://www.jstor.org/stable/40795546

| Illness Experienced | Male Workers | | Female Workers | | Both | |
|---|---|---|---|---|---|---|
| | Before Employment | After Employment | Before Employment | After Employment | Before Employment | After Employment |
| Number of Workers | 245 (100.0) | 245 (100.0) | 426 (100.0) | 426 (100.0) | 671 (100.0) | 671 (100.0) |

According to this report, 23% female workers mentioned that they often fell sick after joining garment industry. Around eighty-two percent female workers experienced various illness since their joining in the garment industry. About 39% of the female garment workers said that they are often suffering from cough, cold and fever after they joined in the garment factory.[15] About forty-two percent female workers reported that they suffered from cough, cold and fever after they joined in the garment factory but not frequently.[16] Apart from these diseases, physical weakness and dizziness are the others problem faced by the female garment workers. According to the 1990 survey by BIDS, more than 37% garment workers reported that they always suffers from physical weakness.[17] Garment workers physical weakness also resulted from the hazardous work.

### 4.4 Accidents and Compensation

Before 2015, there was no uniformity regarding to employment injury compensation for garment workers in Bangladesh. After Rana Plaza accidental cause some initiatives were taken to formulate a uniform system, and the ILO has been working with the government of Bangladesh and the employers' associations to design a national employment injury insurance scheme to protect workers. Section 150 of the Bangladesh labour Act, 2006 stated that employers' have obligation to report about accidents and injuries in workplace. DIFE is working with this issue seriously and from 2015-2018, a total number of 1,163 accidents were reported to DIFE.[18] DIFE has worked under Bangladesh Labour Act 2006

15 ibid

16 ibid

17 Pratima Paul-Majumder, "Health Impact of Women's Wage Employment: A Case Study of the Garment Industry of Bangladesh", Vol. 24:1, (1996),pp- 63, The Bangladesh Development Studies, http://www.jstor.org/stable/40795546

18 National Profile on Occupational safety and health in Bangladesh, (2019), Available at: https://dife.portal.gov.bd/sites/default/files/files/dife.portal.gov.bd/page/a51db80d_ca8e_4cae_9579_5f6f089d5754/2021-09-15-05-58-20b6eeb7481056b939b691d2d26a401a.pdf, Accessed date: 25/01/2023

(as amended 2018) to ensure compensation for reported workplace injuries and it has been settled and workers received compensation, thereby. Total amount settled compensation during this period was taka 12.24 million.[19] The National Occupational Health and Safety policy instructed the treatment and compensation of injured workers, and rehabilitation as per his capability.[20]

### 4.5 Working Hours and Wages

The workers are forced to work for long working hour and pressurised to work even in visible unsafe working condition.[21] Section 100 of the Bangladesh Labour Act, 2006 (as amended 2013), the working hours for adult worker is eight-hours in a day and the total working hours shall not exceed ten hours in a day including overtime. An adult worker shall not be allowed to work in an establishment for more than forty-eight hours in a week and in no circumstances it shall not exceed sixty hours in a week.[22] In case of the working hour, there is an exception under Bangladesh Labour Act. It provides that-

> The Government, if satisfied that in public interest or in the interest of economic development such exemption or relaxation is necessary, in certain industries, by order in writing under specific terms and conditions, may relax the provision of this section or exempt, for a maximum period of six months, from the provision of this section at a time.[23]

It is very common scenario that the workers are working in the garment industry more than ten hours in a day round the year. The ILO Convention on Hours of Works, 1919 provides that, no one shall be allowed to work in an industry more than eight hours in a day and more than forty-eight hours in a week.[24] The garment workers sometimes work forcefully by the employer until midnight which is the violation of the Bangladesh Labour

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19 ibid

20 Clause 4.b.11 and 3.a.12 of the National Occupational Health and Safety Policy.

21 Rebecca Prentice, "Labour Rights from Labour Wrongs? Transnational Compensation and the Spatial Politics of Labour Rights after Bangladesh's Rana Plaza Garment Factory Collapse", Vol. 53 (6), 2021, ANTIPODE, https://doi.org/10.1111/anti.12751

22 Section 102 of the Bangladesh Labour (amended) Act, 2013

23 ibid

24 Preamble of the ILO Convention on Hours of Work,1919

Act and also the violation of ILO Conventions. According to the ILO Convention on Night Work, 1990 the term night work means all work which is performed during a period of not less than seven consecutive hours, including the interval from midnight to 5 a.m., to be determined by the competent authority after consulting the most representative organisations of employers and workers or by collective agreements.[25] The workers of the 'Jeans Plus Ltd.' are forced to work from 8.00 a.m to 10.00 p.m or 11.00 p.m in a day[26] and they had to work also in Friday from 8.00 a.m to 5.00 p.m or 6.00 p.m.[27] In this factory over 1,000 workers are working. The pregnant women workers have no job security and they do not get any maternity leave from the employer.[28]

The wage is also very low, a senior sewing operator earns only U.S 41 cent per hour.[29] The garment worker's monthly wage is lower comparative to the other countries to the world. In 1994, the minimum wage was Tk. 940 only for the garment workers. In 2006 it was revised and fixed Tk. 1,662.50 only. In 2013, it was Tk. 5,300.00 and finally now the minimum wage is Tk. 8,000.00. As of March 2021, Bangladesh is paying the lowest minimum wage among the Asian countries.[30] The monthly minimum wage for entry-level workers garment sector of Bangladesh is U.S $95 per month where some other countries wages are much higher. For example, in Pakistan the minimum wage rate is U.S. $104, in Sri Lanka U.S. $ 105, in India U.S. $145, in Myanmar U.S. $157, in Cambodia U.S. $190, and in Indonesia U.S. $243 per month.[31] Nineteen buyers from leading brands around the world, including Gap and Walmart, gathered in Dhaka to express their concern over persistent labour unrest in the industry to the government. The companies urged the government to adjust wages in the

25 Article 1 of the ILO Convention on Night Work, 1990

26 "International Label Children's Clothing Made Under Slave-like Conditions in Bangladesh", Institute for Global Labour and Human Rights, http://www.globallabourrights.org/alerts/bangladesh-jeans-plus-pullandbear-lcwaikiki,accessed date- 27.01.2023.

