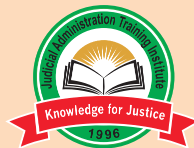
ISSN: 2220-6752

Journal of JUDICIAL ADMINISTRATION TRAINING INSTITUTE

Volume XXIII ■ May 2024



An Annual Publication of JATI

ISSN: 2220-6752

Journal of
Judicial Administration Training Institute

Volume XXIII, May 2024

Judicial Administration Training Institute (JATI)
15, College Road, Dhaka-1000, Fax: 88-02-223354029
Web: www.jati.gov.bd
E-mail: research.publication.jati@gmail.com

BOARD OF ADVISORS

Madam Justice Nazmun Ara Sultana — Chairman
Director General
(Former Judge, Appellate Division, Supreme Court of Bangladesh)

Mr. Sk. Ashfaqur Rahman — Member
Director (Training) and Director (Administration), In-charge
(Senior District Judge)

EDITORIAL BOARD

Mr. Mir Md. Amtazul Hoque — Editor
Director (Research & Publication) (District Judge)

Mr. Abu Hassan Khairullah — Assistant Editor
Deputy Director (Research & Publication) (Joint District Judge)

Dr. Md. Alamgir — Member
Deputy Director (Training) (Joint District Judge)

Ms. Nusrat Sharmin — Member
Research Officer (Senior Assistant Judge)

Ms. Khondaker Tasnuva Haque — Member
Assistant Director (Training-1) (Senior Assistant Judge)

Mr. Biplob Kumer Kuri — Member
Assistant Director (Research & Publication)

Disclaimer

The views expressed in the JATI Journal are those of the authors and do not necessarily reflect the views of the JATI or the Government of Bangladesh or the editors or publishers.

ISSN 2220-6752

Published by Judicial Administration Training Institute
15, College Road, Dhaka-1000, Bangladesh

Published on 15 May 2024

Price Tk. 400.00, US $5

Copyright @ Judicial Administration Training Institute; all rights reserved

Foreword

It is with immense pleasure that I present Volume XXIII of the Journal of the Judicial Administration Training Institute (JATI Journal) for the year 2024. I would like to express my sincere appreciation to all those who have contributed to the timely publication of this edition. Their dedication and hard work have ensured the continued success of this important academic platform.

The JATI Journal holds a unique position in the legal landscape of Bangladesh. Published annually, it stands as the only flagship scholarly journal produced by officers of the Subordinate Judiciary. Within its pages, a vibrant exchange of ideas takes place, as the journal delves into a range of classical and contemporary legal issues, both nationally and internationally. Its contributors hail from a diverse background, encompassing judges, advocates, academics, and other esteemed legal professionals. This rich tapestry of perspectives fosters critical analysis and insightful discussions on the crucial matters shaping our legal system.

The mission of the JATI Journal is multifaceted. We strive to provide a platform for thoughtful and impactful legal scholarship, one that is deeply rooted in the invaluable experience of the judiciary. By fostering a meaningful dialogue between the judiciary and the broader legal community, we aim to address critical legal issues and promote a deeper understanding of the law and its profound impact on society. Our vision is to be recognized as a leading source of authoritative legal commentary from the judiciary. We aspire to shape legal discourse by offering practical insights and real-world perspectives, while simultaneously influencing the development of the law through well-reasoned arguments on emerging issues.

This year’s edition holds a particular significance as we are fortunate to have received contributions from esteemed members of the judiciary themselves. Our deepest gratitude goes to Madam Justice Naima Haider, Mr. Justice Md. Rezaul Hasan (M.R. Hasan) and Mr. Justice Md. Zakir Hossain for their invaluable time and expertise. Their contributions, focusing on the digital future of Alternative Dispute Resolution and

paperless arbitration, the concept and relevancy of the Universal Declaration of Human Rights, and the principle of legitimate expectation in the Bangladeshi judicial landscape, offer invaluable insights and will undoubtedly spark further discussion and analysis.

We are equally grateful to all the other contributors whose diverse and insightful articles enrich this edition. Their dedication to legal scholarship is truly commendable.

Furthermore, I would like to express my sincere appreciation to the Board of Directors of the journal, the Editorial Board, and the Research and Publication wing of JATI. Their tireless efforts, particularly the painstaking labor of the Research and Publication wing, have made this publication possible.

As we move forward, it is crucial to recognize that the legal landscape is in constant flux. To remain relevant, the JATI Journal must adapt and innovate. By embracing adaptability, creativity, and a deep engagement with the legal community, we can ensure that the JATI Journal continues to serve as a valuable resource for lawyers, students, and scholars for years to come.

The law is a dynamic field, constantly evolving and adapting to the ever-changing needs of society. The JATI Journal has a vital role to play in shaping its future by providing a platform for critical analysis, innovative ideas, and meaningful discussions. I have full confidence that, by working together, we can continue to uphold the JATI Journal's legacy of excellence and make a significant contribution to the legal discourse in Bangladesh.

May 2024
Dhaka

Justice Nazmun Ara Sultana
Director General
Judicial Administration Training Institute

Editorial Note

The Judicial Administration Training Institute (JATI) is proud to present Issue XXIII of its 2024 Journal. This volume features a rich collection of thirteen scholarly articles authored by a distinguished group of legal minds. These include jurists, judicial officers, legal practitioners, and academics. Their diverse expertise contributes meaningfully to the ongoing dialogue in judicial administration. This Editorial Note offers a brief glimpse into this wealth of content.

We begin by expressing our profound gratitude to the esteemed jurists whose insightful analyses grace this volume. The Honorable Madam Justice Naima Haider, the Honorable Mr. Justice Md. Rezaul Hasan (M.R. Hasan), and the Honorable Mr. Justice Md. Zakir Hossain have enriched the Journal with their insightful analyses, embodied in their respective articles on the digitalization of alternative dispute resolution mechanisms and the concept of paperless arbitration, the application of the Universal Declaration of Human Rights and its theoretical underpinnings and contemporary relevance, and the application of the doctrine of legitimate expectation, significantly enrich the content and value of this volume.

In the same vein, our immense gratitude and appreciation to all the other distinguished contributors whose work explores the multifaceted dimensions of the contemporary legal domain. Articles like "Access to Rural Justice and Human Rights in Bangladesh" by Senior District Judge Mr. Atwar Rahman, and "The Right to Education of Rohingya Refugee Children" by District Judge Mr. Mohammad Faruque, explore critical issues faced by vulnerable communities.

Innovation and best practices are also a focus. Joint District Judge Md. Atiqur Rahman's paper on "Professional Liability in Building Construction" examines legal frameworks that can improve Bangladesh's construction industry. Likewise, Joint District Judge Md. Mahboob Sobhani's article, "The Future of Justice: Embracing AI," explores the potential of artificial intelligence to enhance efficiency and decision-making in Bangladeshi courts.

The Journal further reflects a growing trend of judicial intervention in global issues. Shushmita Ahmed's "Judicial Action in Climate Justice" explores the role of international courts in addressing climate change, while Nila Khatun's study, "The Use of Technology in Bangladeshi Courts," investigates how technology can improve access to justice.

Finally, issues of national importance are not overlooked. Studies like "Protection and Voluntary Repatriation of Rohingyas" by Arif Ahmed, and "Ensuring Road Safety in Bangladesh" by Md. Minhajul Abedin Chowdhury & Tanzima Akter Sumi, address challenges faced by Bangladesh. Sharara Mehnaz Khan's "Exploring Comparative Constitutional Law" highlights the importance of examining foreign legal concepts to enrich Bangladesh's own legal framework.

In conclusion, Issue XXIII of the JATI 2024 Journal offers a rich exploration of contemporary legal issues. This accomplishment would not have been possible without the unwavering support of the Honorable Director General Madam Justice Nazmun Ara Sultana. We express our heartfelt gratitude for her continued guidance throughout this endeavor. We also extend our sincere appreciation to the esteemed members of our advisory board and all those who have been instrumental in bringing this volume to fruition.

Mir Md. Amtazul Hoque
Editor
JATI Journal 2024, Volume XXIII
and
Director (Research & Publication)
Judicial Administration Training Institute

CONTENTS

Foreword iii

Editorial Note v

The Digital Future of Alternative Dispute Resolution and the Concept of Paperless Arbitration 1
Justice Naima Haider

Universal Declaration of Human Rights: The Concept and the Relevance 19
Justice Md. Rezaul Hasan (M.R. Hasan)

Legitimate Expectation and Its Application 23
Justice Md. Zakir Hossain

Access to Rural Justice and Human Rights in Bangladesh: Understanding the Linkage 41
Atwar Rahman

Right to Education of Rohingya Refugee Children: A Critical Review under International Law 53
Mohammad Faruque

Professional Liability in Building Construction: An Unsung Literature in Bangladesh 77
Md. Atiqur Rahman

The Future of Justice: Embracing Artificial Intelligence (AI) in Bangladesh Courts 109
Md. Mahboob Sobhani

Judicial Action in Climate Justice: International Courts and Human Rights Bodies in Rights-Based Climate Change Litigation 139
Shushmita Ahmed

The Use of Technology in Bangladeshi Courts to Mitigate the Backlog of Cases 165
Mst. Nila Khatun

A Critical Study on the Provisions Relating to Cognizance of Offence in Criminal Trial of Bangladesh 187
Md. Bayjid Rayhan
Tahmina Akther Moon

Protection and Voluntary Repatriation of Rohingyas: *Non-refoulement* Obligations and Challenges of Bangladesh 215
Arif Ahmed

Ensuring Road Safety in Bangladesh to Protect the Right to Life: An Analysis of Existing Laws 243
Md. Minhajul Abedin Chowdhury
Tanzima Akter Sumi

Exploring Comparative Constitutional Law and Its Significance in the Bangladesh Constitution by Analyzing Multi-Jurisdictional Cases 261
Sharara Mehnaz Khan

The Digital Future of Alternative Dispute Resolution and the Concept of Paperless Arbitration

Justice Naima Haider*

Introduction

'Paperless Arbitration' is now a buzzing word in the field of alternative dispute resolution. The 'Online Dispute Resolution' (ODR) and 'e-Arbitration' plays the main role to encourage the arbitration proceeding to go paperless. Furthermore, saving the environmental and recent Covid-19 pandemic are another 2(two) crucial issues for this new idea of paperless legal proceedings including arbitration. However, the rapid growth of information technology (IT) and implementation of IT in legal proceedings to make thing easier and quicker plays the vital role to raise the awareness among the people to ensure paperless procedure in every sector of legal proceedings including arbitration.[1] On the one hand cost constraints remain stringent and demands for speedy resolution increase, on the other hand disputes are becoming increasingly international, complex, and growingly include multiparty proceedings and mass claims. Excessive duration and costs of the administration of justice has become a common complain nowadays. Arbitration has become so popular as a medium of resolving majority of complex dispute which might even include state parties and IT tools plays a crucial role to reduce the excessive costs and duration which consequently facilitate the arbitration. The emergence and development of IT tools for dispute resolution has a great potential to change the conduct of arbitration proceedings, especially international commercial arbitration proceedings. The worldwide usage of internet has changed the way the business was used to be conducted earlier which makes it harder to tolerate the delay. Hence, Users expect their disputes to be resolved according to the same standards as those under which they carry out the transactions giving rise to such disputes.[2] But the arbitration is going to the opposite direction and becoming more formalistic by adopting so-called ´judicialization´ or ´legalization´ in international

---

* Judge, High Court Division, Supreme Court of Bangladesh

1 <https://lk-k.com/wp-content/uploads/The-Use-of-Information-Technology-in-Arbitration.pdf> accessed 13 June 2022.

2 <https://lk-k.com/wp-content/uploads/The-Use-of-Information-Technology-in-Arbitration.pdf> accessed 13 June 2022.

arbitration. The extension of implementing IT tools in arbitral procedure can alleviate the opposition which will safeguard the procedural guarantees and the quality of justice. The strong momentum of using IT tools in arbitral proceedings is clearly visible. For instance, major arbitral institutions like the International Chamber of Commerce, the American Arbitration Association, and the World Intellectual Property Organization Arbitration and Mediation Center have recently launched projects offering case management websites, virtual case rooms, extranets, and other IT tools allowing multiparty communications.[3]

Arbitration

Arbitration is nowadays most effective and vital method of resolving disputes, specially international commercial disputes, which may include states, individuals and corporations.[4] From the period of *lexmercatoria*[5] to the present form of international contract, a lot has been changed to adopt the change in the nature of the business. The globalisation of world trade and investment are two key players who has made this method of dispute resolution so popular. Similar to the contract, an arbitration does not exist in a legal vacuum, rather it is combination of the rules of the procedure that have agreed or adopted by the parties and the arbitral tribunal.[6] Arbitration can be defined in the following way:-

> *An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in differences between the parties.*[7]

---

[3] <https://lk-k.com/wp-content/uploads/The-Use-of-Information-Technology-in-Arbitration.pdf> accessed14 June 2022.

[4] Nigel Blackaby, Constantine Partasides QC, Alan Redfern and Martin Hunter, Redfern and Hunter on International Arbitration, (6thedn, OUP 2015) 1.

[5] Lord Mustill and Stuart C Boyd QC, Commercial Arbitration (2ndedn, Butterworths, 2001) 80.

[6] Nigel Blackaby, Constantine Partasides QC, Alan Redfern and Martin Hunter, Redfern and Hunter on International Arbitration, (6thedn, OUP 2015) 1.

[7] David St. John Sutton, Judith Gill and Matthew Gearing, Russell on Arbitration (23rd edn, Sweet & Maxwell, 2009) 5.

For the parties to implement arbitration the contract should be a valid contract in the eye of law. Waller L.J. in *Soleimany v Soleimany*[8] noted that:

> *There may be illegal or immoral dealings which are, from an English law perspective, incapable of being arbitrated because an agreement to arbitrate them would itself be illegal or contrary to public policy under English law.*[9]

The definition of 'International Commercial Arbitration' may vary from jurisdiction to jurisdiction. The necessity of 'International Commercial Arbitration' in international commerce is inevitable and it is an indispensable catalyst for promoting world trade, which is not only in theory but also in practical utility.[10] The most effective method of creating a 'universal' system of law governing international arbitration has been through international convention (and, more recently, through the Model law).[11]

Importance & Advantage of Arbitration

The advantage of arbitration as against limitation have been variously indicated to be : (a) that arbitration allows the parties to keep private the details of the dispute; (b) the parties can choose their own rules or procedure; (c) there is greater scope for minimising acrimony; (d) the costs can be kept low; (e) the times and places of hearing can be chosen according to convenience; and (f) there will be saving of time; (g) the ability of the parties to choose their own judge permits and choice of an expert in the field who is more able to view the dispute in the commercial setting.[12] However, commencing an arbitration prematurely can also have significant potential downsides, such as losing the opportunity for an amicable resolution, loss of credibility if a party is subsequently forced to

---

8 [1999] Q.B. 785

9 David St. John Sutton, Judith Gill and Matthew Gearing, Russell on Arbitration (23rd edn, Sweet & Maxwell, 2009) 35.

10 P.C. Rao and William Sheffield, Alternative Dispute Resolution (1stedn, Universal Law Publishing, 2015) 1.

11 Nigel Blackaby, Constantine Partasides QC, Alan Redfern and Martin Hunter, Redfern and Hunter on International Arbitration, (6thedn, OUP 2015) 59.

12 P.C. Rao and William Sheffield, Alternative Dispute Resolution (1stedn, Universal Law Publishing, 2015) 61.

change its position later in the arbitration, the presence of cost-shifting principles under many national laws and arbitration rules can create a further risk in any prematurely commenced arbitration etc.[13]

The importance of arbitration in commercial transactions is most significant. Most importantly whenever there is a cross-border or transnational transactions, the parties to that particular transactions always keep a clause for 'arbitration' nowadays. The volume of cross-border or international transactions is always going upwards and thus the use of new electronic contracting tools for conducting the transactions, which resulted into a paperless business procedure. To complete business dealing(s) it is very important to sign document(s). However, in a paperless procedure the parties do not sign the document(s) in the conventional way, rather they signed electronically. Here comes the issue of enforceability of electronically-signed documents, which is also a fact for arbitration agreement because the role of the signature in an arbitration agreement is of paramount importance.[14] The importance of signature in respect of arbitration agreement is twofold, first, it demonstrates the willingness of the parties and second, it shows the consent of the parties to follow the rules that is set out in the arbitration agreement.[15]

Online Dispute Resolution

Before we discuss any further, we need to make a brief discussion about ODR. Online dispute resolution (ODR) evolved as a new method of ADR in 1990s in e-commerce space. Online arbitration is one of the forms of ODR. Online arbitration is a process by which parties may consensually submit a dispute to a non-governmental decision maker, selected by or for the parties, to render a binding, non-binding or unilaterally binding award, issuing a decision resolving a dispute in accordance with neutral procedure which includes due process in accordance with the parties' agreement or

---

[13] Steven P. Finizio and Duncan Speller, A Practical Guide to International Commercial Arbitration: Assessment, Planning and Strategy (1st edn, South Asian Edition, Sweet & Maxwell, 2014) 87.

[14] <https://www.acerislaw.com/electronic-arbitration-agreements-admissibility-and-enforceability/>accessed14 June 2022.

[15] <https://www.acerislaw.com/electronic-arbitration-agreements-admissibility-and-enforceability/>accessed 14 June 2022.

arbitration tribunal decision.[16] If the online arbitration is conducted totally online then the entire arbitration process is conducted by the use of email, video conferencing and web based communications. However, if the procedure is partly online arbitration, it is a combination of online proceedings (e.g. use of fax and post for the submission of evidence, communication between the arbitrators, and deliberation of the award) as well as offline proceedings (e.g. live in-person hearings, etc.).[17]

On one hand ODR helps to resolve dispute promptly, on the other hand it is cost-effective. Basically, ODR facilitate the usage of technology in arbitration proceedings.[18] The usage of technology in arbitration still mimics the process of previous physical realm because the technological innovation in legal field is still very limited. However, the adoption of ODR in international arbitration gives us some hope of to break the trend and to harness the benefits of technology.[19] It is still a challenged to be adaptable for the continuous emerging technologies (e.g. quantum, AI, distributed ledger technology and smart legal contracts).[20]

Advantages of Online Dispute Resolution

Advantage of Online dispute resolution includes- reducing costs and better enforcement of the solution recommended or imposed by the chosen institution.

Cost-effectiveness

The reason behind the cost-effectiveness are (a) rapid processing of disputes, (b) the lower costs involved, and (c) only partial assumption of the operating costs by the parties.[21]

---

16 FarzanehBadiei, 'Online Arbitration Definition and Its Distinctive Features',<http://ceur-ws.org/Vol-684/paper8.pdf>accessed 15 June 2022.

17 FarzanehBadiei, 'Online Arbitration Definition and Its Distinctive Features', http://ceur-ws.org/Vol-684/paper8.pdf>accessed 15 June 2022.

18 <https://www.lw.com/thoughtLeadership/protocol-online-case-management-international-arbitration> accessed 15 June 2022.

19 <https://www.lw.com/thoughtLeadership/protocol-online-case-management-international-arbitration> accessed15 June 2022.

20 <https://www.lw.com/thoughtLeadership/protocol-online-case-management-international-arbitration> accessed15 June 2022.

21 <https://unctad.org/system/files/official-document/edmmisc232add20_en.pdf>accessed 15 June 2022.

(a) Speed of Dispute Resolution

Traditionally, not paralyzing the business life and the normal exchanges between commercial partners is the main advantage associated with ADR. It is known to all that regular court proceeding take months, even years, to reach a conclusion. On the other hand, ADR curtails the process of conducting disputes. When working online, the instantaneous circulation of information reduces the time still further. It is to be mentioned here that, in order to familiarize themselves and make an award certain time is needed for the arbitrators. Lack of complexity in "quality disputes" also speed up the arbitration procedure. Hence, the adoption of ODR could further increase the speed of the arbitration procedure.[22]

(b) Lower Costs

ODR does not require the parties or their legal representative to be present physically, rather it allows to settle the dispute remotely. The parties of an arbitration procedure can simply transfer their relevant documents and data messages to a particular site chosen by organization, that are conducting the procedure. They can do this from their workplace without moving to a separate venue and they don't have to pay any extra then their regular internet bill. This will save the cost of travelling to appear before the court, which may sometimes be located in a different country. There are some methods of ODR which reduce the necessity of human intervention and thus offer even more cost reduction (e.g. with automated settlement assistance systems, the computer calculates the value of the settlement on the basis of the claims of each party).[23]

When human intervention is necessary, whether in systems of electronic conciliation or electronic arbitration, significant cost reduction seems possible only for disputes that do not involve overly complex legal questions and that do not require an expert's presence.[24] Disputes relating to registration of domain names is a case in point, because the panel

---

22 <https://unctad.org/system/files/official-document/edmmisc232add20_en.pdf>accessed 15 June 2022.

23 5 Schultz T et al., «Online Dispute Resolution: The State of the Art and the Issues». E-com Research Project of the University of Geneva, Geneva, 2001, p. 61. Available on the Internet at: <http://www.online.adr.org>

24 <https://unctad.org/system/files/official-document/edmmisc232add20_en.pdf>accessed 15 June 2022.

members only have to confirm that the claimant is the owner of the trademark and that the respondent made a bad-faith registration.[25] The same is fact in some "quality disputes", where non-performance of contract is an issue and the said non-performance has to be confirmed by the third party chosen by the parties. Establishing electronic nonperformance may not be easy to prove, specially when necessary access code is not supplied by a database owner or a software publisher. However, sometimes difficulties may arise to identify whether the fault is to contribute to the software or the operating system when the software does not work well on the client's computer.

(c) Financing of ODR

The costs of ODR are not always shared equally between the litigants, for example if the business is affiliated to a quality label programme, then electronic arbitration costs the claimant nothing, rather it is financed by the business's annual subscription to the certification programme.[26] It is to be mentioned here that, typically arbitration costs are shared equally between the parties, unless the arbitrators make an award to pay the entire cost by the losing party. In our naked eyes, these systems may seem very favourable to the client, who benefits from free access to extra-judicial methods of dispute settlement, however, call for particular vigilance regarding the independence of the dispute resolution body, which might show a certain bias towards the business.[27] After all, the business might be a "serial litigant", providing regular cases for the arbitral tribunal. However, this argument should not be exaggerated, because an arbitration award made contrary to the principle of independence will not receive the exequatur of the State courts in the majority of States.[28]

In order to implement 'arbitration' to resolve the disputes regarding international contract it is crucial to adopt the growing trend of current

---

[25] <https://unctad.org/system/files/official-document/edmmisc232add20_en.pdf>accessed 15 June 2022.

[26] <https://unctad.org/system/files/official-document/edmmisc232add20_en.pdf>accessed 15 June 2022.

[27] <https://unctad.org/system/files/official-document/edmmisc232add20_en.pdf>accessed15 June 2022.

[28] <https://unctad.org/system/files/official-document/edmmisc232add20_en.pdf>accessed 15 June 2022.

world which is 'paperless arbitration'. In this regard United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 might play the key role to harmonize the standards of paperless arbitration from proceeding to award.

United Nations Convention on the Use of Electronic Communications in International Contracts, 2005[29] and Paperless Arbitration

Considering the increased use of electronic communications over international commercial activities and the obstacle resulted from the uncertainty as to the legal value of such uses of electronic communications, uniform rules was really necessary to bring the harmony into the international trade law. Consequently, a new 'Convention on the Use of Electronic Communications in International Contracts (hereinafter, 'Convention'[30])' has been adopted by the United Nations on 23rd November, 2005 and which come to enter into force on 1st March, 2013. It was prepared by the 'United Nations Commission on International Trade Law (UNCITRAL)' since 2002-2005. Till now, it has been signed by 18 countries and 9 countries have become party to it only, so far.[31]

In the explanatory note prepared by the Secretariat of UNCITRAL for information purposes only, it has outlined the main features of the Convention stating that 'The purpose of the "Electronic Communications Convention"[32] is to offer practical solutions for issues related to the use of electronic means of communication in connection with international contracts'[33]. Convention was never intended to provide a uniform rule for

---

[29] United Nations Commission on International Trade law, The United Nations Convention on the Use of Electronic Communications in International Contracts (Sales No. E.07.V.2, United Nations Publication, January 2007) <http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf> accessed 01 January 2018.

[30] The convention has 25 Articles contained into four chapters, namely, Sphere of application (Articles 1 – 3), General Provisions (Articles 4 – 7), Use of electronic communications in international contracts (Articles 8 – 14) & Final provisions (Articles 15 – 24).

[31] <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html> accessed 01 January 2018.

[32] 'The United Nations Convention on the Use of Electronic Communications in International Contracts' has been termed as 'Electronic Communications Convention' or 'Convention' in the explanatory note by the UNCITRAL secretariat.

[33] United Nations Commission on International Trade law, The United Nations Convention on the Use of Electronic Communications in International Contracts (Sales No. E.07.V.2,

substantive contractual issues which are not specifically related to the use of electronic communication. Even though convention contains some substantive rules in order to ensure the effectiveness of electronic communications, conceiving the idea that a complete and strict separation between technology-related and substantive issues is unwanted and less desirable in the area of international trade.[34]

Principles of Convention[35]

Convention has been propounded upon two principles which have been specified into the fifth paragraph of the Preamble. These two principles are: technological neutrality and functional equivalence. In order to improve the efficiency of commercial activities these two principles are the core of any legislation of transactions done with the use of electronic communication[36]

Technological Neutrality

This principle has been enunciated to provide the necessary flexibility to cover all kinds of technology or the medium used for the electronic communications, so that it can easily accommodate the future developments. Such neutrality and flexibility on the use of technology is highly appreciative because specifying any particular technology of transmission or storage of information may cause possible obsolescence of the law with the advent of future innovations or development of technology. Therefore, neutral approach aims to accommodate any future development without further legislative work.

Functional Equivalence

The idea behind this principle is to provide functional equivalence between electronic and traditional documents, and also, between electronic

---

United Nations Publication, January 2007) 13 <http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf> accessed 01 January 2018.

34 ibid.

35 United Nations Commission on International Trade law, The United Nations Convention on the Use of Electronic Communications in International Contracts (Sales No. E.07.V.2, United Nations Publication, January 2007) <http://www.uncitral.org/ pdf/english/texts/electcom/06-57452_Ebook.pdf> accessed 01 January 2018.

36 <http://www.bibliotekacyfrowa.pl/Content/22563/United_Nations.pdf>accessed28January 2018.

signature and handwritten signatures. Such approach has been preferred to remove the obstacles which have been created from the legal requirements for the use of paper-based documents, prescribing particular forms, hindering the development of electronic communication means.[37] To meet up this challenges 'functional equivalence' principle provides that after meeting the specific requirements for example writing, original, signed and record by electronic documents it will have the same degree of legal certainty like the paper-based system.

Harmonization of Paperless Arbitration in Different Jurisdictions

To harmonize the paperless arbitration two principles, i.e. 'technological neutrality' and 'functional equivalence', based on which Convention has been developed, could be very effective. However, it should be borne in mind that 'flexibility' may bring uniformity but to some level of rigidity is needed to bring the uniformity. As it has been seen above that allowing too much flexibility in making choice to the States in order to alter the application has failed to bring the intended harmonization of the application of the Convention.

Along with the above two principles, another principle could be regarded to harmonize the application of paperless arbitration and that is 'non-discrimination principle'[38]. As 'Technological neutrality' necessarily will allow the use of the future advance technology without changing the domestic law but it may create a problem in paperless arbitration when a party to the arbitration is using advance technology which is not available to the other party. So, an agreement needs to be struck down. This hurdle can be overcome by giving the power to the arbitral tribunal in choosing the technology to be used in arbitration process after considering the position of the both parties. Hence, 'non-discrimination' principle is necessary along with the 'Technological-neutrality' principle.

---

[37] ibid.

[38] 'Non-discrimination' principle was adopted as one of fundamental principles along with 'technological neutrality' and 'functional equivalence' in 'UNCITRAL Model Law on Electronic Commerce (1996)'. <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html > accessed 17 January 2018.

The second principle, i.e. ‘functional equivalence’, may play a significant role in paperless arbitration because it will allow the same legal effect to both paper-based documents and electronic documents in the arbitration procedure from the proceeding stage to award enforcement stage. Because by virtue of this principle electronic documents will have the same legal effect as paper-based documents even though the State has yet not been taken any step to enunciate legal rules to give same legal effect of electronic documents as paper-based documents.

According to *Thomas D. Halket*, using appropriate technology in arbitration process will significantly increase speed efficiency and will decrease the cost.[39] As large amounts of documentary evidence can be analyzed by software in a way which is not possible by hand. Video conferencing will be more cost effective and comprehensive as an alternative to the traditional in-person hearing based procedures which is overly costly and it will be more convenient when in-person hearing is not possible for unavoidable circumstances. Another advantage to the paperless arbitration has been pointed out by *Gillian Lemaire* that the problem to accommodate large number of voluminous printouts of electronic files or photocopies will be mitigated because sometimes it becomes very difficult to arrange significant storage space by arbitration institutions or to carry such documents each and every time when the hearing took place.[40]

In paperless arbitration it is highly likely that one party may not be equally well equipped or experienced of technologies which could be used for electronic communications. Inevitably, parties will not be on equal footing which may result detrimental to due process of arbitration process. Hence, ‘non-discrimination’ principle has to apply so that parties can be brought to an equal footing in paperless arbitration process. Therefore, ‘non-

---

[39] Thomas D. Halket, ‘The Use of Technology in Arbitration: Ensuring the Future is Available to Both Parties’ (2007) Vol 81:269 St. John’s Law Review. <http://www.halketweitz.com/use_of_technology_in_arbitration.pdf> accessed 1st February 2018.

[40] Gillian Lemaire, ‘Paperless Arbitrations – Where Do We Stand?’ (Kluwer Arbitration Blog, 19 February 2014) <http://arbitrationblog.kluwerarbitration.com/2014/02/19/paperless-arbitrations-where-do-we-stand/?_ga=2.233101854.1834001926.1523691267-598905935.1523691267> accessed 21 January 2018.

discrimination' principle will ensure that both the parties in paperless arbitration are on equal footing thereby the reliance on win-win situation which is the essence of arbitration will be upheld. Therefore, determination of the technology which is to be used in the paperless arbitration have to be decided in a way after considering the availability of equipment, technology and experiences from both parties to ensure the fair and due process. Hence, to accommodate such situation wider discretion of using technology can be achieved through 'Technological neutrality' principle as it does not provide any specific or particular use of technology for electronic communication. Lastly, to give effect the same level of legality to the electronic documents as much as documents which could be ensured by incorporating the 'functional equivalence' principle in paperless arbitration. One may raise the question that once the same level of degree of legality has already been given under the Convention of electronic documents and paper documents, then, why it is necessary to incorporate it into the rules. Because if the requirements to attract the application of the Convention are not possible then to give legal certainty to the electronic documents like papers 'functional equivalence' rule is very essential. Precisely arbitration does not specifically link to any particular geographic location and the dispute is being resolved on the basis of chosen law by the parties. If the choice of law under an international agreement is not a Contracting State with a Non-Contracting State then the Convention will not be applicable. Accordingly, if they choose paperless arbitration then parties will be bound by its rules. Therefore, to achieve harmonization in paperless arbitration these three principles taking into a single unit can play an active role to harmonize the process.

Is it Possible to Achieve Harmonization through the Convention?

Aleksandra Kuczerawy pointed out that though the above two principles provides the necessary flexibility to achieve the uniform application of the Convention but the flexibility contained in the last chapter of the convention whereby necessary power has been given to the States to alter the application of the convention may create an obstacle from obtaining a harmonizing application and creating legal certainty of the Convention.[41] Such drawbacks turn out to be true as upon acceptance, the Russian Federation has declared that Convention will apply only when parties have

[41] ibid.

agreed to regulate their international contract by it. It has also specifically stated that Convention will not be applied to such transactions for which a notarized for or State registration is required under Russian law or to transactions for the sale of those goods which has been prohibited or restricted to be transferred across the Customs Union border. Upon ratification, Singapore has also declared that electronic communications relating to any contract for the sale or other disposition of immovable property or any interest in such property the Convention will not be applied. Additionally, in respect of will, indenture, trust or power of attorney executed for any contract governed by the Convention, it will also not be applicable. And, Sri Lanka has declared upon ratification that the Convention will be refused to apply to electronic communications or transactions which are expressly excluded under Section 23 of Electronic Transactions Act No. 19 of 2006, of Sri Lanka.[42] Though the Convention is intended to permit States the flexibility to adapt the new advent developments in 'communications technology' which will be applicable to trade law into the domestic law without necessitating the wholesale removal of the paper-based requirements themselves or disturbing the legal concepts and approaches underlying those requirements, but in practice, States have refrained to adopt the whole application of the Convention intact. Thus, the uniform application of the convention to harmonize the use of electronic communication in international trade has not been fulfilled yet necessary changes should be taken involving the flexibility of States power to alter the application of the Convention.

Impact of the Convention on International/Cross-border Transactions

To attract the application of the Convention both the parties need not to be Contracting State to the Convention provided that the law of the contracting State is the applicable law in the international contract between a Contracting State and Non-Contracting State. The purpose of the Convention is to provide the electronic communications the same degree of legal certainty just like paper-based communications. And, to eradicate the discrimination between electronic documents and paper-based documents the Convention has ensured that the validity and enforceability of electronic documents could not be denied just because the information

42 <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005 Convention_ status.html> accessed 01 January 2018.

contains in paper-based documents. In the body of the Convention the contract has not been defined to cover arbitration agreement. However, from the reading of the explanatory notes of the Convention it has been transpired that 'contract' word should be understood in a wider sense than domestic laws. The word 'contract' should be construed as to cover 'arbitration agreements' which are in electronic form. In addition, Convention has expressly specified, through its provision contained in Article 20(1), that it applies to the 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)' (New York Convention). Since, the Convention applies to 'New York Convention' therefore even if the arbitral award is in the form of electronic form it could be enforced against the other party who is not Contracting State provided that non-contracting State is a signatory State to the 'New York Convention'. Again, the use of electronic communications in accordance with the Convention, it requires prior consent from the both parties or where no express consent has been given it will be inferred from the dealings of the parties. Therefore, it is pertinent to say that the parties have to give their consent for the arbitral award in the form of electronic. Or, in other cases, it might be implied where 'arbitration agreement' is already in electronic form or they have agreed for paperless arbitration.

From the reading of Convention and its explanatory notes, it has also transpired that it allows parties to a contract to exchange information between them irrespective of stages of the contract, i.e. negotiation, during performance of the contract or after the contract has already been performed. Therefore, it will sufficiently facilitate the whole paperless arbitration process from proceeding to award. Because, by virtue of the Convention in paperless arbitration the statement of claim, statement of defense, expert witness in writing and other evidences in electronic form will have the same legal certainty as much as paper-based documents have under ordinary arbitration proceedings. As the convention does not provide any specific technology to be used for electronic communications thereby in the paperless arbitration it can be suitable for a party who is not well equipped with the modern technology. As the convention applies to New York Convention then there is no hurdle to give the Award in electronic form under the paperless arbitration proceedings.

Furthermore, UNCITRAL Arbitration Rules as revised in 2010 allows all the Notices from the Arbitration Tribunal or from the parties and the Notice of the Arbitration can be exchanged through e-mails. If such notices comply with the requirements for statement of claims and statement of defences respectively then such notices can be treated as statement of claims and statement of defences, therefore, no paper-based copies need to be delivered by post to the parties.[43] Under Article 28(4) of rules Tribunal can examine the witness and expert witness through the means of telecommunication (such as video conferencing) and do not require their presence at the time of hearing.

As UNCITRAL Arbitration Rules provides rules and regulation of arbitration proceedings about using the use of electronic communications and the Convention is also providing the same legal certainty to the information contained in electronic form as much as paper-based documents, therefore, together with both are providing essential features for paperless arbitration to achieve a harmonizing standard.

The Potential of Implementation of Paperless Arbitration in Bangladesh

The impact of Arbitration Act, 2001 (the Act) is clearly visible in almost all commercial contracts between the parties. Arbitration clause has become a norm to every commercial contract.[44] Section 89B of the Code of Civil Procedure also provides the opportunity for arbitration. However, the usage of IT tools in Bangladesh is still very low and before Covid 19 pandemic the legal proceedings never happened on a video conference. Furthermore, the Act does not provide any option for virtual arbitration proceedings. In comparison to our neighbor countries we have not achieved much in arbitration sector, specially partly adaptation of UNCITRAL Model Law in the Act and failure to implement New York Convention properly are two main reasons for lacking in countrywide implementation of arbitration.[45] Whereas, the arbitration rules and

[43] Articles 3, 4, 20 & 21 of UNCITRAL Arbitration Rules, as revised in 2010.

[44] S.K. Chawla, Law of Arbitration & Conciliation (3rdedn, Eastern Law House, 2012) 259: An arbitration agreement is an agreement to submit present or future disputes to arbitration. Disputes is thus an essential element in the definition of arbitration agreement.

[45] Dr. P CMarkanda, Naresh Markandaand Rajesh Markanda, Law Relating to Arbitration and Conciliation (9thedn, LexisNexis, 2016) 772.

procedures of international arbitral institutions like "The International Chamber of Commerce's International Court of Arbitration" (ICC), "The International Centre for Settlement of Investment Disputes (ICSID) and "The Singapore International Arbitration Centre (SIAC)" permit the use of videoconferencing and virtual hearings in one form or another[46], our country has not taken any initiative to adopt the IT tools in legal proceedings or arbitration proceedings yet. There is no legal bar against fixing a designated digital platform like "Zoom" or "Skype" or other similar platforms available in Bangladesh as the place of arbitration.[47] However, lack of skill over technology is a vital hindrance for achieving the goal of ODR in Bangladesh because taking part in videoconference and conducting virtual hearing is not the same thing. Virtual arbitration hearings would, among others, ideally require a digital database of all pleadings, documents and laws filed and/or referred to by the parties, an operator controlling the video-link, a separate operator ensuring easy and efficient access to particular documents to which the counsels refer to from time to time which requires extensive training of arbitrators and counsels.[48]

Conclusion

The emergence of paperless arbitration started with the implementation of ODR by different international organisations. However, very recently with the outbreak of COVID-19 virus, our world shifted to online dispute resolution mechanisms and thus the topic 'paperless arbitration' gets its new momentum. The development of IT has contributed a lot to the development of online dispute resolution systems including arbitration. The usage of new electronic contracting tools for conducting national and international business is inevitable. But the development of ODR and using paperless procedure also raises new problem which is enforceability of electronically-signed documents. In the case of the arbitration agreement, the same issue arises because the importance of the signature in an arbitration agreement cannot be overlooked. The signature not only demonstrates the parties' willingness to submit to arbitration, but it also

---

46 <https://www.thedailystar.net/law-our-rights/news/arbitrations-bangladesh-during-covid-19-pandemic-1902163>accessed 15 June 2022

47 <https://www.thedailystar.net/law-our-rights/news/arbitrations-bangladesh-during-covid-19-pandemic-1902163>accessed 15 June 2022

48 <https://www.thedailystar.net/law-our-rights/news/arbitrations-bangladesh-during-covid-19-pandemic-1902163>accessed 15 June 2022

confirms the parties' commitment to follow the arbitration agreements.[49] In this respect the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005[50] has been enacted. In order to enforce an arbitral award based on the New York Convention's[51] provisions must consider the formal requirements set forth in Article II of the Convention; failure to do so may result in the nullity of the final award under Article V (1) of the Convention (a).[52] However, Article V of the New York Convention rules (New York Convention 1958) is the only grounds for refusing to enforce a foreign arbitral award.[53] Although, various international organisations have already started to work on ODR and paperless arbitration procedure but implementing paperless arbitration may not be a near future for us. Nevertheless, the recent usage of video conference during Covid-19 pandemic gives us a little hope that there is still possibility to harmonize our arbitration sector with the modern world.

---

49 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4009480> accessed 13 June 2022.

50 <https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications> accessed 13 June.

51 <https://www.newyorkconvention.org/> accessed 14 June 2022.

52 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4009480> accessed 15 June 2022.

53 <https://www.newyorkconvention.org/> accessed 15 June 2022.

Universal Declaration of Human Rights: The Concept and the Relevance[*]

Justice Md. Rezaul Hasan (M.R. Hasan)[**]

If the community of the states had a common religion, then that could have been the 'Universal Declaration of Human Rights, 1948, in the sense that each of the signatories have expressed their allegiance to this declaration, UDHR, in brief. These are the collection of some rights inherent in each human being, which are fundamental to their survival with dignity. Perhaps, we also know that, the dignity of a human being survives his death.

The UDHR, as evident from its preamble and the contents, is a mutual pledge, belief and understanding of the international community and this provides a common platform for all nations to peacefully co-exist, to co-operate as well as to grow and survive as a mankind.

The basic legal instrument, that records the human rights, is the Universal Declaration of Human Rights (UDHR) adopted by the General Assembly of the United Nations, on 10th December, 1948, ratified by all 193 members of the United Nation.

All democratic states have, by now, incorporated these basic human rights, described either as the fundamental rights or as the bills of rights, in their respective constitutions, so that any violation can be redressed by the respective domestic courts.

The European countries, on their part, have founded the Council of Europe, CoE, in 1949, with 46 member states. The UK and other members of the CoE have signed the European Convention of Human Rights, in 1950, in addition to their ratifying the UDHR, earlier in 1948. Moreover, to ensure implementation of these rights, the CoE has established the European Court of Human Rights, in 1959. Since November 1, 1998, this

---

[*] This article was published on December 11, 2023 in the Daily Star, in observance of the International Human Rights Day.

[**] Judge, High Court Division, Supreme Court of Bangladesh

is a full time court situated in France (known as the 'Strasbourg Court'). The individuals of any member state can apply directly to this court.

The UK, however, has also passed the Human Rights Act, 1998 (HRA), in the same year when the ECHR has started functioning. This is a British domestic law and this has come into force on 2nd October, 2000. Thenceforth, this forum is available to the citizens of the U.K. to complain about the violations and to redress the grievances under the HRA.

Long before the UDHR, 1948, the Constitution of the United States was approved on September 17, 1787 and it has become effective on June 21, 1788. By several amendments made thereafter, between 1791-1992, the USA has incorporated these basic human rights into their constitution and has been the first, amongst the states, to guarantee these basic human rights, the human dignity and fair treatment to all her people. Life, liberty and the pursuit of happiness are recognized in the Declaration of Independence of the USA, July 4, 1776, as the three inalienable rights given to all human by their creator.

These basic human rights have also been incorporated in the 1972 Constitution of the newly independent Peoples Republic of Bangladesh, under Part III, described as "Fundamental Rights", in the Articles 27 to 44. Most importantly, Article 44 of the Constitution makes the right to 'enforce the fundamental right' as a fundamental right in itself.

The democratic countries of the west have, by now, conspicuously shown that these countries hold a uniform value about the human rights philosophy. They consider the democracy as one side of the coin, while the human rights as another. They have also demonstrated a strong will to zealously guard, promote and support these rights, although there are serious allegations of human rights violation or, at least, indulging in human rights violation, against some of them, particularly, on the issue of Israil's unlawful occupation of Palestine's land and rampant violations of human rights of the Palestinian peoples, termed us 'genocide' by some observers.

The human rights situation is, nowadays, a basic norm used in rating the countries. Besides, in this age of information technology, the human rights

issues have become a matter of interest and great concern to the international community, particularly to the western world. The observations and the reports made on a country, by the watchdogs, may create 'good' or 'bad' perception about it. So, the importance of 'human rights' issues need not be over emphasized.

Notably, Bangladesh has shown an unprecedented respect to the human rights and the human dignity by rehabilitating, with her own limited resources and with the support of the UN and other friendly countries including the USA, about 1,000,000 Rohingya refugees by now.

Notably, issues of human rights are not at all an academic issue, nor are these any political rhetoric in Bangladesh. Article 11 of Bangladesh Constitution, as one of the fundamental Principles of State Policy affirms that, 'the Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed'.