27 ibid

28 Supra Note. 26

29 ibid

30 Average monthly basic wage of garment workers in selected Asian countries between March 2020 to March 2021, Statista, Available at: /https://www.statista.com/statistics/1281264/average-monthly-wage-garment-workers-asia, Accessed date: 01/02/2023

31 Ibid.

sector, as this is the main source of labour unrest.[32] When the workers demand to increase the wage sometimes they are being tortured by the employer. According to 'Odhikar' a leading human rights NGO in Bangladesh that during June 2012 worker's unrest erupted in many garment factories, including the export-oriented industry Opex Garments of Sinha Group, at Kanchpur in Narayanganj for overdue wages and in protest of torturing workers at Ashulia and Savar.[33] Present actual wages of the workers of various grades in the garment industries of Bangladesh is the following[34]:

The revised wage structure will take effect retrospectively from Dec, 2018 and it will be re-adjusted with their salaries from Feb onwards: Commerce minister

| Grade | Gross Wage 2013 | Gross Wage 2018 | Proposed Gross Wage |
|---|---|---|---|
| 7th | 5300 | 8000 | 8000 |
| 6th | 5678 | 8405 | 8420 |
| 5th | 6042 | 8855 | 8875 |
| 4th | 6420 | 9245 | 9347 |
| 3rd | 6805 | 9590 | 9845 |
| 2nd | 10900 | 14630 | 15416 |
| 1st | 13000 | 17510 | 18257 |

### 4.6 Leave and Holidays

Most of the garment workers are illiterate even they do not know what rights they have under national and international law even they do not know that there a weekly holiday for them under national labour law. Bangladesh Labour Act, 2006 provides that, an adult worker in an industry shall be allowed to get one day as a holiday.[35] They also entitled to get festival holiday. Sometimes workers work during their weekly holidays and festival holidays, without getting compensatory holidays, because of

32 "Top RMG buyers worried at unrest", 19 July, 2012, The Daily Star.
33 "Human Rights Monitoring Report January-June 2012", 1July, 2012. [Odhikar.org]
34 https://m.theindependentbd.com/post/183137
35 Section 103 of the Bangladesh Labour Act,2006

the emergency situation of the delivery of the order. Every person shall be allowed eleven days in a calendar year with payment but if it is necessary to join in work, that worker has a right to get two days additional compensatory holidays with full pay and substitute holiday shall be provided.[36] If the workers do not join in the work due to his/her illness or any other reasonable reasons they do not get the wage for that leave including casual leave[37], sick leave[38] and annual leave[39] which are guaranteed under Bangladesh Labour Act, 2006.

### 4.7 Trade Unions and Threat to the Workers

Right to form Trade Union is a fundamental right of the garment workers. Before 2013, if garment workers want to form trade union or join in a trade union they need to take prior permission from their employer. After the Rana Plaza garment factory collapse in 2013, the Government of Bangladesh agreed to allow the garments workers to form trade unions without the prior permission from the factory owner.[40] After amending the labour law in 2013 around 99 trade unions formed, and 16 unions complained against their employers.[41] Trade Union leaders and members faces job insecurity and sometimes tortured by the employers. Human Rights Watch, New York has taken interview about 47 workers in 21 factories in and around Dhaka from October.

According to its report, some union organizers said they were beaten up, and others said they had lost their jobs or had been forced to resign. Factory owners sometimes used local gangsters to threaten or attack workers outside the workplace, including at their homes, they said.[42] Human Rights Watch said that one woman said that when workers in her factory presented their union registration forms to the company owner, he

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36 Section 118(1),(3) of the Bangladesh Labour Act, 2006

37 Section 115 of the Bangladesh Labour Act,2006

38 Section 116 of the Bangladesh Labour Act,2006

39 Section 117 of the Bangladesh Labour Act,2006

40 Jason burke, "Bangladesh eases Trade Union Laws after factory building Collapse", The Guardian, 13 May 2013, http://www.theguardian.com/world/2013/may/13/bangladesh-trade-union-laws, accessed date-13.10.2022.

41 Ruma Paul, "Bangladesh Garment Factories intimidate Workers over Unions: Group", Reuters,2014, http://www.reuters.com/article/2014/02/06/us-bangladesh-labour-rights-idUSBREA150YN20140206

42 ibid

threw it in a dustbin then threatened them, saying he would never allow union membership. Two of her fellow organizers were later attacked by unidentified assailants, one with cutting shears, she said. Two weeks later, a group of men, including a known gangster and the factory owner's brother, visited her home and threatened her. She agreed to resign.[43]

### 4.8 Violations against Child Labour

The garment industries of Bangladesh recruit child labour with low wages. In 1992, total number of garment factory was 1,500 and total workers were 750,000 of which 10% was under the age of 14 years.[44] Childs works in garment industry because of poverty. One 14-year-old girl tells the undercover camera carrier: We have to work to eat.[45] It is estimated that, around two hundred to three hundreds children bellow the age of 11 years are employed by the Hanes, PUMA and Walmart at the Harvest Rich plant in Bangladesh.[46] The child workers forced to works 12 to 14 hours in a day and sometimes all night 19 or 20 hour shifts in everyday even in Friday with low wage rate.[47] Physical torture against the child workers is very common in the garment factories of Bangladesh. The supervisors beat the child workers and they also use abusive language to the child workers in the work place. According to the Institute for Global Labour and Human Rights Report 2006, Beauty works in the Harvest rich factory in Bangladesh as a helper was beaten. She told that, the supervisor calls her names, beats the workers and shouts with the workers.[48] A 17-year-old male worker explained that the supervisors say things like, "If— your mother. You're a prostitute."[49] *Marcia Eugenia*, head of the U.S Office of Child Labour, Forced Labour, and Human Trafficking, cited that the

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43 ibid

44 "Addressing Child Labour in the Bangladesh Garment Industry 1995-2001", PP-5, New York and Geneva.

45 Miles Brignall and Sarah Butler, "Bangladesh Garment Factories still exploiting Child Labour for UK Products", 6 February 2014, The Guardian, https://www.theguardian.com/world/2014/feb/06/bangladesh-garment-factories-child-labour-uk, accessed date-24.12.2022

46 Charles Kernaghan, Director, National Labor Committee," Children Are Again Sewing Clothing for Major U.S. Companies"2006, pp-1, Institute for Global Labour and Human Rights, http://www.globallabourrights.org/reports/child-labor-is-back, accessed date-17.12.2022.

47 ibid

48 Ibid. at pp-18

49 ibid

information that we have for Bangladesh is that the children that are likely working are working in informal garment production. Probably in unregistered production units, with small or temporary workshops rather than the big factories which are normally associated with garment production in Bangladesh.[50]

### 4.9 Violations against Women Worker

The employers employ female workers both in formal and non-formal way. Women who are employed under non-formal way get low wage than male workers. The garment industries have provided unprecedented wage employment opportunities to young women because their labour are comparatively cheap.[51] The investigation team found that in one factory female operators did not get the same wage as their male counterparts, though they had the same years of service and were doing the same job.[52] Workers said that they were not allowed to see the wages calculation when receiving their wages.[53] Women workers do not get any compensation when they are laid-off due to lack of shipment orders.[54] Female garment workers become victim of violence in workplace, residence or street. Female workers works in a hostile, intimidating and sexually charged environment at the workplace.[55] The female workers are verbally, physically or sexually harassed by the supervisors, linemen, line chiefs and Production manager.[56] Female workers accuse the harassment mainly by pulling hair, slapping, hitting, stroking, touching the body and kissing.[57] The female workers who have to work night shift, they are very afraid of

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50 RefayetUllah Mirdha, "Child Labour Still there", 3 December 2014, The Daily Star. http://www.thedailystar.net/child-labour-still-there-53111.

51 M. Monjur Morshed, "A study on Labour Rights Implementation Readymade Garment(RMG) Industry Bangladesh: bridging the gap between the theory and Practice", PP- 69, University of Wollongong, http://ro.uow.edu.au/theses/40/

52 ibid

53 Supra Note. 51, -pp-70

54 ibid

55 M. Monjur Morshed, "A study on Labour Rights Implementation Readymade Garment(RMG) Industry Bangladesh: bridging the gap between the theory and Practice", PP- 74, University of Wollongong, http://ro.uow.edu.au/theses/40/

56 ibid

57 Supra Note 55

being raped inside the factory.[58] A pregnant women worker shall have the right to get eight weeks preceding the expected date of her delivery and eight weeks immediately following the day of her delivery as maternity benefit, if she has worked under her employer for at least six months before the day of delivery.[59] The DIFE is actively working and monitoring to ensure this right of pregnant women worker from 2017. In 2017, a total of 6,283 female workers received maternity benefits. In 2018, that number was increased to 9,623.

### 4.10 Fire in the Garment Industry in Bangladesh

Fire in garment factory of Bangladesh is a very common scenario since very long time and some garment factory buildings also collapsed in Bangladesh. As a result, thousands of garment workers were killed from those incidents. Some major fire incidents and factory building collapse case will be discussed in following:

#### 4.10.1 Spectrum Sweater Factory Collapse Case[60]

The Spectrum Sweater Industries Ltd. situated in Palashbari, Savar. It was a nine storied garment factory building collapsed on 11th April of 2005. The factory building was collapsed before the workers leaving the factory. Many workers including one who saw the cracks in the factory had tried to report regarding the safety of the factory wall five days prior to the factory collapse. But the employers neglected their report.[61] As result 69 workers were dead and 89 workers were injured.[62] Nine human rights organization including BLAST and four injured worker filed a writ petition in 2005 before the HCD of Bangladesh and claims that the concerned authorities in relation to building construction, labour safety and welfare are in failure to practice their statutory duties which is the violation of the constitutional provisions (Article 27,31 and 32). The HCD issued a Rule Nisi on 25th

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58 M. Monjur Morshed, "A study on Labour Rights Implementation Readymade Garment(RMG) Industry Bangladesh: bridging the gap between the theory and Practice", PP- 75, University of Wollongong, http://ro.uow.edu.au/theses/40/

59 Section 46(1) of the Bangladesh Labour Act, 2006

60 Md. Kamal Hossain and Others Vs. Bangladesh and Others, Writ petition no.3566 of 2005, HCD, Bangladesh

61 "Background on Factory Deaths in Bangladesh", Maquila Solidarity Network, 17 April of2006.http://en.maquilasolidarity.org/currentcampaigns/Bangladesh/ healthsafetyback ground, Accessed date-18.12.2022

62 Supra Note 60.

May 2005 upon the respondents to show cause as to why they should not be directed to take necessary measures and legal actions to carry out and conduct an effective public inquiry by establishing a commission to identify the reasons for the collapse and persons and agencies responsible in this incident.[63] Only BGMEA submitted the report amongst the respondents. This case is still pending for hearing.[64]

### 4.10.2 KTS Garment Fire Incident Case[65]

On 23 February, 2006, a fire broke out during working hour at the 'KTS Textile' factory in Chittagong. The main gate was locked which is illegal. There was only one narrow staircase to escape but this staircase was filled with boxes of cloths.[66] There was no safety equipment and no fire alarm, no bells, just screams, workers running for exits or grabbing each other for safety.[67] One survivor worker said that the most unfortunate were the women. They could do nothing but be burnt alive. One Surviving worker 'Thakurani Das' said that she only realized the factory was on fire when she heard screams of agony and panic from the ground floor and the factory was suddenly plunged into darkness.[68] Another worker, Delwar Hossain, testified that some of us suffered injuries while jumping out the windows, or racing to escape through a narrow staircase that was fortunately open.

Many workers died after jumping out of 3rd and 4th floor windows.[69] In this fire incident about 84 workers were killed including child workers.[70] ASK, BLAST and others filed a Writ Petition No. 2019 of 2006 against the Government of Bangladesh and Others before the HCD, Bangladesh-

> The petitioners argued that the failure of the respondents to ensure compliance with fire safety measures, the failure to prosecute the

63 ibid
64 ibid
65 ASK, BLAST and Others Vs. Bangladesh and Others, Writ petition no. 2019 of 2006, HCD, Bangladesh, Bangladesh Legal Aid and Services Trust (BLAST), http://www.blast.org.bd/issues/workersrights/467, Accessed date- 02.02.2023
66 ibid
67 Supra Note 65
68 ibid
69 Supra Note 67
70 ibid

> persons responsible for the deaths and injuries suffered by the workers and the failure of the statutory bodies to discharge their functions under health and safety, workers' rights and environmental laws constituted violations of the right to life and to be treated in accordance with law as guaranteed under Articles 31 and 32 of the Constitution.[71]

On 16th March 2006, the HCD issued a Rule Nisi calling upon the respondents to show cause as to why the authorities concerned should not be directed to take necessary action as required by law to effectively investigate, prosecute and punish those responsible for deaths and injuries of the victims of fire at KTS Garments in Chittagong but the respondents were served with a contempt notice in 2010 for failure to comply with the Court's orders and the hearing is pending.