In addition to guaranteeing these fundamental rights in Part III of the Constitution, the Republic has walked further to protect, preserve and defend these rights. Hence, Article 26(1) declares that, all existing law (pre-constitutional law) inconsistent with the fundamental rights shall become void on the commencement of the Constitution. While Article 26 (2) puts an embargo on the state in making any law that may be inconsistent with such rights and also mandates that the law so made shall be void to the extent of such inconsistency. Moreover, Supreme Court has been vested with jurisdiction, under Article 102, to entertain writ petitions and to strike down or to declare void any acts of the executives or of any statutory authority or of a tribunal and even an Act of Parliament, if done or made in violation of Part III, guaranteeing these fundamental rights in the Constitution. Similarly, the court can, by an appropriate order, compel or prohibit the authorities, to do or not to do any act, as the case may be, to uphold these rights, on any application made to it.

Apparently, the values and the scheme, as regards the 'democracy' as one side of the coin and the 'human rights' as the another, as envisioned in Article 11 of the Constitution, are in harmony with those of the western democracies and their allies.

Legitimate Expectation and Its Application

Justice Md. Zakir Hossain*

'Legitimate expectation' was first used by Lord Denning in 1969. Since then it has assumed the position of a significant doctrine of public law in almost all jurisdictions. The doctrine of legitimate expectation belongs to the domain of public law. It is intended to give relief to the people when they are not able to justify their claims on the basis of law in literal sense though they had suffered a civil wrong or injury because their legitimate expectation has been violated. It is rooted in natural justice. Legitimate expectations of a person are such kinds of right which the court now enforces, particularly by means of writ issuance, which is particularly focusing on public law.

In private law, a person can approach the court only when his right based on statute or contract is violated but this rule of *locus standi* is relaxed in public law to allow standing even when a legitimate expectation from a public authority is not fulfilled. Through this doctrine a public authority can be made accountable on the ground of an expectation which is legitimate.

A natural or constitutional residence of this doctrine is Article 27 of Bangladesh which abhors arbitrariness and insists on fairness in all administrative dealings. It is now firmly established that the protection of equality before law is available not only in case of arbitrary class legislation but also in case of arbitrary state action. This doctrine has both positive and negative contents. If it is applied negatively an administrative authority can be prohibited from violating the legitimate expectations of the people and if applied positively an administrative authority can be compelled to fulfill the legitimate expectations of the people.

In this pretext, this Article is to explore about the legitimate expectation and its application from Bangladesh perspective.

---

* Judge, High Court Division, Supreme Court of Bangladesh

Concept and Importance of Legitimate Expectation

Expectation means the act or state of expecting: that which is or may fairly be expected: that which should happen, according to general norms or custom or behavior: that the degree of proportionality or the value of something expected.[1] Generally the right to a hearing or to be consulted, or usually put in ones case may arise out of the action of the authority. In this way a promise made in the shape of statement of policy or a procedure regularly adopted by the authority may give rise to an expectation which might be best understood as legitimate expectation. So, the principle of legitimate expectation means such an expectation that may arise from an express promise given on behalf of the public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.[2]

A past practice of consulting before a decision is taken may give rise to an expectation of consultation before any future decision is taken. This is so far mean legitimate expectation of the person warranted by the authority. It may be of two types (1) Procedural legitimate expectation,[3] and (2) Substantive legitimate expectation[4].[5] The doctrine of legitimate expectation has got wide meaning from different view point in a famous case. In *Asaf khan and others v. The Court of Settlement, Dhaka and others*[6] Justice M.M. Ruhul Amin in favor of the Division Bench comments that "legitimate expectation is a concept of administrative law which means that an administrative authority can not abuse its discretion by legitimate expectation by disregarding undertaking or statement of its intent."

So, a person may have legitimate expectation of being treated in certain way by an administrative authority even though he has no legal right to receive first treatment. Where an action of administrative authority

---

1 Md. Samsul Huda & ors v. Bangladesh, 17 BLT, (HCD), 2009, 62. Para 68.

2 Sirajul Islam v. Bangladesh; 60 DLR (HCD), 2008, 79, para 19.

3 The term procedural legitimate expectation denotes the existence of some process, right of the applicant claims to possess as the result of behavior by the public body which generates the expectation.

4 The term sustentative legitimate expectation refers to the situation in which the applicant seeks a particular benefit or commodity such as a welfare benefit or a licence.

5 Craig PP., Administrative Law, fifth Edition, 2003, Sweet and Maxwell Ltd, London.

6 23 BLD 7,24

adversely affects legal right of an individual, duty to act fairly and reasonably is implicit. Even in case where there is no legal right, he may still have legitimate expectation for receiving the treatment of fair play in action.

The doctrine of legitimate expectation has an important place in the development of law of judicial review. The core objectives of doctrine of legitimate expectation are to protect and strengthen the context of reasonableness and natural justice.

Test of Legitimacy of an Expectation

Legitimacy of an expectation can be inferred only if it is founded on the sanction of law or customs or established practice or procedure in regular or natural sequence and when its exercise is fair, reasonable and in accordance with law.[7] However, as it is very crucial to determine an expectation as reasonable or legitimate, certain points favored by different jurists and justice might greatly aids in doing so.[8]

When and how an expectation becomes legitimate, should be construed carefully. The means of test must be standard one. Justice Amirul Kabir Chowdhury, formerly chairman of National Human Rights Council, presented a test in *Md. Hafizul Islam v. Government of Bangladesh and others*[9] in the following way-

> The concept of legitimate expectation is to some extent uncommon in our jurisprudence. The word ‘legitimate’ connotes lawfully begotten. An expectation to become legitimate therefore should not be sworn of lawful begetting. The concept of legitimate expectation cannot be given such wide interpretation so as to allow any wishful hope without lawful root.

Again, mere fanciful expectation can not be taken to be a reasonable expectation. Even expectation based on contract or relationship would not

---

7 SSA Bangladesh v. Engr. Mahmudul Islam & ors, 24 BLD, (AD), 2004.

8 Craig, PP. Administrative Law, Sweet and Maxwell ltd, Fifth Edition, 2003, London, page-651.

9 23 BLD, (HCD), 153, 157.

be maintainable if it is not clearly founded. In *Rabia Bashri Irene v Bangladesh Biman*[10] it is seen that the expectation of the petitioner was reasonable in all respects. It was not merely speculative. The court held that "the petitioner's expectations of being absorbed in the service after satisfactory completion of five years service can not but said to be their legitimate expectation".

However, there is no doubt that every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case.[11]

Relationship of Legitimate Expectation with Other Doctrines

(i) Legitimate Expectation and Natural Justice

As stated earlier, the term 'legitimate expectation' has no specific definition as like that of natural justice. It is a situation where an individual in no way be debarred from his legal rights even from the expectation which has no legal footing, without due procedure. On the other hand, natural justice is something, which maintains certain principles in disposing justice. Legitimate expectation is a plea for the claimant to seek natural justice.

In administrative law, traditionally, the requirements of procedural fairness have been known collectively as the rules of natural justice.[12] The rules of natural justice shall necessarily mean to conform to the principles in Latin form.[13]

---

[10] 52 DLR, 308.

[11] Sirajul Islam v. Bangladesh; 60 DLR, (HCD), 2008, 79, para 19

[12] It includes two principles generally:

1. The principle of audi alteram partem (meaning 'hear the other side') encompassed the rules that a man should be heard before taking any decision, whether it is written or oral.
2. The principle of nemo judex in causa sua (meaning no man should be a judge in his own case) which covers the rules that the decision maker must not decide his own case and he should not appear to be biased in coming to a decision.

[13] Zebunnesa. Begum, Judicial role in development if natural justice and legitimate expectation in commonwealth Caribbean and Bangladesh, Amin Book House, First Edition, 2006,page-3

With a view to conform to the principles of natural justice the Constitution of Bangladesh has incorporated[14] the concept of procedural due process similar to that of American Constitution, in the sense that, it guarantees the protection of the law and to be treated in accordance with law as an inherent right of every citizen or every other person within Bangladesh. It also provides for safeguards as to arrest and detention as well as protection in respect of trial and punishment[15] to protect the legitimate expectation ensuring natural justice.

The principles of natural justice were originally applied to court of justice and now extend to any person or body deciding issues affecting the rights or interests where a reasonable person would have legitimate expectation that the decision making process would be within some rules of fair procedure.[16] In the long run, we can say the principles of natural justice depend on fair hearing. Whether a hearing is fair or contaminated required to be understood through the maintenance of following formalities.

(ii) Legitimate Expectation and Estoppel

The rules of estoppel as statutorily found in Evidence Act 1872.[17] But legitimate expectation will apply where the public authorities or any person makes representation in the shape of information and ensures some entitlement to the person concerned. It is often seen that the government authorities seek immunity against estoppel to defraud the legitimate interest on the fake plea that they derive power from the people in general. As estoppel is here to protect the legitimate expectation of the individual, Estoppel gives back up to the individual to enjoy his legal rights and interests. In this regard let us examine a case[18], where the government had notified that new industries will be exempted from taxes for three years. In reliance on the notification, a person establishes an oil mill. However, the government later decided to withdraw the notification. The Supreme Court

---

14 Article 31 of the Constitution of Bangladesh.

15 Article 33 and 35 of the Constitution of Bangladesh.

16 Smith S.A. De, Constitutional and Administrative Law, 4the Edition, page-569; University of Dhaka v. Zakir Ahmed, 16 DLR, (SC),1964, 722; Faridsons Ltd v. Pakistan, 13 DLR, (SC), 1961, 233.

17 It applies when a person has made some representation by words act or omission and thereby intentionally caused or permitted some other person to believe the thing represented to be true; and the other person believed and acted upon such representation.

18 M.P. Sugar Mills v. U.P, AIR, 1979, SC, 621, 644.

of India upon consideration of long list of cases[19] in many jurisdictions upheld that the government is bound by the notification due to estoppel and the petitioner is entitled to protect his legitimate expectation not to pay taxes for three years.

Estoppel and legitimate expectation have some similarities in the sense that in certain cases, estoppel has no application, just like legitimate expectation. There is no estoppel against an Act of the legislature,[20] even it is not possible against the law of the land and supreme law, i.e., the Constitution. Similarly, in case of emergency and greater constitutional interest, legitimate expectation would not be applied. Waiver or acquiescence in the facts of the case operates as estoppel.

(iii) Legitimate Expectation and Judicial Review

The doctrine of legitimate expectation has an important place in the developing law of judicial review. It is enough merely to note that the legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the court to apply for judicial review.[21]

In judicial review the law court is basically obliged to determine that whether the alleged act under review is lawful or unlawful or detrimental to the legitimate interest of individual. The basic function of the court with regard to illegal action or decision is to declare it as void and thus give protection to the legitimate interest as well as natural justice.[22]

Legitimate expectation gives proper footing to the individual justice seekers to bring his case under the jurisdiction of judicial review of the Supreme Court of Bangladesh.[23] Legitimate expectation and judicial review has a great relationship in the sense that unless there is legitimate interest (in absence of which judicial review court would not take into consideration the whole matter) there is no judicial review. So, what

---

19 English India American jurisdictions cases.
20 Kerala v. Gwalior silk Mfg. co. ltd, AIR, 1973, SC, 2734.
21 Sirajul Islam v. Bangladesh; 60 DLR(HCD) 2008, 79, para 14.
22 Mahnudul Islam, Rule of Law, Constitutional Law of Bangladesh, Mollick Brothers, 2nd Edition, 2003, page-436.
23 Ibid Sirajul Islam vs Bangladesh; 60 DLR (HCD), 2008, 79, para 14.

actually constitutes proper footing or *locus standi* needs to be clear in all forms. The word *locus standi* means "the right to bring an action or to be heard in a given forum."[24] In the case of *Kazi Muklesur Rahman v. Bangladesh*[25] quite early in our constitutional journey, the question of *locus standi* was given a liberal contour.[26]

Whether the Court has jurisdiction to protect the legitimate expectation of a particular person can be best satisfied from the Article 102 (1) of the Constitution of Bangladesh which confers power on the High Court Division to enforce the fundamental rights within the meaning of legitimate expectation as well. But condition is that he must be affected by the unconstitutionality of the law which breaks his legitimate interest.

The rule of court of review is essentially supervisory.[27] Basically the duty of the review court is to observe *inter alia* whether the authority has exceeded its authority, or committed any act *ultra viresly,*[28] violating the legitimate expectation of a particular person which is, in fact, in the route and process of development.

(iv) Legitimate Expectation and Rule of Law

Regarding the protection of legitimate expectation rule of law has a vital rule. It is the fundamental aim of the Constitution of Bangladesh that every organ of the state must justify his action in terms of law.[29] Laws of the country need to be enacted after taking into consideration of Article 27 and 31 of the constitution of Bangladesh where Article 27 prohibits any sort of discrimination and Article 31 introduces the aspect of due process in action to prohibits arbitrary proceeding and protect the interest of the individual. Thus, legitimate expectation might be respected through maintaining rule of law.

---

24 Black's Law Dictionary of Byran A Garner, Seventh Edition

25 26 DLR, (SC),1974,44

26 It was held that "It appears to us that the question of locus standi does not involve the Courts jurisdiction to hear a person but of the competency of the person to claim a hearing, so that the question is one of discretion which the court exercises upon due consideration of the facts and circumstances of each case."

27 Shamsul Huda v. BTMC, 32 DLR, 1980, 114.

28 Wade, H.W.R. Administrative Law, 6th Edition, page-280.

29 Article 7 and 31 of the Constitution of Bangladesh.

However, supreme priority should be given on the fact that a person ought not to be deprived of his personal liberty or other substantial interest without giving an opportunity of fair hearing before an independent court.[30] The prime concern of rule of law is like that the power is to be exercised in a manner which is not unreasonable and detrimental to the legal interest of individual. Because it may frustrates the legitimate expectation of a person. The case of *Bangladesh vs Idrisur Rahman*[31] is an example of it,[32] which is mostly related here.

However, in the concluding hour, a comment by Hilaire Barnett to satisfy the meaning of the rule of law taking into account the legitimate expectation, is worth to referring to as follows-

> The rule of law– in its many guises- represents a challenge to state authority and power, demanding that powers both be granted legitimately and that their exercise is according to law. According to law means both according to the legal rules and something over and above purely legality and imputes concepts of legitimacy and constitutionality. In its turn, legitimacy implies rightness or morality of law.[33]

Constitutional Provisions Relating to Natural Justice and Legitimate Expectation

The enumeration of following provisions ensuring fundamental rights along with other rights conforming natural justice clearly indicates that nowadays the legitimate expectation comes into play as a legal right. The provisions are-

The Preamble and Article 7: Through the Preamble and Article 7, the

---

30 S.A. De Smith, Constitutional and Administrative Law, 4th Edition, Page-30.

31 15 BLC (AD), 2010, 49.

32 It was held that "If a right or privilege of a sitting judge sought to be denied citing the provision of Article 111 of the constitution that will not only be contrary to rule of law but would also be contrary to consultation being in violation of his fundamental rights guaranteed under Articles 27 and 31 of the constitution. Further this would also amount to a denial of his right of access to justice which is an inviolable right secured and ensured in the constitution and equally founded in the doctrine of American due process of law."

33 Barnett Hilaire, Constitutional and Administrative Law, Cavendish publishing limited, Fifth Edition, 2002, page 125.

Constitution of peoples Republic of Bangladesh ensures the supremacy of the constitution. Supremacy of constitution means its fundamentality.[34]

The Preamble of Bangladesh Constitution states that it shall be a fundamental aim of the state to realize a society in which the rule of law, fundamental human rights, freedom, equality and justice will be ensured. For realization of this aim, part III of the constitution provides for a number of rights as fundamental which the state is prohibited from transgressing. Again, naturally any law inconsistent with the constitutional provisions relating to principles of natural justice in particular legitimate expectation will be void.

Article 26: It provides that all existing laws inconsistent with the fundamental rights as provided in Part III shall to the extent of inconsistency become void on the commencement of this constitution and state shall not make any law inconsistent with those rights. All these rights are necessarily legal and legitimate rights in fact.

Article 27: It provides that all citizens are equal before the law and are entitled to the equal protection of law. It combines the English concept of equality before the law and the American concept of equal protection of law. 'Equality before law' means that among equals law shall be equal and shall be equally administered. There shall not be any special privilege because of birth, creed frustrating the legitimate rights of another.

Article 31: It guarantees the protection of law. It has two parts (i) the citizens and the residents of Bangladesh have the inalienable right to be treated in accordance with law and (ii) no action detrimental to the life, liberty, body, reputation, or property of any citizen or resident of Bangladesh shall be taken except in accordance with law. The content of Article 31 is akin to due process clause of American constitution. This procedural due process is the American counterpart of the English principles of natural justice with the difference that while the principles of natural justice can be excluded by statute, the due process requirement cannot be so excluded.

---

[34] Huda, A.K.M. Shamsul, The Constitution of Bangladesh, Volume-1, Istiaq Hasan, Signet Press ltd, 1st Edition, 1997, page-260.

Article 32: It ensures reasonableness of a law regarding deprivation of life or liberty both from the substantive and procedural point of view. Under this Article, any law depriving a person, citizen or non-citizen, of life or personal liberty, must not be arbitrary and must be reasonable and fair.

Article 33: It provides for specific procedural safeguards against arbitrary arrest and detention and together with Articles 32 and 35 makes a total code in respect of arrest, detention and trial.[35]

Article 35(3): under this Article speedy and public trial by an independent and impartial court or tribunal established by law have been enumerated as fundamental rights. Even speedy and a fair trial have been guaranteed.

Article 44(1): in this Article the right to move the High Court Division of the Supreme Court of Bangladesh by a writ petition, in accordance with clause (1) of Article 102 for the enforcement of the fundamental rights conferred by part III of the constitution is guaranteed. So, Article 44(1) itself is a fundamental right.

Article 102(2): It empowers the High Court Division to issue orders or writs, including writs in the nature of *certiorari, mandamus, prohibition, habeas corpus and quo-warranto*, whichever may be appropriate for the enforcement of any of the rights conferred by part III. So, naturally a person can go to the High Court Division if any administrative authority does something in breach of the principles of natural justice contained in some Articles of the constitution as discussed above.[36] All these rights are necessarily legitimate as guaranteed by the highest law of the country.

The above-mentioned constitutional mandate implies the government along the judiciary of Bangladesh to recognize and enforce the legitimate

---

[35] Subject to certain limitations Article (1) and (2) provides inter alia, that a person arrested must be informed as soon as possible of the grounds of arrest; He must be allowed to consult and be defended by a lawyer of his choice; He must be produced before a magistrate within twenty-four hours of arrest; and He must not be detained for a period longer than twenty-four hours plus the time of journey without the authority of the magistrate.

[36] Zebunnesa Begum, Judicial role in development of natural justice and legitimate expectation in commonwealth Caribbean and Bangladesh, 1st Edition 2006, Amin Book house, page-81.

expectation of individual, institution and others.

Statutory Sources of Natural Justice for the Protection of Legitimate Expectation

There are several statutes which lay down the procedures with relation to principles of natural justice which the administrative authority must follow to the legitimate interest of any person.

The Code of Criminal Procedure, 1898: Under section 367(5) of the Code, it is required to the court to assign reasons for passing death sentence or life time imprisonment.

The Code of Civil Procedure, 1908: It is a procedural law. Procedural law is grounded on principles of natural justice.[37] If summon is not duly served on the defendant, that is a good ground for setting aside as *ex parte* decree under Order 9 Rule 13 of the Code of Civil Procedure.

Besides this statuary law there are some other laws i.e. Public Servants (Inquiries) Act, 1950 and the Government Servants (Discipline and Appeal) Rules of 1985 and the Bangladesh Bank (Nationalization) order, 1972 (P.O. 26 of 1972) are prominent with regard to the provision of natural justice to protect the legitimate interest and right of a particular person.

In fact all the aforementioned provision shows that Bangladesh Courts are developing one notion that violation of any of the principles of natural justice is not sustainable in the fields of Administrative Law in Bangladesh. With the change and growth of administrative law largely contributed by case law in the country, the principles of natural justice (legitimate expectation as one of the elements of natural justice) have thus attained considerable advances to ensure free and fair justice in this administrative era of the 21st century.

With a view to set a relationship between natural justice and legitimate expectation we can utter as following- If there is any interest of legitimate expectation, then the rules of natural justice comes into play. In *Marks v.*

---

[37] Abdur Rahman & others v. Sultan & others, 3 BLD, 1983, (AD), 129.

Minister of Home Affairs[38] we see something similar, the suggestion that natural justice and legitimate expectation is one and the same thing. It is also can be said that the doctrine of legitimate expectation has developed in reference to the principles of natural justice. From the foregoing legal provision it is apparently clear that the stands of Bangladesh to uphold the natural justice, within the meaning of proper treatment of legitimate expectation, is not out of way. If legitimate expectation gets its recognition, natural justice will necessarily be effective.

Development in Bangladesh

Bangladesh is comparatively a newly born independent state. The sub-continent, the then India became independent from British rule in 1947. By the Indian Independence Act 1947, the British parliament created two dominions: India and Pakistan. Pakistan had two parts: East Pakistan and West Pakistan. The then East Pakistan is today Bangladesh, which became independent after nine months of liberation war in 1971.

So, naturally in various ways India, Pakistan and Bangladesh share some common features in their legal systems and judicial approaches. The decisions of the courts of three countries are often cited as judicial precedents in court of each country and consequently a decision in the court of one country is often influenced by the decisions of the courts of the other two countries.

In Bangladesh, it is true that there is no general statute like administrative justice Act lying down the minimum procedure which administrative authorities must follow while exercising decision making power. There is, therefore, a huge variety of administrative procedures. Sometimes the statute under which the administrative authority exercised power lays down the procedure which the administrative authority must follow. But at times the administrative authority is left free to devise its own procedure. Nonetheless, the court has always insisted that administrative authorities must follow a minimum of fair procedure (ensuring legitimate interest of

[38] (1985), 35 WIR 106.

individual). This minimum procedure refers to the concept of natural justice[39] which ultimately protects and endures legitimate expectation.

Again in Bangladesh though natural justice enjoys no express constitutional status the Appellate Division of the Supreme Court of Bangladesh in *Abdul Latif Mirza v. Government of Bangladesh*[40] had observed that “it is now well- recognized that the principle of natural justice is a part of the law of the country”.

Bangladeshi courts yet not directly decided on the issue of legitimate expectation. In fact in the whole sub-continent it is still an issue not very much familiar to their legal systems. But it is a matter of hope that there are three facts heading to the possibility of the recognition of the concept of legitimate expectation by the courts in Bangladesh. First, the legal system of Bangladesh is greatly influenced by English laws where we can see a development trend towards the concept of legitimate expectation. Secondly, Bangladesh has written constitution where clear principles of natural justice are embodied. Thirdly, Bangladesh courts are developing the principles of natural justice based on common law, the constitution, and some statutory provisions.[41] These facts clearly indicate that Bangladesh is in a suitable position to develop the concept of legitimate expectation. Consequently in many cases, the issue was discussed. Here we can mention a case where the concept of legitimate expectation has got its recognition in Bangladesh substantially. In *Fazlul Karim Selim v. Bangladesh*,[42] the District Magistrate did not use the term ‘Legitimate expectation’. But in deciding in favor of the applicant that he should have been given a fair hearing, what the court wanted to assert that in the case of first grant of license and renewal of license, the principles of natural justice are attracted in a limited way, considering legitimate expectation.

---

[39] Talukder S.M. Hassan, Development of Administrative Law in Bangladesh: Outcome and Prospects, The Bangladesh law researchers Association, and the law Readers, Bangladesh, First Edition, 1997.

[40] 31 DLR, (AD), 1979, 1.

[41] Zebunnesa Begum, Judicial role in development of natural justice and legitimate expectation in commonwealth Caribbean and Bangladesh, Amin Book House, First Edition, 2006, page-(93-94)

[42] 33 DLR, 1981,406.

However, there are some provisions in the constitution of Bangladesh which clearly refer to the principles of natural justice. Bangladesh is a commonwealth country. So, following the English and the Indian decisions, the courts in Bangladesh have been developing the legitimate expectation doctrine with reference to the principles of natural justice, with the help of writ proceedings, since a long time.

When Court May Refuse Applying Legitimate Expectation

The doctrine of legitimate expectation is an equity doctrine and therefore the fruit of this doctrine cannot be enjoyed as a matter of course. It is a flexible doctrine which can be moulded to suit the requirements of each individual case. Nonetheless if it is found that the individual's claim and own conduct is unlawful and unworthy in credit then the court might not apply the doctrine. It is very well traced in a famous English case, namely *Cinnamond v. British Airport Authority,*[43] where the court ordered that the decision of the authority to prohibit the entry of taxi drivers into the Airport was based on their own past conduct, which had invited fines. It needs to be borne in our mind that in the case of any sort of oral hearing, this doctrine of legitimate expectation is not enough qualified to coup with it. The House of Lords in *Lioyd v. Mahon*[44] held that the doctrine does not include within its ambit a right to oral hearing.[45]

However, it is good to say that the denial of legitimate expectation is a ground for challenging an administrative action but the court will not interfere unless the denial is arbitrary, unreasonable, and denial is not for the greater general interest and inconsistent with the principles of natural justice. Actually, the expectation must be legally begotten. Where it is seen that legitimate expectation has no legal root it might not be termed to be legitimate expectation.[46] However, as per the observations of the

---

[43] 1980, 2 All ER, 368 (CA).

[44] (1987), 1 All ER 1118 (HL).

[45] It was further held that "Legitimate expectation strongly efforts for rule of fair play in the administration. Whenever there is any means of unfairness acts then through judicial review this unfairness is protected. But there is no chance to apply this doctrine where unfairness absents. Courts have also not protected expectations by judicial review when nothing unfair was found on the part of the authority. It is also true when legitimate public interest demanded otherwise."

[46] Md. Hafizul Islam v. Government of Bangladesh & ors, 23 BLD (HCD), 2003.para 12. Syed Arif Niazi v. Bangladesh, 60 DLR, (HCD), (2008), 209

Supreme Court in a case,[47] it is found that- the doctrine of legitimate expectation cannot be invoked to alter the terms of a contract of a statutory nature. Similarly, in *Howrah Municipal Corporation v. Ganges Road Company Ltd,*[48] it has been held that no right can be claimed on the basis of legitimate expectation when it is contrary to statutory provisions which have been enforced in public interest.

It is also possible to ignore the application of doctrine of legitimate expectation to protect the public interest. Where there is peace and security of the state is involved the affected might be refused of his legal expectation. If emergency so require the principle of natural justice may be considered after hearing. But it is doubtful if in the absence of a clear and emergent governmental interest arising out of its subject matter, a law excluding the operation of the principles of natural justice, can pass the due process test of Article 31 of the constitution of Bangladesh. In *Gulam Azam v. Bangladesh*[49] and *Abul Al'a Mouddodi v. Weat Pakistan*[50] case it was observed that in case of an emergency, the principles of natural justice can be complied with in certain circumstances after the action is taken. So, if it is needed to detain a person immediately to ensure the security of the state, the application of natural justice to protect legitimate expectation can be excluded.

Again reliance or representation must be present there for the application of this doctrine, otherwise it has no applicability. An expectation could be based on an express promise or representation or by established past action of settled conduct. "The representation must be clear and unambiguous it could be a representation to the individual or generally of a class of persons."[51] In another case, it was held that-

> The petitioners could not show any reliance upon legal authority since the alleged permission by RAJUK was subject to restrictions imposed by Rule 26 of the Building

---

47 Assistant Excise Commissioner v. Issac Peter (1994) 4 SCC 104,

48 (2004) 1 SCC 663

49 46 DLR(AD), 1994, 192.

50 17 DLR(AD), 1965, 209.

51 Chairman, Bangladesh Textile Mills Corporation v. Nasir Ahmed Chowdhury 2002, BLD (AD) 199.

> Construction Rules and mandatory provision of obtaining the permission under the provision of Civil Aviation Rules 1984 and the absence of such permission rendered the plan of a high rise building illegal and as such no reliance could be placed by the writ petitioners as to the alleged legitimate expectation and promissory estoppel.[52]

Limitation of the Doctrine

During the recent development of administrative law, doctrine of legitimate expectation takes a vital portion in public law. Nonetheless this doctrine is not free from loopholes. Due to its certain limitations, it is not substantially able to render service to the public by giving protection to their legal rights and enjoyment. So, in terms of prudent knowledge and an observant approach, the following lacunas are prominent and worth mentioning here:

The first limitation is that the doctrine of legitimate expectation is absolutely a procedural matter. In case of substantive action this doctrine is hardly visible.

The second limitation is that it has no application against statutes. This means that all laws made by the legislature shall be untraceable by the doctrine of legitimate expectation. It is one of the main lacunas of this doctrine, as it has no authority to preclude legislation.

Public policy, morality or security of the state is another plea against whom no legal expectation shall prevail. If one's allegation is volatile to the security of the state or public policy, the doctrine of legitimate expectation will not apply. The security of the state is enough qualified to override the expectation or right of the individual.

For the proper application of this doctrine, a substantial resort needs to be based on formality. Mere irregularities in the proceeding can restrict the parties from their entitlement. The highest importance has been given to the compliance of conditions required for the consideration of this doctrine.

---

[52] Rajuk v. A Rouf Chowuhry, 61 DLR,(2009),28

Though it is true that public importance and security should get priority, individual rights ought not to be undermined in any way. In many cases, the applicant is deprived of his personal rights in the name of public interest.

It is, among others, one of the lacunas of this doctrine that in case of contractual relation there is no application of the doctrine of legitimate expectation.

A mere wish, will or hope even a desire solely is not sufficient enough to constitute the basis of legitimate expectation.

In Bangladesh perspective, the Constitution of Bangladesh only contains some rules of natural justice in a general way. The words legitimate expectation has no place in the constitution or any other statutes of Bangladesh. There is no specific Act containing the minimum procedure requiring administrative authorities to follow in times of exercising decision making power.

Concluding Remarks

It can be concluded that a legitimate expectation of a person may not by itself is an enforceable right, but failure to consider and give due weight to it may render the decision of the public authority arbitrary. This legitimate expectation is a relevant factor requiring due consideration in a fair decision making process. Whenever the question of legitimate expectation arises, it is to be determined in the larger public interest wherein other more important considerations made outweigh what would otherwise have been the legitimate expectation of the claimant.

Again, this principle of legitimate expectation in essence, imposes a duty to act fairly and requires the concerned authorities to act reasonably in dealing with the rights and interests of the people in the given circumstances. If there is any breach, the court should not be slow in holding so. If the situation so demands, the court shall certainly strike down such orders in exercise of its power of judicial review of executive actions.[53]

---

[53] Md. Samsul Huda & ors v. Bangladesh, 17 BLT, (HCD), 2009, 62. Para 68.

We have already seen that the boundary of natural justice was further expanded by importing the concept of legitimate expectation by both English and Indian courts. The Constitution of Bangladesh desired to the satisfaction of the general people. The constitution contains a number of fundamental rights; it ensures the observance of rule of law and promises political, economic, and social equality and justice to all citizens.[54] With a view to giving effect to the constitutional aim of Bangladesh, particularly to ensure justice for its citizens, it is very much possible for the Bangladeshi courts to recognize and explore the developing concept of legitimate expectation. More and more, the Bangladeshi courts are expanding the frontiers of natural justice as they move closer to the possibility of recognizing legitimate expectation.[55]

---

[54] Kamal, Justice Mostofa, Bangladesh constitution: Trends and Issues, 2nd Edition, 1994, University of Dhaka press, page-36.

[55] Zebunneasa Begum, Judicial role in development if natural justice and legitimate expectation in commonwealth Caribbean and Bangladesh, First Edition, 2006,Amin Book House, page-90

Access to Rural Justice and Human Rights in Bangladesh: Understanding the Linkage

Atwar Rahman*

Abstract

This article examines the relationship between access to rural justice and human rights in Bangladesh. As poverty, case backlogs, delays, and high costs emerge as major obstacles to formal justice system in rural communities, the article advocates for cost-effective rural justice mechanisms as alternatives. Tracing the evolution of access to justice, it highlights Bangladesh's adoption of legal aid, Public Interest Litigation (PIL), and Alternative Dispute Resolution (ADR) from global trends to facilitate access to justice. The article shows how the constitutional provisions and international instruments emphasize the link between rural justice and human rights. The article finally argues for the pivotal role of rural justice in poverty reduction and human rights realization in the socio-economic context of Bangladesh. The article concludes that pro-poor initiatives and collaborative efforts from the government and other stakeholders are needed for ensuring access to rural justice.

1. Introduction

Ensuring access to rural justice in Bangladesh, a poverty-stricken country, is one of the core challenges that the country's justice delivery system faces. Poverty poses the greatest barrier against access to justice for the rural communities in Bangladesh. Access to justice is considered one of the fundamental human rights as described in Article 31 of the Constitution of Bangladesh. The poor, distressed, disadvantaged, and vulnerable communities are unwilling to pursue formal justice and legal entitlements in Bangladesh due to a huge backlog of cases, delays in the disposal of cases, and high costs of litigation.[1] As an alternative to that formal justice, ensuring access to rural justice may make a difference as it is cost-effective, unlike the formal and structured court systems. This

* Atwar Rahman, PhD, is the Secretary (Senior District and Sessions Judge) of the Law Commission, Bangladesh. This article is a part of his PhD thesis. He can be reached at atwarata@gmail.com.

1 N Ameen, 'Dispensing Justice to the Poor: The Village Court, Arbitration Council vis-à-vis NGO' (2005) 16(2) The Dhaka University Studies 103–122.

article tries to offer a novel, but often ignored, understanding of the nexus between human rights and access to rural justice.

Access to justice conventionally refers to the ability of individuals to appear before formal courts or other legal judicial structures of the state. Theoretically, everyone is entitled to such access, which is a primary means of protecting and promoting human rights. Unfortunately, however, the gap between formal entitlements and actual access can sometimes be huge. In fact, justice within the state system is considered to be beyond the means of most people in South Asia.[2] In such cases, rural justice system may be a mechanism to deliver justice to women, including other disadvantaged groups like the poor. This can also reduce the sufferings of rural people by reducing poverty in Bangladeshi socio-economic context.

2. Development of the Concept of Access to Justice

Access to justice has been defined by the UNDP as 'the ability of people from disadvantaged groups to prevent and overcome poverty by seeking and obtaining a remedy, through the justice system, for grievance in accordance with human rights principles and standards.'[3] Cappelletti and Garth have identified three waves of access to justice starting from the 1960s.[4] All three waves started in the United States of America (USA) and then spread all around the developed and developing world.

Among the three waves, the first one began with a series of efforts from many developed countries to increase access to legal aid and advice to their citizens. For example, in 1963 the US Supreme Court held that criminal defendants have a right to legal counseling in serious criminal

---

2 Dina Siddiqi, Paving the Way to Justice: The Experience of Nagorik Uddyog, Bangladesh (One World Action 2003) <http://www.oneworldaction.org/download/pavingtheway.pdf> accessed 24 January 2021.

3 Ramaswamy Sudarshan, 'Rule of Law and Access to Justice: Perspective from UNDP Experience', paper presented to the European Commission Expert Seminar on Rule of Law and the Administration of Justice as part of Good Governance, Brussels, 3-4 July 2003 <http://www.undp.org/oslocentre/access.htm> accessed 9 June 2019.

4 Authors like Cappelletti and Garth Outline the movement of access to justice in three waves, while Parker extends such development in four waves. For details, see Christine Parker, Just Lawyers: Regulation and Access to Justice (Oxford University Press 1999) 30.

charges.[5] Further, the right to legal aid to civil litigants in the USA was established through Legal Services Cooperation Services. Similar initiatives to provide legal aid and legal counseling were replicated by many other developed and developing countries afterwards. For example, the provisions of legal aid to civil and criminal cases were initiated in Bangladesh through the enactment of the Legal Aid Services Act, 1000.[6]

The second wave enhanced access to justice through a class of actions, popularly known as Public Interest Litigation (PIL). PIL is understood as efforts to provide legal representation to secure the interests of unrepresented or underrepresented groups.[7] This kind of litigations provided an opportunity to file a single suit to represent collective or social interests. The objective of this innovation was to reduce the cost of access to justice by deciding on cases of common interest collectively. In Bangladesh, like the initiation of legal aid, PIL was first coined by the landmark judgment of *Anwar Hussain Chowdhury v Bangladesh*[8] where the plaintiff challenged the 8th Amendment of the Constitution of Bangladesh. However, the concept of 'aggrieved person' for the purpose of PIL was finally extended in a series of cases in mid 1990s, including the case of *Dr Mahiuddin Farooque v Bangladesh and Others* in 1994.[9]

The third wave of access to justice movement started with the introduction of Alternative Dispute Resolution (ADR) and other informal processes to resolve small claim cases in the USA.[10] In keeping pace with this development, Bangladesh also developed the concept of an alternative system beside the formal one by introducing new laws and amending the existing laws.[11]

---

5 See Christine Parker, Just Lawyers: Regulation and Access to Justice (Oxford University Press 1999) 30.

6 Act No. VI of 2000.

7 Mamta Rao, Public International Litigation: Legal Aid and Lok Adalats (Eastern Book Company 2015) 10.

8 41 DLR (AD) 165.

9 Writ Petition no. 891 of 1994.

10 See Christine Parker, Just Lawyers: Regulation and Access to Justice (Oxford University Press 1999) 30.

11 For example, see Code of Civil Procedure, 1908, s 89; Arbitration Act, 2001.

3. Linkage between Access to Rural Justice and Human Rights

Justice V R Krisna Iyer observed that access to justice is a basic to human right.[12] A number of international human rights instruments including the Constitution of Bangladesh emphasize the guarantee of the access to justice. For example, Article 27 of the Constitution of Bangladesh has declared equal protection of the law for all. However, women, for example, do not experience equality while exercising their rights in practice. Inadequate laws and loopholes in legislative frameworks, poor enforcement of laws, and vast implementation gaps make these guarantees hollow promises, having little impact on the day-to-day lives of women.[13] The justice chain, the series of steps that a woman has to take to access the formal justice system or to claim her rights, often breaks down due to the lack of capacity in the justice system and discriminatory attitudes of service providers, including the police and judiciary.[14] In such cases, rural justice system may be a mechanism to deliver justice to women, including other disadvantaged groups like the poor.

3.1. The Constitution of Bangladesh

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.[15] Article 27 of the Constitution states:

> All citizens are equal before the law and are entitled to equal protection of the law.

Article 31 considers equal protection of the law as an inalienable right of every citizen of Bangladesh by stating that:

---

[12] S Murlidhar, Law, Poverty and Legal Aid: Access to Criminal Justice (LexisNexis Butterworths 2004) v.

[13] The World Bank, Gender Stats: Analysis of data (UN Women 2010) <http://genderstats.worldbank.org> accessed 23 January 2019.

[14] UN Women, Progress of the World's Women 2011-12: In pursuit of Justice (UN Woman, 2011) <https://www.unwomen.org/-/media/headquarters/attachments/sections/ library/ publications/2011/progressoftheworldswomen-2011-en.pdf?la=en&vs=2835> accessed 27 August 2021.

[15] Article 7(2) of the Constitution of Bangladesh provides that '[t]his constitution, is the solemn expression of the will of the people, the Supreme law of the Republic and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.'

> To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh.

Though the term 'access to rural justice' is not categorically included in these articles, the essence of 'access to rural justice' is incorporated with the terms 'equal' and 'protection of the law' for all citizens. Thus, it can be assumed that people's right to access to justice, protection of the law, is inalienable and equal, *irrespective of socio-economic status*—be it poor or rich, rural or urban. Incorporation of these rights as fundamental rights, as defined in Part III of the Constitution, can be enforced by law. It is also established that the Constitution asserts a firm 'guarantee' for enforcement of these rights as human rights in case of violations.[16] Article 26 of the Constitution provides that any part of the law made contrary to any fundamental rights granted by the Constitution is void.

The Fundamental Principles of State Policy as enumerated in Part II of the Constitution also speaks for access to justice. Though the Fundamental Principles of State Policy are not legally enforceable like Fundamental Rights in Part III, these principles act as a guide to the interpretation of the Constitution and also carry an idealistic and promotional value for the government.[17] Article 11 of the Constitution as a state policy states that the 'Republic shall be a democracy in which fundamental human rights and freedoms… shall be guaranteed….' Therefore, when read together, Articles 8 (1), 11, 27 and 31 establish the notion that the right to access to

[16] Article 44(1) provides that '[t]he 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". Again, Article 102(1) states that '[t]he 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 of the fundamental rights conferred by Part III of this Constitution.'

[17] Article 8 (2) of the Constitution of the People's Republic of Bangladesh says, '[t]he principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but shall not be judicially enforceable.'

justice is constitutionally recognized as a fundamental right as well as a fundamental principle.

3.2. International Human Rights Law and Access to Rural Justice

Three international instruments, which are collectively called 'three stage locket' of human rights,[18] speak of access to justice and human rights. The Universal Declaration of Human Rights (UDHR) 1948 was adopted by the UN General Assembly on 10 December 1948. Following severe human rights violations in many countries of the world during World War II, the UDHR was adopted to establish a standard of human rights that every human being is entitled to enjoy as his/her inherent entitlement as a human being. Like many other human rights, the right to access to justice through courts has been recognized as a universal human right in the UDHR. It is mentioned in Article 6 of the UDHR that everyone has the right to recognition everywhere as a person before the law. Moreover, the UDHR prohibits any form of discrimination in the delivery of justice to individuals. 'Individual' includes the disadvantaged rural people too as specified in Article 7 of UDHR:

> All are equal before law and are entitled without any discrimination to equal protection of the law.

Right to access to justice recognized in the UDHR is also reiterated in Article 16 of the International Covenant on Civil and Political Rights of 1966. It says that '[e]veryone shall have the right to recognition everywhere as a person before the law.'

4. Access to Rural Justice in Bangladeshi Socio-Economic Context

Being one of the low-middle income countries in the world, Bangladesh hosts an estimated population of 148.6 million, of which nearly 31.5 per cent are reported as living below the national poverty line.[19] The poverty rate in rural areas is much higher than that in urban areas. The upper

---

18 See Muhammad Ekramul Haque, 'Constitutional Framework of Protection of Human Rights in Bangladesh' (2011) 22(1) Dhaka University Law Journal 55-78.

19 World Bank, The World Development Indicator Report 2010 (World Bank 2010) <http://data.worldbank.org/country/bangladesh> accessed 12 June 2020.

poverty rates[20] in rural and urban areas were 45.3 percent and 35.4 percent respectively.[21] The lower poverty rates were 33.1 percent and 19 percent in rural and urban regions, respectively.[22] An average of 76 percent of women fall under the category of 'poor' in terms of income and resource endowments, as the state report of the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) Committee recognizes.[23] The exorbitant costs of professional legal services and litigation are a burden for them. So, poverty is a fundamental obstacle that effectively impedes economically disadvantaged groups' access to justice.

For these large number of poor marginalized people, access to rural justice may bring a change in their living conditions. Strengthening access to rural justice for everyone irrespective of socio-economic status, particularly for those who find themselves in vulnerable situations, requires the overall promotion of respect for human rights.

There are close connections between the realization of human rights, access to rural justice and poverty, considering that they affect one another. Experts indicate that non-discriminatory access to rural justice is an essential pillar for developing and combating poverty, in that it leads to the effective implementation of other human rights. In the absence of transparency and accountability of state institutions and of opportunities for right-holders to participate in the justice process, people are being deprived of their right to rural access to justice. This makes it harder for them to realize their other human rights.

As stressed by the UNDP, access to justice is particularly important for the people of disadvantaged groups.[24] In this respect, the lack of access to

---

20 Poverty rate is the ratio of the number of people (in a given age group) whose income falls below the poverty line. For details, see OECD, 'Poverty Rate (indicator)' <https://data.oecd.org/inequality/poverty-rate.htm> accessed 20 February 2020.

21 'Extreme poverty trebled in 2020', Dhaka Tribune, Dhaka, 24 January 2021. <https://www.dhakatribune.com/business/economy/2021/01/24/extreme-poverty-trebled-in-2020> accessed 27 August 2021.