### 4.10.3 Tazreen Garment Factory Fire Incident Case

The 'Tazreen factory fire incident' happened in 2012. In this incident one hundred and eleven workers were killed of which only 58 dead bodies was identified and handed over to their family and rest of the dead bodies were buried in 'Jurain graveyard' under the supervision of Anjuman-e- Mafidul Islam a trust organization in Bangladesh. These 53 unidentified dead bodies were tested in the National Forensic DNA profiling Laboratory in Dhaka Medical College in Bangladesh among them 43 workers have been identified and remaining 10 dead bodies were impossible to identify. In this incident, each victim's family who was being identified got only Tk. 20,000.00 for the funeral which had been given by Dhaka District Administration in collaboration with the Ministry of Relief and Disaster Management and Bangladesh Knitwear Manufacturers and Exporters Association *(*BKMEA) had given seven thousands taka for each identified dead bodies for the same purpose. A good initiative was taken by the Bangladesh Garment Manufacturer and Exporter Association (BGMEA). The injured workers in Tajreen fire incident 90 injured workers were given Tk. 1,00,000/- (one lac) each and the medical expenses of injured workers treated in different hospitals were borne by BGMEA. After this incident Ain-O-Shalish Kendra (ASK), Bangladesh Legal Aid and Services Trust (BLAST), filed a writ petition before the High Court Division (HCD) of

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71 Supra Note 69

the Supreme Court of Bangladesh in 2012. ***ASK, BLAST and others Vs. Bangladesh and others (Tazreen Garment Case), Writ Petition No. 15693 of 2012, HCD.*** ASK, a renowned legal service NGO commenced an investigation with a view to finding out the actual reasons of the fire incident in the Tazreen Garment factory in 2012. The investigation included the visit of the Tazreen Garment factory and interviews of the victim workers and their family members, witnesses, concerned police officers and fire station officials.[72] The report concluded that the main causes were narrow staircases, no emergency exit staircases or fire exit doors, insufficient fire defence, only one main exit/entrance on the ground floor and so on.[73]

On the basis of this reasons BLAST, ASK, BRAC and Nijera Kori filed the Writ Petition against the failure of the respondents to ensure effective enforcement of applicable law on work place safety in particular to the prevention of deaths and injuries of the workers from fire in garment industries. The petitioners argued that the concerned government authorities have failed to perform their duties. They prayed for the effective enforcement of applicable laws on work place safety and to prevent the future deaths and injuries of the workers from fire in work place.[74] The petitioners also stated that these accidents violate the Constitutional rights of workers as guaranteed in Articles 11, 14, 15, 21, 27, 31 and 32 of the Constitution.[75] On 26th November 2012, the HCD issued a Rule Nisi and said that, the respondents to show cause within four weeks as to why they should not be directed to prosecute and punish responsible for the fire. and it also directed to BGMEA that to submit report within two months on whether the authorities of the factories comply with the relevant laws to run those, and what steps they have taken to save the workers from fires. The HCD also directed to the authorities of Tuba Groups and Tazreen Fashions Ltd, to state in detail what steps have been taken regarding compensations for the workers killed and the injured,

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72 ASK, BLAST and Others Vs. Bangladesh and Others (Tazreen Garment Case), Writ petition No-15693 of 2012, HCD. Bangladesh Legal Aid and Services Trust(BLAST), http://www.blast.org.bd/issues/workersrights/467, Accessed date- 02.01.2023

73 ibid

74 Supra Note 72

75 ibid

and what measures they have taken to ensure treatment of the injured staffers.[76] Rule-Nisi delivered, not yet reported.[77]

### 4.10.4 Rana Plaza Factory Collapse Incident Case[78]

The most recent incident in garment industry happened in 2013. The Rana Plaza factory building collapse was so pathetic. The building of this garment factory was built without the permission of Rajdhani Unnayan Kartripakkha (RAJUK).[79] There were five garment industry and about 5,000 workers were working there.[80] On April 24, 2013, this eight story factory building collapsed during the working hours. The main gate was locked at that time, as a result 1,133 workers died and thousands of workers injured, 2,438 workers rescued and 140 workers remained uncounted.[81] A Writ Petition also filed by ASK and BLAST before the HCD of Supreme Court of Bangladesh in 2013 claiming that failure of the respondents to ensure effective enforcement of applicable laws on building construction and workplace safety, in particular, failure to prevent deaths and injuries of garment workers and other people from collapse of the nine-storey building namely Rana Plaza, in Savar, Dhaka amounting to breach of statutory duties and gross negligence of the respondents.[82] HCD directs to freeze the account of the building owner and the employers of five garment factory in that building. It also directs that the salaries of the workers should be paid from these accounts under the supervision of BGMEA.[83] After this incident the representatives from the government of Bangladesh, the garment industry both locally and internationally, trade unions, NGOs, came together to help the victim workers and their family and formed Rana Plaza Coordination Committee.[84] International Labour Organization (ILO) was acting as a neutral chair in this arrangement. The

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76 ibid

77 Supra note 74

78 Ain- O- Salish Kendra (ASK) and Bangladesh Legal Aid and Services Trust (BLAST), Writ Petition No- 4390 of 2013. HCD, Bangladesh.

79 "Broken Dreams: A Report on RANA PLAZA Collapse", PP-4, Fact finding Report, 19 June 2013, Odhikar. odhikar.org

80 ibid pp- 5

81 Ibid

82 Supra Note 78

83 ibid

84 "Rana Plaza Arrangement", [http://www.ranaplaza-arrangement.org/], accessed date- 24.01.2023

main object was to develop a comprehensive and independent process that would deliver support to the victims, their families and dependants in a predictable manner consistent with international labour standards.[85] Each claim was independently assessed and calculated, based on a formula developed by actuarial experts in line with standards embedded in the ILO Convention on the Employment Injury Benefits, 1964.[86] Under this arrangements every person who has made an eligible claim under the Arrangement has been paid an initial 50,000 BDT payment. Each claimant should also have received a relief payment of 45,000 BDT from the retailer Primark.[87]

## 5. Conclusion

Bangladesh garment industry to contribute the country's economic development and employment. The main success of this sector is the empowerment of large number of women. Bangladesh is earning billions of dollars from this sector. The working environment is not properly maintained by the employers. There are many incidents happened including firing and factory building collapse. As a result, thousands of workers were killed. Safe and secure working environment is the fundamental right of the workers but the employers do not maintain these principles in the garment industry. The effective trade unions should be established though more than 300 trade unions are existing. They do not get wages in time and forced to work which is one kind of modern day's slavery though the Labour (Amended) Act, 2013 of Bangladesh provides that wages of the workers shall be paid within the seven days after completing the wage month. Child labour till now exists in Bangladesh which is the violation of both the Bangladesh Labour Act and the ILO Convention on the Worst form of Child Labour, 2001. The main reason of the child labour is poverty.

Under certain circumstances and conditions, the employers may to recruit child labour and conditions may include the limiting working hour, protection of health, assurance of education by the garment employer. To improve the labour rights and working environment in the garment

85 ibid
86 Supra note 84
87 ibid

industry in Bangladesh, the government should impose mandatory duty to employers, including bus service and reasonable rest for the workers. If workers get their own transport facilities worker, especially women workers would feel more comfortable to join in workplace. Harassment outside the factory will be reduced. The government may take some measures to impose extra duties to employers to pay the debts. The government can make strict penal provisions for any wilful accidents or any accidental killing of workers which is resulted for the negligence of the employers or other authorized employee or concerned government officials. This kind of killing should be considered as 'Murder' under Bangladesh Penal Code, 1860. Mandatory life insurance for workers should be introduced in the garments. The employers can arrange their own inspection team whose work would be the inspection of the facilities of the workers, working environment etc. Most of the garment workers do not know that what rights they have under national and international law. Government, NGOs, Trade Unions and Civil Society Organizations can arrange different awareness programs including advertisement on television channels, public campaign etc. regarding the rights of the garment workers.

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# Exploring the Determining Age of a Child in the Context of Labor Legislation: Bangladesh

Md. Khaled Ashraf*

**Abstract**

Child Labor refers to the work which is mentally, physically, socially, or morally dangerous and harmful to children and interferes with their schooling by depriving them of the opportunity to attend school. In Bangladesh, child labor is very common. In 2006, Bangladesh enacted the Bangladesh Labor Act and outlawed work by children under the age of 14. But the number of child laborers is increasing at an alarming rate day by day. Socio-economic condition of Bangladesh is mainly responsible for child labor. In Bangladesh, children work for helping their families financially, as many families live at the poverty level. Moreover, child workers are cheaper and considered to be more compliant and obedient than adult workers. Consequently, employers are intended to take this opportunity. Bangladesh government and child labor-related NGOs, are working for eradicating child labor in Bangladesh. The determining age of a child makes the concept of child labor a difficult matter to be implemented. An attempt is made in this paper to present a legal analysis of determining the age of a child and identifying why it is difficult to implement in the eye of the law. And also identifying the reality of child labor, government initiatives to reduce child labor, Laws relating to child labor in Bangladesh, and finally some recommendation regarding the improvement of the current situation.

**Keywords:** Child Labor, Deprivation, Socio-Economic Condition, Bangladesh, Legal Analysis.

## 1. Introduction

Social norms and economic realities of Bangladesh make child labor very common. Many familiesrely on the income generated by their children for survival, so child labor is often highly valued. Additionally, employers often prefer to employ children because they are cheaper and considered to be more compliant and obedient than that of adult workers. When children

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are forced to work, they are often denied their rights to education, leisure, and play. They are also exposed to situations that make them vulnerable to trafficking, abuse, violence, and exploitation. Reportedly, millions of children are not attending school; however, estimates may vary. Among children aged 5-14, about five million, are economically active.[1] "Child labor" is a narrower concept than "working children". The determining age of a child is a little bit confusing which makes the situation difficult for the government to ensure implementation. There are differences regarding the age of child in labor related legislations. On the other hand, every child bears the nation's future. We all have attained our childhood and it is a habitual truth that everyone must enjoy his infancy period. In the infancy period if a child gets proper care, education, and proper guidance only then they canbecome a good human being and bring a better time for others. According to UNICEF, in Bangladesh, there are 64 million children among 160 million people. About 40% of the total population is a child.[2] We all know that every person is born with some rights that are inalienable and non-discriminatory. But it is a matter of sorrow that in Bangladesh though all babies are born with the same rights, even then they don't get the same rights. Child labor is one of the reasons behind this situation. Among 64 million children, 4.8 million children are engaged in child labor. More specifically, 12.6% of children aged 5 to 14 are deployed in the work force.[3] A maximum ofthem are employed in rural area. About 83% of child laborers are employed in a rural areas and 17% are employed in an urban areas.[4]

## 2. Background

Economic growth, in the nineteenth and early twentieth centuries, faced a significant reduction in child labor in the western world, but it was not properly realized that this social problem had been shifted to developing nations. However, the prevalence of child labor is not a new economic

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1 Bangladesh Bureau of Statistics, Report on National Child Labor Survey (2018-2019)

2 UNICEF, Children in Bangladesh, < https://www.unicef.org/bangladesh/en/children-bangladesh >

3 UNICEF, "Child labor in Bangladesh" (PDF), June 2010.<https://web.archive.org/web/20111122204427/https://www.unicef.org/bangladesh/Child_labour.pdf>

4 Bangladesh Bureau of Statistics (2006). Baseline Survey for Determining Hazardous Child Labor Sectors inBangladesh 2005. Dhaka: Government of the People's Republic of Bangladesh. ISBN 978-9845086257.

activity in the modern world. Child labor has been a common practice throughout history, and still, children are employed in different human societies, especially in developing and under-developedcountries.[5]

The social problem of child labor is more widespread in poor and developing countries. It is of worth noting that in the 1800s, child labor became an important economic instrument fordevelopment and industrial growth. During that period, children under the age of 14 years were employed in agriculture, factories, mining, and as street vendors. It is also found that children from poor families were expected to support the total income of the family, and sometimes they worked in very unhygienic environments in 12-h shifts.[6]

It is highlighted that the supply of child labor is linked not only to poverty but also to the in-accessto educational institutions and their affordability. Furthermore, it is argued that poor families are prone to depend on child labor if their parents assume the returns to investment in education as low, and educational institutions do not maintain an inclusiveness and accessibility approach to all. Added to that, in some developing economies, immediate returns from unskilled work are relatively high. Given the context, families are likely to engage their children in a variety of economic activities. Child labor is morally and ethically unacceptable. In order to address the social problem, for the first time in human history, UNICEF, as the specialized body of the UnitedNations (hereinafter will be mentioned as UN) ratified the Convention on the Rights of the Child (hereinafter will be mentioned as CRC) in 1989.[7] The CRC recognized children as humans with all kinds of rights rather than the economic instrument of their parents. However, it is an unfortunate reality that this Convention does not exclude children who work for their families as child laborers. The CRC, for the first time in world history, is a specific human rights treaty of thestate parties to guarantee the rights of the child around the world.[8] The Convention is commonly perceived to be the formal