22 ibid

23 Third and Fourth Reports of Bangladesh submitted to the CEDAW Committee 1997, CEDAW/c/BGD/3-4 (1 April 1997).

24 Ramaswamy Sudarshan, Rule of Law and Access to Justice: Perspective from UNDP Experience, paper presented to the European Commission Expert Seminar on Rule of Law

rural justice becomes an aggravating factor of the poverty in which most marginalized population lives. This legal exclusion transforms into socio-economic exclusion, making poverty even more difficult to combat. This exclusion is particularly felt by women who often find themselves in various forms of discrimination. They have further limitations in accessing rights and justice, making their social and economic situation even more fragile. Conversely, strengthening access to rural justice can be an essential tool for combating individual, group, and structural practices that generate poverty and insecurity. Such strengthening may make the policies aimed at reducing poverty more effective.

Access to justice is not only central to the realization of constitutionally guaranteed rights, but also broader goals of development and poverty reduction. There are strong links between reducing poverty, ensuring access to justice and establishing democratic governance. Where access to justice to all citizens, irrespective of gender, race or class is absent, democratic governance is undermined. Lack of access to justice limits the effectiveness of poverty reduction and democratic governance programs by limiting participation, transparency and accountability. This view is reflected in the World Bank Legal and Judicial Reform Report of 2002 as follows:

> Improving, facilitating and expanding individual and collective access to law and justice supports economic and social development. Legal reforms give the poor the opportunity to assert their individual and property rights; improved access to justice empowers the poor to enforce those rights. Increasing accessibility to courts lessons and overcomes the economic, psychological, informational and physical barriers faced by indigenous populations, and other individuals who need its services.[25]

---

and the Administration of Justice as part of Good Governance, Brussels, 3-4 July 2003 <http://www.undp.org/oslocentre/access.htm> accessed 9 June 2019.

[25] World Bank, Legal and Judicial Reform Report, (Access to Justice) Website 2002 cited in Ann Stewart, 'Juridifying Gender Justice: From Global Rights to Local Justice', in John Hatchard and Amanda Perry-Kessaris (eds), Law and Development: Facing Complexity in the 21st Century (Cavendish Publishing Ltd 2003) 36-54.

In essence, enhancing accessibility to law and justice not only fosters economic and social progress but also empowers marginalized communities by dismantling barriers to legal recourse. By prioritizing legal reforms and bolstering access to courts, societies can pave the way for inclusive development and ensure the protection of individual and property rights for all.

To ensure access to justice for the poor people, there needs to be a cooperation from the government, local authorities and other stakeholders. In the long-term, the state should take the lead role in ensuring and enhancing rural people's access to the rural justice system. Access to rural justice initiatives should be based on two sets of activities, the first is state-centric in that the state should attempt to improve the effectiveness of justice delivery mechanisms of the state, namely the courts, the court officials, the police, and other relevant agencies of the government; the second is people-centric, in that the state should concentrate on assisting citizens, particularly, socially and economically vulnerable people to deal with legal problems by way of legal awareness, legal aid, and alternative dispute resolutions.

Additionally, in Bangladesh, the lack of implementation of laws has in many situations forced people to submit the case of personal matters to rural justice processes. An overall lack of confidence in the legal system seems to be increasing. To regain the confidence of citizens, some reforms in procedural matters of administration of justice may be necessary. In an overpopulated country like Bangladesh, where courts are over burdened with the backlog of cases, both state and non-state justice systems are important. State institutions are to be made more pro-women and pro-poor. Such a policy measure may be the best way of ensuring that rural justice is fair for all citizens. It is too difficult for NGOs to monitor the administration of justice in the informal justice system forever. Instead, the State must eventually take over as the trusted administrator of pro-people and pro-poor justice. The initiatives targeting state institutions and/or state supervision of informal justice administration are crucial to building state capacity and fostering interest for long-term investment in empowering marginalized people and ensuring their accessibility in the justice system.

5. Conclusion

Besides being a basic human right, access to justice is an indispensable means to combat poverty, prevent and resolve conflicts.[26] Access to rural justice, thus, can be a key factor to eradicate poverty in rural areas of poverty-stricken countries like Bangladesh. The main spirit of the War of Liberation of 1971 was to ensure equality, human dignity and social justice. Access to rural justice is in the heart of social justice. To realize the aim and spirit of the liberation war, there is a pressing need to ensure access to rural justice. Because, substantive rights without a procedural process to implement that right do only lip service in implementing the concept of justice. Unless rights are supported by legal remedies to address their violation, rights in the abstract offer little protection; and legal remedies are hollow without some means of triggering their availability.[27] Thus, speaking of human rights without ensuring people's access to rural justice to enforce their human rights in case of infringement will not be effective in reality. Therefore, access to rural justice is essential.

Bibliography

Primary Sources:
Arbitration Act, 2001
Code of Civil Procedure, 1908
Constitution of the People's Republic of Bangladesh, 1971
Legal Aid Services Act, 2000
Anwar Hussain Chowdhury v Bangladesh, 41 DLR (AD) 165.
Dr Mohiuddin Farooque v Bangladesh and Others, Writ Petition no. 891 of 1994.

Secondary Sources:
'Extreme poverty trebled in 2010', Dhaka Tribune, Dhaka, 14 January 2011. <https://www.dhakatribune.com/business/economy/1011/01/14/extreme-poverty-trebled-in-1010> accessed 17 August 2011.

Ameen N, 'Dispensing Justice to the Poor: The Village Court, Arbitration Council vis-à-vis NGO' (2005) 16(1) The Dhaka University Studies 103–111.

Haque ME, 'Constitutional framework of Protection of Human Rights in Bangladesh' (2011) 11(1) Dhaka University Law Journal 55-78.

---

[26] UNDP, 'Access to Justice Concept Note' (Justice System Strategic Programme 2010) 3 <http//:docs.google.com/viewer?a=v&q=caches> accessed 30 April 2021.

[27] J Nockleby, 'How to Manufacture a Crisis: Evaluating Empirical Claims Behind Tort Reform' (2007) 86(2) Oregon Law Review 533.

Murlidhar S, *Law, Poverty and Legal Aid: Access to Criminal Justice* (LexisNexis Butterworths 2004) v.

Nockleby J, 'How to Manufacture a Crisis: Evaluating Empirical Claims Behind Tort Reform' (2007) 86(1) Oregon Law Review 533.

OECD, 'Poverty Rate (indicator)' <https://data.oecd.org/inequality/poverty-rate.htm> accessed 10 February 2010.

Parker C, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press 1999) 30.

Rao M, *Public International Litigation: Legal Aid and Lok Adalats* (Eastern Book Company 2015) 10.

Rural Poverty Portal, IFAD, 'Rural Poverty in Bangladesh' <http://www.ruralpovertyportal.org/country/home/tags/bangladesh> accessed 07 December 2015.

Siddiqi D, Paving the Way to Justice: The Experience of Nagorik Uddyog, Bangladesh (One World Action 2003)

<http://www.oneworldaction.org/download/pavingtheway.pdf> accessed 14 January 2011.

Stewart A, 'Juridifying Gender Justice: From Global Rights to Local Justice', in John Hatchard and Amanda Perry-Kessaris (eds), *Law and Development: Facing Complexity in the 11st Century* (Cavendish Publishing Ltd 2003) 36-54.

Sudarshan R, 'Rule of Law and Access to Justice: Perspective from UNDP Experience', paper presented to the European Commission Expert Seminar on Rule of Law and the Administration of Justice as part of Good Governance, Brussels, 3-4 July 2003 <http://www.undp.org/oslocentre/access.htm> accessed 9 June 2019.

The World Bank, *Gender Stats: Analysis of data* (UN Women 2010) <http://genderstats.worldbank.org> accessed 13 January 2019.

Third and Fourth Reports of Bangladesh submitted to the CEDAW Committee 1997, CEDAW/c/BGD/3-4 (1 April 1997).
UN Women, *Progress of the World's Women 1011-11: In pursuit of Justice* (UN Woman, 2011) <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/1011/progressoftheworldswomen-1011-en.pdf?la=en&vs=1835> accessed 17 August 2011.

UNDP, 'Access to Justice Concept Note' (Justice System Strategic Programme 2010) 3 <http//:docs.google.com/viewer?a=v&q=caches> accessed 30 April 2011.

World Bank, Legal and Judicial Reform Report, (Access to Justice) Website 2001

World Bank, The World Development Indicator Report 2010 (World Bank 2010) <http://data.worldbank.org/country/bangladesh> accessed 11 June 2010.

Right to Education of Rohingya Refugee Children: A Critical Review under International Law

Mohammad Faruque[*]

Abstract

At present Bangladesh is hosting 1.1 million Rohingya, an ethnic minority of Myanmar who fled away due to persecution. Fifty percent of the total refugees are children who direly need education. Currently Rohingya children are getting primary education at temporary learning centers rather than a school. Only twenty percent of 500,000 school aged children are attending temporary learning centers. The rest of the 400,000 children and youth are not receiving formal education due to the inadequacy of centers. The right to education of Rohingya refugees' children of Myanmar residing in the refugee camp of Bangladesh is a matter of great concern and challenging issue due to conflict among the concerned parties regarding curriculum, pedagogy, language, and resource allocation for quality and inclusive education. Myanmar, country of origin of Rohingya refugees, refuses to allow humanitarian groups to use the Myanmar language curriculum in the refugee camps in Bangladesh on the ground of denial of citizen status and out of fear of integration into Myanmar society after repatriation. Moreover, Myanmar has imposed restrictions on Rohingya to take secondary and higher education in Myanmar. This article will examine the various international conventions, observations of human rights treaty bodies and case laws regarding the right to education of the refugee's children. This will be examined from the perspectives of Bangladesh, Myanmar, and international community whose responsibility in this regard are different.

Introduction

The right to education is a social, economic, and cultural right as well as second generation rights which need positive action of the state and public resources. Although the right to education is a fundamental right as per international laws, it does not sufficiently tackle the issue of binding legal obligations on the state parties to take affirmative action regarding the right to education of migrants, refugees, asylum seekers and stateless

---

[*] Mohammad Faruque is an Erasmus Mundus Scholar EU, WIPO scholar & JAMS Fellow on ADR, USA currently working as a Judge (District and Sessions Judge), Women & Children Repression Prevention Tribunal-1, Brahmanbaria District.

persons. As a consequence, it is very challenging to ensure the right to education of the children of refugees and stateless persons.

Rohingya people, an ethnic minority, live in the northern part of Rakhine state of Myanmar. They are considered one of the most persecuted minorities in the world. In August 2017 violence erupted there and so estimated 693, 000 Rohingya people have fled to Bangladesh as of April 2018 due to persecution and half of them are children.[1] Recently the International Court of Justice ordered Myanmar to take all measures within its power to prevent the killing of Rohingya or causing bodily or mental harm to members of the group.[2] Currently, more than 900,000 Rohingya refugees are in camps in the Cox's Bazar district in Bangladesh, the country's southern region. They include nearly 700,000 new arrivals on top of more than 200,000 Rohingya refugees already living in the area, having fled previous waves of persecution and repression in Myanmar. Bangladesh is currently hosting 1.1 million Rohingya; among them nearly 50 percent are children.

Status of Education of Children of Rohingya Refugees in Bangladesh and Myanmar

At present children of Rohingya refugees are receiving elementary education at temporary learning centers (TLC) rather than a school where facilitators take classes. Only 20 percent of 500,000 schools aged children are attending TLC which means about 400,000 children and youth are not receiving formal education due to inadequacy of centers[3].

The learning centers are inadequate, only providing about two hours of instruction a day, most classes are geared toward the pre-primary and early grades of primary school and there are basically no educational facilities

---

1 Report of United Nations Children Emergency Education Fund (UNICEF): Prioritizing Learning for Rohingya Children available at https://www.unicef.org/documents/prioritising-learning-rohingya-children-bangladesh

2 International Court of Justice Summary 2020/1 date 23January,2020 available at https://www.icj-cij.org/files/case-related/178/178-20200123-SUM-01-00-EN.pdf

3 Inter-Sector Coordination Report (ISCG) https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/20180510_-_iscg_-_sitrep_final.pdf

for adolescents or adults.[4] Only one-quarter of school aged children attend temporary learning centers, which means nearly 400,000 children and youth are not receiving a formal education.[5] An estimated 97 percent of adolescents and youths aged 15 to 18 years are not enrolled in any type of learning facility.[6]

Bangladesh, a host country is allowing the Rohingya refugees to receive informal education in refugee camp. Considering the need for education of Rohingya children, aid agencies established informal learning centers to provide informal education for the children aged from three to fourteen years, but they feel constrained to set up learning centers for adolescents. Consequently, most adolescents and older teenagers are deprived of getting education and they are frustrated. They feel alienated and hopeless. Therefore, a generation will be lost due to lack of education in the long run.

In some instances, governments in the host country and officials in the refugee's country of origin have allowed refugees to study the national curricula in those countries or have certified their education. A modified version of the Syrian curriculum was taught to Syrian refugee children by refugees without the Syrian government's consent, and the Turkish government authorized and accredited this practice.[7] Children from Karen and Karenni ethnic groups of Myanmar studied in the curriculum developed by the refugee communities themselves in the refugee camps in

---

4 Human Rights Watch (2018), Bangladesh is not my country: The Plight of Rohingya Refugees from Myanmar https://www.hrw.org/sites/default/files/report_pdf/ bangladesh 0818_web2.pdf accessed on 27 February 2023.

5 Inter Sector Coordination Group (ISCG) 2018, "Situation Report: Rohingya Refugee Crisis" May 10,2018 available at https://www.humanitarianresponse.info/en/ operations/ bangladesh/document/situation-report-rohingya-crisis-coxs-bazar-10-may 2018?_gl=1* uguz0n* ga* MTY4NDAyNDEyMi4xNjc3NDkyMzg2* gaE60Z NX2F68 *MTY3NzQ5 MjM4NS4xLjAuMTY3NzQ5MjM4NS42MC4wLjA. (Accessed on 27 February 2023).

6 UNICEF:" Beyond Survival: Rohingya Refugee Children in Bangladesh want to learn." Dhaka: UNICEF Bangladesh, August 2019 available at htps://www.unicef.org/ media/57631/file/Rohingya%20refugee%20children%20want%20to%20learn% 202019%20.pdf accessed on 21 January,2021

7 Human Rights Watch: "Education for Syrian Refugee Children: What Donor and Host Countries should do, September 16,2016< https:// www.hrw.org/news/2016/09/16 >accessed on 20 July 2022

Thailand. Some refugee's children who were taught at refugee's camps in Thailand and then repatriated to Myanmar received transfer certificates as a proof of formal education and that certificates helps them to access formal public education system in Myanmar.[8]

Learning and integration into the wider community, policy and pedagogic responses require host language training combined with preservation of mother tongue. This requirement was recognized in many questionnaire responses.[9] Recently in 2020, government of Bangladesh has taken a landmark decision to allow Myanmar curriculum to teach the children of Rohingya refugee in the learning centers of camp. UNICEF has decided to expand access to education by introducing the Myanmar curriculum for education of Rohingya refugee children living in camps in Cox's Bazar, Bangladesh, together with other national and international humanitarian actors. The pilot project of UNICEF selected 10,000 Rohingya students from six to nine grades at the beginning and subsequently will expand to other grades students in phase by phase. This pilot project emphasizes older children, who currently have less access to education compared with their younger counterparts.[10]

In another decision, the evidence suggested that the Burmese government's denial of access to tertiary education for the Rohingya population, though in an insidious and incremental way so as not to attract the attention of the international community.[11] "The Rohingya also have limited access to secondary and tertiary education as well as other public services.[12]" The mother language of Rohingya which is popularly known

---

8 Human Rights Watch: "Education for Syrian Refugee Children: What Donor and Host Countries should do, September 16, 2016<https://www.hrw.org/news/2016/09/16> accessed on 20 July 2022.

9 UNESCO (2010), Reaching the marginalizes Replies to questionnaire of the Special Rapporteur and EFA Global Monitoring Report 2010 page 49 available at https://unesdoc.unesco.org/ark:/48223/pf0000186606.

10 Karen Reidy(2020): Expanding education for Rohingya refugee children in Bangladesh UNICEF South Asia available at https://www.unicef.org/rosa/stories accessed on 20 January 2018

11 Reference no 1/38085, RRT, 18 Feb 2002 at 6 under "Claims and Evidence".

12 UNHCR (2011): State of Denial: A Review of UNHCR's response to protracted situation of Stateless Rohingya Refugee in Bangladesh, UNHCR Policy Development and

as Arakani is non-written in nature, which causes constraints regarding the mother tongue based multi-lingual education system. Another major challenge to provide access to education to the Rohingya children in Burmese language is the lack of competent teachers in Burmese language since very few Bangladeshis and Rohingya teachers have competency in this language.[13]

It is widely recognized that having a home language that differs from that used in schools has a negative impact on achievement. The government of Cyprus, for example, indicates that one of the most important needs of migrants, refugees and asylum seekers is the preservation of their mother language, customs, and culture.[14] Language is largely neglected in policies on migration and education. The issues of language ought to be streamlined within national education planning, with clear guidance on not only integrating migrant and refugee students into schools but also providing access to home language learning (UNESCO, 2018c). In southernmost part of Thailand Patani Malay speaking children were taught in their mother tongue Patani Malay, Malay, and standard Malay language. It has shown educational success and increased the quality of educational provision. It offers an example of how multilingual educational programs including mother tongue could be extended to more minor communities.

Access to higher education is even more restricted. Sittwe is the only university in Rakhine State. Since a travel ban on Sittwe was enforced on the Rohingya population in February 2001, Rohingya students are not allowed to join university on a full-time basis.[15] According to UNICEF, a 2013 report (based on the statistics of 2009-2010) pre-school attendance of Rohingya Children aged about 3 to 5 year in the Rakhine state is the

---

Evaluation Services, Geneva, Switzerland, December, 2011 available at https://www.unhcr.org/4ee754c19.pdf accessed on 28 February 2023.

13 Education for All (EFA) Global Monitoring Report, 2010 page 49 available at https://www.tandfonline.com/doi/full/10.1080/20004508.2020.1823121.

14 Human Rights Council(2010): The right to education of migrants, refugees and asylum-seekers, 14th Sessions, ,A /HRC/14/25, 16 April 2010 available at https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNSR_RTE_of_ Migrants_Refugees_Asylum-seekers_2010.pdf

15 Chris Lewa (2003): Issues to be raised concerning the situation of Rohingya Children in Myanmar (Burma): Submission to the Committee on the Rights of the Child, Asian Forum for Human Rights and Development (FORUM-ASIA), Bangkok, Thailand.

lowest in Myanmar which is 5% in comparison with the national average of 23 percent. The rate of non-enrollment of Rohingya children in primary school age is 29% which is higher than national average rate of enrollment e.g., 12%.[16]

We are discussing the probable loss or risk of a generation of Rohingya children. It concerns not only the 500,000 or so people on the Bangladeshi side of the border, but also the remaining residents of Rakhine state in Myanmar, whose access to education is, at best, uneven and severely constrained.[17] On the list of the top 10 host nations, only Bangladesh is one of the two nations that does not offer inclusive education to refugees; the other nations do so for the children of refugees.[18]

Right to Education of the Children under International Laws

Children have a right to an education under the international legal system. In addition to being a human right in and of itself, education also functions as a crucial means of achieving other human rights.[19]

The first specific reference to the right of the child to education in an international human rights instrument is enshrined in Principle 7 of the 1959 UN Declaration of the Rights of the Child.[20] The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him, on a basis of equal opportunity, to

---

16 UNICEF Advocacy Alert (2019): Beyond Survival, Rohingya Refugee Children in Bangladesh want to learn, https://www.unicef.org/media/57631/file/Rohingya%20refugee%20children%20want%20to%20learn%202019%20.pdf

17 Simon Ingram (2017) UNICEF Spokesman, Myanmar Children Facing Hell on Earth, available at https://news.un.org/en/tags/simon-ingram

18 UNESCO (2019): Global Education Monitoring Report,2019 Migration, Displacement and Education: Building Bridge, not Walls: UNESCO available at file:///C:/Users/HP/Downloads/265866eng.pdf accessed on 28 February 2023

19 CESCR General Comment no:13 available at https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CESCR_General_Comment_13_en.pdf

20 Sharon Detrick (1999): A commentary on the United Nations Convention on the Rights of the Child, Martinus Nijhoff Publishers 1999 Page 472

develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society.[21]

Right to Education of Refugee Children under Convention on the Children Rights (CRC)

The UN Convention on the Rights of the Child is Magna Carta for the protection and promotion of the rights of Children. With 196 State Parties of the United Nations, representing almost all member states, having ratified this convention, it can be termed a case of universal ratification. The convention's rapid adoption reflects its global importance.[22]

States Parties recognize the right of the children to education in this convention and assume the obligations to provide primary education as universal, compulsory, and free to all children. As an obligation, State Parties have an immediate obligation to provide free and compulsory primary education to all children including refugee children. According to this convention, States shall take measures to make secondary education including general and vocational as well as higher education available and accessible to all the children based on capacity. The right to education such as primary education shall be achieved based on equality. States shall achieve the right to secondary and higher education progressively.

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.[23] The enjoyment of rights stipulated in the Convention are not limited to children who are citizens of a State and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children–

---

[21] Principle 7 of United Nations Declaration of the Rights of the Child,1959 available at https://archive.crin.org/en/library/legal-database/un-declaration-rights-child-1959.html

[22] Ton Liefaard and Julia (2017): The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead, Forwarding page BRILL, NIJHOFF.

[23] Article 2(1) of Convention on the Rights of the Child,1989 available at https://www.unicef.org/child-rights-convention

including asylum-seeking, refugee and migrant children– irrespective of their nationality, immigration status or statelessness.[24]

Right to Education under International Covenants on Economic, Social and Cultural rights

Article 13 of international covenants on economic, social, and cultural rights recognize the right of everyone to education. The State Parties of this convention recognize the universal free primary education for all, secondary and higher education shall be accessible to all by every appropriate means through progressive provision for free education.

State Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present convention and in other international human rights or humanitarian instruments to which the said States are parties.[25]

Depriving any person or group of persons of access to education of any type or at any level and limiting any person or group of persons to education of an inferior standard or maintaining separate educational systems or institutions or inflicting conditions incompatible with the dignity of man are considered as discrimination under this convention.

Education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds. [26] "All" in the meaning of the Covenant means "To everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant

---

[24] Committee on the Rights of Child, 39th Session, CRC General Comment no. 6, 2005 available at https://www2.ohchr.org/english/bodies/crc/docs/gc6.pdf accessed on 23 February 2022

[25] Article 22 of the Convention on the Rights of the Child, 1989 available at https://www.unicef.org/child-rights-convention accessed on 21 January 2021.

[26] Committee on the Economic, Social and Cultural (1991): 21st Session ICESCR General Comment no. 13, 1999: 3 available at https://www.refworld.org/pdfid/4538838c22.pdf

workers and victims of international trafficking, regardless of legal status and documentation."[27]

Convention against Discrimination in Education 1960

The General Conference of the United Nations Educational, Scientific and Cultural Organization adopted the Convention against Discrimination in Education in its 11th Session in 1960. For the purpose of this Convention, the term discrimination includes any distinction, exclusion, limitation or preference which, being based on race, color, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular of depriving any person or group of persons of access to education of any type or at any level.[28]

Right to Education of Children of Refugee under Refugee Convention

Article 22 of Convention Relating to the Status of Refugees, 1951 endorses equal treatment to refugee's children about elementary education. It also recommends providing education to refugees such as access to higher education, vocational education, recognition of foreign school certificates etc. other than basic education. As per article 22(1) of this convention, Children of refugees and refugee who do not complete their elementary education have the right to receive it with the citizens of an asylum state equally, and they do not have to wait for the determination of status procedures to be commenced or concluded.[29]

Right to Education under International Convention on the Protection of the Rights of all Migrant Workers and Their Families, 1990

The right to education of children of migrants is provided in article 30 of the above international convention. It recognizes the right to access to education including access to public pre-school as a basic right on the basis of the principle of equal treatment. Irregular situations with regard to stay or employment of either parent or irregularity of the child's stay in the

---

27 ICESCR General Comment no. 20, 2009: §30.ibid

28 Article 1 of Convention against Discrimination in Education,1960 available at https://www.unesco.org/en/right-education/convention-against-discrimination

29 Article 22, The Refugee Convention,1951 available at https://www.unhcr.org/4ca34be29.pdf accessed on 21 March 2020

state of employment in the host country should not be grounds for refusal of education to migrant's children.

Right to Education of Children under European Charter on Fundamental Rights

Article 14(2) of the European Union Charter on Fundamental Rights ensures the right to education including the possibility to receive free compulsory education. Moreover, article 2 of Protocol no. 1 of the European Convention on Human Rights guarantees the right to education.

Right to Education under the Universal Declaration of Human Rights (UDHR)

Article 2 of UDHR provides entitlement to some fundamental rights and freedom including right to education with discriminations. Distinction or discrimination is discouraged on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status**.** Article 26 of the UDHR declares primary or elementary education as universal, free, and compulsory. It also encourages the State Parties to accord technical, professional, and higher education to all based on merit. Everyone is entitled to all the rights and freedom set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.[30] Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all based on merit.[31]

At the international level, the right to education has also been affirmed in a range of non-binding documents and declarations, most notably the 1990 World Declaration on education for all[32] which was reaffirmed ten years

---

30 Article 2 of Universal Declaration of Human Rights,1948 www.un.org/universal/en/universal-declaration-human-rights/ accessed on 29 May 2021

31 Article 26 ibid

32 World Conference on Education for All: Meeting basic learning needs, World Declaration on Education for All and Framework for Action to meet basic learning needs, Jomtien, Thailand 5-9 March,1990 available at https://bangkok.unesco.org/sites/default/files/assets/ECCE/JomtienDeclaration.pdf accessed on 28 February 2023

later in 2000 Dakar Framework for Action.[33] On the basis of the above-mentioned discussion, it is evident that children of Rohingya refugees have the right to access education under international human rights treaties. States parties must take necessary steps to fulfill their obligation under international treaties and respect, protect and fulfill the right to access to education without any reservation.

Necessity of Education for the Rohingya Children

The enormous expenses associated with denying education to refugees are beyond measurement.

Without schooling, a refugee cannot hope for a more fruitful and prosperous future. Refugees who are denied access to education or training programs are more likely to experience frustration and get engaged in criminal or armed activity. A refugee who is still illiterate and verbally inept will have a difficult time protecting their human rights.[34] Education is an investment in the future generations, especially during emergencies and protracted crisis. In times of crisis, spending money on education has a substantial return on investment.[35]

Failure to progress on education for children and youth affected by crises will undermine efforts to achieve the Sustainable Development Goals (SDGs), especially SDG4, which strives for universal, equitable education for all children by 2030. Children who got the opportunity to attend schools during emergencies get better protection, a healthier environment and have more access to lifesaving resources. Children who receive proper education are able to build and maintain more stable and peaceful societies in the longer term, as they are less exposed to groups resorting to violence. Forcible displacement cycles, risks to affected populations' safety, hunger,

---

33 World Education Forum, The Dakar Framework for Action: Education for All: Meeting Our Collective Commitments, Dakar, Senegal 26-28 April,2000 available at http://www.portal.oas.org/LinkClick.aspx?fileticket=M/7kIZ0taMw%3D accessed on 28 February 2023

34 Rudd Lubbers, United Nations High Commission for Refugee, learning for a Future: Refugee Education in Developing Countries, UNHCR, Geneva (2001) Page 1 available at https://www.unhcr.org/4a1d5ba36.pdf. Accessed on 28 February 2023

35 Education can't wait (2019):''Foundation Engagement in Education in emergencies and protracted crisis" Policy Brief, available at www.educationcannotwait.org accessed on 12 June 2020

poverty, and disparity frequently persist when timely education responses are absent in times of crisis.[36]

Access to good and inclusive education allows children to enjoy their lives and supports them to protect them from persecution in future. It makes them capable of availing future opportunities and allows them to be skilled and useful of any country that they may stay. There are multiplier effects of empowerment of the refugees and displaced persons if they are educated properly, and it decreases their dependence on the host government and support to establish long term peace and social cohesion.[37] Providing education to Rohingya children is necessary to achieve sustainable development goals (SDG). Goal 4 of SDG deals with inclusive and equitable quality education for all. The preamble of sustainable goals envisioned a world where every child grows free from violence and exploitation. Sustainable Development Goal 4.5 targets to eliminate gender disparities in education and promises equal access to all levels of educations and vocational trainings. It advocates for inclusive education i.e., vulnerable people including persons with disabilities, indigenous people, and children in vulnerable situations.[38] The children of Rohingya refugees are in vulnerable situations due to forced displacement from their motherland.

United Nations Educational, Scientific and Cultural Organization (UNESCO) report of 2002 put emphasis on the importance of education in emergencies i.e., education for populations affected by unforeseen situations such as armed conflict or natural disasters. The rationales for providing education for refugee children are as follows:

---

[36] ibid

[37] ECW Facilitated Multi-Year Resilience Program, Bangladesh, "Education for Rohingya Refugees and host communities in Bangladesh, Multi-Year Resilience Program (2018-2022)" www.educationcannotwait.org

[38] United Nations: Transforming our world: the 2030 Agenda for Sustainable Development, Goal 4.5 available at https://sustainabledevelopment.un.org/content/documents/ 21252030 %20Agenda%20for%20Sustainable%20Development%20web.pdf accessed on 22 January 2020

Education enables us to fulfill the psychological needs of the children affected by conflicts or disasters which unsettle their lives and social networks. It is a tool for protecting and safeguarding children in crisis as are seriously vulnerable in situations. Education offers a network for providing health and survival lessons as well as means and methods for teaching new skills and ideals, such as peace, harmony, tolerance, conflict resolutions etc. Education for all is an instrument for building up social relations, whereas educational incongruities take the lead to poverty for the illiterate and instigate civil conflict. It is essential for long-term development, establishing peace, and reconstructing the socioeconomic and cultural foundations of the family, local community, and country.

Education plays a crucial role in the development of every child, but it is even more important in an emergency situation. Future uncertainty for Rohingya children can cause anger and hopelessness. Without sufficient educational chances, they are more vulnerable to the risks of child marriage, trafficking, exploitation, and abuse. Young girls and boys who participate in skills training gain confidence, self-esteem, and the knowledge and abilities they'll need in the future. Rohingya children can start to shape their own futures and make greater contributions to their communities with the proper investment in education.[39]

Refusal of the Right to Education of Rohingya Children a Violation of International Law

The Economic Committee has emphasized that the obligation 'to provide primary education for all' is an immediate duty of all States Parties[40] and

---

[39] UNICEF: Expanding education for Rohingya refugee Children in Bangladesh, https://www.unicef.org/rosa/stories/expanding-education-rohingya-refugee-children-bangladesh accessed on 20 April 2021

[40] Committee on Economic, Social and Cultural Rights (1999), 21st Sessions, Document E/C.12/1999/10 General comment No. 13: The right to education (art. 13) (refworld.org) at para.57 available at https://www.refworld.org/pdfid/4538838c22.pdf

constitutes part of 'minimum obligation' of the right to education.[41] In light of this there is no question that denial of the right to primary education in and of itself amounts to persecution.[42] As the Refugee Review Tribunal (RRT) has stated, discriminatory denial of access to primary education is such denial of a fundamental human right that it amounts to persecution.[43] In this regard, it is vital that decision-makers consider both explicit forms of denial (for example, exclusion because of birth status, political opinion of parents, race or gender)[44].

Violations of article 13 may occur through the direct action of State Parties (act of commission) or through their failure to take steps required by the Covenants (acts of omission). By way of illustration, violation of article 13 include: the introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education; the failure to take measures which address de facto educational discrimination; the use of curricula inconsistent with the educational objectives set out in article 13(1); the failure to maintain a transparent and effective system to monitor conformity with article 13(1); the failure to introduce, as a matter of priority, primary education which is compulsory and available free to all; the failure to take "deliberate, concrete and targeted" measures towards the progressive realization of secondary, higher and fundamental educational institutions; the failure to ensure private educational institutions conform to the "minimum educational standards" required by article 13(3) and (4); the denial of academic freedom of staff and students; the closure of educational institutions in times of political tension in non-conformity with article 4.[45] The need to ensure free, compulsory primary education to all without discrimination is also stressed in some Concluding

---

41 Ibid, at para.57.

42 Freiberg vs Canada, (Secretary of State)78 FTR 283(1994); ODO(Re) Nos VA1-03231, VA1-03232, VA1-03233(2003) RPOD VO 66 available at https://ca.vlex.com/vid/freiberg-v-can-681759101

43 Refugee Review Tribunal (1995), Reference V95/03256, RRT, 9 October 1995 at para. 47 available at https://www.refworld.org/pdfid/4b17c13a2.pdf accessed on 28 February 2023

44 Human Rights Watch (2005): Failing Our Children: Barriers to the Right to Education, Page 24 available at hrw.org/reports/2005/education accessed on 17 March 2018

45 B.G. Ramcharan: The Right to Education, Judicial Protection of Economic, Social and Cultural Rights; Chapter IX, Page 209, The Raoul Wallenberg Institute Human Rights Library, Martinus Nijhoff Publishers,2005.

Observations of the Committee. For example, in relation to Kuwait, the Committee has expressed concern that the state does not provide free compulsory education to Non-Kuwaiti children as a right enshrined in the Covenant.[46] "In relation to China, the Committee is concerned about the continued irregularities in the State party's provision of universal access to free compulsory primary education, in particular with regard to rural communities, minority regions, disadvantaged families and internal migrant populations."[47] The enjoyment of the right to education is often least accessible to those who need it most disadvantaged and marginalized groups and, above all, children from poor families. It therefore requires enforcement in case of its breaches or violations.

As such, the Special Rapporteur would like to underline the important role that adjudication plays in the effective realization of the right to education, and in ensuring that it is given effect to. He considers it vital to improve access to justice for all those whose right to education is not fully protected and respected.[48]

"In *Catan and Others v. Moldova and Russia*[49] The ECHR looked into the language policy introduced in schools by the separatist authorities in Transdniestria. The objective of this language policy was Russification. Following the forced closure of Moldovan language schools (using the Latin alphabet), parents had to choose between sending their children to schools where they were taught in an artificial combination of language and Cyrillic alphabet and with teaching materials produced in Soviet times, or to sending their children to schools that were less well equipped and less conveniently situated, on their way to which they were subjected to harassment and intimidation. The forced closure of schools and subsequent harassment was held to be an unjustified interference with the

46 CESCR Concluding Observations: Kuwait, E/C 12/1/Add. 98(7 June 2004), [26].

47 CESCR Concluding Observations: China, E/C 12/1/Add.107 (13 May 1999), [23].

48 Human Rights Council (2013), Report of the Special Rapporteur on the right to education on justiciability of the right to education, A/HRC/23/35(10 May 2013),[2]-[3].

49 European Court of Human Rights (ECtHR), Catan and Others v. Moldova and Russia Grand Chamber, Nos. 43370/04, 8252/05 and 18454/06, 19 October 2012 available at file:///C:/Users/HP/Downloads/001-114082.pdf accessed on 23 August 2021

children's right to education that amounted to a violation of Article 2 of Protocol No. 1 to the ECHR.[50]

Obligation of Host Country and Country of Origin as well as International Community in This Respect under International Law

The right to education and the general non-discrimination principle are enshrined in the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. Myanmar and Bangladesh are both signatories of the International Covenant on Economic, Social and Cultural Rights, 1966 and The United Nations Convention on the Rights of the Child, 1989.

Article 2(2) of ICESCR imposes an immediate obligation on State Parties to guarantee that the rights under the Covenant will be enjoyed without discrimination. Non-discrimination is an immediate and cross-cutting obligation in the Covenant. In addition to refraining from discriminatory actions, State Parties should take concrete, deliberate and targeted measures to ensure the discrimination in the exercise of Covenant rights is eliminated.[51] State Parties have immediate obligations in relation to the right to education, such as the "guarantee" that the right "will be exercised without discrimination of any kind" [art. 2(2)) and the obligation to "take steps" (art. 2(1)] towards the full realization of article 13.[52]

Government of Myanmar imposes restrictions on the use of national educational resources such as curricula, assessments and training manuals for the education of Rohingya children in Bangladesh. Rohingya people are ethnic minority living in the Rakhine state, southern part of Myanmar since long. Article 27 of International Covenant on Civil and Political Rights (ICCPR) deals with the right of the minority which states that in those Stages in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in

---

50 European Union Agency for Fundamental Rights & Council of Europe: Handbook on European Law relating to the rights of the child, available at https://www.echr.coe.int/documents/handbook_rights_child_eng.pdf

51 Committee on Economic, Social and Cultural Rights (CESCR) General Comment no. 20[7] [13] available at https://www.refworld.org/docid/4a60961f2.html.

52 Committee on Economic, Social and Cultural Rights (CESCR) General Comment no.3 para.2 available at https://www.refworld.org/pdfid/4538838e10.pdf.

community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. The European Charter for Regional or Minority languages acknowledges the value of traditionally used language and provides protection for them. The United Nations Declaration on the rights of Indigenous People and the Framework Convention for the protection of National Minorities also supports this distinction.[53] The importance of use of national language is also manifested in the case laws of the European Court of Human Rights. The forced closure of Latin-script schools constituted a violation of their right to be educated in their national language.[54] "All unaccompanied and separated children have the right to maintain their cultural identity and values including the maintenance and development of their native language."[55] Myanmar claims that Rohingya are not citizens of Myanmar and so they are not entitled to receive education in the language of Myanmar. But the UN Human Rights Committee reiterated the right of education of minorities in the light of Article 27 of ICCPR. It must be noted however that the UN Human Rights Committee interprets article 27 of ICCPR broader. They need not be nationals or citizens; they need not be permanent residents. Thus, migrants' workers or even visitors in a State Party constituting such minorities are entitled.[56]

---

[53] Andrassy G (2012) Freedom of language: A universal human right to be recognized. International Journal on Minority and Group Rights 19(2): 195–232 available at https://brill.com/view/journals/ijgr/19/2/article-p195_5.xml

[54] European Court of Human Rights (ECtHR), Catan and Others v. Moldova and Russia Grand Chamber, Nos. 43370/04, 8252/05 and 18454/06, 19 October 2012 available at file:///C:/Users/HP/Downloads/001-114082.pdf accessed on 23 August 2021

[55] CESCR General Comments no:6; [13-14], available at https://www2.ohchr.org/english/bodies/crc/docs/gc6.pdf accessed on 29 May 2019

[56] Klaus Deiter Beiter(2006), The Protection of the Right to Education by International Law,,44: Human Rights General Comments 23,1994 available at https://www.researchgate.net/profile/Klaus-Beiter/publication/311909233_The_Protection_of_the_Right_to_Education_by_International_Law_Including_a_Systematic_Analysis_of_Article_13_of_the_International_Covenant_on_Economic_Social_and_Cultural_Rights_Martinus_Nijhoff_2006_I/links/5c03fda2299bf1a3c15da8a9/The-Protection-of-the-Right-to-Education-by-International-Law-Including-a-Systematic-Analysis-of-Article-13-of-the-International-Covenant-on-Economic-Social-and-Cultural-Rights-Martinus-Nijhoff-2006.pdf accessed on 25 June 2019

Myanmar denies the rights of children of Rohingya on the ground of nationality. But the right to education cannot be denied on the grounds of non-nationality. The ground of nationality should not bar access to Covenants rights, e.g., all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers, and victims of international trafficking, regardless of legal status and documentation.[57] The right to education, like all human rights, imposes three types or levels of obligations on State Parties: the obligation to respect, protect and fulfil. The obligation to respect requires States Parties to avoid measures that hinder or prevent the enjoyment of the right to education.[58] The Committee confirmed that States Parties have "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels" of each of the rights enunciated in the Covenant, including "the most basic forms of education".

"In the context of article 13, this core includes an obligation: to ensure the right of access to public educational institutions and programs on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13(1); to provide primary education for all in accordance with article 13(2)(a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with "minimum educational standards" [art.13(3) and (4)]".[59]

Discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the

---

[57] Committee on Economic, Social and Cultural Rights (CESCR General Comment No.20[30] available at https://www.refworld.org/docid/4a60961f2.html accessed on 1 March 1, 2023

[58] Committee on Economic, Social and Cultural Rights (CESCR) General Comment 3 available at 3 https://www.refworld.org/pdfid/4538838e10.pdf accessed on 23 September 2020.

[59] CESCR General Comment no:3, ibid.

child to benefit from educational opportunities. While denying a child's access to educational opportunities is primarily a matter which relates to article 28 of the Convention, there are many ways in which failure to comply with the principles contained in article 29 (1) can have a similar effect.[60] "State parties are bound to respect the obligations arising out of treaties. Recalling the determination of the peoples of the United Nations to establish condition under which justices and respect for the obligations arising from treaties can be maintained"[61]. In order to protect and guarantee the rights of Rohingya refugee children in accordance with the Convention on the Rights of the Child and to preserve their hopes of a better future, UNICEF makes the following Call to Action:[62]

> UNICEF urges the government of Bangladesh to take necessary steps to extend the Learning Competency Framework and Approach and an alternative curriculum for the Rohingya Children. It also calls on both governments to allow use of their national curriculum as well as assessment system to provide progressive education for the children of Rohingya. It also urges to provide training on life skills and livelihoods for adolescents to mitigate frustration and helplessness and ensure separate and distinct birth registration processes for Rohingya Children. It also requests Bangladesh to sign and ratify Convention and Protocol relating to status of Refugees and take measures to protect and prevent human trafficking of Rohingya children. UNICEF further appeals to the international community to help Bangladesh and humanitarian organizations to provide humanitarian assistance for Rohingya children and families in camps of Bangladesh. It

---

60 General Comment no:1 of paragraph 10 of Committee on Convention on the Rights of Child available at file:///C:/Users/HP/Downloads/G0141253.pdf accessed on 1 March 2023.

61 Preamble of the Vienna Convention on the Law of the Treaties,1969 available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf accessed on 28 February 2023.

62 UNICEF (August 2019):" Beyond Survival: Rohingya Refugee Children in Bangladesh want to learn" page 38 available at https://www.unicef.org/media/57631/file/Rohingya%20refugee%20children%20want%20to%20learn%202019%20.pdf accessed on 28 February 2023

also urges to pursue the Government of Myanmar to develop the solution for safe, voluntary, and sustainable repatriation of Rohingya Refugees including children. It also advises to engage the Government and civil society in both countries for a durable and peaceful solution to the Rohingya refugee crisis.

Conclusion

In conclusion, from the foregoing discussion, it is transpired that the children of Rohingya Refugees have right to access to education particularly primary education under all international conventions and it is immediate duty of all states parties to provide free primary education and creating impediment regarding their right to education is the violation of international conventions. Not to provide inclusive primary education may be considered as persecution since the international community agreed in principle to provide primary education as free and universal through ratification of international conventions.

As State Parties to the International Convention on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of Child (CRC) both Myanmar and Bangladesh have positive and immediate obligations to provide compulsory free primary education without any reservations. Every treaty in force is binding upon the parties to it and must be performed by them in good faith. States Parties as well as international organizations have an obligation to ensure that these countries are fulfilling their obligation under international law and provide resources and create an environment for accessing inclusive and quality education otherwise a generation will be lost without hope. Providing resources for accessing inclusive, certified and quality education to these children by the international community can be an investment for the future generation. Investment in the education of Rohingya refugee children is desperately needed. The Rohingya children should be taught in Myanmar language and curriculum so that they can be integrated into the society of Myanmar after repatriation. It will take a long time to repatriate the Rohingya refugees in Myanmar considering the past record

of repatriation and prevailing situations. Due to the lack of teachers and curriculum in Burmese language, the curriculum and pedagogy of host country as well as international curriculum should be allowed for this transition period so that they can get an opportunity to develop essential skills to survive in the future wherever they finally settle. UNICEF calls on the international community to provide support to the Government of Myanmar to create the conditions for the safe, dignified, voluntary and sustainable return of Rohingya refugees.

Bangladesh, a least developed and populous small country with over 160 million people, lacks the financial and infrastructural capacity to resettle these Rohingya refugee children. Bangladesh, Myanmar, and the international community should come forward for the implementation of the right to education of the children of Rohingya refugees focusing on promoting repatriation and discouraging assimilation. State Parties of the Convention on Child Rights are under obligation to promote and encourage international cooperation in matters relating to education of children.