5 Concluding observations of the Committee on the Rights of the Child: Bangladesh, June 2019

6 Bangladesh Bureau of Statistics, Report on National Child Labor Survey, 2019-2020

7 UNICEF, ILO, World Bank Group, Understanding Children's Work in Bangladesh, June 2021

8 Article 1, Convention on the Rights of the Child, 1989

human rights treaty that illustrates a universally accepted principle for children. It is highlighted that the Convention made a great breakthrough for child rights, as it alsorecognizes malnutrition and the absence of basic education as violations of child rights.[9]

**3. Scenario of Bangladesh**

According to the World Bank Indicators, 37% of the 133.3 million people of Bangladesh belong to the age group of 0 to 14 years, yielding a children population of almost 50 million.[10] This number is more than the total population of most countries of the world. In developing countries like ours, children constitute around 40% of the population while in developed countries, the ratio of children population is less than 20%.[11] Such a large number of children mean that a good proportion of our population is dependent on others for their livelihood and sustenance as it falls on the adults to look after the children. Given such a large child population, coupled with the low productivity of adults and resource constraints, it is inevitable that not all children are cared for and many of them have to work for their livelihoods.

On the positive side, the number of working children in the age group of 10-14 years is declining,as the World Bank Indicators suggest. While 35% of children in this age group were working in 1990, their numbers have declined to 27% by 2018 which is a significant achievement.[12] In richer countries, no child in this age group works.[13] In the world of adults, children can easily be abused, misused, exploited, and maltreated by uncaring adults. Hence, it is the obligation of law, and, through the law of the state, to take special measures to nurture children by protecting them fromcertain actions and by providing for their special treatment.

Child labor is a common phenomenon in Bangladesh. The government of Bangladesh has taken many steps to reduce the number of child laborers. The government has also enacted a code of labor related law, where the topic of child labor is also included. According to Labor Act, 2006, child

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9 Article 6, Convention on the Rights of the Child, 1989

10 World Bank, (2003), World Bank Indicators, Washington, D.C,2003, Table at p.38

11 Ibid, at pp.38-40.

12 World Bank, (2021), World Bank Indicators, at p.68

13 Ibid, at pp.68-70

labor is clearly prohibited. Besides, by virtue of this Act government of Bangladesh also adopted a policy named National Child Labor Elimination Policy (NCEP) 2010. Besides these Acts and policies, our Government is investing a large amount of budget every year in the development of children. But it is a matter of sorrow that this initiative went in vain. Lack of proper guidance, the gap in the proper investigation of money, and the gap of law are causes of such failure.

## 4. Reasons behind Child Labor and Reality in Bangladesh

According to Iowa Labor Center, current causes of global child labor are poverty, limited access to education (Illiteracy), and poor sanction of child labor. Bangladesh is not out of these reasons. Among them, poverty is the prime concern. According to Asia Development Bank (ADB), 21.8% of people are living below the national poverty line.[14] Consequently, the manager of a family has to employ their small son or daughter to work for getting their necessary needs. Secondly, around 26% of adults in Bangladesh are still illiterate.[15] Without education, one cannot be aware of his or her rights and this is the second cause of increasing child labor. Third, the Bangladesh Labor Act prohibited child labor in 2006. Still, in 2023 local people and law enforcement authorities are silent in implementing it strictly. Besides all these things child labor is also famous amongst employers for another reason of low wages. The cost of child wages is often low. The wages are as little as 10%-20% of an adult male.[16] The employers have to pay a big sum for adult workers, but in the case of a child, they are free to pay a decreased amount. In a nutshell, the reasons may be outlined as follows:

### 4.1 Illiteracy

The rate of literacy is significantly low, which is being treated as one root cause of child labor in Bangladesh. Per capita income remains very low,

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14 International Labor Organization, Causes of Child Labor,<https://laborcenter.uiowa.edu/sites/laborcenter.uiowa.edu/files/styles/large/public/wysiwygrouploads/labor_centeruilogo.jpg?itok=ftn1l2cV > Accessed on January 2023

15 Asian Development Bank, Poverty Data: Bangladesh<https://www.adb.org/countries/bangladesh/poverty#:~:text=In%20Bangladesh%2C%20the%20population%20living,2016% 20to%209.2%25%20in%202019.>

16 The Daily Star; 7th September 2019<https://www.thedailystar.net/frontpage/literacy-rate-in-bangladesh-2019-100-pc-still-far-cry-1796734>

which did not let the mass people to get educated,and realize the importance of education in life. Moreover, greater portions of those, who have such realization, are unable to continue the expense, which is required for their basic education. As a result, the majority of the people remain illiterate, and they have found nothing wrong to engage their children in any such hard-working activities.[17]

### 4.2 Family Break-up

Family bonding would have been loosen when the financial crisis rises at its peak. This may be happened to many hundreds and thousands of families across different areas of Bangladesh. When the separation has come so frequently between the parents, children are depriving of shelters and facing the hard reality of life before their expected time. The problem has been seen as very severe in intensity when this happens to the lower class and the lower middle class of society. Children are then left with no options but to engage in any sort of earning for their living.[18]

### 4.3 Poverty

As the root cause of many other problems, poverty is being treated as one key triggering reason for child labor in Bangladesh.[19] When people have to think about their meals, and how to manage them; issues like education are then counted as a luxury to them. Even after realizing the draw backs of child labor, and its negative impact on the physical, and psychological state of the children, parents are sometimes left with no option but to engage their child in some hard-working job. All these are reasons behind the increasing rate of child labor in Bangladesh.