References

1) Report of United Nations Children Emergency Education Fund (UNICEF): Prioritizing Learning for Rohingya Children available at https://www.unicef.org/documents/prioritising-learning-rohingya-children-bangladesh International Court of Justice Summary 2020/1 date 23January,2020 available at https://www.icj-cij.org/files/case-related/178/178-20200123-SUM-01-00-EN.pdf
2) Inter-Sector Coordination Report (ISCG) https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/20180510_-_iscg_-sitrep_final.pdf
3) Human Rights Watch (2018), Bangladesh is not my country :The Plight of Rohingya Refugees from Myanmar https://www.hrw.org/sites/default/files/report_pdf/bangladesh0818_web2.pdf accessed on 27 February 2023.
4) Inter Sector Coordination Group (ISCG) 2018, "Situation Report: Rohingya Refugee Crisis" May 10,2018 available at https://www.humanitarianresponse.info/en/operations/bangladesh/document/situation-report-rohingya -crisis-coxs-bazar-10-may-2018?_gl=1*uguz0n* ga* MTY4NDAyNDEyMi4xNjc3NDkyMzg2* gaE60Z NX2F68 *MTY3NzQ5MjM4NS4xLjAuMTY3NzQ5MjM4NS42MC4wLjA. (Accessed on 27 February 2023)
5) UNICEF:" Beyond Survival: Rohingya Refugee Children in Bangladesh want to learn." Dhaka: UNICEF Bangladesh, August 2019 available at hpts://www.unicef.org/media/57631/file/Rohingya%20refugee%20children%20want%20to%20learn% 202019%20.pdf accessed on 21 January,2021

6) Karen Reidy(2020): Expanding education for Rohingya refugee children in Bangladesh UNICEF South Asia available at https://www.unicef.org/rosa/stories accessed on 20 January 2018
7) Reference no 1/38085, RRT,18 Feb 2002 at 6 under “Claims and Evidence”.
8) UNHCR (2011): State of Denial: A Review of UNHCR’s response to protracted situation of Stateless Rohingya Refugee in Bangladesh, UNHCR Policy Development and Evaluation Services, Geneva, Switzerland, December,2011 available at https://www.unhcr.org/4ee754c19.pdf accessed on 28 February 2023
9) Education for All (EFA) Global Monitoring Report,2010 page 49 available at https://www.tandfonline.com/doi/full/10.1080/20004508.2020.1823121
10) Human Rights Watch: "Education for Syrian Refugee Children: What Donor and Host Countries should do, September 16,2016< https:// www.hrw.org/news/2016/09/16 >accessed on 20 July 2022
11) Human Rights Watch: "Education for Syrian Refugee Children: What Donor and Host Countries should do, September 16,2016< https:// www.hrw.org/news/2016/09/16 >accessed on 20 July 2022
12) UNESCO (2010), Reaching the marginalizes Replies to questionnaire of the Special Rapporteur and EFA Global Monitoring Report 2010 page 49 available at https://unesdoc.unesco.org/ark:/48223/pf0000186606
13) Chris Lewa (2003): Issues to be raised concerning the situation of Rohingya Children in Myanmar (Burma): Submission to the Committee on the Rights of the Child, Asian Forum for Human Rights and Development (FORUM-ASIA), Bangkok, Thailand.
14) UNICEF Advocacy Alert (2019): Beyond Survival, Rohingya Refugee Children in Bangladesh want to learn, https://www.unicef.org/media/ 57631/file/Rohingya%20refugee%20children%20want%20to%20learn%202019%20.pdf
15) Simon Ingram (2017) UNICEF Spokesman, Myanmar Children Facing Hell on Earth, available at https://news.un.org/en/tags/simon-ingram
16) UNESCO (2019): Global Education Monitoring Report,2019 Migration, Displacement and Education: Building Bridge, not Walls: UNESCO available at file:///C:/Users/HP/Downloads/265866eng.pdf accessed on 28 February 2023
17) CESCR General Comment no:13 available at https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CESCR_General_Comment_13_en.pdf
18) Sharon Detrick (1999): A commentary on the United Nations Convention on the Rights of the Child, Martinus Nijhoff Publishers 1999 Page 472
19) Principle 7 of United Nations Declaration of the Rights of the Child,1959 available at https://archive.crin.org/en/library/legal-database/un-declaration-rights-child-1959.html
20) Ton Liefaard and Julia (2017): The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead, Forwarding page BRILL, NIJHOFF
21) Article 2(1) of Convention on the Rights of the Child,1989 available at https://www.unicef.org/child-rights-convention
22) Committee on the Rights of Child, 39th Session, CRC General Comment no. 6, 2005 available at https://www2.ohchr.org/english/bodies/crc/docs/gc6.pdf accessed on 23 February 2022
23) Article 22 of the Convention on the Rights of the Child,1989 available at https://www.unicef.org/child-rights-convention accessed on 21 January 2021
24) Committee on the Economic, Social and Cultural (1991): 21st Session ICESCR General Comment no. 13, 1999: 3 available at https://www.refworld.org/pdfid/4538838c22.pdf
25) ICESCR General Comment no. 20, 2009: §30.ibid
26) Article 1 of Convention against Discrimination in Education,1960 available at https://www.unesco.org/en/right-education/convention-against-discrimination
27) Article 22, The Refugee Convention,1951 available at https://www.unhcr.org/4ca34be29.pdf accessed on 21 March 2020

28) Article 2 of Universal Declaration of Human Rights,1948 www.un.org/universal/en/universal-declaration-human-rights/ accessed on 29 May 2021
29) Article 26 ibid
30) World Conference on Education for All: Meeting basic learning needs, World Declaration on Education for All and Framework for Action to meet basic learning needs, Jomtien, Thailand 5-9 March,1990 available at https://bangkok.unesco.org/sites/ default/files/ assets/ECCE/JomtienDeclaration.pdf accessed on 28 February 2023
31) World Education Forum, The Dakar Framework for Action: Education for All: Meeting Our Collective Commitments, Dakar, Senegal 26-28 April,2000 available at http://www.portal.oas.org/LinkClick.aspx?fileticket=M/7kIZ0taMw%3D accessed on 28 February 2023
32) Rudd Lubbers, United Nations High Commission for Refugee, learning for a Future: Refugee Education in Developing Countries, UNHCR, Geneva (2001) Page 1 available at https://www.unhcr.org/4a1d5ba36.pdf. Accessed on 28 February 2023
33) Education can't wait (2019):''Foundation Engagement in Education in emergencies and protracted crisis" Policy Brief, available at www.educationcannotwait.org accessed on 12 June 2020
34) ibid
35) ECW Facilitated Multi-Year Resilience Program, Bangladesh, "Education for Rohingya Refugees and host communities in Bangladesh, Multi-Year Resilience Program (2018-2022)" www.educationcannotwait.org
36) Education can't wait (2019):''Foundation Engagement in Education in emergencies and protracted crisis" Policy Brief, available at www.educationcannotwait.org accessed on 12 June 2020
37) ibid
38) ECW Facilitated Multi-Year Resilience Program, Bangladesh, "Education for Rohingya Refugees and host communities in Bangladesh, Multi-Year Resilience Program (2018-2022)" www.educationcannotwait.org
39) UNICEF: Expanding education for Rohingya refugee Children in Bangladesh, https://www.unicef.org/rosa/stories/expanding-education-rohingya-refugee-children-bangladesh accessed on 20 April 2021
40) Committee on Economic, Social and Cultural Rights (1999), 21st Sessions, Document E/C.12/1999/10 General comment No. 13: The right to education (art. 13) (refworld.org) at para.57 available at https://www.refworld.org/pdfid/4538838c22.pdf
41) Ibid, at para.57.
42) Freiberg vs Canada, (Secretary of State)78 FTR 283(1994); ODO(Re) Nos VA1-03231, VA1-03232, VA1-03233(2003) RPOD VO 66 available at https://ca.vlex.com/vid/ freiberg-v-can-681759101.
43) Refugee Review Tribunal (1995), Reference V95/03256, RRT, 9 October 1995 at para. 47 available at https://www.refworld.org/pdfid/4b17c13a2.pdf accessed on 28 February 2023
44) Human Rights Watch (2005): Failing Our Children: Barriers to the Right to Education, Page 24 available at hrw.org/reports/2005/education accessed on 17 March 2018
45) B.G. Ramcharan: The Right to Education, Judicial Protection of Economic, Social and Cultural Rights; Chapter IX, Page 209, The Raoul Wallenberg Institute Human Rights Library, Martinus Nijhoff Publishers,2005.
46) CESCR Concluding Observations: Kuwait, E/C 12/1/Add.98(7 June 2004),[26].
47) CESCR Concluding Observations: China, E/C 12/1/Add.107 (13 May 1999),[23].
48) Human Rights Council (2013), Report of the Special Rapporteur on the right to education on justiciability of the right to education, A/HRC/23/35(10 May 2013),[2]-[3].
49) European Court of Human Rights (ECtHR), *Catan and Others v. Moldova and Russia* Grand Chamber, Nos. 43370/04, 8252/05 and 18454/06, 19 October 2012 available at file:///C:/Users/HP/Downloads/001-114082.pdf accessed on 23 August 2021.

50) European Union Agency for Fundamental Rights & Council of Europe: Handbook on European Law relating to the rights of the child, available at https://www.echr.coe.int/documents/handbook_rights_child_eng.pdf.
51) Committee on Economic, Social and Cultural Rights (CESCR) General Comment no.20[7] [13] available at https://www.refworld.org/docid/4a60961f2.html
52) Committee on Economic, Social and Cultural Rights (CESCR) General Comment no.3 para.2 available at https://www.refworld.org/pdfid/4538838e10.pdf
53) Andrassy G (2012) Freedom of language: A universal human right to be recognized. International Journal on Minority and Group Rights 19(2): 195–232 available at https://brill.com/view/journals/ijgr/19/2/article-p195_5.xml.
54) European Court of Human Rights (ECtHR), *Catan and Others v. Moldova and Russia* Grand Chamber, Nos. 43370/04, 8252/05 and 18454/06, 19 October 2012 available at file:///C:/Users/HP/Downloads/001-114082.pdf accessed on 23 August 2021.
55) CESCR General Comments no:6; [13-14], available at https://www2.ohchr.org/english/bodies/crc/docs/gc6.pdf accessed on 29 May 2019
56) Klaus Deiter Beiter(2006), The Protection of the Right to Education by International Law,,44: Human Rights General Comments 23,1994 available at https://www.researchgate.net/profile/Klaus-Beiter/publication/311909233_The_Protection_of_the_Right_to_Education_by_International_Law_Including_a_Systematic_Analysis_of_Article_13_of_the_International_Covenant_on_Economic_Social_and_Cultural_Rights_Martinus_Nijhoff_2006_I/links/5c03fda2299bf1a3c15da8a9/The-Protection-of-the-Right-to-Education-by-International-Law-Including-a-Systematic-Analysis-of-Article-13-of-the-International-Covenant-on-Economic-Social-and-Cultural-Rights-Martinus-Nijhoff-2006.pdf accessed on 25 June 2019
57) Committee on Economic, Social and Cultural Rights (CESCR General Comment No.20[30] available at https://www.refworld.org/docid/4a60961f2.html accessed on 1 March 1, 2023
58) Committee on Economic, Social and Cultural Rights (CESCR) General Comment 3 available at 3 https://www.refworld.org/pdfid/4538838e10.pdf accessed on 23 September 2020
59) CESCR General Comment no:3, ibid
60) General Comment no:1 of paragraph 10 of Committee on Convention on the Rights of Child available at file:///C:/Users/HP/Downloads/G0141253.pdf accessed on 1 March 2023
61) Preamble of the Vienna Convention on the Law of the Treaties, 1969 available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf accessed on 28 February 2023
62) UNICEF (August 2019):" Beyond Survival: Rohingya Refugee Children in Bangladesh want to learn" page 38 available at https://www.unicef.org/media/57631/file /Rohingya%20refugee%20children%20want%20to%20learn%202019%20.pdf accessed on 28 February 2023

Statutes

1) Universal Declaration of Human Rights, 1948.
2) The International Covenant on Civil and Political Rights, 1966.
3) The International Covenant on Social, Economic and Cultural Rights, 1966.
4) Convention on the Rights of the Child, 1989.
5) Convention against Discrimination in Education, 1960.
6) United Nations Declaration of the Rights of the Child, 1959.
7) The Refugee Convention, 1951.

Professional Liability in Building Construction: An Unsung Literature in Bangladesh

Md. Atiqur Rahman*

Abstract

Recognized as an inherently precarious sector, the construction industry spans diverse domains, including public infrastructure, private residences, and industrial projects. Within this field, a multitude of entities, including principals, government bodies, contractors, sub-contractors, consultants, architects, engineers, and quantity surveyors, assume varied roles. This paper specifically explores the professional liability (PL) within the construction industry, centering on architects and engineers (A-E). It addresses a complex challenge in the construction domain related to allocating responsibilities and determining accountability. The global legal landscape recognizes two primary regimes for establishing the PL of A-E: the common law doctrine of joint and several liability, and the principle of proportionate liability. This study delves into two primary inquiries. Initially, it examines the PL impact of A-E on stakeholders in the construction industry. Subsequently, it scrutinizes how A-E's PL affects the allocation of construction risks in contracts. The central hypothesis asserts that the PL of A-E is of paramount significance because of its strong association with professional indemnity (PI) insurance. This type of insurance is designed to safeguard and promote the interests of all parties engaged in the construction industry, placing special emphasis on civil remedies for the victim. The conclusion argues that a rational assessment of PL and the embrace of PI insurance by A-E have the potential to foster a favorable environment within the construction sector in Bangladesh.

1. Introduction

Building construction is regarded as an inherently risky industry.[1] It encompasses a wide variety of fields, from public works to private residences and industrial buildings;[2] includes multiple players like 'principals, government bodies, contractors, sub-contractors, consultants, architects, engineers, quantity surveyors and so on' performing diverse

* Attached Officer (Joint District and Sessions Judge), Law and Justice Division, Ministry of Law, Justice and Parliamentary Affairs, Bangladesh Secretariat, Dhaka, Bangladesh.

1 Laina Chan, 'Insuring Risk in Construction Project' (2019) 34 Building and Construction Law Journal 378, 378.

2 Inge Bertels, 'Building Contractors in Late-Nineteenth-Century Belgium: From Craftsmen to Contractors' (2011) 26 Construction History 1, 4.

duties and responsibilities.[3] Of the stakeholders, this paper focuses on PL of A-E. In Bangladesh, PL regime of A-E remains a relatively unexplored domain, typically, resulting in not approaching to court to seek damage for professional negligence largely due to high chance of potentially inadequate compensation, possibly attributable to the absence of PI insurance, and too much emphasis on criminal proceedings rather than going after civil remedies against the professionals.[4]

A complicated question often arises when the issue of who is responsible for what and how risks are allocated comes up in the construction domain.[5] Globally, two dominant legal regimes are being used to determine the PL of A-E─ common law doctrine of joint and several liability; and principle of proportionate liability. This paper revolves around two key questions. First, it explores the way to understand how PL of A-E impacts construction industry's stakeholders. Second, it examines how A-E's PL affects construction risk allocation in a construction contract. The central contention of this study is that PL of A-E is of utmost importance because of its significant connection with PI insurance, which serves to safeguard and advance the interests of all parties involved in the construction industry, stressing more on civil remedies for the victim.

This paper commences by elucidating the fundamental concept of profession, thereafter concentrating on the specific fields of architecture and engineering. The essay then delves into A-E's PL. Following this, the discussion proceeds to explore the fundamental principles of joint and several liability. Subsequently, the study examines the proportionate liability framework. After that, it details on the fundamental tenets of risk allocation and the contractual autonomy of the concerned parties. The conclusion covers arguing that the logical determination of PL and the adoption of PI insurance by A-E could potentially contribute to the

---

3 Ian Bailey, Construction Law in Australia (Thomson Reuters (Professional) Australia, 4th ed, 2018) 61-7.

4 Md Rizwanul Islam, Legal Remedies for Professional Negligence of Lawyers, The Daily Star (Dhaka, 31 July 2018) <https://www.thedailystar.net/law-our-rights/legal-remedies-professional-negligence-lawyers-1613485> accessed 10 November 2023.

5 Owen Hayford, 'Watch Out! The Duty to Warn on Construction Projects' (2008) 24 Building and Construction Law Journal 163, 179-181.

establishment of a conducive environment in the construction sector in Bangladesh.

2. Profession: Conceptualization

The term 'profession' is a dynamic idea which is difficult to precisely define.[6] It refers to a type of occupation,[7] expecting to utilize extra expertise, wisdom and understanding in the course of their work in addition to reasonable 'care, attention and diligence'.[8] Abraham Flexner offered an inclusive definition of profession stating that an occupation must:

> (1) possess and draw upon a store of knowledge that was more than ordinarily complex; (2) secure a theoretical grasp of the phenomena with which it dealt; (3) apply its theoretical and complex knowledge to the practical solution of human and social problems; (4) strive to add to and improve its stock of knowledge; (5) pass on what it knew to novice generations not in a haphazard fashion but deliberately and formally; (6) establish criteria of admission, legitimate practice, and proper conduct; (7) and be imbued with an altruistic sprit.[9]

It is imperative for professionals to possess specialized schooling, expert knowledge, and comprehensive training in order to exercise their self-sustaining judgment effectively. This enables them to achieve optimal outcomes that align with the best possible interests of their clients, while upholding a fiduciary relationship characterized by sensitivity and profound importance. It is crucial for professionals to prioritize objectives beyond mere profit maximization, demonstrating discipline and accountability. This can be achieved through the establishment of codes of

---

6 Hossein Ali Abadi, Desmond Tutu Aventimi and Alan Coetzer, 'The Meaning and Essential Nature of a Profession: A Multi-Perspective Approach' (2020) 30(1) Labor and Industry 85, 92.

7 Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd and Others (1987)14 FCR 215, 219.

8 John W Wade, 'An Overview of Professional Negligence' (1986) 17(4) Memphis State University Law Review 465, 477.

9 Norman Bowie, 'Law: From a Profession to a Business' (1988) 41 (4) The Vanderbilt Law Review 741, 743.

conduct, self-regulatory measures such as licensing, and other mechanisms like continuing education and license renewal requirements.

Despite being challenging to precisely described, a profession is straightforward to distinguish from business.[10] Particular ‘moral or ethical’ obligations that the professionals are supposed to maintain are one of the traits that distinguish a profession from a ‘trade or businesses.[11] In addition to the specific client, the professionals are also committed to the wider community to maintain higher standard of behavior in some circumstances which lacks in a pure business contract.[12] Typically, a commercial contract is a result centered whereas a professional engagement entails using ‘professional care, skill and diligence’ which may preclude the client’s ostensible purpose.[13] Therefore, these criteria, and not just whether the agreed-upon goal is reached, will be used to evaluate a service provider’s performance under an agreement for professional services.[14]

Now, it is necessary to examine the individuals who might be classified as professionals, namely those falling into the categories of A-E.

2.1. Architect

It is impracticable to provide a widely agreed-upon definition of architect.[15] Typically, an architect can be defined as a trained someone with expertise in designing buildings and other related structures.[16] Alternatively, an architect is a person ‘who designs and supervises the construction of buildings or other large structures’.[17] *Bangladesh National Building Code* (BNBC) defines architect as an individual who possesses a bachelor degree in architecture and holds membership in the *Institute of Architects, Bangladesh* (IAB).[18] The professional institution works as a

---

[10] Bailey (n 3) 307.
[11] ibid 305.
[12] ibid.
[13] ibid.
[14] ibid.
[15] Julian Bailey, Construction Law: Volume III (London Publishing Partnership, 3rd ed, 2020) 1357.
[16] ibid.
[17] Constance Frisby Fain, ‘Architect and Engineer Liability’ (1995) 35(1) Washburn Law Journal 32, 33.
[18] rule 6, Bangladesh National Building Code, 2020.

regulatory body regulates and oversees the architectural profession, imposes restrictions on the use of the title architect, and carries out investigations into complaints and takes disciplinary actions against the architect.[19] Typically, the architect is engaged in all phases of a construction project, from inception to completion, and includes not only the initial plans and specifications but also the management of all contracts relating to building construction.[20]

2.2. Engineer

The term engineer is a wider concept and can refer to practitioners of various engineering fields.[21] Unlike architect, the term 'engineer' has less limitation on usage.[22] Engineering is 'the art of directing the great sources of power in nature for the use and convenience of man'.[23] The engineer is one who applies his acquired theoretical insights on scientific and mathematical to real life ends like 'the design, manufacture and operation of efficient and economical structures, machines, processes, and systems'.[24] An engineer is someone 'who provides structural, mechanical, electrical, design or other technical advice' to a construction project.[25]

In Bangladesh, definition of an engineer, as outlined in the BNBC, pertains to an individual who possesses a bachelor degree in engineering and holds membership in the *Institute of Engineers, Bangladesh* (IEB).[26] The IEB functions as a regulatory entity that governs and supervises the engineering field enforcing regulations pertaining to the designation of engineer, conducts inquiries into grievances, and implements disciplinary measures against engineers.[27] Majority of building construction projects

---

19 Institute of Architect, Bangladesh (IAB) (webpage) <http://www.iab.com.bd/Site/History> accessed 12 November 2023; See also memorandum of association and articles of association and by-laws of IAB.

20 Ian Bailey and Matthew Bell, Construction Law in Australia (Thomson Reuters, 3rd ed, 2011) 64.

21 Bailey (n 15) 1370.

22 Bailey (n 3) 67.

23 ibid.

24 Fain (n 17) 33.

25 Shaheer Tarin, 'The Liability, Negligence and Insurances of an Architect or Engineer in Construction Projects' (2018) 34(1) Australian Insurance Law Bulletin 7,7.

26 Rule 6 (n 18).

27 Institute of Engineers, Bangladesh (IEB) (webpage) <https://www.iebbd.org/pages/about.jsp> accessed 12 November 2023; See also constitution and by-laws of IEB.

require multidisciplinary engineers; and in mega construction project, each engineer may be responsible for a separate component of the design.[28]

At this juncture, the study examines the liability commonly associated with the A-Es during the performance of their tasks in a construction project.

3. Professional Liability

Although the idea of PL of A-E has been around since the Napoleonic code,[29] it had evolved by the end of nineteenth century.[30] Typically, professionals in the building construction industry, include engineers of all type and architects.[31] They generally belong to a recognized professional setting which oversee their performance and makes sure they observe professional benchmarks.[32] In doing so, the professional associations like IEB and IAB set certain constraints and limits through registration, licensing and initiating disciplinary action.[33]

Professional etiquette and obligation to others are binding on professionals. PL issues will arise, and they face the potential of being sued for damage if they fail to discharge their obligations or duty of care to others in a construction project.[34] However, they are not accountable for mistakes in decision, unless the mistakes are so grave that a substantially well-informed and qualified professional would not have committed it.[35]

PL covers the responsibilities of A-E that are typically governed by the pertinent legislations, common law principle and that the community expects to be carried out with utmost 'intellectual skill and

[28] Bailey and Bell (n 20) 64.

[29] Craig R Schmuder, 'Liability of the Architect-Engineer for Construction Contracts' (1986) 16(2) Public Contract Law Journal 365, 365.

[30] Carl Sapers and Penny Merliss, 'The Liability of Architects and Engineers in Nineteenth-Century America' (1988) 41(2) Journal of Architectural Education 39, 40.

[31] Kevin Barrett, Defective Construction Work: And the Project Team (John Wiley and Sons, 2008) 132.

[32] ibid.

[33] Bailey (n 3) 305.

[34] Paul Pedley, Essential Law for Information Professionals (Facets, 4th ed, 2019) 269.

[35] Ian Yule, Architects and Engineers in Ray Hodgin (ed) Professional Liability: Law and Insurance (Routledge, 2nd ed, 2020) 105,116.

qualifications'.[36] Typically, professionals are acknowledged as having a concurrent duty 'both in contract and tort'.[37] Alternatively, PL is governed by 'the law of contract and the law of tort'.[38] Furthermore, professionals might be held accountable for engaging in misleading and deceptive practices, as stipulated by different legislations that aim to safeguard the rights of customers within respective jurisdiction of a country. The law of contract is concerned with the legal responsibility, resulting from a party's failure to fulfill the obligations outlined in the agreement whereas tort law is pertinent with the duty to exercise reasonable care to circumvent triggering financial damage to those who are directly to be impacted.[39] Therefore, if professionals such as A-Es commits wrong, not only are they in violation of any agreement that they might have entered into with their client, but they are also committing the tort of carelessness besides their liability arises from misleading and deceptive conduct.[40]

3.1. Contractual Liability

The contractual obligations of A-E in a construction venture are largely depended on the role for which they were appointed.[41] It might include both precise and comprehensive duties as well as more general commitment to advance the benefits of clients and operate with 'reasonable skill and care'.[42] Conventionally, they are designated in the appointment agreement to serve as the client's representative.[43] The official contract between the employer, who may be principal or contractor, and the A-Es is the appointment agreement which outlines the commitments that every participant of the contract has made to fulfil.[44]

---

[36] Bailey (n 3) 307.

[37] Patrick Mead, 'The Impact of Contract upon Tortious Liability of Construction Professionals' (1998) 6(2) Torts Law Journal 145, 150.

[38] Rupert Jackson, 'Professional Liability' (1988) 136 (5384) Renal Society of Australasia Journal 536, 536.

[39] ibid.

[40] ibid.

[41] Bailey (n 3) 308.

[42] Johathan Mance, Iain Goldrein and Robert Merkin (eds), LLP Limited, Insurance Disputes, Vol 1 (at Service 3) [18.67].

[43] Bailey (n 3) 308.

[44] Bart Kavanagh and Christopher Miers, Architects' Responsibility for the Work of Others in Anthony Speaight and Matthew Thorne (eds) Architect's legal Handbook: The Law for Architects (Routledge, 10th ed, 2021) 321, 321.

The contract clauses frequently call for the A-E to perform a variety of roles including 'independent certifier, assessor or contract administrator' in a building project although in practice many construction projects do not have any formal or written contract among the participants.[45] When no official contractual relationship exists between the parties, it is presumed that an implied contractual term exists stating that the professionals will employ 'reasonable care and skill' in providing the professional services, that concurrent contractual and tortious liabilities exist, and that the victim may choose to file a lawsuit 'in either contract or tort or both'.[46]

The functions of A-Es under the appointment agreement can be classified based on the date of entering the construction contract.[47] The pre-contractual duties include preparing and documenting effective, realistic designs for the project whereas during construction their job is to supervise the client's works under the construction agreement.[48] The A-Es are typically assumed to perform certain supplementary duties that may be inferred into a building contract.[49] For instance, when an architect was engaged verbally to oversee the layout and erection of a building, it will be expected that he will recommend the client to obtain the necessary permits before hiring a contractor to proceed with the construction activities.[50]

The liability of A-E must be interpreted from the precise language of the agreement.[51] To illustrate, if an architect was employed solely to draw the layout and not to perform onsite operations, the negligent supervision approach cannot be used to hold the architect professionally liable in that case.[52] It is settled that the A-E who provide services solely bound by the doctrine of using 'reasonable care and skill' and are exempt from the

45 Bailey (n 3) 308.

46 Ben Zipser, 'Professionals and the Standard of Care' (1999) 7(2) Torts Law Journal 167, 181.

47 Bailey (n 3) 308.

48 ibid.

49 Mance, Goldrein and Merkin (n 42) [18.70].

50 ibid.

51 Marc M Schneier, 'Design Professional Liability for Construction Worksite Accidents—Hoe Arkansas Led the Way to a National Consensus' (2022) 75(2) Arkansas Law Review 381, 396-97.

52 ibid 397.

greater requirement of suitability of purpose.[53] However, when they are impliedly obliged to design and construct a venture, they will be liable if the work is not commensurate with the client's purpose.[54]

The A-E may also be required to observe the doctrine of fitness for purpose in the following situations: 'where the designer not only designs but also supply the materials; in certain design and build or joint venture project; and where the evidence indicates that, usually, the professional has agreed to achieve a result'.[55] Therefore, in either scenario, the professionals might fulfil their responsibilities 'under the common law of negligence' to utilize reasonable 'skill and care' yet violate relatively stringent contractual obligation that the task they have accomplished is fairly fit for the intended purpose.[56]

Typically, A-Es in Bangladesh entered a construction contract complying standardized terms for employment and standardized agreement forms to provide their professional services.[57] The adoption of prescribed format for the contract increases the likelihood that the A-Es performance will be assessed in line with the services typically rendered by the ordinary members of the profession in question and not in accordance with the different or higher standard described in a non-standard agreement.[58] In such circumstances, *the Contract Act, 1872* (CA) and *Specific Relief Act, 1877* (SRA) come into play to govern the contractual agreement between A-E and principal (client).

In order for a construction contract to be enforceable through civil courts, it must satisfy certain requirements stating in the chapter II of the CA. These include being documented in writing and being the result of

---

53 Yule (n 35) 125.

54 Bailey (n 3) 313.

55 Yule (n 35) 126-27.

56 Ben Zipser, 'Professionals and the Standard of Care' (1999) 7(2) Torts Law Journal 167,183.

57 Architect and Engineer (A-E) in Bangladesh usually follow Standard Tender Document (STD) in entering construction contract. See Central Procurement Technical Unit, IMED, Ministry of Planning, Government of the People's Republic of Bangladesh <https://cptu.gov.bd/standard-documents/standard-tender-document.html> accessed 14 November 2023.

58 Bailey (n 3) 309-10.

voluntary agreement between parties who possess the legal capacity to enter into a contract. Additionally, the contract must be aimed at achieving a lawful objective and involve the exchange of lawful consideration. Furthermore, it must be free from any errors, whether they pertain to legal principles or factual matters, as well as any misrepresentation, coercion, undue influence, unconscionable dealing, or illegality.

Under common law, individuals who have suffered harm as a result of a contractual breach possess the opportunity to seek redress through three distinct avenues: initiating a lawsuit to recover damages, asserting a claim for *quantum meruit*, or seeking the enforcement of the contract through specific performance.[59] However, the Bangladeshi civil courts usually refrain from enforcing specific performance of construction contract due to its heavy reliance on the personal qualifications or volition of A-Es; instead, in accordance with s 21(b) of the SRA, courts choose to award monetary compensation to the plaintiff-client as an alternative remedy.

3.2. Tortious Liability

A-Es are concurrently responsible for their professional services under the law of tort.[60] They are liable not just to the contracting parties i.e., client but also to the unaffiliated third parties. [61] The Australian court have acknowledged that if a person sustained actual harm due to the faulty design or performance of construction work may file a lawsuit in tort against the responsible A-Es for the damage caused to the victim. [62]

The A-Es bear 'concurrent duty of care to the client' to undertake expert services outlined in the agreement with reasonable care and competence.[63] In case of formal contractual relationship, the A-E's liability in tort would not be allowed to avoid or go around a contractual exceptions or restrictions or that the contractual framework canceled out the duty of

---

59 ibid 124-31.

60 Rupert Jackson, 'Professional Liability' (1988) 136 (5384) Renal Society of Australasia Journal 536, 536.

61 Robert Wickins, Professional Liability (Hong Kong University Press, 3rd ed, 1996) 3

62 Woolcock Street Investments Pty Ltd v CDG Pty Ltd (Formerly Cardnoand Davies Australia Pty Ltd) and Another (2004) 205 ALR 522 [56].

63 Bailey (n 3) 314.

care.[64] Furthermore, A-E's pre-contractual advice may incur liability upon them if the client performs certain activities relying on the advice of the A-E.[65] Additionally, the professionals in construction industry could be held tortiously liable if they worked beyond the ambit of their client-granted authority; intentionally enforced misguided contract administration; erroneously made documentations that led to the contractor's failure to submit a bid; unjustly advanced the objectives of the principal;[66] and disregarded the duty to maintain 'honesty and integrity'.[67]

In some situations, construction professionals are held accountable for their obligations to third parties with whom no contractual relationship exists with them.[68] Recognizing the third parties who deserve the duty of care and comprehending its scope are critical in the event of tortious 'duty of care to the third parties'.[69] Liability to third parties may result from insufficient measures for robustness in the woodwork of a veranda that collapsed, injuring the occupants, or from defective layout of a structure that collapsed and injured spectators.[70] However, the A-Es would be liable to the third party if the party legitimately dependent on the professional's services and there exists a 'special relationship of proximity' between the parties.[71]

In Australia, the vulnerability test— which determines 'whether the purchaser was vulnerable to the person who caused the failure, whether they relied upon that person or whether the person assumed responsibility'— is used to hold the A-Es liable to third parties, such as subsequent purchaser, for pure economic loss.[72] Moreover, if a third party relies on A-E's negligently made false assertions, the professionals will face liability in tort.[73] For instance, A-E would be liable if they negligently

---

64 RM Turton and Co. Ltd. (In Liquidation) v Kerslake and Partners [2000] 3 New Zealand Law Reports 406 [8] [9].

65 Bailey (n 3) 314.

66 ibid 315.

67 Kavanagh and Miers (n 44) 328.

68 ibid 331.

69 ibid.

70 Bailey (n 3) 315-16.

71 ibid.

72 Bailey (n 3) 316.

73 ibid.

certified the financial soundness of the main contractor to the subcontractor.[74]

The application of tort law in Bangladesh is severely constrained because of jurisdictional issues.[75] Indeed, this particular field of law is primarily theoretical and lacks practical implementation in the country.[76] In the absence of a specific laws pertaining to tort law, some statutes implicitly deal with different aspects of tort law within both criminal and civil jurisprudence.[77] Furthermore, the *High Court Division* (HCD) of the *Supreme Court of Bangladesh* (SCB)[78] has rendered multiple judgments contributing to development of two types of torts─ 'constitutional torts and purely private law wrongs, dressed as a private law tort' in the country.[79]

There are two potential avenues for remedying A-E's tortious liability in Bangladesh. The initiation of a lawsuit pertaining to private law torts─ the defendant (A-E) works in private or public capacity where liability arises from common law principle─ typically occurs inside the suitable civil courts and tribunals claiming damage against the professionals while the application of constitutional tort is contingent upon the combined influence of article 44 and 102(1) of the Bangladesh constitution.[80] In instances where A-E works in government entity is held liable for professional negligence infringing the fundamental rights outlined in part

---

74 ibid.

75 ATM Enamul Zahir and Sayeeda Anzu, 'Interpretation of Law of Tort by the Apex Court of Bangladesh' (2018) 9 Rajshahi University Law Review 14, 27.

76 Taqbir Huda, 'Vicarious Liability of Employers in the Law of Tort: Deciphering Bangladesh Beverage Industries v Rowshan Akhter and Others' (2016) 16(2) Bangladesh Journal of Law 119, 122.

77 Naima Haider 'Development of the Laws of Tortious Liability in Bangladesh' (2021) 32(1) Dhaka University Law Journal 196, 197.

78 According to article 94(1) of the Constitution of the People's Republic of Bangladesh, the Supreme Court of Bangladesh is comprised of two divisions, namely the High Court Division and the Appellate Division. Each Division have distinct jurisdiction.

79 Ridwanul Haque while commenting on the keynote in a seminar titled 'The Rise of Constitutional Tort in South Asia' held in Dhaka on 13 March 2019 which has been reported in the Future Law (webpage) <http://futrlaw.org/rise-constitutional-tort-south-asia/> accessed 15 November 2023.

80 Sadman Rizwan Apurbo, 'Development of Tort Law in Bangladesh and Recent Cases Discissions' (Bangladesh Law Digest, 23 May 2018).

III of the Bangladesh constitution, victim have the option to file a writ petition in the HCD seeking compensation, therefore attributing responsibility to the state.[81]

The paucity of judicial precedents specifically addressing the PL of A-E in the context of building construction prompted the examination of the *Chaterine Masud and Others v Md Kashed Miah and Others*[82] (Catherine case). The HCD in the Catherine case set precedent regarding private tort cases that can be instituted in the 'subordinate courts'[83] seeking compensation from wrongdoers whose careless actions have caused harm to victims. Also, the HCD in the case of *Children's Charity Bangladesh Foundation vs Bangladesh*[84] (CCB Foundation case) expressed views that individuals who have suffered death or injuries as a result of a wrongful act committed by any government entity have the option to bring a lawsuit under s 1 of the *Fatal Accidents Act, 1855* seeking compensation either in a competent civil court or to file a writ petition with the HCD to seek redress.

It transpires that tortious liability of construction professionals is closely related to the concept of reasonable care and skill. Now the essay will discuss what the standard of reasonable care and skill is.

3.2.1. Benchmark of Care and Skill

The yardstick by which A-E's professional services are measured is the typical degree of care and skill possessed by the average professional of that type.[85] The *American Institute of Architects'* Document outlines

---

[81] ibid.

[82] 70 DLR (HCD) 2018 (Special Statutory Jurisdiction) 349 Transferred Miscellaneous Case No. 01 of 2016. The lawsuit originally filed before the District Judge, acting as the Motor Accident Claims Tribunal, Manikganj registered as miscellaneous case no. 01 of 2012. The Tribunal commenced the proceedings and framed issues on 23.08.2012. Subsequently, the case was transferred to the HCD following a transfer miscellaneous case order vide no. 01 of 2016 of the HCD and the trial of the case has been concluded in the HCD considering its nature and legal implication.

[83] Besides the Supreme Court of Bangladesh, the government, as authorized by article 114 and 117 of the constitution, has established a variety of courts and tribunals through multiple Acts collectively referred to as subordinate courts.

[84] Writ Petition No. 12388 of 2014 (Special Original Jurisdiction, High Court Division) reported in 70 DLR (HCD) 2018, 49.

[85] Bailey (n 3) 317.

standard of professional care stating that 'the architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances'.[86]

In the Australian case of *Voli v Inglewood Shire Council*, *Windeyer J.* argued that the A-E should carry out their duties with ordinary skill and care, meaning they are not required to demonstrate 'extraordinary degree of skill or highest professional attainment' in discharging professional commitments.[87] Moreover, care and competence are evaluated at criteria that prevailing during the period when the pertinent services were performed, not the superior degree of 'knowledge and skill' developed in the profession after the accomplishment in issue.[88] Conversely, if a construction professional commits to brining to bearing a higher degree of skill compared to his/her peers, the landscape can be different. In this situation, the professional would be required to execute at the best level possible, not just one that is typically accepted among the construction professionals.[89]

In Bangladesh, regarding reasonable skill and care, the HCD in CCB Foundation case stated that:

> [T]he standard or degree of care which a man is required to use in a particular situation varies with the obviousness of the risk. If the danger of doing injury to the person or property of another in pursuance of a certain line of conduct is great, great care is necessary. If the danger is slight, only a slight amount of care is required. The care that will be required of them will be the care that an ordinary prudent man is bound to exercise. But persons who profess to have special skill, or who have

[86] Standard of Care for Design Professionals in Rapidly Changing Times, New Orleans City Business (LA), 12 June 2020, Regional Business News (Webpage) <https://discovery.ebsco.com/c/xppotz/viewer/html/afhvckcqnn> accessed 16 November 2023.

[87] Ben Patten and Hugh Saunders, Professional Negligence in Construction (Routledge, 2nd ed, 2018) 61.

[88] Bailey (n 3) 317.

[89] Julian Bailey, Construction Law: Volume II (London Publishing Partnership, 3rd ed, 2020) 889.

> voluntarily undertaken a higher degree of duty, are bound to exercise more care than an ordinary prudent man.[90]

However, the construction contract between the A-E and client greatly complicates the question of the required degree of care when it comes to supervision of the construction work of a project.[91] The court would face extreme difficulty to assess the acceptable level of care without referring to the specific wordings of the contract since the scope of the professional's obligation to supervise would vary from case to case depending on the agreement.[92]

3.3. Liability for Misleading and Deceptive Conduct

The term misleading conduct is frequently employed to refer to behavior that violates a legal ban against engaging in misleading or deceptive conduct.[93] Liability for the conduct can be widely characterized as misleading is not exclusively confined to tort law; rather, it may also give rise to a breach of contract claim.[94] In common law, there exist several doctrines that pertain to the subject matter, such as contractual guarantee, dishonesty, negligent misstatement, hurtful untruth, defamation, rescission for fraudulent misrepresentation, and passing off while in equity there exist pertinent principles that govern or address the conduct which include the act of rescission in cases involving fraudulent or innocent misrepresentation, the concept of estoppel, and the breach of fiduciary obligation.[95]

In Bangladesh, it is mandatory for all construction activities to adhere to the guidelines set forth in the BNBC. A-Es frequently have the responsibility of certifying specific aspects of construction projects,

---

90 70 DLR (HCD) 2018, 49 [51].

91 Disa Sim, 'Expanding Tort Claims in Construction Cases: Time to Contract?' (2003) 11(1) Tort Law Review 38, 41.

92 ibid 42.

93 Henrey Cooney, 'Causation and Contributory Negligence: The Use and Misuse of Casual Concepts in Cases of Misleading Conduct' (2022) 49 University of Western Australia Law Review 262, 263.

94 ibid.

95 Joshep Sabbagh, Elise Bant, and Jeannie Marie Paterson, 'Mapping Misleading Conduct: Challenges in Legislative Design' (2022) 49(2) University of Western Australia Law Review 144, 149.

ensuring that they adhere to the essential standards for safety, health, amenity, and sustainability.[96] In the event that a certification includes inaccurate information or if the granted certificate seems to be fraudulent, the individuals responsible for issuing the certification may face potential legal responsibility which could result in a referral to the relevant professional organizations to take appropriate actions, such as revoking recognition or registration.[97]

Similar to Australia,[98] the *Consumers' Right Protection Act, 2009* (CRPA) of Bangladesh imposes liability for delivering construction services to the consumers.[99] Understandably, construction services are commonly provided by A-Es, hence establishing potential liability for the services they provide. The CRPA does not include a clear definition for the term 'misleading and deceptive conduct'; however, it does define 'anti-consumer right practices' in s 2(20). In the absence of any specific definition of misleading and deceptive conduct, ss 2 (20)(d) of CRPA that especially deals with deceiving consumers by providing untrue or false advertisement for the purpose of selling any goods or services can be used as a reference point for determining misleading and deceptive conduct in the context of delivering construction services. The CRPA establishes legal accountability, encompassing both civil and criminal consequences, for construction professionals involved in the provision of construction

---

96 Bangladesh National Building Code (n 18) r 26(1).

97 ibid r 26(2).

98 In Australia, s 18 of the Australian Consumer Law (ACL) serves as a legal provision that specifically forbids the engagement in activities that are deemed misleading or deceptive. The violation of the ban can be remedied through the pursuit of individual claims for damages as stipulated in s 236, or alternatively, through the imposition of comprehensive compensation orders as outlined in ss 237─239 of the ACL. In construction domain, A─Es in Australia are commonly held accountable under s 18 of the ACL for issuing defective certificate pertaining to the suitability and intended use of a building project. See Elise Bant and Jeannie Marie Paterson, 'Exploring the Boundaries of Compensation for Misleading Conduct: The Role of Restitution under the Australian Consumer Law' (2019) 41(2) Sydney Law Review 155, 157; James Knell and Mikayla Colak Minter Ellison, 'Engineer Issuing Defective Certification Held Liable to Third Party for Misleading and Deceptive Conduct' (2021) Australian Construction Law Bulletin 105, 105.

99 Section 2(22) of the Consumers' Right Protection Act, 2009 provides a definition of the term 'service'. This definition encompasses several types of services, including construction services, which are made available to consumers in exchange for a monetary consideration. However, it is important to note that services provided free of charge are not included under this definition.

services. In addition to the criminal culpability imposed on A-E, s 66 of the CRPA grants consumers the right to initiate legal proceedings claiming civil remedies against construction service providers for engaging in anti-consumer right practices.

4. Liability under Common Law

The principle of 'joint and several liability of concurrent wrongdoers' is often called solidary liability.[100] Deriving from the law of tort, the theory has its root in common law and has been developed through various judicial pronouncements in the UK and other common law countries over time.[101] This approach advocates the 'principle of strict liability' in terms of victims' rights.[102] Tortious liability is a civil wrong that can result from a breach of contract or a breach of a duty imposed by any legislation apart from contractual obligations, and it can be addressed 'by an award of damage'.[103]

The fundamental idea of tortious liability is that when multiple players are involved in any action that caused the same damage, they are referred to as 'joint tortfeasors' and are held vicariously liable for the wrongdoings of others.[104] The other two types of tortfeasors recognized by common law are 'several tortfeasors' who injured the same plaintiff in different ways, maybe causing similar harm or distinct damages and 'concurrent tortfeasors' who are jointly or severally accountable for the same wrongdoings.[105]

The approach implies that each negligent party may be considered as the primary reason and, consequently, have to take on the entire risk.[106] In

---

100 Jane Swanton and Barbara McDonald 'Reforms to The Law of Joint and Several Liability— Introduction of Proportionate Liability' (1997) 5 Torts Law Journal 109,109.

101 Haider (n 77) 197.

102 Sunita Choudhary 'Fundamentals and Urgent Reformation in Law of Torts' (2020) 20 Supremo Amicus 570, 573.

103 John Tyril 'Construction Liability' (1986) 2(1) Building and Construction Law Journal 7, 8.

104 Kit Barker and Others, The Law of Torts in Australia (Oxford University Press, 5th ed 2011) 794.

105 ibid.

106 Jeffrey Goldberger, 'Australian Construction Law: A Review of the Principle' (2021) 35(4) Commercial Law Quarterly 3, 45.

other words, concurrent wrongdoers, no matter how much each wrongdoer contributed to the victim's loss, are each answerable to the victim for the whole loss,[107] and the theory entitled the victim to recoup his/her entire loss from any of the wrongdoers.[108] For instance, if a contractor, architect, engineer and local council are to be held jointly and severally liable for the construction damage of a house, each player would be treated as an effective cause of the damage, and the principal (homeowner) is entitled to sue anyone or more of those four.[109]

The ultimate purpose of joint and several liability is to make the wrongdoers pay for the wrong they have committed by compensating the victim,[110] placing the victim in an advantageous position because when one or more wrongdoers are traceless or insolvent, the victim can still get full remedy from any of the others who are also responsible for the similar injury.[111] The rule permits a plaintiff to file a lawsuit against a single tortfeasor to recover damages, even while there is a chance that other contributing wrongdoers may not contribute because they are unable to satisfy the sued defendant for a variety of causes.[112] In a word, the method gives victims a wide latitude in deciding who to hold accountable.[113] However, the principle is inapplicable 'if one of the defendants owed obligations to the plaintiff in the contract which was not concurrent and co-extensive with a tortious duty of care.[114]

---

[107] Brad Woodhouse and Clementine Rendle, 'High Court Limits Scope of Proportionate Liability Claims' (2015) 67(6) Governance Directions 368, 369.

[108] Barbara McDonald' Proportionate Liability in Australia: The Devil in the Detail' 26(1) Australian Bar Review 29, 32.

[109] JLR. Davis 'Inquiry into the Law of Joint and Several Liability, Report of Stage One, (1994) 37 The Australian Construction Law Newsletter 36, 37-8

[110] Tyril (n 103) 8.

[111] Kevin Nicholson, 'Reflections on the Practical Operation of the (Not Very) Uniform Proportionate Liability Regimes in Australia' (Geoff Masel Lecture Series, Insurance Law Association, June 2014) 4.

[112] Goldberger (n 106) 47.

[113] New South Wales Law Reform Commission, 'Community Law Reform Program Eighteenth Report: Contribution Among Wrongdoers: Interim Report of Solidarity Liability' (Report No. 65, 1990) [13].

[114] JLR Davis, 'Proportionate Liability: Proposals to Achieve National Uniformity' (Report, 2008) 6; See also Reports: RW Miller and Co Pty Ltd v Krupp (Australia) Pty Ltd (1992) 11(2) Building and Construction Law Journal 74, 149-152.

In the context of construction law, tortious liability typically derives from the work of various participants in the construction process relating to 'design, the provision of professional services, construction defects, product liability, misrepresentation and negligent advice or information.[115] By utilizing joint and several liability doctrine, the plaintiff has, in the past, sued not just the principal perpetrator but also the 'deep pocket defendant' like A-Es who are usually covered by PI insurance and made only a little contribution to the damage.[116] The A-Es were frequently required to pay the entire judgement amount although they contributed a minuscule percentage to the injury caused to the plaintiff because every single party 'being jointly and severally liable for the entire decretal amount.[117] Therefore, a well-informed plaintiff initiates legal proceedings against the person whose liability insurance will pay the entire claim.[118] This approach infuriates construction stakeholders and politicians, resulting in the introduction of the proportionate liability regime in several industrialized nations including Australia.[119]

5. Liability under Proportionate Liability Regime

In general, 'proportionate liability' refers to a mechanism for modifying various types of common law liability,[120] capping 'the liability of a wrongdoer.[121] The doctrine's advocates frequently referred to it 'as a logical extension of the ethics of comparative (contributory) negligence.[122] The theory proposed a pathway to avoid the adverse effects of the common law principle of joint and several liability in case of 'economic loss or property damage but not personal injury.[123] It introduced a paradigm shift in construction risk allocation from the defendant, who

---

115 ibid.

116 Tony Horan, 'Proportionate Liability: Towards National Consistency' (Report, September 2007)11.

117 ibid.

118 Andrew Rogers, 'Fairness or Joint and Several Liability (2000) 8 Torts Law Journal 107,107.

119 Nicholson (n 111) 4.

120 Bailey and Bell (n 20) 153.

121 Jeffrey Goldberger,' Proportional Liability and the Contractual Allocation of Risk. Part 3 of 3' (2021) Commercial Law Quarterly 27, 27.

122 Kit Barker and Jenny Steele, 'Drifting Towards Proportionate Liability: Ethics and Pragmatic' (2015)74(1) The Cambridge Law Journal 49, 49.

123 Bailey and Bell (n 20)153-4.

sought contribution from the co-defendant, to the plaintiff.[124] The concept solely works in situations ‘where there might have been joint and several liability and where the sued person could ask those who were also responsible to contribute the damages.[125] The theory obviously benefits defendants over plaintiffs upon whom the burden has been shifted to bring in all prospective respondents in the preliminary lawsuit, instead of ‘leaving to the defendants the ultimate responsibility of joining others as third parties as contribution proceeding’.[126]

In contrast to the common law principle of joint and several liability, the goal of the doctrine is to allocate losses among wrongdoers proportionate to their degree of liability, meaning that the victim will only enable to recover a fraction of his/her entire loss from each wrongdoer.[127] Unlike the proportionate liability framework, which forces the principal of a construction venture to evaluate the economic viability of each party, the joint and several liability arrangement ensures that the claimant will be able to recoup the entire loss in the case of any disagreement from any concurrent wrongdoer.[128]

The principle is used to apportion how much each wrongdoer is responsible for when multiple players' ‘concurrent but distinct’ actions or omissions result in an occurrence of ‘economic loss or property damage’ to other people.[129] In this regard, the term ‘economic loss’, which excludes damage due to physical harm or loss to property apart from the faulty product, is financial loss brought on by a defective product or injury to the goods itself. It covers ‘the diminution in value of the product’ and the

---

[124] Barbara McDonald and John Carter ‘The Lottery of Contractual Risk Allocation Add Proportionate Liability’ (Legal Studies Research Paper No. 10/15, Sydney Law School, The University of Sydney, January 2010) 23-4.

[125] Davis (n 114) 5.

[126] Barbara McDonald, ‘Reforms to Liability in the Construction Industry’ (1994) 2(3) Torts Law Journal 285, 292.

[127] Doug Jones, ‘Proportionate Liability’ (2004) 98 Australian Construction Law Newsletter 20, 21-2.

[128] Doug Jones, ‘Proportionate Liability Revisited’ (2021) International Construction Law Review 195, 197.

[129] Owen Hayford, ‘Proportionate Liability- Its Impacts on Risk Allocation in Construction Contracts’ (2006) 22(5) Building and Construction Law Journal 322, 324.

expense of fixing or replacing the flawed item.[130] It strictly restricts the liability of each party to the extent of their respective contribution to the victim's loss.[131]

When the court declared the proportion of liability of each wrongdoer, it is, subject to any successful appeal, irreversible and the defendants are insulated from subsequent claims; therefore, it is the plaintiff's responsibility to locate and effectively recoup damages from others involved.[132] In other words, now it is the plaintiff who requires going after all of the wrongdoers to obtain his/her whole damage.[133] The principle emphasizes allocating liability equitably as opposed to guaranteeing that the victim receives full amount of compensation which he/she is entitled.[134] Nevertheless, the approach presents notable issues when determining the allocation of obligation among parties involved in a building project, thereby increasing the complexity for courts in the process of apportioning liability.

6. Contractual Autonomy and Risk Allocation

Risk is typically referred to the distinction between what happened and what was expected.[135] The *Project Management Book of Knowledge* describes the term as 'an event occurring uncertainly and has a positive effect or negative effect of project objectives '.[136] It cannot be completely eradicated from a building construction venture; rather, it may only be shifted to other side to the contract or shared according to the proper contractual terms.[137] The risk connected with a building construction

---

130 Gail Kelley, Construction Law: An Introduction for Engineers, Architects, and contractors (RS Means Company, 2012) 240.
131 Goldberger (n 121) 47.
132 Barker and Steele (n 122)50.
133 Nicholson (n 111) 5.
134 Jones (n 127) 37.
135 Aurelija Peckiene, Andzelika Komarovska and Leonas Ustinovicius, 'Overview of Risk allocation between Construction Parties' (2013) 57 Procedia Engineering 889, 889.
136 Surisetti Divya Sankar, Kilkarni Shashikanth, and Sangamalla Mahender, 'Risk Management in Construction Industry' in Indrajit Pal and Sreevalsa Kolathyar (eds) Sustainable Cities and Resilience: Select Proceedings of VCDRR 2021, Lecture Notes in Civil Engineering, Vol 183 (Springer Singapore, 2022) 45, 46.
137 ibid.

should be allocated in a manner that strikes a balance among the parties involved.[138]

When the issue of risk allocation between the parties arises, construction contracts typically are the central instrument for the court to be considered. In the common law regime, contracting parties have broad latitude in constructing a construction contract, defining the perimeter of their risks, and limiting tortious liability of the undertaking. [139] Common law courts are generally uninterested in intervening in a contractual relationship between parties who have gone to considerable lengths to govern it themselves.[140] Therefore, the autonomy of contract outweighs the protectionist nature of tort is regarded as conventional or a beginning step in terms of their interplay.[141]

However, by imposing the tortious responsibilities that go beyond what is written in the construction contract has the potential to cross the agreed upon boundaries of the risk allocation by enabling the plaintiff to get around the deliberately settled equilibrium among the multiple participants in the construction industry.[142] Typically, contracting parties strive to 'contract out the proportionate liability' regime explicitly or impliedly in the wording of contractual agreements to maximize recovery of loss from the other contracting party if principle wishes or to minimize uncertainty over the allocation of contractual risks.[143] When parties come to an arrangement beforehand on how to share the contractual risks between them and that arrangement is different from the applicable law would have

---

138 Haitham Haloush, 'Rethinking Traditional Approaches of Parties' Autonomy in Constriction Contracts: Decennial Liability as a Case Study' (2020) 62(6) International Journal of Law and Management 577, 577.

139 Alexander Jackman, 'Vulnerability, Autonomy and Protection: The Role of Actual and Hypothetical Contracts in The Duty of Care to Protect Against Pure Economic Loss' (2020) 49(1) Australian Bar Review 82, 83.

140 Mark Robertson, 'Pure Economic Loss Claims: Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 and Its Lessons for Owners, Builders, Developers, Vendors, Purchasers, Professional advisors and Their Respective Insurers' (2016) 28(1) Insurance Law Journal 71,78.

141 Jackman (n 139) 83.

142 Sim (n 91) 39.

143 Jehan-Philippe Wood, David Wilson and Karen Francis, 'Apportion with Caution: Proportionate Liability Post─Selig v Wealthsure and Tips on Contracting Out of Proportionate Liability' (2016) 20(8) Inhouse Counsel 161, 162.

applied, contracting out will take place.[144] Understandably, the courts will show respect to an explicit clause in a contract that demonstrates a purpose to preclude proportionate liability regime, and the contracting parties are free to negotiate out of the framework.[145] The crucial issue is if the contractual responsibility conflicts with the regime; in such a case, the framework will not be applicable.[146]

Since A-Es are one of the vulnerable participants to risks deriving from professional services in construction industry, they can manage the risks by obtaining insurance. It is often said that PL has a close relationship with professional indemnity insurance.[147] Therefore, it is pertinent to focus on professional indemnity insurance.

7. Professional Indemnity Insurance

Insurance is critical in transferring and conducting risks in construction industry.[148] A multitude of policies are being obtained the construction stakeholders to tackle the risks.[149] Construction professionals are also facing multifarious risks, necessitating to purchase PI insurance to protect themselves from those risks.[150] It is widely regarded as a 'risk shifting mechanism'[151] in a construction project because it effectively shifts economic ramifications caused by the particular professional conduct to the insurer.[152]

---

[144] Nicholson (n 111) 12.

[145] Philip Carr, 'Proportionate Liability Update: Can Parties Contract out of Proportionate Liability?' (2013) 28(8) Australian Insurance Law Bulletin 124, 125.

[146] ibid.

[147] Jenny Baster and Martin Davis, 'Professional Indemnity Insurance─A Better Way' (2006) 159(6) Proceeding of the Institution of civil Engineers─ Civil Engineering 62, 62.

[148] Adeline Pang, 'Building Protection into Professional Risk: The Operation of Professional Indemnity Insurance in Construction' (2007) 18 Insurance Law Journal 68, 68.

[149] ibid 69.

[150] ibid.

[151] A Kanchana and C Javalah, 'Review on professional Indemnity Insurance for Quantity Surveyors' (Conference Paper, International Conference on Business management, 11 December 2020) 1947.

[152] Kim Rosenberg, 'Risky Business: Professional Indemnity Insurance as a Means of Managing "Professional'' Risks on Construction Projects' (2005) 16(3) Insurance Law Journal 228, 242.

According to *Digby Charles Jess,* PI insurance can be defined as 'an insurance which indemnifies the insured professional against pecuniary loss arising out of the professional's negligent act, error or omission which causes loss to be suffered by his or her client or a third party'.[153] It covers the insured's lawful obligation to reimburse compensation claims lodged within the insurance term and reported to the insurer due to the policy holder's inability to utilize 'reasonable care and skill' in rendering professional services.[154] The policy guards against 'negligent acts, errors, or omissions during the course of providing the professional services'.[155] Typically, the policy's language is intended to shield the covered construction professionals from PL resulting from the planning or building of an infrastructure.[156] In order to be covered by the PI insurance, the lawful obligation and professional negligence should have close nexus with the insured's professional services described in the policy.[157] However, claims resulting from poor craftsmanship in physical construction are not covered by the policy.[158]

In contrast to Australia,[159] the professional bodies in Bangladesh, namely IAB and IEB, have not implemented a requirement for PI insurance as a

---

[153] ND Hooker and LM Pryor, 'Professional Indemnity Insurance' (1990) 32 Journal of the Staple Inn Actuarial Society 37, 38.

[154] Chan (n 1) 398.

[155] Sean T Devenney and Gregg Bundschuh, 'Is the Line Blurring between General and Professional Liability Insurance and Insured Resk Project Delivery' (2009) 29(2) Construction Lawyer 15, 15.

[156] Bailey (n 15) 1404.

[157] ibid.

[158] Pang (n 148) 70.

[159] In Australia, the Building Act 1993(Vic) and the Design and Building Practitioners Act 2020 (NSW) require building practitioners like engineers to carry PI insurance. The Victorian Building Act issued multiple gazette notifications on the adoption of PI insurance for the professionals in line with the s 135, 137 A and 137D of the Building Act 1993 (Vic). Although the adoption of PI insurance is not mandated by law in other Australian jurisdictions, some professional organizations' membership requirements impose obligation to have the PI insurance. In addition, the Australian Procurement and Construction Council Inc. formulated Professional Indemnity Insurance Guidelines in the building and construction industry to assist public bodies in determining the scope and terms of such policy for the offerings rendered by the A-Es. See s 24, Design and Building Practitioners Act (NSW); s 135 Building Act 1993 (Vic); Victorian Government Gazette, Domestic Building Insurance Ministerial Order, No. S 98, Friday, 23 May 2003; Victorian Government Gazette, Domestic Building Insurance Ministerial Order, No. S 91, Thursday, 12 May 2005; Victorian Government Gazette, Domestic Building Insurance Material

prerequisite for obtaining a license to provide professional services to clients.[160] Despite the availability of PI insurance for construction professionals in Bangladesh, offered by companies like *Federal Insurance Co. Ltd*[161] and *Green Delta Insurance*[162], the policy has not gained widespread popularity due to the absence of necessary membership requirements in professional associations. In Bangladesh, PI insurance be made compulsory for those seeking professional accreditation with the IAB or IEB. This measure would serve to protect A-Es against financial liabilities resulting from any professional errors or negligence they may commit.

In professional negligence claim, defense costs are typically covered by the insurance company. Practically, PI insurance protects the construction professionals as well as the client and the third parties in case the professionals violate their obligation to exercise reasonable care and skill, ultimately bringing a win-win situation among the participants in the construction business.[163] The A-E, for example, may be liable for millions of dollars in damages in a large construction project, either acting alone or an employee of a partnership firm, leading the professionals or firm insolvent, leaving the aggrieved party without full compensation.[164] In that situation, PI insurance can bring about equilibrium among the parties involved, assisting the professionals or firm to remain afloat in the industry while ensuring that the victim receives entire compensatory damages. This is the way how PI insurance is benefiting all concerned in the construction domain.

Order No. S 19, Friday 17 January 2020; Victorian Government Gazette, Domestic Building Insurance Material Order No. G 26, 1st July 2021; Ian Bailey, Construction Law in Australia, (Thomson Reuters (Professional) Australia, 4th ed, 2018).

160 K Shamsuddin Mahmood, 'Can fidelity and liability insurance can serve the purpose?' The Daily Star (Dhaka, 4 September 2018) <https://www.thedailystar.net/news/law-our-rights/can-fidelity-and-liability-insurance-policy-serve-the-purpose-1628647> accessed 15 November 2023.

161 See Federal Insurance Co. Ltd (webpage) <https://www.federalinsubd.com/professional-indemnity-insurance/> accessed 16 November 2023.

162 See Green Delta Insurance (webpage) <https://green-delta.com/product-and-services/> accessed 16 November 2023.

163 Rosenberg (n 152) 242.

164 James Leabeater, Architects' Professional Indemnity Insurance in Anthony Speaight and Matthew Thorne (eds) Architect's Legal handbook: The Law for Architects (Routledge, 10th ed, 2021) 353, 353.

8. Conclusion

To properly allocate risk during construction contract negotiations, construction professionals such as A-Es must be aware of the liability and risk attached to their respective commitments. Due to their diverse role in a construction project, the A-Es are particularly exposed to assuming greater liability and risk. Historically, the common law principle of liability has not bothered to specify the percentage of responsibility for which A-Es are liable because the doctrine empowered the court to hand down compensatory order against any of the wrongdoers. However, proportionate liability regime calls for apportioning the proportion of liability for which A-Es, as a concurrent wrongdoer, can be held liable to pay compensation for their professional duties.

The construction contract, tort, as well as misleading and deceptive conduct are the common sources of PL of A-E. In the modern construction industry, although the construction contracts are usually followed various prescribed formats, the assessment of PL poses significant challenges for the court. Receiving claims from PI policy necessitates determining and apportioning the A-E's PL. The proportionate liability framework, which is relatively new approach, has undoubtedly been introduced in multiple industrialized countries including Australia given the financial vulnerability of the insurance industry. Although the insurance industry appears to gain more from the new liability framework, in reality, the industry through the PI policy has been instrumental in keeping things balance, comforting victim, and presumably lowering the premiums that ultimately fall on the principal, all of which are to the advantage of the construction business as a whole.

The exploration of construction professionals' PL in Bangladesh legal literature is relatively underdeveloped. In the jurisdiction, victims have shown a minuscule inclination to pursue civil or tortious redress against the A-Es for their wrongdoing, instead of opting for criminal recourse. Likewise, PI insurance for A-E is a primitive concept within the insurance industry of the country. The liability regimes and PI insurance are closely linked, necessitating collaborative efforts that encompass policy intervention, theoretical analysis, and empirical study. These endeavors aim to enhance the effectiveness of A-E's PL in the construction sector,

with the potential to establish a harmonious relationship among the various stakeholders involved in construction projects in Bangladesh.

Bibliography

Articles/Books

Abadi HA, Desmond TA and Alan C, 'The Meaning and Essential Nature of a Profession: A Multi-Perspective Approach' (2020) 30(1) Labor and Industry 85

Apurbo SR, 'Development of Tort Law in Bangladesh and Recent Cases Discissions' (Bangladesh Law Digest, 23 May 2018)

Bailey I, Construction Law in Australia (Thomson Reuters (Professional) Australia, 4th ed, 2018)

Bailey I and Matthew B, Construction Law in Australia (Thomson Reuters, 3rd ed, 2011)

Bailey J, Construction Law: Volume II (Routledge, 2nd ed, 2016)

— — Construction Law: Volume III (London Publishing Partnership, 3rd ed, 2020)

Bant E and Paterson JM, 'Exploring the Boundaries of Compensation for Misleading Conduct: The Role of Restitution under the Australian Consumer Law' (2019) 41(2) Sydney Law Review 155

Barker K and Others, The Law of Torts in Australia (Oxford University Press, 2011)

— — Jenny S, 'Drifting Towards Proportionate Liability: Ethics and Pragmatics' (2015) 74(1) The Cambridge Law Journal 49

Barrett K, Defective Construction Work: And the Project Team (John Wiley and Sons, 2008)

Baster J and Martin D, 'Professional Indemnity Insurance—A Better Way' (2006) 159(6) Proceedings of the Institution of Civil Engineers ─ Civil Engineering 62

Becker HS, Sociological Work: Method and Substance (Routledge, 1st ed, 2017)

Bell GM, 'Professional Negligence of Architects and Engineers Symposium on Professional Negligence' (1958) 12(3) Vanderbilt Law Review 711

Bertels I, 'Building Contractors in Late-Nineteenth-Century Belgium: From Craftsmen to Contractors' (2011) 26 Construction History 1

Carr P, 'Proportionate Liability Update: Can Parties Contract out of Proportionate Liability?' (2013) 28(8) Australian Insurance Law Bulletin 124

Chan L, 'Insuring Risk in Construction Project' (2019) 34 Building and Construction Law Journal 378

Choudhary S, 'Fundamentals and Urgent Reformation in Law of Torts' (2020) 20 Supremo Amicus 570

Cooney H, 'Causation and Contributory Negligence: The Use and Misuse of Casual Concepts in Cases of Misleading Conduct' (2022) 49 University of Western Australia Law Review 262

Davis JLR, 'Inquiry into the Law of Joint and Several Liability, Report of Stage One' (1994) 37 The Australian Construction Law Newsletter 36

Devenney ST and Gregg B, 'Is the Line Blurring between General and Professional Liability Insurance & Insured Risk/Project Delivery' (2009) 29(2) Construction Lawyer 15

Fain CF, 'Architect and Engineer Liability' (1995) 35(1) Washburn Law Journal 32

Goldberger J, 'Australian Construction Law: A Review of the Principles' (2021) 35(4) Commercial Law Quarterly 3

— — 'Proportionate Liability and the Contractual Allocation of Risk. Part 3 of 3' (2021) 35(2) Commercial Law Quarterly 27

Haider N, 'Development of the Laws of Tortious Liability in Bangladesh' (2021)32 (1) Dhaka University Law Journal 196

Haloush H, 'Rethinking Traditional Approaches of Parties' Autonomy in Construction Contracts: Decennial Liability as a Case Study' (2020) 62(6) International Journal of Law and Management 577

Hayford O, 'Proportionate Liability ─ Its Impacts on Risk Allocation in Construction Contracts' (2006) 22(5) Building and Construction Law Journal 322

— — 'Watch out! The duty to warn on construction projects' (2008) 24 Building and Construction Law Journal163

Hooker ND and Pryor LM, 'Professional Indemnity Insurance' (1990) 32 Journal of the Staple Inn Actuarial Society 37

Huda T, 'Vicarious Liability of Employers in the Law of Tort: Deciphering Bangladesh Beverage Industries v Rowshan Akhter and Others' (2016) 16(2) Bangladesh Journal of Law 119

Jackman A, 'Vulnerability, Autonomy and Protection: The Role of Actual and Hypothetical Contracts in the Duty of Care to Protect against Pure Economic Loss' (2020) 49(1) Australian Bar Review 82

Jackson R, 'Professional Liability' (1988) 136(5384) Renal Society of Australia Journal 536

Jones D, 'Proportionate Liability' [2004] Australian Construction Law Newsletter

— — 'Proportionate Liability Revisited' (2021) International Construction Law Review 195

Kanchana A and Jayalath C, 'Review on Professional Indemnity Insurance for Quantity Surveyors' (2021) 17 Proceedings of International Conference on Business Management

Kavanagh B and Miers C, 'Architects' Responsibility for the Work of Others in Speaight A and Thorne M(eds) Architect's legal Handbook: The Law for Architects (Routledge, 10th ed, 2021)

Kelley G, Construction Law: An Introduction for Engineers, Architects, and Contractors (RS Means Co., 2012)

Knell J and Ellison MCM, 'Engineer Issuing Defective Certification Held Liable to Third Party for Misleading and Deceptive Conduct' (2021) Australian Construction Law Bulletin 105

Mance J, Goldrein I and Merkin R, (eds), LLP Limited, Insurance Disputes, Vol 1 (at Service 3)
McDonald B 'Reforms to Liability in the Construction Industry' (1994) 2(3) Torts Law Journal 285

— — 'Proportionate Liability in Australia: The Devil in the Detail' 26(1) Australian Bar Review 29

— — and Carter J, 'The Lottery of Contractual Risk Allocation Add Proportionate Liability' (Legal Studies Research Paper No. 10/15, Sydney Law School, The University of Sydney, January 2010)

Mead P, 'The Impact of Contract upon Tortious Liability of Construction Professionals' (1997) 13(6) Building and Construction Law Journal 359

Nicholson K, 'Reflections on the Practical Operation of the (not very) Uniform Proportionate Liability Regimes in Australia' (Geoff Masel Lecture Series, Insurance Law Association, June 2014)

Pang A, 'Building Protection into Professional Risk: The Operation of Professional Indemnity Insurance in Construction' (2007) 18 Insurance Law Journal 68

Patten B and Hugh S, Professional Negligence in Construction (Routledge, 2nd ed, 2018)

Peckiene A, Andzelika K and Leonas U, 'Overview of Risk Allocation between Construction Parties' (2013) 57 Procedia Engineering 889

Pedley P, Essential Law for Information Professionals (Facet, 4th ed, 2019)

Robertson M, 'Pure Economic Loss Claims: Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 and Its Lessons for Owners, Builders, Developers, Vendors, Purchasers, Professional Advisors and Their Respective Insurers.' (2016) 28(1) Insurance Law Journal 71

Rogers A, 'Fairness or Joint and Several Liability' (2000) 8 Torts Law Journal 107

Rosenberg K, 'Risky Business: Professional Indemnity Insurance as a Means of Managing "professional" Risks on Construction Projects' (2005) 16(3) Insurance Law Journal 228

Sabbagh J, Bant E, and Paterson JM, 'Mapping Misleading Conduct: Challenges in Legislative Design' (2022) 49(2) University of Western Australia Law Review 144

Sapers C and Penny M, 'The Liability of Architects and Engineers in Nineteenth-Century America' (1988) 41(2) Journal of Architectural Education 39

Schneier MM, 'Design Professional Liability for Construction Worksite Accidents— How Arkansas Led the Way to a National Consensus Symposium: Construction Law in the Legal Academy: Panelists' (2022) 75(2) Arkansas Law Review 381

Sim D, 'Expanding Tort Claims in Construction Cases: Time to Contract?' (2003) 11(1) Tort Law Review 38

Stephenson A, 'Proportional Liability in Australia— The Death of Certainty in Risk Allocation in Contract' (2005) 22(1) International Construction Law Review 64

Surisetti DS, Kilkarni S, and Sangamalla M, 'Risk Management in Construction Industry' in Pal I and Kolathyar S(eds) Sustainable Cities and Resilience: Select Proceedings of VCDRR 2021, Lecture Notes in Civil Engineering, Vol 183 (Springer Singapore, 2022) 45

Swanton J and McDonald B, 'Reforms to the Law of Joint and Several Liability-Introduction of Proportionate Liability (1997) 5 Torts Law Journal 109

Tarin S, 'The Liability, Negligence and Insurances of an Architect or Engineer in Construction Projects.' (2018) 34(1) Australian Insurance Law Bulletin 7

Tyril J, 'Construction Liability' (1986) 2(1) Building and Construction Law Journal 7

Wade JW, 'An Overview of Professional Negligence' (1986) 17(4) Memphis State University Law Review 465

Wickins R, Professional Liability, Third Edition (Hong Kong University Press, 1996)

Wood J, David W and Karen F, 'Apportion with Caution: Proportionate Liability Post-Selig v Wealthsure and Tips on Contracting out of Proportionate Liability.' (2016) 20(8) Inhouse Counsel 161

Woodhouse B and Clementine R, 'High Court Limits Scope of Proportionate Liability Claims' 67(6) Governance Directions 368

Ian Y, Architects and Engineers in Hodgin R (ed) Professional Liability: Law and Insurance (Routledge, 2nd ed, 2020) 105

Zahir Enamul ATM and Anzu S, 'Interpretation of Law of Tort by the Apex Court of Bangladesh' (2018) 9 Rajshahi University Law Review 14

Reports

Davis JLR, 'Proportionate Liability: Proposals to Achieve National Uniformity' (Report, 2008)

Horan T, 'Proportionate Liability: Towards National Consistency' (Report, September 2007)

New South Wales Law Reform Commission, 'Community Law Reform Program Eighteenth report: Contribution Among Wrongdoers: Interim Report of Solidarity Liability' (Report No. 65, 1990)

Newspaper Reports

Islam Md R, Legal Remedies for Professional Negligence of Lawyers, The Daily Star (Dhaka, 31 July 2018)

Mahmood KS, 'Can fidelity and liability insurance can serve the purpose?' The Daily Star (Dhaka, 4 September 2018)

Cases

Chaterine Masud and Others v Md Kashed Miah and Others (2018) 70 Dhaka Law Report (HCD) 349, (Special Statutory Jurisdiction), Arising out of Transferred Miscellaneous Case No. 01 of 2016 (Bangladesh)

Children's Charity Bangladesh Foundation v Bangladesh (2018) 70 Dhaka Law Report (HCD) 49, Arising out of Writ Petition No. 12388 of 2014 (Special Original Jurisdiction, HCD) (Bangladesh)

R M Turton & Co Ltd (In Liquidation) v Kerslake and Partners [2000] 3 New Zealand Law Reports 406 (New Zealand)

Woolcock Street Investments Pty Ltd v CDG Pty Ltd (Formerly Cardno and Davies Australia Pty Ltd) and Another (2004) 205 Australian Law Report 522 (Australia)

Legislations

Building Act, 1993 (Victoria) (Australia)

Constitution of the People's Republic of Bangladesh

Design and Building Practitioners Act, 2020 (New South Wales) (Australia)

The Contract Act, 1872 (Act No. IX of 1872) (Bangladesh)

The Consumers' Rights Protection Act, 2009 (Act No. XXVI of 2009) (Bangladesh)

The Fatal Accidents Act 1855 (Act No. XIII of 1855) (Bangladesh)

The Specific Relief Act, 1877 (Act No. I of 1877) (Bangladesh)

Websites

Institute of Architect, Bangladesh, <http://www.iab.com.bd/Site/History> accessed 12 November 2023

Institute of Engineers, Bangladesh, <https://www.iebbd.org/pages/about.jsp> accessed 12 November 2023

Central Procurement Technical Unit, IMED, Ministry of Planning, Government of the People's Republic of Bangladesh <https://cptu.gov.bd/standard-documents/standard-tender-document.html> accessed 14 November 2023

The Future Law, <http://futrlaw.org/rise-constitutional-tort-south-asia/> accessed 15 November 2023

Standard of Care for Design Professionals in Rapidly Changing Times, New Orleans City Business (LA), 12 June 2020, Regional Business News, <https://discovery.ebsco.com/c/xppotz/viewer/html/afhvckcqnn> 16 November 2023

Federal Insurance Co. Ltd., <https://www.federalinsubd.com/professional-indemnity-insurance/> accessed 16 November 2023

Green Delta Insurance, <https://green-delta.com/product-and-services/> accessed 16 November 2023

The Future of Justice: Embracing Artificial Intelligence (AI) in Bangladesh Courts

Md. Mahboob Sobhani*

Abstract

In the backdrop of the Fourth Industrial Revolution, where Artificial Intelligence (AI) stands as a transformative force, the integration of AI in various sectors, including the legal and judicial systems, becomes imperative for Bangladesh. This research explores the significance, challenges, and opportunities of AI adoption in the Bangladeshi legal framework amidst the digital revolution. Employing an exploratory research design, the study investigates the scope for integrating cutting-edge AI technology in Bangladesh's judiciary, aiming to accelerate the delivery of quality judicial services. The paper delves into global trends in AI application in the legal sector, identifies specific scopes and challenges for AI implementation in Bangladeshi courts, and proposes AI models tailored to the country's judicial needs. Key findings highlight AI's potential to streamline legal procedures, improve decision-making, and enhance judicial efficiency, albeit facing challenges such as AI bias, ethical considerations, and data security issues. The study advocates for a human-centric and regulated approach to AI integration in the legal sector, emphasizing the need for regulatory measures to address AI prejudices. Furthermore, the paper underscores the role of AI in reducing case backlog, enhancing judicial efficiency, and aiding decision-making, proposing actionable AI models to support Bangladeshi courts. Ultimately, the research underscores the necessity for Bangladesh's judiciary to embrace AI and modern technologies to ensure efficient justice delivery and contribute to the nation's vision of a 'Smart Bangladesh'.

Keywords: Judicial Artificial Intelligence, Algorithm Justice, Robot Judge, E-Judiciary, Techno-Legal Affairs.

1. Introduction

In an era of the Fourth Industrial Revolution, where artificial intelligence (AI) is seen as one of the most significant technological advancements, the need to embrace AI in various sectors, including the legal and judicial systems, becomes imperative for Bangladesh. Globally, the integration of

---

* Joint District Judge, 4th BJS, Currently deputed as a Legal Domain Expert on ICT at the Aspire to Innovate (a2i) Programme, ICT Division. He is an Australia Awards Scholar and a Melbourne Law School Graduate.

AI into traditional judicial systems represents a significant transformation in the field of justice. As society becomes more interconnected and reliant on advanced technologies, the legal sector is evolving to keep pace, but the justice institutions have been slower than other government sectors to intensive use of technologies.[1] Nonetheless, this slow yet sure shift offers numerous potential benefits, such as improving efficiency and accessibility in courts. The growth also presents challenges, particularly in preparing the court, judges and other legal professionals for the adoption of high-tech solutions.

The courtyard of Bangladesh also finds the tint of digitization amidst the fast-moving digital world. The cornerstone of digitisation in the Bangladesh judicial system is to make justice delivery simpler, and cheaper reducing the backlog of 4.2 million cases.[2] To that cause, I argue with my hypothesis of this paper that using high-tech models like AI as an auxiliary force can bolster that optimism enabling the justice delivery system.

Against such a backdrop, the premise of this article is that of exploring the importance, challenges, and opportunities of AI in the judiciary from a global perspective, with a focus on how AI can be implemented in the Bangladeshi legal system in the context of the digital revolution.

The foundation of the paper lies in the exploratory research design. It is ‘exploratory’ because the research question, ‘whether there is the scope of use of cutting-edge AI technology in Bangladesh judiciary and whether that could accelerate the quality judicial services delivery’, is not answered in academia before. Hence, the study will probe into this nobel issue for a more precise investigation testing both the hypothesis and research question.

---

1 Cinara Rocha and João Carvalho, ‘Artificial Intelligence in the Judiciary: Uses and Threats’ EGOV-CeDEM-ePart 2022, September 06–08, 2022, Linköping University, Sweden (Hybrid) 1’.

2 Ashutosh Sarkar, ‘Cases Pile up in Courts’ (The Daily Star, 27 April 2023) <https://www.thedailystar.net/news/bangladesh/news/cases-pile-courts-3305171> accessed 20 April 2024.

The paper is organized into six parts. It begins by discussing the terminology and concepts related to AI and its application in the legal sector. It then examines the global trends in AI and the challenges faced by legal sectors worldwide as they embrace AI technologies. Next, the paper delves into the specific perspectives of AI in Bangladesh's courts, exploring the potential scopes and challenges of implementing AI in the country's legal system. The paper then discusses the development of a model tailored to the needs and circumstances of the Bangladeshi courts, considering the necessary balance between human expertise and AI-driven processes. Finally, this paper showcases the research finding with the concluding remarks.

I believe the paper is relevant to the ongoing context of building a smart judiciary by 2041. The digitisation process. In the context of the introduction of modern technologies in the judicial system where the use of IT has been at a rudimentary level,[3] my efforts may contribute to the present stock of knowledge for developing a standard protocol for AI use.

1.1 Terminology

The term 'artificial intelligence' and a few others associated with it become buzzwords nowadays, and are heavily loaded with different preconceptions and assumptions. Hence, at the outset, it is crucial to provide clear terminology before digging deep into the research topic. For this paper, the following technical terms have been used:

1.1.1 Artificial Intelligence (AI)

In 1955, Stanford Professor John McCarthy first coined artificial intelligence as "the science and engineering of making intelligent machines".[4] It is a non-biological autonomous entity; *autonomy* being the ability to give rules (ancient greek: *nomos*) to oneself (ancient greek: *auto*).[5] As an advanced computer system, AI is capable of performing

---

[3] Mahboob Sobhani, 'Leveraging Digitisation in Bangladesh Judiciary: Prospects and Challenges' Jounal of Judicial Administration Training Institute (2021) 21 44.

[4] John McCarthy, 'WHAT IS ARTIFICIAL INTELLIGENCE?' Stanford University Revised 2007, 1 <http://jmc.stanford.edu/articles/whatisai/whatisai.pdf> accessed 19 April 2024.

[5] For other definitions see: Shane Legg and Marcus Hutter, 'A Collection of Definitions of Intelligence' [2007] 157 Frontiers in Artificial Intelligence and Applications 17. See also:

complex tasks that historically only a human could do, such as reasoning, making decisions, or solving problems. Thus, intelligence attained by a computer, machine or robot artificially is the replication of the natural intelligence of a human being.

AI is simply developing a machine that thinks like and acts like a human mind using machine learning.[6] The computer has to learn how to respond to certain actions, so it uses algorithms[7] and historical data. The actual use of AI largely consists of machine learning applications that depend on a huge amount of data used to recognise patterns on their own and make predictions[8] which have the potential to drive considerable transformative innovations for institutions and society.[9] Achieving this end requires three key components, firstly, Computational systems, secondly, Data and data management and finally, Advanced AI algorithms (code).[10] The more humanlike the desired outcome, the more data and processing power required. We unknowingly take assistance from AI every day.

1.1.2 Algorithm

A process, instructions or set of rules to be followed in calculations or other problem-solving operations, especially by a computer.[11]

Ugo Pagallo, The Laws of Robots: Crimes, Contracts, and Torts (Law, Governance and Technology Series 10, Springer 2013) 2ff; Neil M. Richards and William D. Smart, 'How Should the Law Think About Robots?' in Ryan Calo, A. Michael Froomkin, Ian Kerr (eds), Robot Law (Edward Elgar Publishing 2016) 5-7.

6 See para 3

7 See para 2

8 Shai Shalev-Shwartz and Shai Ben-David, Understanding Machine Learning: From Theory to Algorithms (1st edn, Cambridge University Press 2014) 19 <https://www.cambridge.org/core/product/identifier/9781107298019/type/book> accessed 18 April 2024.

9 O. Ballester, An artificial intelligence definition and classification framework for public sector applications, in: DG.O2021: The 22nd Annual International Conference on Digital Government Research, 2021, p. 67–75. URL: https://doi.org/10.1145/3463677.3463709. doi:10.1145/3463677.3463709.

10 'What Is Artificial Intelligence or AI and Why Is It Important | NetApp' <https://www.netapp.com/artificial-intelligence/what-is-artificial-intelligence/> accessed 19 April 2024.

11 Standford University, Human-Centred AI: Artificial Intelligence Definitions 1 https://hai.stanford.edu/sites/default/files/2020-09/AI-Definitions-HAI.pdf accessed 19 April 2024.

1.1.3 Machine Learning

The capability of machines to imitate intelligent human behaviour. This branch of AI enables computers to learn from training data without explicit programming.[12]

1.1.4 Natural Language Processing (NLP)

NLP is a field within computer science that uses machine learning to analyze text and speech data, enabling computers to understand human language.[13] This technology empowers computers to understand, manipulate, and interpret human language, facilitating communication with people in their own language and streamlining other language-related tasks. For instance, NLP allows computers to read text, listen to speech, analyze it, gauge sentiment, and identify key elements.[14]

1.1.5 Foundation Model

It's a machine learning model that is trained on large, unlabeled datasets and is then fine-tuned for a variety of applications.[15] It can understand patterns (logic, image, shape, number), structures, and representations, which allows to apply information about one situation to another, build upon its internal knowledge, and perform multiple computations simultaneously. Prominent examples of the Model are applications like OpenAI ChatGPT and Microsoft's Florance.[16]

1.1.6 The Internet of Things (IoT)

IoT describes the network of physical objects—"things"—that are embedded with sensors, software, and other technologies to connect and exchange data with other devices and systems over the internet.[17]

---

12 ibid

13 ibid

14 ibid

15 01 AI and others, 'Yi: Open Foundation Models by 01.AI' (arXiv, 7 March 2024) 3 <http://arxiv.org/abs/2403.04652> accessed 19 April 2024.

16 ibid

17 John McCarthy, 'WHAT IS ARTIFICIAL INTELLIGENCE?' Stanford University Revised 2007, 1 <http://jmc.stanford.edu/articles/whatisai/whatisai.pdf> accessed 19 April 2024.

1.1.7 Computer Vision

Computer vision is a field of AI that allows computers to understand and identify people and objects in images and videos.[18] It uses machine learning and deep learning models to process data from cameras and videos, and then classify and identify objects. Computer vision can also simulate how humans see and understand their environment.[19]

2. A World Moving with AI

AI is a disruptive new technology[20] and its prognosis is highly uncertain.[21] It has emerged as the most influential and groundbreaking technology that has transformed various aspects of modern society. Its swift progress and extensive uses have significantly affected many areas of contemporary life. Its contributions to efficiency, productivity, healthcare, and sustainability are undeniable.[22] The human-centric, responsible and ethical development and use of AI have the potential to continue shaping our society positively, enhancing our lives, and creating new opportunities for innovation and growth.[23] However, for this paper, the discussion is kept limited in this chapter to the application of AI in the legal sector.

2.1 AI in the Legal Domain

As AI technology continues to evolve, the law is by no means excluded from this development. The integration of AI in the legal sector holds immense potential to transform the legal landscape for the better and it is evident.[24] During a visit to Rensselaer Polytechnic Institute in April 2017, John Roberts, Chief Justice of the Supreme Court of the United States, was asked whether he could foresee a day, when AIs would assist with courtroom fact-finding or, more controversially even, judicial decision-making.[25] 'It's a day that's here,' he said, 'and it's putting a significant

[18] ibid

[19] ibid

[20] Eugene Volokh, 'Chief Justice Robots' 68 DUKE LAW JOURNAL 1137.

[21] 'Steve Fuller, Review: The Age of Em: Work, Love and Life When Robots Rule the Earth by Robin Hanson VL- 1, 2017, Journal of Posthuman Studies 106.

[22] ibid

[23] ibid

[24] For para 2.1.2 Use of AI in the Legal Sector for further discussion.