## 5. Consequences of Child Labor

Child labor has several negative consequences as well as some positive sides too. Child labor can destroy the future of the child. Hazardous child labor causes physical, mental, and behavioral problems for the children. Child workers are deprived of the joy and advantages of a normal childhood. A child who works does not have a normal time for education. This situation increases the percentage of uneducated youth. They will be

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17 Innovative Issues and Approaches in Social Sciences, Causes of Child Labor.<http://www.iiass.com/index.php?option=com_content&view=article&id=1181>

18 Ibid

19 Ibid

fated to become an illiterate adult. It will affect their thoughts, conscience, and whole life. The economy and growth of the country face a lot of problems if children do not get a proper education. They would not get any opportunities in their social life in an organized way. In fact, they do not have the chance to improve their life. Ethical and moral support is strongly required for a child to flourish. But child workers do not get it properly. They do not even get proper parent monitoring. So, they easily involve in illegal activities. They are easily addicted to drugs and ruin their life. Also, they become victims of physical, mental, and sexual violence.[20] Child laborers may also engage in disease because they will expose to an unhygienic environment, dangerous diseases like influenza, cystic fibrosis, and contagious disease that can even cause death. There are also a few positive sides to child labor. Bangladesh is not a rich country. Here, many people live at the poverty level. For these families, income from their children is hugely supportive. When the children help their father or elder members of the family in the work, the family gets trusted helping hands and can earn more. Poor children cannot go to school as their families cannot bear the cost of education. If the children work in their leisure time, they themselves can bear tuition fees. Where there is a labor shortage, children can help to reduce labor shortage by working the permitted works.

## 6. The Dilemma Regarding the Age of a Child: Legal Analysis

The Children Act, 1974 was enacted around 50 (fifty) years ago. It did prescribe several special measures to deal with children who came into contact and conflict with the law. The 1974 Act defines child as a person under the age of sixteen years, and when used with reference to a child sent to a certified institute or approved home or committed by a Court to the custody of a relative or other fit person means that child during the whole period of his detention notwithstanding that he may have attained the age of sixteen years during that period or not.[21] On the other hand, the Labor Act was enacted in Bangladesh during 2006. Before this Act, there were many enactments in this regard. Against this backdrop, it was a crucial problem to identify who was a child and whowas a youth. The 2006 Act clearly says that a person who has not completed his fourteenth year

20 Jahangir Shah, The Daily Prothom Alo (Dhaka, 16 January 2022)

21 Section 2(f), The Children Act 1974

of age will be considered as a child.[22] But, according to the Children Act 2013, 'child' means a person who has not completed his fourteenth year of age.[23] So, the 2013 Act clearly defines who is a child. But in another section of this 2013 Act, there is a different definition of a child. Where it has been said that notwithstanding anything contain in any other law for the time being in force, all persons up to 18 years shall be regarded as children for the purpose of this Act.[24] Here comes the question--who is a child?

However, there are different definitions of the child in various other legislations. A few examples are cited below to illustrate the situation. Thus, for example, the Child Marriage Restraint Act, 1929 defines a child and a minor if male as one under 21 years of age and if female under 18 years of age.[25] The Vagrancy Act provides that a child means a person under the age of 14 years.[26] The Nari-o-Shishu Nirjatan Daman Ain, 2003 provides that a child is a person up to 16 years.[27] Here is no uniform definition of a child in the eye of the law.

The Labor Act, 2006 has simply prohibited child labor. It says; "No child shall be employed or permitted to work in any occupation or establishment". It means in every case child labor is prohibited and illegal.[28] But it is a matter of concern that the 2006 Act made child labor legal in another section, where it confers that notwithstanding anything contained in this chapter, a child who has completed twelve years of age, may be employed in such light work as not to endanger his health and development or interfere with his education.[29] So, another question arises- is child labor legal by the Labor Law 2006?

We all know labor employment is a type of contract where one party agrees to give labor in return of payment. If we take child labor as legal under

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22 Section 2, The Labor Act,2006
23 Section 2, The Children Act 2013
24 Section 4, The Children Act, 2013
25 Section 2(a), The Child Marriage Restraint Act, 1929
26 section 2(3), The Vagrancy Act, 1943
27 Section 2, the Nari-O-Shishu Nirjaton Daman Ain,2000
28 Section 34(1), the Children Act 2013
29 Section 44, the Children Act 2013

section 44 of the 2006 Act, it would not be a legal contract under the Contract Act 1872. According to the Contract Act, 1872 a person who has not attained the age of majority is not competent to make a contract.[30] In this context, the Majority Act 1875 confers that a person is said to have attained his or her majority when he or she shall have completed his or her age of eighteen years and not before".[31] But by the Labor Act, 2006 age of the child is mentioned as 14. According to the Contract Act, 1872 child laborer cannot enter into a legal contract.

Child labor is one kind of forced labor at the age of 12 or 14 as a person does not become physically or mentally strong. The Constitution of Bangladesh guarantees all the fundamental rights of the people of Bangladesh and it prohibits all forms of forced labor.[32]

Bangladesh is also under some international obligations to protect children from child labor or anykind of abuse. In 1990 Bangladesh has ratified the 1989 Convention on the Rights of the Child. The 1989 Convention discusses the age of a Child. According to this Article, a human being below the age of eighteen shall be regarded as a child.[33] This Convention gives protection from child labor and directs the state's party to ensure education for the child.[34] It also directs the state partyto provide a minimum age for admission to employment and provided for appropriate regulation of the hours and conditions of employment.[35] Arguably, the same definition ought to apply to children of Bangladesh since it is a signatory to the CRC. We are obliged to incorporate its provisions into our domestic law. The CRC committee reiterated its recommendation to Bangladesh to do so most recently in its concluding observations.[36]

30 Section 11, the Contract Act 1872
31 Section 3, the Majority Act 1875,
32 Article 34, the Constitution of Bangladesh
33 Article 1, the Convention on the Rights of the Child, 1989
34 Article 32, the Convention on the Rights of the Child.
35 Ibid
36 Committee on the Rights of the Child, Concluding Observations: Bangladesh, CRC/C/BGD/CO/4 26 June 2009,para 12-13

## 7. Laws Relating to Child Labor in Bangladesh

There are some laws, ordinances, and rules to regulate the employment of child laborers in respect of age, working hours, working conditions, economic exploitation, harmful effects of work on growth and development, etc. Laws relating to child labor in Bangladesh are as follows:

### 7.1 The Mines Act, 1923 (Act No. IV of 1923)

According to this Act 'child' means a person who has not completed 15 years and 'young person' means a person who has completed 15 but not 17 years of age. Under this Act, no child shall be appointed in a mine or allowed to be present in any part ofthe mine which is below the ground. According to the same Act, unless a certificate of fitness granted by the medical practitioner is in the custody of the manager of themine, a young person shall not be employed in any part of the mine. And no such young person is permitted to work in the mine during the period between 7 p.m. and 7 a.m.[37]

### 7.2 The Children (Pledging of labor) Act, 1933 (Act No. XI of 1933)

This Act prohibits the pledging of the labor of children. In this Act, a child means a person under 15 years. An agreement, written or oral, express or implied, whereby the parent or guardian of a child in return for any payment or benefit received by him, undertakes to cause or allows, the services of the child to be utilized in any employment is void.[38] The Act provides a penalty for a parent or guardian making an agreement to pledge the labor of a child. It also provides for a penalty for the persons who are making with a parent or guardian an agreement to pledge the labor of a child and also for a penalty for employing a child whose labor has been pledged.