[25] Adam Liptak, 'Sent to Prison by a Software Program's Secret Algorithms' The New York Times (1 May 2017) <https://www.nytimes.com/2017/05/01/us/politics/sent-to-prison-by-a-software-programs-secret-algorithms.html> accessed 18 April 2024.

strain on how the judiciary goes about doing things.'[26] Thus, based on the intriguing comment this paper now puts a specific focus on the scope of AI in the legal paradigm.

2.1.1 Scopes of AI Use in the Legal Domain

A recurring and controversial question in academia is whether AI could replace the work of judges. Scholars speculate that AI will gradually replace judges, prosecutors, and lawyers.[27] Other authors believe that AI applications will not get to decide judicial cases but support decision-making, as creativity would be needed to choose between competing rules and create new ones.[28] To this regard, the European Commission for the Efficiency of Justice (CEPEJ) affirms that applications of AI in the Judiciary are restricted to machine learning applications specialised in solving one problem as follows:

> In most occasions, the objective of these systems is not to reproduce legal reasoning but to identify the correlations between the different parameters of a decision and through the use of machine learning, to infer one or more models. Such models would be used to 'predict' or 'foresee' a future judicial decision.[29]

At present use of AI in the legal domain is gaining traction as technology continues to shape various industries. AI can play a crucial role in streamlining legal processes, enhancing decision-making, and improving the overall efficiency of the judicial system. By analyzing vast amounts of data quickly and accurately, AI algorithms can help identify patterns, predict outcomes, and even assist in legal research. This not only saves time and resources but also reduces human error in complex legal cases.

---

[26] ibid.

[27] EnaJus, The challenges of justice by artificial intelligence [Youtube video, 2021. URL: <https://www. youtube.com/watch?v=EMC-5NYJLjA&t=2510s> assessed on 19 April 2024.

[28] P. Rubim, B. Fortes, 'Paths to digital justice: Judicial robots, algorithmic decision-making, and due process' (2021) 7 Asian Journal of Law and Society 453, 469

[29] European Commission for the Efficiency of Justice (CEPEJ), European ethical charter on the use of artificial intelligence in judicial systems and their environment, (2018) 29.

Reviewing the literature concerned with AI uses in the legal sector, I've revealed eight categories which emerged from the content analyses considering the type of applications and functionalities. The main solutions I've found are:

i. **Similar Cases Push Systems:** Designed to automatically push similar judicial cases to help judges and staff reflect on specific cases. Generally, the system works by inserting keywords, and then similar cases (or related to the subject) are pushed for human review.[30]
ii. **Litigation Risk Assessment Systems:** Systems based on judicial statistics and analysis of similar cases give basic information that could evaluate the possible judgment result in advance and help parties decide whether to enter the litigation process.[31]
iii. **Document-assisted Generation Systems:** Application that automatically generates decisions to help judges write their judicial documents. May include suggestions of the applicable law and penalty.[32]
iv. **Speech-to-text applications:** The system converts spoken language into written text used in courtroom records or hearings.[33] This technology is used to record testimony with voice recognition, analyze case materials, and verify information from databases in real-time.
v. **Risk Prediction Systems:** The application used in the penal system is supposed to predict risks for violent crime, sexual offending, and recidivism risks, helping judges decide about depriving people of their freedom.[34]

---

30 N. Wang, 'Black box justice: Robot judges and ai-based judgment processes in china's court system' (2020) International Symposium on Technology and Society, Proceedings 58, 65.

31 A. Završnik, 'Criminal justice, artificial intelligence systems, and human rights' (2020) 20 ERA Forum 567–583.

32 J. Yu, J. Xia, 'E-justice evaluation factors: The case of smart court of china' (2020) 10 Information Development 38

33 N. Chugh, 'Risk assessment tools on trial: Lessons learned for "ethical ai" in the criminal justice system' (2021) International Symposium on Technology and Society 44.

34 R. Fogliato, A. Xiang, Z. Lipton, D. Nagin, A. Chouldechova, 'On the validity of arrest as a proxy for offense: Race and the likelihood of arrest for violent crimes' (2021) AIES

vi. **Answering Questions Robots:** The application answers questions submitted to the Judiciary via a keyboard or verbally concerning a relevant case, verdicts, laws, how to bring a lawsuit, how to investigate their legal rights, and how to obtain evidence.[35]

vii. **Emotion Recognition Systems:** The system can identify the speaker's emotional state, improving the information obtained in the courtroom. While this application is already deployed (in Poland and Italy), similar innovative AI research promises to disrupt hearing and trials by better-predicting deception than humans.[36]

viii. **Filtering Systems:** The system organises information according to a defined criterion and takes action, such as grouping cases and returning or allocating the cases to judges.[37]

In short, AI technology creates scopes to accelerate organizational priorities and navigate critical business challenges. It allows legal and judiciary stakeholders to operate more effectively by automating repetitive and time-consuming duties. It enables the judges (also lawyers) to handle easily the downstream chores (e.g., summarization of legal judgments, legal search, case law analysis, review documents, due diligence analysis of contracts) and focus more on the decision-making in cases. Therefore, these adduced findings of this chapter will be the guideline while modelling the AI program from the Bangladesh court's perspective.

2.1.2 Use of AI in the Legal Sector

If we look around the world we can see there are groundbreaking and astounding use of AI and AI-powered programs doing fascinating things in the judiciary. To limit the discussion the recent AI development in the English, Indian and Chinees are discussed below. These are chosen due to the legacy of common law heritage, approximity in the legal and social

---

2021 - Proceedings of the 2021 AAAI/ACM Conference on AI, Ethics, and Society 100–111.

35 E. Troulinos, 'The prospects of artificial intelligence in a court information system' (2020) 2844 CEUR Workshop Proceedings 119–122.

36 Z. Wu, B. Singh, L. Davis, V. Subrahmanian, 'Deception detection in videos' (2017) <www.aaai.org.> accessed 19 April 2024.

37 W. Sousa, R. Fidelis, P. Souza Bermejo, A. Silva Gonçalo, B. Souza Melo, 'Artificial intelligence and speedy trial in the judiciary: Myth, reality or need? a case study in the Brazilian supreme court' (2022) 39 Government Information Quarterly 101660.

phenomenon and possibility of tailoring the notions in Bangladesh perspective.

From English jurisdiction, one fascinating example of AI use is noteworthy. An AI lawyer, CaseCruncher Alpha, has beat 100 lawyers in a challenge. For 775 predictions the computer won hands down, with CaseCruncher getting an accuracy rate of 86.6%, compared with 66.3% for the lawyers.[38] Thus, CaseCruncher Alpha is already predicting judicial decisions with high accuracy. Law firms in England also apply e-discovery software[39] to cases that involve many documents to be screened. Technology-assisted legal review is also starting to receive judicial stamps of approval.[40]

In India, AI is being used in the judicial system to improve case management, scheduling, and legal research. Indian Supreme Court Portal for Assistance in Courts Efficiency (SUPACE) launched in 2021 uses machine learning to deal with large chunks of case data.[41] It is a tool that collects relevant facts and laws and makes them available to a judge. It is not designed to take decisions, but only to process facts and to make them available to judges looking for input for a decision. SUVAS (Supreme Court Vidhik Anuvaad Software) is a machine-assisted translation tool that can translate English-language documents, orders, and judgments into ten vernacular languages.[42] The Supreme Court has also released an official application that translates legal documents and orders written in English into nine vernacular languages.[43]

---

38 Inés Casserly, 'AI Fought the Law, and Won' (TNW | Artificial-Intelligence, 1 November 2017) <https://thenextweb.com/news/ai-battles-human-lawyers-and-wins> accessed 20 April 2024; 'The Robot Lawyers Are Here- and They're Winning' <https://www.bbc.com/news/technology-41829534> accessed 20 April 2024.

39 See: John Markof, 'Armies of Expensive Lawyers, replaced by Cheaper Software' New York Times (New York, 4 March 2011) ; Hug Son, 'JPMorgan software does in seconds what took lawyers 360,000 hours' The Independent (London, 28 February 2017) all accessed 18 April 2024

40 Ibid.

41 'SUPACE - Optimize IAS' <https://optimizeias.com/supace-2/> accessed 20 April 2024.

42 'AI-Powered Courts Can Rewrite Future of Judiciary' <https://www.newindianexpress.com/opinions/2023/Nov/02/ai-powered-courts-can-rewrite-future-of-judiciary-2629474.html> accessed 20 April 2024.

43 ibid.

China’s smart courts, smart inspection and other key projects have been fully rolled out, such as the “smart court navigation system” and “intelligent push system” launched by the Supreme People’s Court in 2018.[44] Besides, Beijing’s “Rui Judge” intelligent research system, Shanghai’s “206” criminal case intelligent auxiliary case system (206 system), Hebei’s “Smart Trial 1.0” trial support system and other local courts launched AI products, not only comprehensively improves judicial efficiency, but also provides convenient and efficient technical support for judges to hear cases.[45] A court in the city of Hangzhou located south of Shanghai started employing AI in 2019. The judge's assistant program called Xiao Zhi 3.0, or "Little Wisdom," first assisted in a trial of 10 people who had failed to repay bank loans.[46] Previously, it would have taken 10 separate trials to settle the issue, but with Xiao Zhi 3.0, all the cases were resolved in one hearing with one judge and a decision was available in just 30 minutes.[47] At first, Xiao Zhi 3.0 took over repetitive tasks such as announcing court procedures during hearings.[48]

In countries such as the US, Denmark, Japan, Singapore, and Australia AI is being used to perform legal research, review documents during litigation, and conduct due diligence analysis contracts to determine whether they meet pre-determined criteria and to even predict case outcomes.’[49]

Overall, these nations have increasingly turned to AI to streamline and enhance the judicial process, judicial service delivery and access to justice. AI assists judges in predicting case outcomes, analyzing evidence, and identifying potential biases, ultimately leading to fairer and more accurate judgments. The adoption of AI in courts demonstrates the potential to

---

44 ‘Human Judges in the Era of Artificial Intelligence: Challenges and Opportunities’ APPLIED ARTIFICIAL INTELLIGENCE 2022, VOL. 36 (1) 1025 <https://www.tandfonline.com/doi/epdf/10.1080/08839514.2021.2013652?needAccess=true> accessed 19 April 2024.

45 ibid.

46 ‘Benjamin Minhao Chen and Zhiyu Li, HOW WILL TECHNOLOGY CHANGE THE FACE OF CHINESE JUSTICE? Columbia Journal of Asian Law 2020 34(1) 15’.

47 ibid.

48 ibid.

49 https://www.gadgetsnow.com/tech-news/iit-kharagpur-researchers-evolve-ai-aided-method-to-automate/articleshow/73355421.cms

revolutionize the legal system, ensuring a more effective and transparent administration of justice globally.

3. Challenges of AI in Legal Sectors: The Global Trend

The legal sector is witnessing a transformative phase with the integration of AI. This evolution is not just a trend but a significant shift in how legal systems and professionals approach their work. While the benefits of AI in the legal field are substantial, it comes with several challenges. This chapter deals with those challenges which warrant understanding, and addressing for a smooth and effective integration of AI technology.

A report by the European Commission for the Efficiency of Justice (CEPEJ)[50] is noteworthy to discuss AI's challenges in the legal arena. CEPEJ highlights concerns about potential threats to the use of AI for the principles of Justice when approving the *European Ethical Charter on the Use of Artificial Intelligence* in Judicial Systems and their environment. The principles posed in the document are: 1) respect for fundamental rights, 2) non-discrimination, 3) quality and security, 4) transparency, impartiality and fairness, and 5) under user control. The threats posed by AI to the Judiciary concerning possible break of these principles. This proposition is explained further in the discussion below.

3.1 AI and Bias

Bias is the most cited risk in the literature which can violate fundamental rights and result in discrimination.[51] AI decision-making might reveal different human-made, structural biases that originate from the legal system, the AI's training data or the AI's programming itself.[52] These biases can be intentional or unintentional.

---

[50] 'European Commission for the Efficiency of Justice (CEPEJ), European ethical charter on the use of artificial intelligence in judicial systems and their environment, 2018 7'.

[51] F. Contini, Artificial intelligence and the transformation of humans, law and technology interactions in judicial proceedings, Law, Technology and Humans 2 (2020) 13.

[52] Sandra Wachter et al, 'Transparent, explainable, and accountable AI for robotics' [2017] 2/6 Science Robotics eaan6080. See also: Christian Joachim Gruber and Iris Eisenberger, 'Wenn Fahrzeuge selbst lernen: Verkehrstechnische und rechtliche Herausforderungen durch Deep Learning?' in Iris Eisenberger et al. (eds), Autonomes Fahren und Recht [2017] 51, 57ff; Niki Kilbertus et al., 'Avoiding Discrimination through Causal Reasoning' [2017] 1ff ; Brent Mittelstadt et al, 'The ethics of algorithms: Mapping the debate' (2016) July-Dec, Big Data & Society 7; Sue Newell and Marco Marabelli,

Intentional bias refers to those derived by decision-makers when creating the algorithms and representing their value judgments and priorities.[53] For instance, system developers' bias is the result of lacking expertise of legal norms of computer programmers making certain improper assumptions while coding. Thus, the judicial decision-making, which is the judge's exclusive prerogative, is eventually taken indirectly by the programmers since they are the creators of the system's rules. Scholars, e.g., Contini affirms that

> … while systems developers delegate a suggestion to the system, they end up achieving a delegation of the decision they are supposed to support.[54]

On the flip side, unintentional bias occurs when algorithms replicate the existing bias in the real world.[55] Using skewed data sets can lead to poor predictive accuracy models. For example, the most famous example of unintentional bias is reflected in *State v. Loomis*[56] in the US jurisdiction. A widely used AI application for criminal justice in the USA, called COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) which evaluates the potential of recidivism[57] of criminal defendants and helps judge decision-making found to be racially biased. This risk assessment software used for predicting the likelihood of defendants committing a future crime was found racially discriminating

---

'Strategic opportunities (and challenges) of algorithmic decision-making: A call for action on the long-term societal effects of ″datification‶' [2015] 24 Journal of Strategic Information Systems 3, 6 all accessed 18 April 2024.

53 Cinara Rocha and João Carvalho, 'Artificial Intelligence in the Judiciary: Uses and Threats' EGOV-CeDEM-ePart 2022, September 06–08, 2022, Linköping University, Sweden (Hybrid) 4.

54 Ibid 14.

55 P. Rubim, B. Fortes, Paths to digital justice: Judicial robots, algorithmic decision-making, and due process, Asian Journal of Law and Society 7 (2021) 453–469.

56 State v Loomis [2016] WI 68, 371 Wis. 2d 235, 881 N.W.2d 749 <https://harvardlawreview.org/print/vol-130/state-v-loomis/> accessed 19 April 2024.

57 "Recidivism refers to a person's relapse into criminal behaviour, often after the person receives santions or undergoes intervention for a previous crime." See NIJ (National Institute of Justice) website of the United States government, Department of Justice. < https://nij.ojp.gov/topics/corrections/recidivism > accessed 19 April 2024.

against African American defendants.[58] ProPublica found that black defendants were far more likely than white defendants to be incorrectly judged to be at a higher risk of recidivism. In contrast, white defendants were more likely to be incorrectly flagged as a low risk than black defendants.[59]

Furthermore, AI exacerbates discrimination in court cases making justice harder to obtain. A recent study from the University College London shows that computers were able to predict over 500 of the decisions of the European Commission on Human Rights with 79% accuracy.[60] Computers can/will predict what the judges are going to do. They will expect the outcome. Thus if the judges don't perform according to the expectation/prediction raised by the AI that will be a legitimacy problem for the court.

3.2 Ethical and Fundamental Rights Considerations

Fundamental rights and ethical considerations are especially relevant when discussing the possible AI applications in the field of justice. In 2022, EUROJUST, The European Union Agency For Criminal Justice Cooperation (EUROJUST) has recognized the most relevant fundamental rights of the EU Charter of Fundamental Rights and the European Convention of Human Rights (ECHR) to be analysed in terms of AI applications in the field of law enforcement and judiciary. These are human dignity, respect for private and family life, the protection of personal data, equality before the law, non-discrimination, and the right to an effective remedy and a fair trial.[61] However, there are numerous examples where these fundamental rights are violated using AI technology like deepfake and deepnude. BBC report of March 2024 reveals that

---

58 Julia Angwin et al 'Machine Bias—ProPublica' <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> accessed 18 April 2024.

59 J. Larson, S. Mattu, L. Kirchner, J. Angwin, How we analyzed the compas recidivism algorithm— propublica, 2016.< https://www.propublica.org/article/ how-we-analyzed-the-compas-recidivism-algorithm > accessed 18 April 2024.

60 'AI and Predictive Justice in Europe' (euronews, 29 January 2019) <https://www.euronews.com/my-europe/2019/01/28/ai-and-predictive-justice-in-europe> accessed 19 April 2024.

61 'EUROJUST and eu-LISA, Joint Report on Artificial Intelligence Supporting Cross-Border Cooperation in Criminal Justice, 2022,' 13 < https://www.eulisa.europa.eu/Publications/Reports/AI%20in%20Justice%20-%20Report.pdf> accessed on 19.04.2024.

eminent figures including US President Joe Biden, London Mayor Sadique Khan, and actress Taylor Swift have become the victims of AI-powered deepfake tools.[62] Their explicit images and mimicked conversations sew the seeds of mistrust and malicious fiction in social media.

3.3 Opacity in the AI System

Opacity relating to the AI system is another growing concern. If litigants don't know the construction and operation of the system, suggestions given by AI may be questionable.[63] Technical and legal 'black boxes' refer to a lack of transparency or difficulty in understanding the algorithm.[64] The technical black box occurs when the algorithm process is unknown even to its developers or is impossible to understand for humans due to our cognitive limitations. Legal black box concerns relate to the public disclosure of algorithmic code legally protected by contracts.

3.4 Technology Reliance and Manipulation

The overreliance on technology is another risk. Humans tend to become reliant on automated decision-making systems. They trust statistical data and begin to give up on their own independent judgment and become blind to system errors.[65] As Contini states, "the decision remains with the judge, but it can be difficult for the judge to resist these 'disinterested' and 'science-based' suggestions".[66]

3.5 Data Protection

Data to be used by AI must be either open public data or licensed data. The protection of personal data, both concerning parties/witnesses and

---

62 How AI and Deepfakes Are Changing Politics | BBC News (Directed by BBC News, 2024) <https://www.youtube.com/watch?v=wxEpPin8MWw> accessed 19 April 2024.

63 Ashley S. Deeks, The Judicial Demand for Explainable Artificial Intelligence, 119 Columbia Law Review, 1829–1850 (2019).

64 O. Ballester, An artificial intelligence definition and classification framework for public sector applications, in: DG.O2021: The 22nd Annual International Conference on Digital Government Research, 2021, p. 67–75

65 J. Thornton, Cost, accuracy, and subjective fairness in legal information technology: A response to technological due process critics, New York University Law Review 91 (2016) 1821.

66 'F. Contini, Artificial Intelligence and the Transformation of Humans, Law and Technology Interactions in Judicial Proceedings, Law, Technology and Humans 2 (2020) 13..Pdf'.

judges/prosecutors, also arises as an important issue from the use of AI in Justice. Justice collects critical information about citizens, and researcher debates involve the difficulty of balancing privacy in court records versus the right of public access to them.[67]

3.6 The Digital Divide

The digital divide is highlighted as a threat to AI deployment in the justice domain too. It includes the skills to use digital services and access the internet and devices.[68] Susskind emphasises that it can be an obstacle to Justice, and it is an important challenge to face. However, he points out solutions such as the availability of a traditional paper-based physical court system in parallel or "some kind of practical help and support to those unable to use the online court services".[69] He also argues that today's traditional courts exclude many people because of their physical or other disabilities.

3.7 Absence of AI Concept Suitable for Legal Science

The current landscape of legal science lacks a comprehensive understanding of artificial intelligence (AI) concepts that are specifically tailored to its unique needs. Spitsin & Tarasov, considering the doctrinal aspect, argue that a problem still unsolved is the absence of an AI concept suitable for legal science.[70] The authors affirm that the current definitions of AI are non-judicial (technical), so they don't bring enough clarity required to the paradigm of the science of law. This absence of a nuanced approach to AI in the legal field hinders progress in leveraging technology to enhance the practice of law. Without a framework that addresses the complexities of legal processes and principles, the potential benefits of AI remain untapped. By developing a more tailored AI concept for legal science, researchers and practitioners can unlock new possibilities for improving efficiency, accuracy, and access to justice in the legal system.

---

[67] D. Ardia, Privacy and court records: Online access and the loss of practical obscurity, University of Illinois Law Review 2017 (2017) 1385–1454.

[68] R. Yulia, R. Sergiy, Justice in the digital age: Technological solutions, hidden threats and enticing opportunities, Access to Justice in Eastern Europe 4 (2021) 104–117

[69] R. Susskind, Online Courts and the Future of Justice, Oxford University Press, 2019 239.

[70] I. Spitsin, I. Tarasov, The use of artificial intelligence technologies in judicature: Challenges of legal regulation, Advances in Social Science, Education and Humanities Research 420 (2020).

Without bridging the gap between AI technology and legal theory the transformative power of AI in the field of law could not be fully realize.

3.8 Artificial Judicial Intelligence: What's the Problem with AI Decision-making?

A robot is sitting for a judicial trial- it is neither a reality nor a fiction. In recent years, artificial intelligence technology has been widely used in the field of justice and an AI judge is not a myth anymore. Compared with human judges, judicial artificial intelligence is more efficient, experienced and objective. However, artificial intelligence has its limits. Artificial intelligence is still essentially machine intelligence based on big data, algorithms and computing power, not organic intelligence. Mere handing down of decisions, would not be enough. To be credible, AI judges, even more than other judges, would have to offer explanatory opinions and not just bottom-line results.[71] Subject to the difference between judicial artificial intelligence and human judges in knowledge structure, application scenario and potential ability, judicial artificial intelligence can not completely replace human judges.[72] This argument is explained further below.

3.9 AI Decision Making: Yet to Attain Enough Skill-Set

Technology is not yet ready to produce an AI with a skill-set that is broad enough for the work of a judge.[73] Not because the necessary intellectual tasks are too complex to be processed by an AI, but rather because the work of a good judge consists of a mix of skills including research, language, logic, creative problem solving and social skills.[74] AIs of the near future excel in some of these individual tasks separately, but not yet in combining them.[75]

---

71 Eugene Volokh, 'Chief Justice Robots' 68 DUKE LAW JOURNAL 1139.

72 'Human Judges in the Era of Artificial Intelligence: Challenges and Opportunities' (n 44).

73 Thomas Julius Buocz, 'Artificial Intelligence in Court' Retskraft - Copenhagen Journal of Legal Studies (2018) 2, 46.

74 Richard A Posner, How Judges Think (First Harvard University Press 2010) 19ff. Jeremy Waldron, 'Judges as moral reasoners' [2009] 7/1 International Journal of Constitutional Law 2 all.

75 'IBM Watson' <https://www.ibm.com/watson> accessed 19 April 2024; David Silver et al, 'Mastering the game of Go without human knowledge' [2017] 550 Nature 354; Joshua Browder's The World's First Robot Lawyer drafting very specific types of legal documents, see: accessed 19 April 2024;.

Jack M Balkin describes AIs in this phase as ‘special purpose human beings’: A key feature of robotic substitution is that it is partial. Robots and AI entities take on particular aspects and capacities of persons (…). This is what I mean when I say that robots and AI agents operate as ‘special-purpose human beings’; they are agents for a particular reason or function, straddling the line between selves and tools, or persons and instruments.[76] That is why AI’s entry into the judiciary will most likely be a gradual and slow process that starts with the parallel existence of AI assistance and human judges.

Is it the Relinquishment of the Decision-making Authority of a Judge?
The coexistence of AI support and a human judge raises concerns about the relinquishment of decision-making authority.[77] To prevent this scenario, timely discussions are crucial on how AI assistance can be integrated into the judicial system. The central question in this discussion is whether to allow AI and human judges to collaborate or to establish a clear institutional separation between them. An explicit division between human-made and machine-generated decisions enables humans to guide AI judgments. It is not feasible to compartmentalize a judge's role into decision-making and non-decision-making aspects. Consequently, involving AI in the adjudication process invariably involves some level of delegation of decision-making power.

How to Combat AI Prejudices
AI approaches to the modern world with immense potential. However, AI must be human-centric and regulated. To address the issues of AI prejudices, there is a crying need for regulatory measures to be put in place. The fact is, in the face of this uncontrolled and random use of AI there is no national and international legal regime developed thus far. Recently, the European Union became the pioneer in setting a regulatory

---

[76] Jack M Balkin, ‘The Path of Robotics Law’ [2015] 6 California Law Review 45, 59. In this context see also: Kerr and Mathen (n 2) 7: ‘What will happen is that, one day soon, an AI will be developed that regularly and reliably outperforms a professional at some complex task traditionally requiring human expertise.’

[77] Thomas Julius Buocz, ‘Artificial Intelligence in Court’ Retskraft - Copenhagen Journal of Legal Studies (2018) 2, 58.

framework for the responsible and ethical use of AI.[78] The *European Union AI Act 2024* was adopted on 16 March this year and is already making waves internationally. The AI Act is the first-ever legal framework on AI, which addresses the risks of AI and positions Europe to play a leading role globally.[79]

Over the growing concerns of AI hallucinations (e.g., AI-generated fake news and false information, the viral dissemination of deep-fakes, and the automated manipulation of AI that could mislead voters in elections the Act is expected to bring a legal check.[80]

The crucial principles underlined in the Act are human-centric, responsible and ethical use of AI and considering AI as a public good for mankind.[81] The AI Act aims to provide AI developers and deployers with clear requirements and obligations regarding specific uses of AI. At the same time, the regulation seeks to reduce administrative and financial burdens for businesses. It is part of a wider package of policy measures to support the development of trustworthy AI.[82] Together, these measures will guarantee the safety and fundamental rights of people and businesses when it comes to AI. They will also strengthen uptake, investment and innovation in AI across the EU.[83] As the first-ever comprehensive legal framework on AI worldwide, the new rules aim to foster trustworthy AI in Europe and beyond, by ensuring that AI systems respect fundamental rights, safety, and ethical principles and by addressing the risks of very powerful and impactful AI models.[84]

---

78 The European Union Artificial Intelligence Act 2014 <https://www.europarl.europa.eu/doceo/document/TA-9-2024-0138_EN.pdf> accessed 19 April 2024.

79 'AI Act | Shaping Europe's Digital Future' (26 March 2024) <https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai> accessed 19 April 2024.

80 'AI-Created Election Disinformation Is Deceiving the World | AP News' <https://apnews.com/article/artificial-intelligence-elections-disinformation-chatgpt-bc283e7426402f0b4baa7df280a4c3fd> accessed 19 April 2024.

81 The European Union Artificial Intelligence Act 2014 <https://www.europarl.europa.eu/doceo/document/TA-9-2024-0138_EN.pdf> accessed 19 April 2024.

82 'AI Act | Shaping Europe's Digital Future' (n 79).

83 ibid.

84 ibid.

However, the effective implementation and enforcement of the Act is challenging. New complementary legislation may include the AI Liability Directive, meant to assist liability claims for damage caused by AI-enabled products and services.[85] The AI Act doesn't bear sufficient tools to tackle the dominant tech giants, which already impact our personal lives, our economies, and our democracies. The dangers of AI are closely tied to the size and influence of the leading companies creating and implementing these technologies. To effectively manage the risks, addressing the dominance of these companies is essential.

Overall, Regarding AI use in the legal sector, It is important to make it clear that judicial artificial intelligence is only a helper of human judges, not a stand-in. Firstly, it should give full play to the role of judicial artificial intelligence in dealing with simple cases and transactional work. Secondly, the roles and functions of judges should be actively transformed to make them more professional, rational and warm.[86] To facilitate the harmonious use of AI including the legal sector, the need for a regulatory framework for AI is crucial in ensuring that AI technologies are developed and used responsibly. Without effective regulations in place, the unchecked growth of AI could lead to unintended consequences that may harm individuals and society as a whole.

4. Use of AI in Courts: Bangladesh Perspective

4.1 Scopes

Using AI for the judiciary is totally an unexplored area in Bangladesh. Countries like Austria, Netherlands, Hungary etc., may have the lowest pending. The reasons are varied number of people, number of cases filed and facilities available & technology used. However, the use of AI in the judicial sector in Bangladesh must focus on the priorities.

---

85 'The E.U.'s Artificial Intelligence Act: An Ordoliberal Assessment' (Montreal AI Ethics Institute, 3 January 2024) <https://montrealethics.ai/the-e-u-s-artificial-intelligence-act-an-ordoliberal-assessment/> accessed 19 April 2024.

86 'Human Judges in the Era of Artificial Intelligence: Challenges and Opportunities' APPLIED ARTIFICIAL INTELLIGENCE, 2022 36 (1) 1025 <https://www.tandfonline.com/doi/epdf/10.1080/08839514.2021.2013652?needAccess=true> accessed 19 April 2024.

The use of artificial intelligence (AI) in the judicial system is a major breakthrough. However, the use of AI in the global judiciary is mainly limited to use as a legal research and analytical tool to facilitate the judicial decision-making process, not in direct decision-making. To that cause, in my opinion, AI could focus on the following issues relating to law and judiciary.

The major challenge for the judiciary is to deal with the huge backlog of cases with an inadequate number of judges against the number of cases. AI use in the legal sector should address the issues firstly, reducing case backlog and secondly, minimising the inefficiencies of the judicial decision-making process using AI models.

AI in Bangladesh courts can be effectively used in two major areas firstly, to reduce the pendency of cases, and secondly to increase the efficiency of the judiciary. It can help with the admin, and it can support judicial decision-making, reducing the margin of error and value-adding the process of decision-making. But ultimately– AI techniques cannot replace a judge. The logic behind this is to save judicial resources and urge the case-handling judges to devote more time, effort and energy to difficult and complex cases, maximizing the efficiency of judicial resources. Therefore, the befitting application of AI technology in the judicial field is directly aimed at improving judicial efficiency.

With the help of powerful algorithms, calculations and the characteristics of standardization, process and repetition, judicial artificial intelligence can complete the work such as evidence examination, case file production, the generation of elemental adjudication instruments in a short period, to promote the improvement of judicial efficiency in a way that changes the means of production, and effectively alleviate the judicial dilemma of many litigants in our country.

4.2 Legal Regime for AI Use in Bangladesh Courts

Legislative initiatives like the *Use of Information Technology by Courts Act, 2020*[87] demonstrate a commitment to harnessing technology and enhancing procedural efficiency allowing the use of AI in courts. The

[87] Act Number IX of 2020.

broad explanation of Section 3 (1) of the Act opens the opportunity for the use of AI in the trial system in a virtual hearing. It states that audio-video or any other electronic means can be used during the trial, inquiry, or hearing of any petition or appeal of any case. Further on the legal framework, the government has drafted *AI Strategy 2020* that doesn't state anything about its plan for the judiciary. However, the government's current venture is finalizing an *AI Policy 2024* that has included the judiciary as the priority sector for AI technology implementation.[88]

The draft proposes that "AI technologies will improve legal processes, streamline judicial efficiency, and enhance access to justice, legal information, and legal aid services."[89] It further adds that "AI tools will be deployed for comprehensive court management, including case processing, tracking, scheduling, legal research, document analysis, prediction of case outcomes, transcription, translation of proceedings, and providing legal recommendations to assist the court."[90]

4.3 Challenges for Bangladesh in Adopting AI Technology in Courts

4.3.1 Data Eco-System

Information is called the raw material of AI technology and data must be digitized. Thus high-quality and interconnected full legal data bank supply to the raw materials of AI technology is crucial. Furthermore, the availability of data sets for Bengali will be challenging. Besides, there is a great lack of infrastructure development in the areas of data handling, storage, computing, scaling, extensibility, and data security.

4.3.2 E-Readiness

The judiciary and it's supporting organization are not ready for such a high-tech initiative yet. There is a lack of technological development as well as infrastructural development for adopting AI technology in Bangladesh. Overall e-readiness of the judicial institutions, internet connectivity, nurturing IT culture and skilled human resources lag in

---

88 'Bangladesh National AI Policy 2024 [DRAFT], s 4.1, Pdf< https://ictd.portal.gov.bd/sites/default/files/files/ictd.portal.gov.bd/page/6c9773a2_7556_4395_bbec_f132b9d819f0/National_AI_Policy_2024_DRAFT.pdf> accessed 20 April 2024'.

89 ibid s 4.1.4.

90 ibid s 4.1.5.

technological and infrastructural development challenging the implementation of this technology.

4.3.3 Regulatory

There is no regulation or regulatory body to check or monitor the activities of AI technologies. The protection of fundamental rights and personal data needs to be safeguarded in particular by regulations. Besides, AI's wide-scale and effective use in the judiciary needs concern changes in the procedural laws guiding the civil and criminal justice in Bangladesh which is a cumbersome and time-consuming process.

5. Discussion on a Befitting Model(s) for Our Courts

Based on the discussion of the previous chapters, e.g., the scopes and limitations of AI, the tech ecosystem of Bangladesh and the requirements of the legal sector, I'm proposing a few actionable AI models for Bangladesh Courts.

The rationale of these models is that the AI models just need to be better than the average of the relevant pool of human judges or officials. It doesn't need to be perfect, because the humans job these models would replace aren't perfect. I argue that, because such a program is also likely to be much cheaper, quicker, and less subject to certain forms of bias, it promises to make the legal system not only more efficient but also fairer and more accessible to poor and middle-class litigants.[91] The expected outcome is that this AI model of AI and NLP can speed up court cases.

Model 1: AI to Help Judges Understand and Summarise the Petitions

Artificial intelligence tools involving natural language processing (NLP) can help to identify the salient points in our court petitions, which can be used to aid the judges in understanding the petition and delivering verdicts. For example, Al can be used to identify what are the basic facts of the case, what are the evidence placed before the court, and what is the prayer by the litigant.

[91] For a similar kind of discussion see Eugene Volokh, 'Chief Justice Robots' 68 DUKE LAW JOURNAL, 2019 1140.

It can help to prepare a summary of the salient points of the case. This can be displayed in an annotated form in front of the judge.

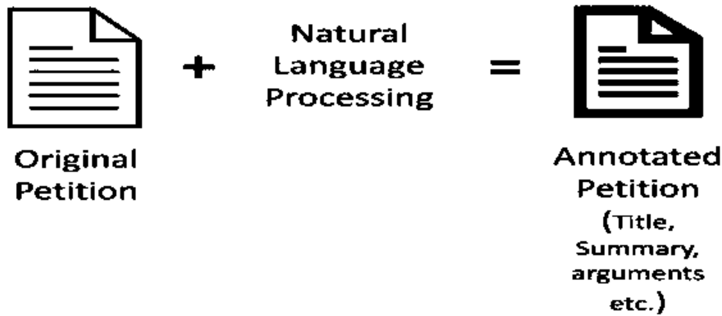


Figure 1: AI to Help Judges Understand and Summarise the Petitions

Model 2: Al to Search Similar Cases

AI and machine learning tools can be used to search similar cases and verdicts from a database of cases. For instance, an AI-powered Legal Search Engine (AIPLSE) can help judges and lawyers easily search and research. The litigants and lawyers can prepare their case better. It can also help judges deliver faster, more balanced and accurate verdicts.

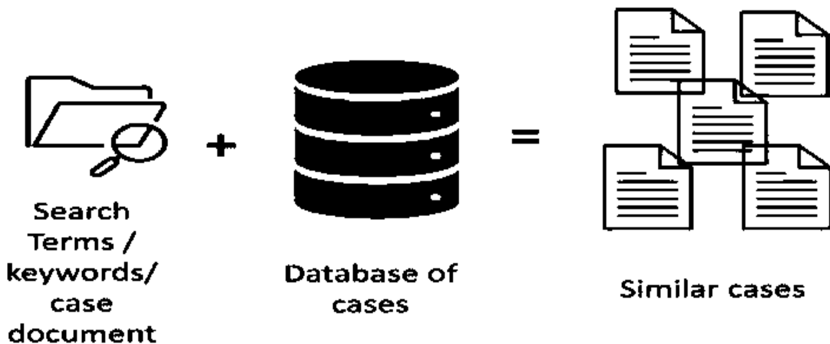


Figure 2: Al to Develop Our Own Legal Search Engine

Model 3: AI to Identify Frivolous Cases

AI tools can be used to identify frivolous cases at the beginning of a case. This can be based on certain pre-set criteria, or prediction using machine learning models trained on legal data, or a combination of both. Such cases

can be quashed at the start thus saving the valuable time, effort and cost of the courts.

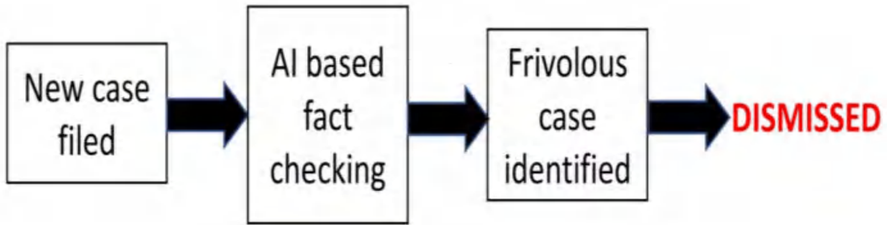


Figure 3: AI to Identify Frivolous Cases

Model 4: AI to help judges in decision-making
Machine Learning models can be trained on a dataset of past legal cases of Bangladesh courts. The trained models can be used to predict the verdicts in ongoing cases based on similarity with past cases. This can help the judges to make more correct decisions.

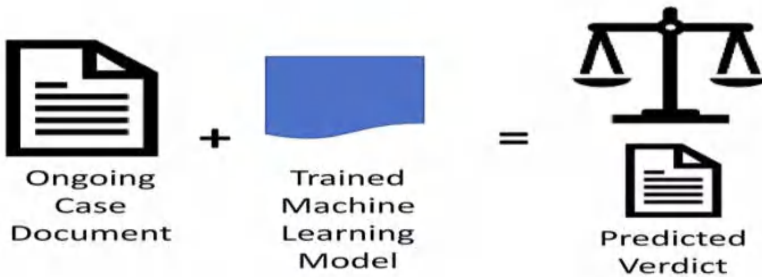


Figure 4: AI Predicts Outcome and Helps Judges in Decision-making

Thus, AI and NLP can speed up court cases in our country. My proposed models, of course, are likely to be a counterintuitive argument in the present Bangladesh context of the information technology ecosystem, the e-readiness of the judiciary, the revision of laws for AI use and the overall socio-economic aspects. The lack of ready-to-use judiciary-related data is a crucial challenge. However, I argue that with the commencement of the e-filing of cases both in higher and subordinate courts, the data ecosystem will be upgraded to proceed further to execute these models. With these models,

I believe that those days are not far away when it will make sense to give AI the decision-making authority in petty cases in Bangladesh courts.

Before moving towards the closing chapter of this paper, referring to the findings of the chapters and based on the above discussion, I answer my research question[92] positively that there is ample scope for the use of cutting-edge AI technology in Bangladesh's judiciary and that use of AI could accelerate the quality judicial services delivery', is not answered in academia before. Therefore, my hypothesis in the first paragraph of this research paper that 'using high-tech models like AI as an auxiliary force can bolster that optimism enabling the justice delivery system' is found to be true.

6. Conclusion

In an ever-growing world, it is necessary to be aware of high-tech developments. However, Introducing technologies like AI to the judiciary is a highly delicate matter because the judiciary is formal and classic, and AI is dynamic. Thus, it requires precaution and patience rather than hurried efficiency optimisation at all costs. Against such a backdrop, the focus of the paper is on AI integration in Bangladesh's legal sector to enhance the judiciary's efficiency.

The major findings of the paper include opportunities for the integration of AI technologies to streamline legal procedures, elevate decision-making capabilities, and enhance the overall effectiveness of the judiciary. Through swift and precise analysis of extensive datasets, AI can discern patterns, forecast results, and provide support in legal investigations. This has the potential to not only conserve time and resources but also mitigate human errors in intricate legal scenarios.

The paper explores that there are major challenges to using AI in the legal sector such as the issues of AI bias, ethical and fundamental right considerations, opacity of AI systems, technical reliance and manipulation, data breach and security, digital divide and absence of AI concept suitable for legal science. These challenges open the frontier that to address the

---

[92] The research question of the paper, which is set in the Introduction part, is ''whether there is the scope of use of cutting-edge AI technology in Bangladesh judiciary and whether that could accelerate the quality judicial services delivery.'

issues of AI prejudices, there is a crying need for regulatory measures to be put in place. The use of AI must be AI human-centric and regulated. The AI Act of the European Union 2024 is spreading light globally in this regard.

To reveal the AI scope for Bangladesh Court the paper argued that AI in Bangladesh courts can be effectively used in two major areas firstly, to reduce the pendency of cases, and secondly to increase the efficiency of the judiciary. It can help with the admin and can support judicial decision-making, reducing the margin of error and value-adding the process of decision-making. However, major challenges to the execution of the proposition are the lack of a robust judicial and legal data eco-system and the e-readiness of the judiciary.

Finally, the paper suggests four actionable AI models to assist the court in summarizing the court documents, facilitating legal search and research, identifying frivolous cases and predicting outcomes to aid judges in decision-making.

Overall, as we live in an era of AI, judges must respond to people's demands for quick dispensation of justice and efficient administration of the judicial process through AI and other modern technologies. With the integration of science and technology, judicial impartiality will be better guaranteed so that it can better serve economic and social development.[93] Judges need role posting in the era of judicial artificial intelligence upgrading them more professional, more rational and more warm to cutting-edge technologies. The aspiration of the paper includes a benchmark that is underpinned by the dream of 'Smart Bangladesh', which the nation's judiciary needs to be a part of. For that, the timeousness in embracing the technologies of the future for a smart judiciary is a prerequisite.

---

[93] 'Jerry Kaplan, Artificial Intelligence : What Everyone Needs to Know, Oxford University Press, Incorporated, 2016. ProQuest Ebook Central, 3.