### 7.3 The Employment of Children Act, 1938 (Act No. XXXVI of 1938)

The Act provides regulation for the employment of children in certain industrial establishments. The Act also provides prohibition for the employment of children below 15 years in the transport of passengers, goods, or mail by railway and the handling of goods within the limits of

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37 The Mines Act, 1923 (Act No. IV of 1923)

38 The Children (Pledging of labor) Act, 1933

any port. According to the Act, no child who has completed 15 years but not 17 years shall be employed or permitted to work in the aforesaid occupations unless the periods of work of such child for any day are so fixed as to allow an interval of rest for at least twelve consecutive hours which shall include at least such seven consecutive hours between 10 p.m. and 7 a.m.[39] The Act also provides that no child below 12 years shall be employed or permitted to work in any workshop where in any of the processes like *bidi* making, carpet making, cement manufacturing, cloth printing, dyeing, weaving, manufacture of matches, explosives and fire work, soap manufacture, tanning, mica cutting and splitting, shellac manufacture, and wood clearing are carried on. The Act contains provisions of punishment for employers permitting or employing children in such works.

### 7.4 The Road Transport Workers Ordinance, 1961 (Act No. XXVIII of1961)

According to the Ordinance, no person other than a driver shall be employed in anyroad transport service before attaining 18 years of age and in case of driving a vehiclebefore attaining 21 years. The Ordinance further provides that no worker shall be employed on a vehicle for more than five hours at a time before he has had an intervalfor rest of at least half an hour or for more than eight hours before he has had at leasttwo intervals like (i) for more than nine hours in a day, and (ii) for more than forty-eight hours in a week.[40]

### 7.5 The Tea Plantation Labor Ordinance, 1962 (Act No. XXXIX of 1962)

According to the ordinance, 'child' means a person who has not completed the age of 15 years, and 'adolescent' means a person who has completed 15 but not 17 years.It also provides that a child of 12 years of age or an adolescent shall not be permitted to work in any plantation unless a certificate of fitness is granted by a certifying surgeon. Such fitness certificate shall be valid for 12 months and it may be renewed. Any contravention of the provisions by an employer shall be a

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39 The Employment of Children Act, 1938

40 The Road Transport Workers Ordinance, 1961

punishable offense liable for imprisonment or fine or both.[41]

**7.6 The Shops and Establishments Act, 1965 (E.P. No. VII of 1965)**
This Act deals with holidays, payment of wages, leaves, working hours, and other related matters concerning the workers employed in shops, commercial and industrial establishments but not factories. According to the Act, 'child' means a person who has completed the age of 12 years and a young person means who is not a child and has not completed the age of eighteen.[42] The Act provides instruction that no young person shall be employed in any establishment.

**8. Observation**
After observing the various related laws of child & child labor, the question arose in my mind is whether determining the age of a child is a complex problem. The answer is that it is a complex issue in the context of Bangladesh. Different labor-related legislations keep different age limits for being considered as children. Consequently, there remains a grey area about who would be a child in the context of labor law. The authority faces difficulties in the case of implementation for not having any unified age of child and definition of child labor. So, there is inconsistency as to the mentioned actual age of a child overall. As a result, it turns into a difficult problem that cannot be solved overnight. So, fixing a definite age should be considered in all laws relating to labor/ industrial sectors where the definition of the child has been given. It has to be also noted that child labor is not always a serious problem it can be reduced by taking the appropriate policy. But determining the age of a child will be considered a permanent dilemma if the age of the child would not the same in all kinds of labor-related laws.

**9. Recommendation & Concluding Remarks**
For the purpose of decreasing the number of child laborers some recommendations are mentioned based on my research. These are following:

(a) Revise the Labor Act 2006, taking into consideration other Acts like the Children Act 2013, Contract Act 1872, and Majority Act

41 The Tea Plantation Labor Ordinance, 1962
42 The Shops and Establishments Act, 1965

1875. Because the only Labor Act 2006 is not clearly defining the age of a child in the context of child labor. Government should revise the age of a Child taking into consideration other acts and International Conventions. Because the local laws are not able to make clear the definition of a Child. For example, the 2006 Act indicates a person as a Child below the age of fourteen. But Children Act, 2013 indicates anyone as a Child below the age of eighteen which is a dilemma in the eye of law.

(b) If child labor cannot be stopped right now even then the government should make a Gazette mentioning that the safety and welfare of child laborers should be maintained strictly. Simultaneously adequate payment should be given. Because the different survey on child labor proves that the payment for child labor is very poor and children do not get the appropriate sum for their labor.

(c) Government should provide free education, and health to those, who are not able to pay for these. Besides, Government must ensure the education facility for child laborers by the employer.

(d) Increasing employment of adults in new sectors so that children of families do not have to bear the economic burden of the low incoming families.

(e) Providing incentives in primary and high school level education.

(f) Regular monitoring of workplaces like brickfields, garments, or other mills and yards or industries where no children are working there and taking necessary measures against the owners who engage them in such works.

(g) Eradication of poverty is a precondition in order to stop child labor. Government has to recruitmore human resources for projects and establishments. So that they can earn their legitimate and necessary wages.

(h) Finally, the welfare of child labor rights should be given the top priority in the national strategy.

Child labor should be regarded as a curse for the nation. Day by day we are developing but without solving this problem of child labor we will never be developed in the true sense. So, for this reason,Government has to take necessary steps to stop child labor. Besides these things, every human being is born with some equal rights. But the child who is engaged in child

labor is not getting their rights. Not only the Government but also, we should be aware of their rights and it is our dutyto protect and ensure their rights. Here it is clear that our current Acts have some lacking by whichit is impossible to protect the child from this curse. Government should take necessary steps to improve this lacking and need to be aware of the imposition by the proper authority. Finally, it isworth concluding with the observation of the Supreme Court of India regarding the welfare of children which is as follows:

> If there be no proper growth of children of today, the future of the country will be dark. It is the obligation of every generation to bring up children who will be citizens of tomorrow in a proper way. Today's children will be the leaders of tomorrow who will hold the country's banner high and maintain the prestige of the Nation. If a child goes wrong for want of proper attention, training, and guidance, it will indeed be a deficiencyof the society and of the government of the day.[43]

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