Reference

AI 01 and others, ‘Yi: Open Foundation Models by 01.AI’ (arXiv, 7 March 2024) <http://arxiv.org/abs/2403.04652> accessed 19 April 2024

‘AI Act | Shaping Europe’s Digital Future’ (26 March 2024) <https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai> accessed 19 April 2024

‘AI and Predictive Justice in Europe’ (euronews, 29 January 2019) <https://www.euronews.com/my-europe/2019/01/28/ai-and-predictive-justice-in-europe> accessed 19 April 2024

‘AI in Justice - Report.Pdf’

‘AI-Created Election Disinformation Is Deceiving the World | AP News’ <https://apnews.com/article/artificial-intelligence-elections-disinformation-chatgpt-bc283e7426402f0b4baa7df280a4c3fd> accessed 19 April 2024

‘AI-Powered Courts Can Rewrite Future of Judiciary’ <https://www.newindianexpress.com/opinions/2023/Nov/02/ai-powered-courts-can-rewrite-future-of-judiciary-2629474.html> accessed 20 April 2024

‘Bangladesh National_AI_Policy_2024_DRAFT.Pdf’

Bu TJ, ‘Artificial Intelligence in Court’ (2018) 2

Casserly I, ‘AI Fought the Law, and Won’ (TNW | Artificial-Intelligence, 1 November 2017) <https://thenextweb.com/news/ai-battles-human-lawyers-and-wins> accessed 20 April 2024

‘Dchen,+[Final+Publish+V2]+How+Will+Technology+Change+the+Face+of+Chinese+Justice.Pdf’

‘Ethical Charter EN for Publication 4 December 2018.Docx.Pdf’

‘F. Contini, Artificial Intelligence and the Transformation of Humans, Law and Technology Interactions in Judicial Proceedings, Law, Technology and Humans 2 (2020) 13..Pdf’

How AI and Deepfakes Are Changing Politics | BBC News (Directed by BBC News, 2024) <https://www.youtube.com/watch?v=wxEpPin8MWw> accessed 19 April 2024

‘Human Judges in the Era of Artificial Intelligence: Challenges and Opportunities’ <https://www.tandfonline.com/doi/epdf/10.1080/08839514.2021.2013652?needAccess=true> accessed 19 April 2024

‘IBM Watson’ <https://www.ibm.com/watson> accessed 19 April 2024

Liptak A, ‘Sent to Prison by a Software Program’s Secret Algorithms’ The New York Times (1 May 2017) <https://www.nytimes.com/2017/05/01/us/politics/sent-to-prison-by-a-software-programs-secret-algorithms.html> accessed 18 April 2024

‘MachineBias—ProPublica’<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> accessed 18 April 2024

Mahboob Sobhani, ‘Leveraging Digitisation in Bangladesh Judiciary: Prospects and Challenges’ Jounal of Judicial Administration Training Institute (2021) 21 44

Rocha C and Carvalho J, ‘Artificial Intelligence in the Judiciary: Uses and Threats’

Sarkar A, ‘Cases Pile up in Courts’ (The Daily Star, 27 April 2023) <https://www.thedailystar.net/news/bangladesh/news/cases-pile-courts-3305171> accessed 20 April 2024

Shalev-Shwartz S and Ben-David S, Understanding Machine Learning: From Theory to Algorithms (1st edn, Cambridge University Press 2014) <https://www.cambridge.org/core/product/identifier/9781107298019/type/book> accessed 18 April 2024

‘SUPACE - Optimize IAS’ <https://optimizeias.com/supace-2/> accessed 20 April 2024

‘The E.U.’s Artificial Intelligence Act: An Ordoliberal Assessment’ (Montreal AI Ethics Institute, 3 January 2024) <https://montrealethics.ai/the-e-u-s-artificial-intelligence-act-an-ordoliberal-assessment/> accessed 19 April 2024

‘The Robot Lawyers Are Here-and They’re Winning’ <https://www.bbc.com/news/technology-41829534> accessed 20 April 2024

Volokh E, ‘Chief Justice Robots’ 68 DUKE LAW JOURNAL

‘What Is Artificial Intelligence or AI and Why Is It Important | NetApp’ <https://www.netapp.com/artificial-intelligence/what-is-artificial-intelligence/> accessed 19

April 2024

The European Union Artificial Intelligence Act 2014

The Use of Information Technology by Courts Act, 2020 [Act Number IX of 2020]

State v Loomis [2016] WI 68, 371 Wis. 2d 235, 881 N.W.2d 749

Judicial Action in Climate Justice: International Courts and Human Rights Bodies in Rights-Based Climate Change Litigation

Shushmita Ahmed*

1. Introduction

Climate change is widely acknowledged as a common global concern of humankind across multiple fora and levels.[1] Climate change is identified as an environmental problem, but it has economic, social, and human rights dimensions too. It threatens food security, public health, property, and the lives of members of the affected communities. On 28 March 2008, the United Nations for the first time acknowledged the relationship between climate change and human rights with the United Nations Human Rights Council Resolution 7/23.[2] It included that climate change poses an immediate and extensive threat to people and communities.[3] Climate change dialogues are largely focused on the international climate change legal framework, policy-making, and technological responses to the global climate change concern. It has been argued that climate change cannot be challenged before the court as there is no causal linkage between greenhouse gas (GHG) emission and state liability. Moreover, there may be lack of evidence and no attribution for the involvement of courts. The intrinsic weakness in climate change regimes makes litigation before international courts and tribunals useless apart from attracting attention. Besides, the international tribunals have no power to execute their judgment against a specific state.

On the contrary, international courts and human rights bodies are responding unlikely to their conventional role in climate change litigation. Particularly, international climate change litigations are acting as a regulatory response towards the issues which are not directly covered by

---

* District Legal Aid Officer (Senior Assistant Judge), Feni.

[1] Luke Elborough, 'International Climate Change Litigation: Limitations and Possibilities for International Adjudication and Arbitration in Addressing the Challenge of Climate Change' (2017) 21 New Zealand Journal of Environmental Law 89, 89.

[2] Marc Limon, 'Human Rights and Climate Change: Constructing a Case for Political Action Symposium' (2009) 33(2) Harvard Environmental Law Review 439, 439.

[3] United Nations Human Rights Council, Human Rights and Climate Change (HRC Res 7/23, UN Doc A/RES/7/23) (28th March 2008)

international climate change regimes. The recent international climate change litigation trend is indicative of the growing consensus that climate change is not only a political matter. Therefore, judicial law-making on climate change is not only encouraging debates on judicial decisions but also increasing awareness across the world. Courts can deal with the negative impact of climate change because it has a direct effect on people's life and livelihood. International courts and human rights bodies have played an active role in rights-based environmental litigations in the recent past. Not all the attempts were successful. However, in some cases, the court ruled in favour of the plaintiffs. International adjudicatory bodies can use such reasoning in applying and interpreting legal principles in climate change litigations as well. The international human rights law is much forceful compared to the climate change law.[4] Most importantly, many states are parties to the international human rights treaties and many of the norms of the international human rights treaties have become customary international law. In this notion, environmental law, more specifically, the climate change law is struggling to hold its position strongly and climate change law claims can attain success if it can establish link with the international human rights law.

This article focused on the role of international courts and human rights bodies in response to the rights-based international climate change litigation. Although there are arguments against the courts' role in climate change law, these international judicial decisions have been concentrating on removing the gap of global climate governance. Most importantly, these decisions encourage having contemporary reforms in international climate change regimes. Then it will conceptualise the idea of climate change litigation, its essential elements and contemporary rights-based international environmental litigations. After that, it examines the nexus between global warming and human rights. Next, this paper deep dive into specific cases of climate change to analyse the role of international courts and human rights bodies in rights-based climate change litigation. Lastly, it focuses on the impact of rights-based climate change litigation on climate science and governance.

[4] Elborough (n 1) 126.

2. Climate Change Litigation: Conceptual Perspective

2.1 What is Climate Change Litigation?

In the last decade, climate change litigation has advanced in so many ways which were supported by legal and social sciences literature. Several authors defined and classified climate change litigation in numerous ways. In simple terms, all kinds of litigations which relate to the global nature of the problem of excessive greenhouse gas (GHG) emissions and deal with the climate impacts are called 'climate change litigation.'[5] There is no settled definition of climate change litigation in both academic literature and practice.[6] The Sabin Centre for Climate Change Law at Columbia University in classifying climate cases defined climate change litigation as 'directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts'.[7] Alternatively, this definition of climate change litigation seeks to accomplish climate change goals but does not in a straight line focus on climate change issues.[8]

In addition, there are climate change litigations where climate change is not the central issue and some suits are motivated by a main concern for the problem of climate change.[9] Moreover, climate change cases can be classified according to objectives like mitigation cases and cases that are focused on adaptation.[10] Cases which have the pro-regulatory format can be defined as litigation against a State.[11] Therefore, scholars have different opinions on the notion of climate change litigation. First of all, there is debate on whether to include only cases that explicitly raise issues of climate change policy or science or it should be extended by including cases motivated by concerns over climate change issues, for instance, a challenge to a coal plant proposal on the grounds of its broader

---

5 Jacqueline Peel Science, 8.23, 8.23.

6 Ibid.

7 Jacqueline Peel and Hari M Osofsky, 'Climate Change Litigation: Lessons and Pathways' (2017) 29(11) The Judicial Commission of NSW 99, 100.

8 Ibid.

9 Ibid.

10 Ibid.

11 Massachusetts v EPA 549 US 497 (2007). The US Supreme Court ruled that under the Clean Air Act the Environmental Protection Agency (EPA) was required either to regulate motor vehicle GHG emissions as an air pollutant or better justify its refusal to do so

environmental impacts or with consequences of climate change like compensation for extreme weather events.[12] There is disagreement on whether climate litigation should include the judgments of courts only or the decisions of the quasi-judicial bodies as well.

2.2 The Essential Elements of International Climate Change Litigation

Every international court deal with the justiciability or admissibility issue in a preliminary stage of a suit. After deciding on the justiciability or admissibility question there is a wide range of sources of legal rights and obligations prescribed in different laws.[13] In the case of international climate change litigation, the court or tribunal decides on the matter of admissibility first to deal with the case. A case can be said justiciable when the respective forum is capable of deciding the matter and considers it appropriate to do so. Another important feature of climate change litigation is 'standing'. In plain meaning, it can be explained that who can bring the claim before the court. Standing criteria is a significant issue for climate change litigation. Sometimes it is difficult to establish a causal link between the activities of the defendant and the claim of the plaintiff in international climate litigations. Moreover, the percentage of contribution of a particular state or non-state actor to greenhouse gas (GHG) emission is difficult to measure. Although there is increasing confidence in climate science, climate change litigation faces major challenges regarding justiciability and standing in international courts and tribunals.[14]

2.3 Revisiting Rights-based International Environmental Litigations

International courts and international human rights bodies are already engaged with environmental litigations.[15] It has been observed that

---

[12] Peel and Osofsky, 'Climate Change Litigation' (n 6).

[13] Michael Burger and Justin Gundlach, 'The Status of Climate Change Litigation: A Global Review' (2017), Social Science Research Network 4, available at <https://papers.ssrn.com/abstract=3364568>, last accessed on 12 March 2024

[14] Sara C Aminzadeh, 'A Moral Imperative: The Human Rights Implications of Climate Change Note' (2006) 30(2) Hastings International and Comparative Law Review 231, 233.

[15] African Commission on Human and Peoples' Rights, Views: Communication No. 155/96, 30th ordinary session, 15th ACHPR AAR Annex V (27 October 2001) 'Social and Economics Rights Action Centre for Economic and Social Rights v. Nigeria', Oneryildiz v

international judges and adjudicators have considered the claims under international environmental litigations which are focused on human rights. Some international courts seem more comfortable to deal with rights-based environmental litigation.[16] The regional human rights bodies have dealt with rights-based international environmental litigations mostly. International Courts and Tribunals are varying in degree to address environmental issues and there are scopes of incompatible judgments in different jurisdictions.[17] However, a series of judicial decisions in the field of rights-based international environmental litigation have ignited an exemplary route for international climate change litigation.

2.3.1 Lopez Ostra v. Spain[18]

A Spanish national filed a case on the ground that the noxious fume emitted from the water plant is disturbing her privacy and family life as the plant was near her residence.[19] She filed a complaint in constitutional court but it was dismissed on the ground that applicant's life and physical integrity had not been disregarded.[20] On appeal, the Supreme Court also rejected her petition. After exhaustion of the remedies in the domestic court, she filed a complaint to the European Court of Human Rights under Article 8 of the European Convention on Human Rights.[21] The Court ruled in favour of her because according to Article 8 para. 1 (art. 8-1) of the Convention, the town council's attitude amounted to unlawful interference with her right to respect for her home and was also an attack on her physical integrity.[22] Therefore, the court recognised that the result of environmental degradation may so affect an individual's welfare as to deprive her of the enjoyment of her private and family life.[23] In this case,

---

Turkey [2002] European Court HR 491 and Lopez Ostra v. Spain (1995) 20 European Court HR 277

16 Philippe Sands, 'International Environmental Litigation: What Future' (1998) 7(1) Review of European, Comparative & International Environmental Law 1, 3.

17 Ibid.

18 Lopez Ostra v. Spain (1995) 20 European Court H.R. 277.

19 Ibid. 3[8]

20 Ibid. 5[15]

21 Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 04 November 1950, 5 ETS 4.XI. 1950, (entered into force 03 September 1953) ('European Convention on Human Rights')

22 Lopez Ostra v. Spain (1995) 20 European Court H.R. 277 16 [58]

23 Ibid.

the court's approach was progressive enough to recognize and apply environmental standards to ensure environmental rights.[24]

2.3.2 Oneryildiz v. Turkey[25]

In 2004, the European Court of Human Rights (ECHR) decided its first environmental case linked to the right to life. In *Oneryildiz v. Turkey case,*[26] the habitat of the applicant was around a garbage dump monitored by City Council of Istanbul. There were hazardous wastes and no steps were taken by the authority. As a result, the explosion of methane gas from the dump occurred and the applicant lost nine members of his family. The applicant based his claim on the right to life provision of Article 2 of the *European Convention on Human Rights (ECHR),*[27] arguing that the relevant authorities' negligence caused the accident and the court found that the authorities had committed a procedural violation of Article 2 right to life, and violated other rights provided in Protocols to the European Convention.[28] The European Court of Human Rights has emphasised that information about environmental risks must be available to those likely to be affected in *Oneryildiz*[29] case; the court particularly focused on the right to information regarding the environmental risk which may pose a threat to life.[30] This is certainly a new dimension for the international environmental law which may invite future claims focused on both human and environmental rights.

2.3.3 Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria[31]

The African Commission on Human and Peoples' Rights acknowledged the impact of environmental degradation on human health explicitly.[32] It

---

24 Sands (n 16) 3.

25 Oneryildiz v Turkey [2002] I European Court HR 491

26 Ibid.496

27 The Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 04 November 1950, 213 UNTS 221 (entered into force 03 September 1953).

28 Ibid.

29 Ibid.

30 Alan Boyle, 'Human Rights or Environmental Rights? A reassessment' (2007) 18(3) Fordham Environmental Law Review 471,484.

31 African Commission on Human and Peoples' Rights, Views: Communication No. 155/96, 30th ordinary sess, 15th ACHPR AAR Annex V (27 October 2001) ('Soc. and Econ. Rights Action Ctr. for Econ. and Soc. Rights v. Nigeria').

found a violation of the right to health in an environmental case, suggesting that the forum would be open to other environmental human rights claims. In *Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria case,* the commission found that Nigeria had disobeyed several norms of human rights adopted in the *African Charter on Human and Peoples' Rights (African Charter)*[33] including Article 16(2).[34]

The commission found that Shell's operations polluted the water, soil, and air, causing both short-term and long-term health problems for the *Ogoni* people and as Nigeria was a party to the *African Charter*, its government had failed to control Shell's activities and protect their citizens, and the Commission declared that it violated the provision of the Charter.[35] In this communication, the commission evaluated the involvement of the scientific aspect of the environment by observing the pollution in the water, soil, and air.[36] Deprivation of 'right to healthy environment' can be asserted as a 'discrimination' or 'inequality' among the people around the globe. The African Commission on Human and Peoples Right considered environmental harm as 'discrimination' in the above-mentioned case.

3. The Linkage between Global Warming and the International Human Rights Law Regimes

It is widely recognized that human health and well-being are largely affected by environmental problems such as air, water, and noise pollution. It may seem that the causal link between climate change and human rights is not as readily outward but climate change has an impact on people's health, food security, infrastructures, and natural resources.[37]

---

32 Hari M. Osofsky, 'Learning from Environmental Justice: A New Model for International Environmental Rights' (2005), 24(1) Stanford Environmental Law Journal 71,113.

33 African (BANJUL) Charter on human and peoples' rights, opened for signature 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), (entered into force 21 October 1986)

34 The African Charter on Human and Peoples' Rights, opened for signature 01 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) art 16(2): states parties to the present Charter shall take the necessary measures to protect the health of their people.

35 Boyle (n 30)481.

36 Ibid.

37 Ibid 241.

In recent times the adverse effects of climate change on humankind cannot be ignored. The effects of environmental degradation on human health have been recognized by all the environmental treaties.[38] However, most of the international or regional human rights treaties do not include the provision of the right to healthy environment explicitly. *The Universal Declaration of Human Rights* was adopted by the General Assembly of the United Nations on 10 December 1948.[39] This is the advancement for the human rights regime to incorporate all human rights in a codified manner. This document includes basic human rights which recognized as first-generation human rights, for example, right to life, liberty, and security of the person, the right to freedom of religion, association, and expression, etc. It is recognized as a substantive source of human rights. The Declaration also includes a right to property and right not to be deprived of such property arbitrarily as well as several other rights.[40]

It cannot be said that environmental problem like global warming falls within the purview of the *International Covenant on Civil and Political Rights (ICCPR).*[41] Civil and Political rights mostly intended to safeguard against the undemocratic governmental decision. Those rights put negative obligations on the government. However, it has been seen in the domestic and international courts that courts interpret the 'right to law' to include the 'right to a healthy and safe environment'. Article 12 of the *International Convention on Economic, Social, and Cultural Rights (ICESCR)*[42] establishes the relation between the right to health and the environment. It speaks about the 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health'; the right to health is important to the enjoyment of other rights, as in an unhealthy environment, one cannot enjoy the other human rights without

---

38 Ibid 253.

39 Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948)

40 Owen Cordes-Holland, 'The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders' Human Rights Protected by the ICCPR Commentary' (2008) 9(2) Melbourne Journal of International Law 405, 418.

41 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

42 The International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR')

interruption.[43] Both civil and political rights, and economic, social, and cultural rights, have been implicated by environmental litigations. These have embodied the rights to life, freedom of residence, and movement along with protection of culture, privacy, family, home, property, and health. Human Rights Committee and other human rights bodies are acknowledging the relationship between human rights and the environment through their decisions. *ICCPR* provides the right to make an individual 'communication' to a United Nations body, which is the Human Rights Committee. This complaint procedure is incorporated in Article 1 of the *ICCPR Optional Protocol*.[44]

The framework UN Convention on Climate Change (UNFCCC)[45] is the major instrument in the international climate change regime. It was adopted at the Rio Conference in June 1992 including a provision that the Convention's 'ultimate objective' was 'stabilisation of greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'.[46] The *Paris Agreement*[47] is one of the key international documents of environmental law. Recent development regarding the linkage between climate change and the human rights law can be found in the preamble of the *Paris Agreement*, which talks about human rights and intergenerational equity as such-

> Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to

---

43 Cordes-Holland (n 40) 419.

44 Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976)

45 The United Nations Framework Convention on Climate Change (UNFCCC), opened for signature 03 June 1992, 1771 UNTS 107 (entered into force 21 March 1994)

46 Ibid.

47 Paris Agreement, opened for signature 12 December 2015, UN Doc. FCCC/ CP/2015/10/Add.1 (entered into force 4 November 2016)

> development, as well as gender equality, empowerment of women and intergenerational equity.[48]

The second major global environmental conference along with the biggest diplomatic meetings in history kicked off in 1992 and one of the noteworthy outcomes of the conference was the Rio Declaration.[49] Principle 2 of that declaration has similarities with Principle 21 of the Stockholm Declaration except that the words like 'and developmental' are inserted between 'environmental' and 'policies'. It can be understood from the wording that there is uncertainty regarding the enforcement of the global warming policies at all levels and the instruments are aspirational in a sense.[50] In other words, the relationship of treaties to each other and the legal authority of the declaration to other sources of international law, are not well settled within the international system, there are varied conceptual possibilities.[51] Therefore it is difficult to understand how these legal instruments can be designed into a coherent theory of a global warming case.

Climate change is a classic global environmental problem. In addition to the climate change treaties, international climate change litigation may find its way through customary international law that one state may not permit activities that may harm another state. Activities of a state can adversely affect the other states though the activities are within the boundaries of that state. For instance, the greenhouse gas (GHG) emission of one state may have a devastating impact on the other state. Trans-boundary harm cases focused on environmental issues have had a mixed record of success in the International Court of Justice (ICJ), and a climate-change case would face particular hurdles because of the evidentiary difficulties in imputing responsibility to one or more governments for their contribution to the global climate disaster.[52]

---

48 Ibid.

49 Osofsky (n 32) 82.

50 Douglas A Kysar, Climate Change and the International Court of Justice (2013), Social Science Research Network, 20 , available at <https://papers.ssrn.com/abstract=2309943>, last accessed on 13 March 2024

51 Elborough (n 1) 96.

52 Ibid 98.

The relationship between climate change and human rights is a recent phenomenon and it attracts the attention of international law and policymaking. The linkage between the human rights and climate change for the first time highlighted by the UN Human Rights Council (HRC) in 2008 and Council Resolution 7/23 expressed the body's concern that 'climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights'.[53] The HRC also requested the Office of the UN High Commissioner for Human Rights (OHCHR) to provide a report on human rights and climate change.[54] In January 2009, the report of the study has been released and according to that study, climate change has adverse effects on the enjoyment of human rights.[55] The global human rights treaties i.e. *ICCPR* and *ICESCR* do not include a specific right to a safe and healthy environment that might be compromised by climate change, the study emphasized that all UN human rights treaty bodies recognize the intrinsic link between the environment and realization of a range of human rights that include individual rights to life, health, food, water, and adequate housing as well as the collective right to self-determination and procedural rights concerning access to information and participation in decision making regarding environmental risks.[56] The study also emphasized the relationship between international peace and security, and global warming.[57] The other regional treaties like the *European Convention on Human Rights*[58] and *American Convention on Human Rights*[59] also include provisions related to right to life, health, home, and privacy which can be interpreted in the light of right to healthy environment.

---

53 Limon (n 2) 444.

54 Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) Transnational Environmental Law 37, 43.

55 Ibid.

56 Ibid.

57 OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, UN Doc. A/HRC/10/61, 15 Jan. 2009 (OHCHR Report).

58 The Convention for the Protection of Human Rights and Fundamental Freedoms, members of the Council of Europe, 5 ETS 4.XI. 1950, opened for signature 04 November 1950, (entered into force 03 September 1953)

59 The American Convention on Human Rights, Organization of American States, opened for signature 22 November 1969, 1144 U.N.T.S. 123 (entered into force 18 July 1978)

3. 1 Right to Life

'Right to life' has been guaranteed in Article 6(1) of the *ICCPR.*[60] Global warming is a threat to the right to life of the people of the affected areas. The low-lying country like Bangladesh is suffering because of global warming compared to other countries.[61] For example, several houses washed away by floods and extreme weather like storms and cyclones have increased in number because of global warming.[62] The victims of climate change living in an unhealthy environment which poses a threat to their right to life. Article 6 of the *ICCPR* provides provisions for states to take positive measures to increase individuals' 'life expectancy'. Due to climate change, the people of affected areas do not have access to pure drinking water, food, etc. which may result in serious health diseases. Therefore, climate change may decrease life expectancy as it has serious impacts on human health.

3.2 Right to Privacy, Home and Family Life

'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.'[63]

In line with the Universal Declaration of Human Rights (UDHR), article 17(1) of the *ICCPR* includes that 'no one shall be subjected to arbitrary or

---

[60] The International Convention on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976) art 6(1)

[61] Fahim Elahi and Niazul Islam Khan, 'A Study on the Effects of Global Warming in Bangladesh' (2015) 3(3) International Journal of Environmental Monitoring and Analysis 118, 119.

[62] Ibid.

[63] Universal Declaration of Human Rights, art. 12, available at <cesr.org/udhr>. See also International Covenant on Civil and Political Rights, art. 17 (1976), available at <www.ohchr.org/english/law/ccpr.htm>, ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation"); European Convention for the Protection of Human Rights and Fundamental Freedoms, art.8, available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> ("Everyone has the right to respect for his private and family life, his home and his correspondence").

unlawful interference with his privacy, family, home or correspondence'.[64] A similar notion can be found in article 8 of *the European Convention on Human Rights*[65] which states that the right to privacy and family life in relation to the environmental issue, and may also appropriate to human-rights based approach to climate change.[66]

3.3 Right to Property

It is interesting to note that neither *ICCPR* nor the *ICESCR* has included the right to property. To find this right, we have to go back to the *UDHR*. Article 17 of the *UDHR* defines the right to property as 'everyone has the right to own property alone as well as in association with others, no one shall be arbitrarily deprived of his property.'[67] This provision of *UDHR* highlights the basic right of one's own property and no one should be arbitrarily deprived of his own property.[68] The right to property has limited scope under climate change laws. People and communities harmed by climate change and in loss of their own property may have valid claims before the international courts. For instance, because of the rising sea levels, the habitats of the people of the Cataret Islands of Papua New Guinea have already been washed away.[69] Another example can be found in the situation of the Inuit communities who are facing mass resettlement choices for losing their households and the damage of culturally and historically significant lands and buildings.[70]

4. International Courts, Human Rights Bodies and Rights-based Climate Change Litigations

The international climate change regime emerged in the early 1990s.[71] After that slow negotiation procedure encouraged frustration and invited to

---

64 The International Convention on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976) art 17(1).

65 Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 04 November 1950, 5 ETS 4. XI. 1950, (entered into force 03 September 1953) ('European Convention on Human Rights') art 8

66 Aminzadeh (n 14)247.

67 Universal Declaration of Human Rights, art. 17, available at <cesr.org/udhr>

68 Aminzadeh (n 14) 248.

69 Ibid.

70 Ibid.

71 Burger and Gundlach (n 13)15.

look for alternative routes.[72] In this sense, international adjudication identified as a reliable resource to supplement the international climate change regime, and proposals were made from time to time to address the relevancy. Apart from International Court of Justice some other fora including the International Tribunal for the Law of the Sea,[73] the UNESCO World Heritage Committee,[74] the Inter-American Commission on Human Rights,[75] the UN Human Rights Committee,[76] the World Trade Organisation,[77] the European Court of Human Rights (ECHR),[78] directly or indirectly deal with climate change litigation.

The human rights-based climate change litigation may sound striking in theory, but the petitioner will lose the case unless he can prove climate change has violated one of his human rights.[79] It is very difficult to bring climate change claims against a state before the International Court of Justice (ICJ) as a contentious issue.[80] The general principle of international law is that unless or until a sovereign state gives consent to the jurisdiction to the ICJ, it cannot hear the case on contentious proceedings. Therefore, no case has been recorded till now on climate change in contentious proceedings. The ICJ may be invited to address the issue of international obligations and state responsibility for the contribution towards climate change.[81] This can arise from advisory proceedings initiated by the UN General Assembly or other UN bodies in seeking an explanation of the

---

72 Ibid.

73 The United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 397, (entered into force 01 November 1994)

74 The Convention concerning the Protection of the World Cultural and Natural Heritage, opened for signature 16 November 1972, 1977 UNTS 151 (entered into force 17 December 1975)

75 The American Convention on Human Rights, organisation of American States, opened for signature 22 November 1969, 1144 U.N.T.S. 123 (entered into force 18 July 1978)

76 The International Convention on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976)

77 Marrakesh Agreement, opened for signature 15 April 1994, 1867 U.N.T.S. 154 (entered into force 01 January 1995)

78 Convention for the Protection of Human Rights and Fundamental Freedoms, members of the Council of Europe, 5 ETS 4.XI. 1950, opened for signature 04 November 1950, (entered into force 03 September 1953)

79 Aminzadeh (n 14) 264.

80 Kysar (n 50).

81 Elborough (n 1)95.

obligations under general international law to prevent climate change or mitigate its adverse consequences.[82] It is widely accepted that there are potential benefits to choose the advisory route rather than the contentious proceeding. As the advisory opinion procedure does not need to deal with plaintiffs, defendants, or jurisdictional complexity.

The rights-based climate change litigation has set a new trend in recent times. It is transforming the aspirational notion of climate change regime into action. For example, the Inuit group filed a petition in the Inter-American Commission on Human Rights, asserting that the U.S. failed to reduce its emissions that violated the right to life, culture, health, and shelter of the *Inuits*'.[83] Another example can be found in the *Teitiota's*[84] case, *Ioane Teitiota,* a citizen of the Republic of Kiribati applied for refugee status in New Zealand was rejected. He claimed before the Human Rights Committee that New Zealand violated his right to life under the International Covenant on Civil and Political Rights.

Climate change litigation based on international law has less chance to be successful because of foreign sovereign immunity and other doctrines that limit the scope to hold liable a foreign state on the ground of global warming.[85] It has been argued that there is no causal linkage between greenhouse gas (GHG) emission and state liability and there is no proof and attribution to hold a state liable by the court. International human rights treaties and customary international law can come into aid to compensate for this barrier. If the court looks at the matter through the human rights lens, the plaintiff will have a strong grip on the subject matter of the litigation. Regional human rights tribunals provide another pathway for seeking remedies under rights-based climate change litigation.[86] In the past, the regional human rights bodies in Europe, Africa,

---

82 Ibid.

83 Petition of Inuit to the Inter-American Commission on Human Rights to seeking relief from violations of human rights resulting from global warming caused by acts and omissions of the United States (07 December 2005), available at <www.earthjustice.org/library/reports/ICCHumanRightsPetition.pdf>

84 Human Rights Committee, Views: Communication No 2728/2016, 127 sess, UN Doc CCPR/C/127/D/2728/2016 (24 October 2019) 5[3] ('Ioane Teitiota v. New Zealand').

85 Elborough (n 1) 96.

86 Peel and Osofsky, 'A Rights Turn in Climate Change Litigation?' (n 22)64.

and the Americas, and have positively dealt with environmental cases.[87] UN Special Rapporteur on Extreme Poverty and Human Rights observed that the Inter-American Court of Human Rights had directly established link between climate change and the human right to healthy environment and most importantly it highlighted the obligations owed to the present and future generations.[88] By contrast, the European Court of Human Rights has not focused on climate change directly.[89]

4.1 Inuit Petition

Ice is an important element for life and livelihood for the people living in the Arctic area. The indigenous Inuit people depend on the ice shelves to hunt, collect food, and communicate. The United States is prominent among the carbon emitter countries that are contributing to the rise of the global temperature.[90] The rise in global temperature is harmful to the Inuit people because it has effects on ice melting and ecological environments. The traditional cultural way of living of Inuit people was disrupted for the reduction of ice surface area.[91] Also, the animals of Artic wildlife faced devastating impacts due to global warming as their habitats were melting. The reduction in the number of animals was also affecting the cultural way of living of Inuit people. On 07 December 2005, the *Inuit Petition*[92] was submitted by Sheila Watt-Cloutier, on behalf of herself and 62 named individuals and all other affected Inuit in the Arctic regions of the US and Canada.[93] They filed the petition based on *the American Declaration on*

---

87 Aminzadeh (n 14)238.

88 UN Special Rapporteur on Extreme Poverty and Human Rights, Climate Change and Poverty, UN Doc A/HRC/41/39 (25 June 2019).

89 Ibid.

90 Centre for International Environmental Law, Inuit Petition and the IACHR (Web Page) <https://www.ciel.org/project-update/inuit-petition-and-the-iachr/#:~:text=Inuit%20Petition%20and%20the%20IACHR%20In%20the%20Arctic%2C,emissions%20that%20contribute%20to%20rising%20global%20warming%20temperatures.>

91 Ibid.

92 Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (submitted Dec. 7, 2005), available at <www.earthjustice.org/library/reports/ICCHumanRightsPetition.pdf>.

93 Hari M Osofsky, 'Inuit Petition as a Bridge- Beyond Dialectics of Climate Change and Indigenous Peoples' Rights Application of International Law to the Problems of Indigenous Peoples: The Indigenous Rights Movement in Other Contexts' (2006) 31(2)

Rights and Duties of Man[94] including other international human rights instruments.[95] Scholars, including Middaugh, have argued that the *Inuit Petition*[96] is justifiable in international law, but it was rejected by the IACHR in November 2006 on the basis that it had insufficient information to determine the issue.[97] There is no doubt that this effort of the Inuit before the IACHR encouraged broadening and re-thinking the terms of the climate change jurisprudence. Although IACHR did not proceed with the petition, this case re-enforced the critical linkage between climate change and human rights. As a result, IACHR initiated a 'thematic hearing' in 2006, which investigated the connection between climate change and human rights.[98] If we critically analyse the position of IACHR in the Inuit Petition, we will find several issues. There are some procedural requirements to be fulfilled to present a petition before the IACHR. The IACHR gave standing to Centre for International Environmental Law (CIEL) and Earth justice to submit petitions on the ground that these NGOs legally recognised by an Organisation of American States (OAS) member.[99] In addition to that exhaustion of all the domestic remedies can act as a hurdle for incapability to exhaust all the domestic remedies for lack of resources. Finally, the jurisdiction issue regarding the petition also problematic because the United States is not a party to the American Convention on Human Rights.[100]

American Indian Law Review 675 ('Inuit Petition a Bridge - Beyond Dialectics of Climate Change and Indigenous Peoples' Rights Application of International Law to the Problems of Indigenous Peoples').

94 The American Declaration on Rights and Duties of Man, opened for signature April 1948, O.A.S. Res. XXX (entered into force 02 May 1948)

95 Peel and Osofsky, 'A Rights Turn in Climate Change Litigation?' (n 54)46.

96 See Sheila Watt-Cloutier, Inuit Circumpolar Conference, Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (7 December 2005) <http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionCC.pdf > at 23 September 2008 ('Inuit Petition').

97 Osofsky (n 32)64.

98 Centre for International Environmental Law, 'Inuit Petition and IACHR' (Web Page) <https://www.ciel.org/project-update/inuit-petition-and-the-iachr/>

99 Aminzadeh (n 14)240.

100 Ibid.

4.2 Teitiota v New Zealand

The UN Human Rights Committee is a body of UN established by the treaty, the *International Convention on Civil and Political Rights (ICCPR),*[101] that is responsible for the supervision of the implementation of the treaty. In recent years, several communications have been made to the Committee related to climate change issues. For example, a citizen of the Republic of Kiribati *Ioane Teitiota,*[102] applied for refugee status in New Zealand was rejected. He claimed before the Human Rights Committee that New Zealand violated his right to life under the *ICCPR* because there was a sea-level rise by global warming, inhabitable land, and housing crises, and scarcity of freshwater in Kiribati. Though the Committee found that there was an absence of a situation of general conflict in the Republic of Kiribati and author had not established that he faced a real, personal and reasonably foreseeable risk of a threat to his right to life as a result of violent acts resulting from overcrowding or private land disputes in Kiribati, at the same time the committee acknowledged that this communication paved the way for future climate change litigation.[103] Though the claim was unsuccessful, it attracted attention to the rights-based approach of international climate change adjudication. Therefore, it can be said that the main purpose of this kind of communication is not to persuade the courts or bodies to determine the greenhouse gas (GHG) emission policy, but to attract public attention and put pressure on the states to reach political solutions, including international treaties and domestic legislation. However, in *Teitiota's* case, the committee observed that though there is the adverse impact of climate change, enough time left for the government of the Kiribati to take steps and resettle its population to other areas.[104] In this situation, the committee ignored the imminent danger arose for the complainant and his family as there was sea-level rise, lack of pure drinking water, and food. Besides, the core problem identified by the analysts regarding this

---

[101] The International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

[102] Human Rights Committee, Views: Communication No 2728/2016, 127 sess, UN Doc CCPR/C/127/D/2728/2016 (24 October 2019) 5[3] ('Ioane Teitiota v. New Zealand').

[103] Ibid.

[104] Human Rights Committee, Views: Communication No 2728/2016, 127 sess, UN Doc CCPR/C/127/D/2728/2016 (24 October 2019) 12[9.13] ('Ioane Teitiota v. New Zealand').

committee that its availability of information about filing a communication.[105] Since there is no clear rule on producing evidence before this human rights committee and an individual may remain confused on what documents should be enclosed with the communication. Sometimes, it takes too long to receive an outcome of such communication.

5. "Rights Turn" of Climate Change Litigation and Its Impact on Climate Governance

5.1 Climate Negotiation

The idea of the first litigation regarding climate change initiated to encourage the compliance of the climate change regime, but later on, it can be observed that climate litigation strategies have also been reformed in a way that those will increase political will to adopt new international climate change regimes. International climate change litigation impliedly put pressure on the global leaders to think of a new international climate change framework to deal with contemporary climate change issues. International climate change adjudication adds direction to the negotiation procedure of climate change. The growth of right-based international climate change litigation is slow in pace, but it is attracting attention to have negotiation between the states. The inter-link between the climate change litigation and negotiations under the *UN Framework Convention on Climate Change (UNFCCC)*[106] along with the *Kyoto Protocol*[107] cannot be overlooked. The *UNFCCC* and the *Kyoto Protocol* provide fora for negotiation and discussion through the Conference of the Parties (CoP) and the Meetings of the Parties (MoP) respectively.[108] The core parties of climate litigation play a central role in the negotiation and international

---

[105] Vera Shikhelman, 'Access to Justice in the United Nations Human Rights Committee' (2018) 39(3) Michigan Journal of International Law 453,480.

[106] The United Nations Framework Convention on Climate Change (UNFCCC), opened for signature 03 June 1992, 1771 UNTS 107 (entered into force 21 March 1994)

[107] Kyoto Protocol to the United Nations Framework Convention on Climate Change, opened for signature 16 March 1998, 37 ILM 22 (1998) (entered into force 16 February 2005) ('Kyoto Protocol').

[108] David B Hunter, The Implications of Climate Change Litigation for International Environmental Law-Making (2007), Social Science Research Network, 8, available at <https://papers.ssrn.com/abstract=1005345> last accessed 13 March 2024.

policy-making processes.[109] State and non-state actors who take part in the climate litigation and they are the members of those international conferences and meetings as well. International adjudication on climate change issues has implied effects on the subject of negotiation and discussion. Most of the time current global warming issues put forward in the negotiation and discussion processes which have been highlighted in the international climate litigation. The CoP/ MoP act as an important avenue for developing ideas and strategies, making and executing plans, informing the press, developing experts that can help in the litigation.[110] The Inuit, for instance, they formally announced their intent to file the petition at CoP.[111] As previously mentioned Inuit is an indigenous community of Arctic that filed a petition on the ground of global warming against U.S. to the Inter American Commission on Human Rights (IACHR). This brought attention to their claims and their concerns, both for the filing of the petition but also in the negotiations process as well.

5.2 Climate Science

Climate change litigation can rely on climate science to find potential solutions. There is a strong possibility that courts may fail to establish the relation between law and science in climate change litigation. Because it may lack the expert scientific knowledge on climate change matters. Nevertheless, the latest attempts of courts suggest that there is an upward trend in utilizing climate science in climate change litigation. Recently, there are developments in attribution science to determine whether extreme weather events are anthropogenic or not. In addition, the contribution of state and non-state actors can be measured through the new technology which may assist the climate change litigation before the court to find the source of climate change. It may act as a major advancement in international climate change litigation, where courts can decide according to the contribution of the state or non-state actors' adverse contribution to the climate. Moreover, climate change litigation not only relies on climate science but also encourages the advancement of climate science. Sometimes, through litigation international community identifies new

---

[109] Ibid.
[110] Ibid 9
[111] Ibid.

climate change problems. It encourages innovative development and research in the field of science to come up with new ideas and solutions.

6. Conclusion

There is no doubt that climate change is a threat to the full enjoyment of human rights. However, the current international environmental regime does not provide adequate protection to human life and dignity from the threat of climate change. International adjudicatory bodies are failing to address climate change issues properly due to substantive and procedural limitations. Climate change is a global and political phenomenon that demands a change in behaviour from every single person around the globe. The international courts and tribunals are playing unconventional role in rights-based international climate change litigations. Those decisions have implied impacts on changing the behaviour and increasing awareness on climate change. The international litigations involving climate justice will continue to investigate and encourage dialogue to motivate to take meaningful climate action by the global leaders, state and non-state actors, and political actors.[112] It has been observed that international courts and human rights bodies played a constructive role in the advancement of rights-based environmental law. Similar analogies can be expected in climate change litigations in near future. The rights-based route of international climate change litigation has opened a new pathway for the victims of climate change. International human rights law provides a basis for intervention when harm occurs solely within another state's border while international environmental law generally does not.[113] The rights-based route is more dependable when the international community, diplomacy, and institutions fail to find ways for mitigation and adaptation of climate change. Climate change litigation attracts attention globally and increases awareness among the people of the world. The rights-based climate change litigations have extensive influential and persuasive effects. There are enormous possibilities for adjudicating human rights claims relating to the climate change, such as states can bring claims to the International Court of Justice, individuals can also bring complaints against states in the European Court of Human Rights, United Nations

---

[112] Elborough (n 1) 130.
[113] Aminzadeh (n 14)259.

Human Rights Committee, Inter-American Commission on Human Rights, etc. The current international and regional monitoring and enforcement mechanisms of human rights arena are much developed than that of climate change regime. By taking advantage of those instruments and mechanisms international climate change litigation can have stronger hold to find its way. There are criticisms on the role of International Courts and tribunals in the development of climate change law. Nevertheless, those will be able to play an active role to ensure fidelity to science, responsiveness to community concern, and application of key principles when climate advocates will put 'human face' on the climate change litigations. This approach is reliable because the independence and autonomy of state sovereignty have been restricted by both international human rights law and international climate change law.[114]

Bibliography

A. Academic Articles and Books

Aminzadeh, Sara C, 'A Moral Imperative: The Human Rights Implications of Climate Change Note' (2006) 30(2) *Hastings International and Comparative Law Review* 231

Boyle, Alan, 'HUMAN RIGHTS OR ENVIRONMENTAL RIGHTS? A REASSESSMENT' (2007) 18(3) *Fordham Environmental Law Review* 471

Burger, Michael and Justin Gundlach, *The Status of Climate Change Litigation: A Global Review* (SSRN Scholarly Paper No ID 3364568, Social Science Research Network, 23 May 2017) https://papers.ssrn.com/abstract=3364568

Cordes-Holland, Owen, 'The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders' Human Rights Protected by the ICCPR Commentary' (2008) 9(2) *Melbourne Journal of International Law* 405

Elborough, Luke, 'International Climate Change Litigation: Limitations and Possibilities for International Adjudication and Arbitration in Addressing the Challenge of Climate Change' (2017) 21 *New Zealand Journal of Environmental Law* 89

Hunter, David B, *The Implications of Climate Change Litigation for International Environmental Law-Making* (SSRN Scholarly Paper No ID 1005345, Social Science Research Network, 15 July 2007) https://papers.ssrn.com/abstract=1005345

---

[114] Ibid 258.

Kysar, Douglas A, *Climate Change and the International Court of Justice* (SSRN Scholarly Paper No ID 2309943, Social Science Research Network, 14 August 2013) https://papers.ssrn.com/abstract=2309943

Limon, Marc, 'Human Rights and Climate Change: Constructing a Case for Political Action Symposium' (2009) 33(2) *Harvard Environmental Law Review* 439

Osofsky, Hari M, 'Inuit Petition as a Bridge - Beyond Dialectics of Climate Change and Indigenous Peoples' Rights Application of International Law to the Problems of Indigenous Peoples: The Indigenous Rights Movement in Other Contexts' (2006) 31(2) *American Indian Law Review* 675

Osofsky, Hari M, 'Learning from Environmental Justice: A New Model for International Environmental Rights' (2005) 24(1) *Stanford Environmental Law Journal* 71

Philippe Sands, 'International Environmental Litigation: What Future' (1998) 7(1) *Review of European, Comparative & International Environmental Law* 1 ('International Environmental Litigation').

Peel, Jacqueline and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law* 37

Peel, Jacqueline and Hari M Osofsky, 'Climate Change Litigation' (2020) 16(1) *Annual Review of Law and Social Science* null

Peel, Jacqueline and Hari M Osofsky, 'Climate Change Litigation: Lessons and Pathways' (2017) 29(11) *The Judicial Commission of NSW* 99

Posner, Eric A, 'Climate Change and International Human Rights Litigation: A Critical Appraisal Responses to Global Warming: The Law, Economics, and Science of Climate Change: Commentary' (2006) 155(6) *University of Pennsylvania Law Review* 1925

Shikhelman, Vera, 'Access to Justice in the United Nations Human Rights Committee' (2018) 39(3) *Michigan Journal of International Law* 453

B. International Cases and Communications

African Commission on Human and Peoples' Rights, Views: Communication No. 155/96, 30th ordinary sess, {27 October 2001) ('Soc. and Econ. Rights Action Ctr. for Econ. and Soc. Rights v. Nigeria').

Human Rights Committee, *Views: Communication No 2728/2016, 127 sess,* UN Doc CCPR/C/127/D/2728/2016 (24 October 2019) 1 (*'Ioane Teitiota v. New Zealand')*

Lopez Ostra v. Spain (1995) 20 Eur. Ct. H.R. 277

Oneryildiz v Turkey [2002] I Eur Court HR 491

Petition of Inuit to the Inter-American Commission on Human Rights to seeking relief from violations of human rights resulting from global warming caused by acts and omissions of the United States (07 December 2005), available at <www.earthjustice.org/library/reports/ICC HumanRightsPetition.pdf>

C. International Treaties

AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS, opened for signature 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), (entered into force 21 October 1986).

Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).

Kyoto Protocol to the United Nations Framework Convention on Climate Change, opened for signature 16 March 1998, 37 ILM 22 (1998) (entered into force 16 February 2005) *('Kyoto Protocol').*
Marrakesh Agreement, opened for signature 15 April 1994, 1867 U.N.T.S. 154 (entered into force 01 January 1995.

The Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 04 November 1950, 5 ETS 4.XI. 1950, (entered into force 03 September 1953) *('European Convention on Human Rights').*

The International Covenant on Civil and Political Rights, Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

The International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) *('ICESCR').*

The United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 397, (entered into force 01 November 1994).

The United Nations Framework Convention on Climate Change (UNFCCC), opened for signature 03 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).

The Convention concerning the Protection of the World Cultural and Natural Heritage, opened for signature 16 November 1972, 1977 UNTS 151 (entered into force 17 December 1975).

The American Convention on Human Rights, organization of American States, opened for signature 22 November 1969, 1144 U.N.T.S. 123 (entered into force 18 July 1978).

The International Convention on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976).

Paris Agreement, opened for signature 12 December 2015, UN Doc. FCCC/ CP/2015/10/Add.1 (entered into force 4 November 2016.

D. Others

Centre for International Environmental Law, *Inuit Petition and the IACHR* (Web Page) <https://www.ciel.org/project-update/inuit-petition-and-the-iachr/#:~:text=Inuit%20Petition%20and%20the%20IACHR%20In%20the%20Arctic%2C,emissions%20that%20contribute%20to%20rising%20global%20warming%20temperatures.

OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, UN Doc. A/HRC/10/61, 15 Jan. 2009 (OHCHR Report).

Special Rapporteur on Extreme Poverty and Human Rights, *Climate Change and Poverty*, UN Doc A/HRC/41/39 (25 June 2019).

The Use of Technology in Bangladeshi Courts to Mitigate the Backlog of Cases

Mst. Nila Khatun*

Abstract

In the world of science and technology, use of technology in courts helps the judiciary across the globe to provide proper justice in many ways namely ensuring accountability in courts and reducing case blockage and making the disposal of cases speedier etc. The huge pile of caseload in Bangladeshi courts is resulting in delayed justice and ultimately creating a barrier for access to justice for Bangladeshi people. However, Bangladeshi legal system is being digitized day by day. Therefore, the use of technology in Bangladeshi courts is being considered as one of the ways to mitigate the barrier to access to justice. But the major concern is 'how the use of technology can be adopted in Bangladeshi legal system to ensure access to justice'. By a critical analysis of the current use of technology in Bangladeshi courts, this study suggests four approaches to be followed for the proper use of technology in courts in Bangladesh to improve access to justice. The four approaches are: namely, firstly, an administrative approach to technology, which requires its use in courts as a necessity. Secondly, a structural approach, which emphasizes a step-by-step, rather than a grand design, structure for technology implementation to improve case management within the Bangladesh judiciary. Thirdly, a managerial/ integrative approach, which views judicial work as teamwork. Finally, a normative approach to technology use, which focuses on adding judicial value while utilizing technology effectively in courts. Thus, this article will discuss the ways of application of technology and the implications of use of technology in Bangladeshi courts to mitigate the case blockage and provide proper access to justice for all.

Keywords: Technology in court, access to justice in Bangladesh, blockage of case, delayed justice, administration of courts, administration of justice, judicial management system.

1. Introduction

Disposal of cases within a reasonable time is an integral part of proper administration of justice in a country, which is also correlated to access to

* Senior Assistant Judge, 11th BJSC.

justice. But delay in the court proceedings is a problem across the globe[1] and Bangladesh is affected by this problem much more severely. Bangladesh Constitution emphasizes access to justice for all citizens.[2] Huge case backlog, delays in the disposal of cases cause major hindrance to get access to formal justice and legal entitlements in the courts for poor and disadvantaged people in Bangladesh.[3] Several legal researches have mentioned that technology can make the litigation cost-friendly[4] and the use of ICT or e-judiciary and digitization of judiciary can reduce the impediments to access to justice in Bangladeshi courts.[5] Others have suggested that 'differentiated case management' can reduce the pressure of caseloads.[6] But it is not investigated that in the context of use of technology in Bangladeshi courts, what type of approach can be adopted and be appropriate for a functional judicial management for Bangladesh.[7] This paper suggests that Bangladesh, being a developing country, may have to go through some sequential steps in adopting regulatory technology in the overall judicial management system.

---

[1] Syed Emran Hossain, (2012) 'Delay in justice: An abysmal crisis' The Financial Express (Dhaka, 6 September).

[2] The Constitution of the People's Republic of Bangladesh, Article 19 (1) "Equality of Opportunity,"; Article 27 "Equality before Law" along with Article 28 and 33 of the Constitution.

[3] Jamila A. Chowdhury, (2018), 'ADR Theories and Practices' 2nd edn., London College of Legal Studies (South).

[4] Ummey Sharaban Tahura, (2021) 'Can technology be a potential solution for a cost-effective litigation system in Bangladesh?' Justice System Journal, 42(2), pp.180-204.

[5] Mohammad Abu Taher, and Siti Zaharah Jamaluddin, (2022), 'Enhancing access to justice through e-judiciary in Bangladesh: A study', UUM Journal of Legal Studies 13.2: 317-344; See also Mohammad Ikbal Hasan, and Fahmida Johura Rupa, (2021), 'Digitalization of Bangladesh judiciary and access to justice', Asian Journal of Social Sciences and Legal Studies 3.3: 49-58.

[6] Ummey Sharaban Tahura and R. L. L. Kelly Margaret, (2015), 'Procedural Experiences from the Civil Courts of Bangladesh: Case Management as a Potential Means of Reducing Backlogs', Australian Journal of Asian Law 16: 1–22.

[7] To be noted here, for the purpose of this paper, "judicial management," means the practices and tools available to administrators, responsible to devise, implement, and enforce policies and decisions regarding the way the judiciary, a court, or individual judges carry out their judicial function. The term also refers to the management by a judge of his or her tasks and to policies and decisions in relation to the environment within which judges operate, their work conditions and facilities. This definition of judicial management is inspired by the authors- Marco, Fabri, and Philip M. Langbroek, eds. (2000), 'The challenge of change for judicial systems: developing a public administration perspective', (No Title).

The main research question is 'how 'the use of technology' as a regulatory tool can mitigate the backlog of cases and how to adopt regulatory technology in the overall judicial management system in Bangladesh?' To answer the main question, Part II of this paper will analyze the current situation of technology use in Bangladeshi courts, particularly regarding the issue of case backlogs. It will argue that further development of technology is necessary to reduce case backlog in these courts. Part III explores how a technological judicial management system can be developed using a four-step approach that includes administrative, structural, integrative, and normative approaches. It will then discuss the impact of such a system on the backlog of cases in the judiciary of Bangladesh. The last section concludes.

1.1 Methodology of This Article

This research will mainly use the qualitative method for data collection and analysis. It will collect data from secondary sources which are various national and international journals, articles, and publications, policies of other countries, case references and other researchers' findings.

1.2 Importance of This Study

This article will note that in order to mitigate the case backlogs and for timely disposal of cases, the proper use of technology in Bangladeshi courts will have significant impact on judicial practices in Bangladesh especially in the context of mitigation of case blockages. The current paper will provide insights into the role of Bangladesh government in patronizing managerial technologies and developing the transformation that technology-driven ecosystems may bring about within the judiciary. In the long run, such system may reshape the task of judges from application of individual judicial wisdom to a task of bureaucratic logic where the judge will have the self-conception of playing a standardized role of processing litigations in Bangladesh. So, this study is going to be a significant contribution which discusses the use of technology in the judiciary of Bangladesh to provide access to justice through mitigation of case backlogs.

2. Case Blockage and Case Management in Bangladeshi courts: What Has Technology to Offer?

This part firstly highlights the correlation among the huge pile of cases, absence of timely disposal of cases and their impacts on the access to justice in Bangladesh. Secondly, this section mentions the current situation of back log of cases in Bangladesh and urges the necessity of proper case management in Bangladeshi courts. Lastly, it will show whether the use of technology in court may be a proper solution to this problem.

2.1 Case Blockage and Delayed Justice: Barrier to Access to Justice in Bangladesh

Actually, the central aspects of access to justice have been mentioned as "reasonable and effective access to courts of law and the opportunity to obtain legal services from qualified professionals."[8] Huge caseloads results in delayed justice and thus hampers obtaining the legal services within reasonable time. Therefore, access to justice may refer to the means of increasing it in this context, which are designated as 'making courts and the legal process more accessible' for the people.[9] Disposal of suits in an inordinate delay makes the court less accessible. Inordinate delay is also considered a violation of human rights and thereby, causing a major concern around the world.[10] Moreover, disposal of legal proceedings in a reasonable time is an integral part of providing access to justice.[11] Hence, the removal of case blockage is a dire necessity for Bangladeshi judiciary.

In an address in 1970, Mr. Warren E Burger, a former Chief justice of the United States, commented that '…a sense of confidence of the court could be destroyed if people come to believe that inefficiency and delay will

---

8 Christie v. British Columbia (2005), 262 D.L.R. (4th) 51 at para. 30 (B.C. C.A.).

9 Patricia Hughes, (2008), 'Law Commissions and Access to Justice: What Justice Should We Be Talking About?' Osgoode Hall Law Journal 46.4: 773-806.

10 Shah Alam, (2010), 'Problems of Delay and Backlog Cases' The Daily Star (Dhaka, 25 February) <https://archive.thedailystar.net/suppliments/2010/02/ds19/segment3/delay.html >accessed on 18 March, 2024.

11 Sekander Zulker Nayeen, (2019), 'Access to Justice is a Right for All' The Daily Star (Dhaka, 19 March) <https://www.thedailystar.net/law-our-rights/rights-advocacy/news/three-dimensions-access-justice-achieving-sdgs-1716856> accessed on 18 March, 2024.

drain even a just judgment of its value'.[12] Decades later, during an address in the national judicial conference in 2016, the then Chief Justice of Bangladesh, noted that huge burden of unsettled cases might enhance the cost of justice and it may discourage people from coming to court.[13] Lord Woolf mentioned that in ensuring access to justice, a civil justice system must have the capacity to deal with cases with reasonable *speed*.[14] Hence, it is well established that timely disposal of suit is one of the core impediments to ensure of access to justice.

2.2 Current Position of Case Backlogs in Bangladesh and the Causes of Delay in Justice

According to a latest case statistic report by the Supreme Court administration (which denotes the case statistics till 2019), "Bangladesh has a total of 3,684,728 case backlogs in all types of courts across the country.[15] There are many reasons behind this problem of backlog of cases in Bangladesh.[16] Some of the causes behind the backlog of cases in Bangladesh include limitations in clients' knowledge of their own cases, lack of lawyers' accountability to their clients, questionable accountability of judges and courts, and insufficient practical support and technical

---

12 A.B.M. Asrafuzzaman and M.G.M. Hasan, (2021), 'Causes and Redresses of Delays in Disposal of Civil Suits in Dhaka District Judge Court: An empirical Study' Dhaka Univ. LJ, 32, p.135.

13 Mizanur Rahman Khan, (2017) '5m pending cases by 2020' The Daily Prothom Alo (English version, Dhaka, 17 Jan 2017) https://en.prothomalo.com/bangladesh/5m-pending-cases-by-2020> accessed on 18 March, 2024.

14 Lord Woolf, (1995) 'Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales' <http://webarchive.nationalarchives.gov.uk > accessed on 18 March, 2024.

15 Mizanur Rahman, (2020), '3.7 million cases in backlog in Bangladesh courts', The Dhaka Tribune (Dhaka 16 July) <https://www.dhakatribune.com/bangladesh/court/216371/3.7-million-cases-in-backlog-in-bangladesh-courts> accessed 18 March 2024.

16 Some projects and reports have identified the various causes of delayed justice in Bangladesh. See Asif Nazrul, Tureen Afroz, and Heather Goldsmith, (2011), 'A Research Report on Evidence Based Analysis of the Trial Courts in Bangladesh' (United Nations Development Program and UK Department for International Development 2011) 9-13; Supreme Court of Bangladesh and United Nations Development Programme, (2015), 'A challenge for a Change: Timely Justice for All: Court Processes, Problems and Solutions' (Judicial Strengthening Project, Supreme Court of Bangladesh 2015,75. Out of many other causes, this study has only mentioned some causes which are related, to a greater extent, to case management and can be addressed through the application or use of technology in courts.

assistance.[17] Additionally, it is found that the current process of distributing cases to the Judges (as per jurisdiction), shortage of modern court records and case management facilities, lack of digital technology, and complex court records management system are one of the basic causes behind the case backlog of this country.[18]

2.3 Emergence of Proper Management of Judicial Process as a Solution to Case Blockages

The efficiency of any judiciary depends on the appropriate management of case-related information.[19] While reaching a logical end and pronouncing a conclusive verdict, the courts need to rely on the obtainability and comprehensiveness of reliable information relating to a case or suit between parties. So, in case the case records are not properly managed, the courts find it difficult to provide the parties with a fair and complete quality decision.[20] Thus, in the absence of effective case management, the parties are deprived of timely justice. On the contrary, it is noted by the court that when all the necessary information regarding the disputes are available and ready to be observed and they are well managed throughout the case, the goal of timely justice can only be achieved.[21] So, apparently, it is evident that using modern technology and modern techniques in the area of 'case management' or more broadly, in 'judicial process management' would be a great initiative to eradicate the problem of heavy caseloads and delayed justice in Bangladesh.

The following section examines the present scenario of use of technology in Bangladeshi courts and explores the need for further development of technology in courts.

---

[17] Supra note 6.

[18] Supra note 12.

[19] Wan Satirah Wan Mohd. Saman, (2014), 'Technology implementation and institutionalisation: a case of Malaysian courts', Doctoral dissertation, University of South Australia.

[20] Ibid.

[21] Hussainara Khatoon vs. Home Secretary, State of Bihar [1979] AIR SC 1360.

2.4 Inception and Present Use of Technology in Bangladesh Judiciary

The year of 2009 is the emerging era of digitization in Bangladesh and recently, Bangladesh has attempted to introduce e-judiciary.[22] The judiciary of Bangladesh has become a part of e-governance when a national web portal was established (the project of A2i). The national web portal includes judicial portal, cause list management system, and monitoring dashboard. In order to monitor the performance of judges and track the long pending litigations, judicial dashboard was significant step to e-judiciary of Bangladesh.[23]

While global COVID-19 pandemic outbreak was going on, a virtual court was introduced to attain bail petitions in criminal cases only. After the introduction of the virtual court, an ordinance was passed in June named 'Use of Information Technology by the Court—2020' which was later passed as an Act. This ordinance enabled litigants to appear virtually through audio, video conference, or other technological means at the various stages of a trial, namely inquiry, deposition of witnesses etc. In addition to this, the Supreme Court of Bangladesh issued practice directions in order to incorporate the technology to maintain regular function of the judiciary. For example, these practice directions gave guideline relating to filing, bail hearing, surrendering, and resolving other urgent matters through virtual presence.[24] Therefore, the significant improvement in the use of technology in the judicial proceedings in Bangladesh is very much evident.

2.5 Urge for Further Development and Use of Technology in Bangladeshi Courts

While investigating the sufficient effectiveness of the current use of technology in courts, it is observed that the full use of technology has not been ensured in every stage of a dispute in courts, though occasionally, courts hold the virtual hearing of any application or petition in a suit. Thus, the use of technology is not fully practiced yet in the major parts of a litigation. For example- the deposition of parties or witnesses,

---

[22] Md Muajjem Hossain, (2017), 'Implications of e-Judiciary: Bangladesh Perspective', Judicial Administration Training Institute 16: 134–9.

[23] Ibid at 137.

[24] The Practice Directions no 08J, 06J, 07J, 230, 216 and 214 issued by the Supreme Court of Bangladesh.

submission of evidence of any necessary documents by the counsellor of the suits, the interim orders on any application or in a case, the cross examination of the witnesses etc. are not fully digitalized.

The ordinance and the practice directions of the Supreme Court have not addressed all the issues related to court procedures. They have not mentioned whether a judge can take a deposition virtually, hear argument or pronounce judgment virtually.[25] After the pandemic situation was almost over, the courts restarted their regular judicial proceedings at the end of August 2020. Thereafter, all virtual activities have come to an end.[26] As a result, it can be concluded that the current capacity of judicial management is not well enough to tackle all the stages of a suit life from opening to closure. Hence, Bangladeshi legal system needs to be equipped with more technological development tools to get the comprehensive benefit of using technology in courts.

Now, the question comes, how the use of technology be adopted as a regulatory tool in judicial management system in Bangladesh.

3. Emergence of Technological Court System in Bangladesh and Arguments for Development

The current part of the paper suggests that with a view to getting full benefit of using technology in court in case of elimination of backlog of cases, Bangladesh needs new generation court system where technology will be used sequentially in the management of judicial function through the following approaches. The following describes and examines the possible situations and outcomes of each approach to using technology in Bangladeshi courts.

3.1 The Administrative Perspective of Technology in Bangladeshi Courts

In the context of administrative perspective, use of technology is crucial for Bangladeshi legal system. From the earlier discussion (on point 2.3) in

---

[25] Ummey Sharaban Tahura, (2021), 'Can technology be a potential solution for a cost-effective litigation system in Bangladesh?', Justice System Journal, 42(2), pp.180-204.

[26] Ibid.

this paper, it is found that there are many administrative causes behind the backlog of cases. Moreover, good court administration has the ability for 'monitoring and case-flow tracking in such a way as to know the status of each case, to know its procedural position, to locate documents and records more easily and to reflect everything in transparency plate'.[27] Good court administration is crucial for ready references and control over the cases in the docket. This also helps the court instantly with any information it needs for effective case management.[28] Hence, at the preliminary stage, use of technology is a necessity to regulate the administrative work of these court cases in Bangladeshi courts.

3.1A Present Scenario of the Use of Technology in Court Administration in Bangladesh

Currently, in Bangladesh, e-cause list, judicial dashboard and 'my court' apps are open for all. They are great signs for the use of ICT in Bangladeshi courts. The e-cause list shows the records the name of the suit along with the steps where the suits are in. The next hearing day of the suits should also contain information about the nature of the hearing. Additionally, one can determine the state of the suit, whether it's dormant or dismissed, through this information. The data can be accessed by public at any time. But the data related to a case from beginning to closure is not stated there.

Except the use of e-cause list, the current suit management system in the lower courts relies basically on paper- based sources such as case diaries and registers at the office of court secretariats. They are basically handwritten logs which contain the listing of the suits opened, motions submitted, and cases closed. These handwritten ledgers include the nature of the suits, the result of the suits, the date of the opening and closing of the cases. The current system cannot directly track the physical location of a case file. In order to do that one must have to check the court office of the suit manually.

---

[27] Md Shah Alam, (2000), 'A Possible Way out of Backlog in Our Judiciary', The Daily Star (Dhaka), 16 April, <https://ruchichowdhury.tripod.com/a_possible_way_out_of_backlog_in_our_judiciary.htm> accessed on 18 March, 2024.

[28] Ibid.

3.1B Necessity for Further Technological Development in Bangladeshi Court Administration

The present position of using technology in court administration is worth of appreciation. But there are some areas where further technological development is necessary. Particularly, the fact can be mentioned that under the current framework, there is no central database or data clearinghouse through which to monitor the flow of cases in the courts beyond opening and exit. Moreover, the data in current mentioned logs or cause list is not always uploaded in real time. Therefore, there is no option to retrieve the information in real time from different courts in Bangladesh.

Moreover, there is no certain way to assess the complexity of the suit. It is also not possible accurately to know the real time certain cases consumed, the ratio of motions or suits per judge and so on. Consequently, it is difficult to design intelligent scheduling modalities which is one of the important elements of case management for the courts to provide justice to the litigant on time. Therefore, judges' overall judicial performance or performance in each court or suit cannot be credibly systematized and streamlined.

So, in Bangladesh, Courtrooms Management System (CMS) must fulfill the need to connect courtrooms to register offices, and chambers to courtrooms etc. Moreover, it will generate credible statistical knowledge or information about caseloads and backlogs as well as data regarding the productivity of each judge in the courts. Thus, in the long run, technology should be harnessed to better manage the judicial process by generating reliable data in real time which will help to dispose the cases timely and will contribute to overall justice to all in Bangladesh.

3.2 Impacts of Using Developed Technology in Court Administration in Bangladesh

There are pros and cons of using technology in judicial administration in Bangladesh. The possible outcomes are mentioned below.

3.2A Positive Impacts

In one hand, first of all, this novel managerial dimension may make the judges 'self-aware' about their judicial performance regarding their

productivity. Secondly, their distinct performance can be and in fact, will be monitored by the heads of the judicial system. Thus, the possible positive outcome of using the developed technology in court administration will ensure higher level of accountability of the judicial officers in Bangladesh.

3.2B Concern for 'Threat to Judicial Function'

While observing the other impacts of such use of technology in Bangladeshi courts, it is worth mentioning that sometimes, different ways of monitoring as well as managing judges may pose a threat to judicial system due to the pressures to subject other judges to sanctions for substandard conduct. As per Frank M. Coffin, "The ascendance of the management-governance function, whether by collegial group, technocrat, or committee, poses, if untouched, an insidious threat to the judicial functioning of the judiciary".[29]

Hence, there is a possibility that the judges my feel to raise objection to the managerial reforms that they may see as limiting their own control over the judicial process. They can assume that this is, in the name of higher level of accountability, excessive monitoring over the judiciary. However, if there is reasonable extent on monitoring and managing the judicial conduct and behavior, this issue may not be a concern for Bangladesh judiciary.

As it is evident from the above discussion that further and new developed technological interference in management of judicial process is necessary. Now, the question to be answered is on the "purpose": 'which demands the new technology should respond?' and the answer lies in the structural and regulative perspective of technology in Bangladeshi Court.

3.3 The Structural and Regulative Perspective of Technology in Bangladeshi Courts

While argument is made for adoption of new and developed technology in judicial administration in Bangladesh, we need to find the purpose for which technology will help us. The reason is that "The search for purpose"

---

[29] See Frank M. Coffin, (1989), 'Grace Under Pressure: A Call for Judicial Self Help', 50 OHIO ST. L.J. 399, 402.

is more fundamental question to ask as it is required to address the policy that should undergird the necessary technological transformation in the Court administration in Bangladesh. The more specific concern is, 'will the use of technology be just administrative and productivity-oriented, or will it be structural and regulative?'

In one hand, under the former approach (just administrative and productivity-oriented), the technology should be used to increase productivity which will put networked scheduling of court cases in place and will focus only on warehousing along with productivity tool. Thus, it will focus on one aspect of the legal system to adopt a solely administrative look in the way to enhance efficiency in judicial works in Bangladeshi courts.

On the other hand, under the latter (structural and regulative) approach, it suggests to adopt a more holistic approach where 'increasing productivity (or in other words, increasing judicial dispose in courts)' will be considered as one goals among other goals.[30] The latter approach also denotes that technology and its development process may not be static. They may be used not only as a mean to attain predetermined goals but also as a tool for setting, drawing up and prioritizing the aims themselves.[31]

Eventually, such use of technology in structural and regulative perspective will help to maintain the reasonable ratio of judge and cases in a court[32] and this will contribute to mitigate the problem of the backlog of cases and enhance timely disposal of suits in Bangladesh.

3.4 Impacts of Structural and Regulative Perspective of Technology

The possible outcome of this approach has the following concerns.

---

30 Among the other goals, one goal might be 'fair distribution of cases within the system' to reduce unexpected case load on one specific judge or court in Bangladesh.

31 Judge Arbel, the former Director of Courts (with a background in tech support) took the initiative to implement this concept in Israeli Court. He wholeheartedly embraced the structural perspective and Israeli judiciary, to a greater extent, got benefitted under such approach.

32 Lack of which are mentioned at point 2.3 in this article as causes of delay in disposal of suits.

3.4A Concern for 'Judicial Discretion'

Under this approach, technology offers an architecture for command and control or in other words 'do' and 'don's'. Technology will deal with the issue of regulating the manner in which judges will be performing their duties. On the issue of management structures of judges, former (16th) Chief justice of the United States William Rehnquist once stated that "Bureaucratization and increased management structures will leave the judges less freedom to exercise personal judgment".[33] Therefore, the management structure of technology in Bangladeshi courts may cause the concern of 'undermining of judicial discretion' as well as may affect the freedom of judges in performing their judicial work. However, the proper management of use of this approach can mitigate this possibility.

3.4B Concern for 'Grand or Step by Step Design' of Using Technology in Bangladeshi Courts

In the structural perspective of technology, issue may arise whether the design of technology used in court would be a 'grand design' or 'brick by brick' approach where the whole process of court suits will be turned into small sections in order to make the use of technology more feasible in the court system.

To be noted here, in many jurisdictions, the grand design approach was taken for the purpose of paper less judiciary where all the steps of a suit were planned to be done through technology. All the registers hoped to be online based. But it did not work mainly for two reasons. One is that it requires a high technological leap and the strength of the tech-sector plays a crucial role. And another is that the limitation of the budgetary issue in such technological development for judiciary.[34]

In the first phase of application of technology in courts, the "grand-design" approach may also not be suitable for Bangladesh judiciary. The reason is that the grand design approach denotes to harness technology to be applied

---

[33] Carolyn Dubay, (2013), 'A Country Without Courts: Doing More with Less in Twenty-First Century Federal Courts', 48 NEW. ENG. L. REV. 531, 536.

[34] Reichman, Amnon, Yair Sagy, and Shlomi Balaban, (2019), 'From a panacea to a Panopticon: the use and misuse of technology in the regulation of judges', Hastings LJ 71: 589. This paper investigates the situation of use of technology in Israeli courts and showed that the grand approach did not fit for this country.

in the entire domain of litigation, including fully digitizing courtrooms by establishing a paper-less court, nearly automated case-management tools, and an all-encompassing inventory analytics. But the tech sector is not high and innovative enough in Bangladesh. Moreover, it is worth mentioning that in Bangladesh, externally, international organizations, such as the Department for International Development, the United Nations Development Programme, or the Canadian Development Agency, occasionally funded the Bangladesh government in order to establish an e-judiciary system to increase court efficiency, strengthen state organizations relating to the judiciary, and enhance access to justice.[35]

However, research has found that, due to limitations of funding, absence of a well-researched, long-term plan, post-project planning, and lack of prudence of policymakers, these projects were unsuccessful.[36] Rather than chasing for a grand approach, in Bangladesh, the ingredients or processes of a total judicial process may be needed to break down into different segments and technology can be used in the small segments part by part. After that the use of such technology can be gradually increased into another step of judicial process or suits. For example, in Bangladesh, only the cause list is online based and later on it can be used in other sections of suits in our courts. Thus, it will meet our current financial limitation as well as in the near future, we can gradually adopt technology wholly in our judicial process.

Now, the question is how technology be used in overall case management in our courts and the answer can be found in the managerial and integrative perspective of use of technology in the courts of Bangladesh.

3.5 The Managerial and Integrative Perspective of Use of Technology in Bangladeshi Courts

In part 2.3 of the present paper, it is mentioned that emergence of judicial (or more specifically case) management can be a solution to the case backlogs in Bangladesh. The present part shows the ways of using technology in court case management in Bangladesh.

---

[35] Sumaiya Khair, (2008), 'Legal Empowerment for the Poor and the Disadvantaged: Strategies Achievements and Challenges', Dhaka: The University Press Ltd.

[36] Supra note 25.

Actually, case management denotes to detailed scheduling of the life and history of a case, drawn by an early judicial intervention which enforces active participation of the parties and strict observance of the schedule under court's supervision. In other words, it is procedural calendar of a particular civil suit.[37] In addition to this, case management is designed "to reduce dilatory, frivolous, inefficient, and protracted litigation practices and to replace party-controlled litigation processes with judge-controlled, sequential steps in the life of a civil proceeding" (in a definite time-frame).[38]

In such management process, judges become more active in overall judicial process. Bangladeshi legal system is mostly adversarial. So, the concern may arise whether case management will be conflicting with our judicial system. To be noted here, it is evident that making judges more active by adopting case management will not necessarily conflict with the country's adversarial system.[39] The former Chief Justice of New South Wales, the Hon JJ Spigelman, noted that 'there is no inconsistency' between an expanded managerial role for the judiciary and the essential requirements of an adversarial system.[40] Hence, Bangladesh judiciary has the opportunity to adopt proper case management system. Moreover, in the upper section of this study, I have suggested that technology can be used in different segments of a whole suit process. The segments responsible for delaying the disposal can be identified. Thereby, in a court case management process, different segments of a case can be categorized on their priority of affecting causing delay in suit disposal or backlogs of cases. Then, they should be digitized as per their effect. Then, accordingly, we can prioritize development and implementation of the technology on other sections.

The Chief Justice of Western Australia, His Honor Wayne Martin, explained that just similar to a medical case where a particular patient is

---

[37] Supra note 27.

[38] 'Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process' (1997-98), New York University Journal of International Law and Politics, Vol. 30, Nos. 1 & 2, p. 62).

[39] Supra note 6.

[40] Spigelman, Chief Justice JJ (2009), 'Case Management in New South Wales', paper presented at the 'Judicial Delegation from India', Sydney, 21 September.

assessed at the very beginning, so too such a procedure should be adopted in court cases. He gave the example that in case of a litigation about inheritance, the suit should be sent straight for mediation with family members.[41] Similarly, Ummey Sharaban Tahura, and R.L.L. Kelly Margaret have suggested that in suits for succession in land, all the necessary parties are important. Thus, this matter should be identified at the filing stage and a different treatment be applied to them as all the interested relatives of the deceased must be added as party to the suit.[42]

In this way, technology in Bangladeshi court cases can be used in managerial and integrative perspective to eradicate the backlog of cases.

3.6 Impacts of Managerial and Integrative Perspective of Technology in Courts

The managerial and integrative perspective of technology in Bangladeshi courts may have the following outcomes.

3.6A Creation of Awareness for Judicial Conduct and Concern for Resistance

First of all, due to the managerial aspect of technology, the process may inspire participation and deliberation among members of the various segments of the legal system. Furthermore, awareness will be grown that current judges should be better integrated into the design of the sought-after technologies as technology should not necessarily be used in a command-and-control fashion. In the managerial notion of technology, dependency on technology is increased (as technology plays crucial role to decide what segments of a suit is most important in case management). This can be considered as rigid orders to judges on how to conduct their business. So, the judges should be given that space to participate in the design of technology used in courts. Otherwise, resistance may come from judges. But the lack of proper technical knowledge may be an issue. However, in order to prevent that resistance, ‘one module at a time’ for better configuration of tested technologies should be taken in court cases

---

41 Martin Wayne, (2009), ‘The Future of Case Management’ Perth: The Supreme Court of Western Australia, 19 September, <www.supremecourt.wa.gov.au/> accessed on 18 March, 2024.

42 Supra note, 6.

and then further development can be done in other part of the cases in hand.

3.6B Tool for Professional-Community-Building in Bangladesh Judiciary

When the use of technology will be increased in courts, it will make the justice delivery process speedier and will enable transparency, reliable deliberation, and sharing of critical resources in courts.[43] Thus, a sense of community will be developed in Bangladeshi legal system. Thus, under this approach, technology will be used as a professional-community-building tool. Then, power and hierarchy may become less obvious as access and permission rules will internally be discussed. In that stage, the heads of the organization would take decision that would be justified to the rest of the members and it will enhance mutual professional reliability in the judiciary of Bangladesh. In the long term, this judicial professionalism will contribute to provide proper justice to all.

Now, the final issue arises: does the Bangladeshi legal system need to consider the fourth, the normative value perspective, of technology? The answer is yes.

3.7 Normative Value Perspective of Technology in Bangladeshi Legal System

In a broad sense, managing a judiciary in a legal system of a country is a normative exercise. In this process of judicial management, technology is argued to be placed at the heart of the managerial process. Thereby, it should be designed with normative values in mind.[44] In addition to this, the uniqueness of cyberspace is in assimilating the values that humans themselves brought with them when they built this space.[45] Therefore, it is obvious that the normative values must be added while using technology in the process of management of judicial process in Bangladesh, such as-

---

[43] Richard Susskind, (2020), 'Covid-19 shutdown shows virtual courts work better.' The Financial Times (UK based online newspaper), May 7, < https://www.ft.com/content/fb955fb0-8f79-11ea-bc44-dbf6756c871a > accessed on 18 March, 2024.

[44] Arthur J. Cockfield, (2004), 'Towards a Law and Technology Theory', 30 MANITOBA L.J. 383.

[45] Lawrence Lessig, (2003), 'Law Regulating Code Regulating Law', 35 LOY. U. CHI. L.J. 1, 14.

transparency, accountability, neutral manner and equal treatment for the users of technology.

Under advanced development of technology use in Bangladeshi courts, courts will leverage more advanced technologies. For instance, it can be presumed that in a court case, when the next step in a judicial process is due, it will make automatically an alert as long as no further schedule is entered on that stage of suit. Thus, the case management will be easier for judges and other officials of our judiciary. It may advance at the stage that the alert system will be directed both at the "deviant" judge (for his/ her non-compliance) and at his seniors (namely, district judge under whom the deviant judge is working). It, thus, serves both as a self-monitoring tool and a supervising tool in case of court cases in Bangladesh.

So, the advanced technology must be designed with the values of transparency, accountability, and equal treatment for the users of technology in court cases. But it has some other consequences.

3.8 Impacts of Normative Value Perspective of Technology in Bangladeshi Legal System

The outcomes of adding normative value to using technology in courts are as follows.

3.8A Concern for 'Judicial Transparency and Judicial Independence'

Under this approach when technology will be in every part of the judiciary of Bangladesh, every judge, judicial division, court, or the entire judiciary may become automatically and instantly, transparent to the heads of the judicial system without any further manual arrangements. Thereby, it will ensure highest level of transparency in judicial works. But there grows a concern namely that while courts' transparency stands to enhance accountability, it may also raise a possible tension with judicial independence. It is often argued that over-transparency may undermine judges' independence.[46] Hence, the extent of transparency must be reasonable and proper in case of using technology in courts.

---

[46] Christ of Demont-Heinrich, (2002), 'When the Panopticon Goes Online: Charting the Geography of Power, Control and Surveillance in Cyberspace', 22 (July 26).

3.8B Concern for 'Judicial Democracy and Timely Disposal of Cases'

Additionally, it can have a democratic effect. It is argued that 'computer-mediated communication' tends to equalize status, decentralize and democratize decision making."[47] Thus, an overall technological judicial management may generate multi-dimensional organizational vectors in the judiciary of Bangladesh. While prioritizing the top-down, hierarchical vector, it also will tend to enhance the horizontal or even bottom-up gaze, as judges are informed of internal managerial data. So, judges may challenge managerial policies and may raise competing organizational demands in case of handling backlog of cases. This tendency, in the long run, will mitigate the problem of delayed disposal of suits in Bangladesh and thereby, will contribute in providing proper access to justice to the litigant parties in Bangladeshi courts.

4. Conclusion

From the above analysis, it can be mentioned that this paper has aspired for and discussed about an advanced technological judicial platform which will pervade the totality of the Bangladeshi judicial system. This technological platform can be the central venue through which parties of a litigation, lawyers, court secretariats, judges, and persons in related to court administrators will be able to interact in each phase of the judicial process and the information will help the court administration to eradicate the backlog of cases for ensuring proper justice to all. However, to achieve this goal, this article suggests that the intended platform can function not only as a case management system but also as a comprehensive judicial management system, capable of monitoring the entire justice production process in Bangladesh. However, Bangladesh being a developing country, we cannot claim to reach that state overnight. Rather, in order to mitigate the case backlogs in courts and to ensure proper access to justice for everyone, Bangladesh may have to face the above stated steps in adopting regulatory technology to attain and use the intended technological judicial management system.

---

[47] Russell Spears & Martin Lea, (1994), 'Panacea or Panopticon? The Hidden Power in Computer-Mediated Communication', 21 COMM. RES. 427, 427 (CMC).

References

Asif Nazrul, Tureen Afroz, and Heather Goldsmith, (2011), 'A Research Report on Evidence Based Analysis of the Trial Courts in Bangladesh' (United Nations Development Program and UK Department for International Development 2011) 9-13;

Asrafuzzaman, A.B.M., and Hasan, M.G.M., (2021), 'Causes and Redresses of Delays in Disposal of Civil Suits in Dhaka District Judge Court: An empirical Study' Dhaka Univ. LJ, 32, p.135.

Christie v. British Columbia (2005), 262 D.L.R. (4th) 51 at para. 30 (B.C. C.A.)

Christof Demont-Heinrich, (2002), 'When the Panopticon Goes Online: Charting the Geography of Power, Control and Surveillance in Cyberspace', 22 (July 26).

Cockfield, Arthur J., (2004), 'Towards a Law and Technology Theory', 30 MANITOBA L.J. 383.

Coffin, Frank M., (1989), 'Grace Under Pressure: A Call for Judicial Self Help', 50 OHIO ST. L.J. 399, 402.

Dubay, Carolyn, (2013), 'A Country Without Courts: Doing More with Less in Twenty-First Century Federal Courts', 48 NEW. ENG. L. REV. 531, 536.

Hasan, Mohammad Ikbal, and Fahmida Johura Rupa, (2021), 'Digitalization of Bangladesh judiciary and access to justice', Asian Journal of Social Sciences and Legal Studies 3.3: 49-58.

Hosain, Syed Emran, (2012) 'Delay in justice: An abysmal crisis' The Financial Express (Dhaka, 6 September).

Hughes, Patricia, (2008), 'Law Commissions and Access to Justice: What Justice Should We Be Talking About?' Osgoode Hall Law Journal 46.4: 773-806.

Hossain, Md Muajjem, (2017), 'Implications of e-Judiciary: Bangladesh Perspective', Judicial Administration
Training Institute 16: 134–9.

Hussainara Khatoon vs. Home Secretary, State of Bihar [1979] AIR SC 1360.

'Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process' (1997-98), New York University Journal of International Law and Politics, Vol. 30, Nos. 1 & 2, p. 62)

Jamila A. Chowdhury, (2018), 'ADR Theories and Practices' 2nd edn, London College of Legal Studies (South).

Khair, Sumaiya, (2008), 'Legal Empowerment for the Poor and the Disadvantaged: Strategies Achievements and Challenges', Dhaka: The University Press Ltd.

Khan, Mizanur Rahman, (2017) ‘5m pending cases by 2020’ The Daily Prothom Alo (English version, Dhaka, 17 Jan 2017) https://en.prothomalo.com/bangladesh/5m-pending-cases-by-2020> accessed on 18 March, 2024.

Lessig, Lawrence, (2003), ‘Law Regulating Code Regulating Law’, 35 LOY. U. CHI. L.J. 1, 14.

Marco, Fabri, and Philip M. Langbroek, eds. (2000), ‘The challenge of change for judicial systems: developing a public administration perspective’, (No Title)

Md Shah Alam, (2000), ‘A Possible Way out of Backlog in Our Judiciary’, *The Daily Star* (Dhaka), 16 April, <https://ruchichowdhury.tripod.com/a_possible_way_out_of_backlog_in_our_judiciary.htm> accessed on 18 March, 2024.

Mizanur Rahman, (2020), ‘3.7 million cases in backlog in Bangladesh courts’, The Dhaka Tribune (Dhaka 16 July) <https://www.dhakatribune.com/bangladesh/court/216371/3.7-million-cases-in-backlog-in-bangladesh-courts> accessed 18 March 2024.

Reichman, Amnon, Yair Sagy, and Shlomi Balaban, (2019), ‘From a panacea to a Panopticon: the use and misuse of technology in the regulation of judges’, Hastings LJ 71: 589.

Saman, Wan Satirah Wan Mohd., (2014), ‘Technology implementation and institutionalisation: a case of Malaysian courts’, Doctoral dissertation, University of South Australia

Sekander Zulker Nayeen, (2019), ‘Access to Justice is a Right for All’ The Daily Star (Dhaka, 19 March) <https://www.thedailystar.net/law-our-rights/rights-advocacy/news/three-dimensions-access-justice-achieving-sdgs-1716856> accessed on 18 March, 2024.

Shah Alam, (2010), ‘Problems of Delay and Backlog Cases’ The Daily Star (Dhaka, 25 February) <https://archive.thedailystar.net/suppliments/2010/02/ds19/segment3/delay.html> accessed on 18 March, 2024.

Spears, Russell & Lea, Martin, (1994), ‘Panacea or Panopticon? The Hidden Power in Computer-Mediated Communication’, 21 COMM. RES. 427, 427 (CMC).

Spigelman, Chief Justice JJ (2009), ‘Case Management in New South Wales’, paper presented at the ‘Judicial Delegation from India’, Sydney, 21 September.

Supreme Court of Bangladesh and United Nations Development Programme, (2015), ‘A challenge for a Change: Timely Justice for All: Court Processes, Problems and Solutions’ (Judicial Strengthening Project, Supreme Court of Bangladesh 2015,75.

Susskind, Richard (2020), ‘Covid-19 shutdown shows virtual courts work better.’ The Financial Times (UK based online newspaper), May 7, < https://www.ft.com/content/fb955fb0-8f79-11ea-bc44-dbf6756c871a > accessed on 18 March, 2024.

Taher, Mohammad Abu, and Siti Zaharah Jamaluddin, (2022), ‘Enhancing access to justice through e-judiciary in Bangladesh: A study’, UUM Journal of Legal Studies 13.2: 317-344.

Tahura, U.S, (2021) ‘Can technology be a potential solution for a cost-effective litigation system in Bangladesh?’ Justice System Journal, 42(2), pp.180-204.

Tahura, U.S, and R. L. L. Kelly Margaret, (2015), ‘Procedural Experiences from the Civil Courts of Bangladesh: Case Management as a Potential Means of Reducing Backlogs’, Australian Journal of Asian Law 16: 1–22,

The Practice Directions no 08J, 06J, 07J, 230, 216 and 214 issued by the Supreme Court of Bangladesh.

Wayne, Martin (2009), ‘*The Future of Case Management*’ Perth: The Supreme Court of Western Australia, 19 September, <www.supremecourt.wa.gov.au/> accessed on 18 March, 2024.

Woolf, Lord, (1995) ‘Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales’ <http://webarchive.nationalarchives.gov.uk > accessed on 18 March, 2024.

A Critical Study on the Provisions Relating to Cognizance of Offence in Criminal Trial of Bangladesh

Md. Bayjid Rayhan*
Tahmina Akther Moon**

Abstract

A standard criminal trial system is expected in every democratic state where the judiciary will conduct the trial of offences independently as well as exclusively. After the historic separation of judiciary from the executive in 2007, the criminal courts run by the members of Bangladesh Judicial Service are conducting the trial of criminal cases exclusively. The trial of a criminal case in Bangladesh starts with the taking cognizance of the offences. A proper taking cognizance of offences is prerequisite for the completion of a criminal trial successfully. Effective disposal of criminal cases is a must to face the global challenge of maintaining smooth administration of justice, good governance and, rule of law in a broader context. Due to lack of the proper appreciation of this particular stage of criminal proceeding, the existing mechanism relating to criminal administration of justice of Bangladesh has been substantially failing to meet the public expectations. There is no alternative for the Judicial Magistrates entrusted with the solemn duty of taking cognizance of offences to delve into this particular matter with utmost sincerity and also for the authority concerned to create such a sound mechanism where the Judicial Magistrates can perform this crucial task flawlessly.

This article takes an attempt to find out the provisions relating to the cognizance of offences in the criminal trial of Bangladesh, the significance of this particular stage of criminal trial, the problems in the taking cognizance of offences and finally, the probable way-outs. The issues raised in this article are important to understand the pros and cons of "Taking cognizance of offences". This paper employs a qualitative methodology to examine numerous pieces of literature, both primary and secondary, and also to conduct a thorough critical analysis for that specific objective.

Keywords: Cognizance, Magistrate, Inquiry, Investigation, Criminal Trial, Cr.P.C.

---

* Judicial Magistrate, Chief Judicial Magistrate Court, Bhola.
** Lecturer, Department of Law, University of Barishal.

1. Introduction

Criminal trial in Bangladesh is mainly regulated by the Code of Criminal Procedure, 1898 which was enacted during the British regime. Even after the independence of Bangladesh no significant change was made in the criminal trial system of Bangladesh. However, after the separation of judiciary in 2007 through the landmark Masdar Hossain judgment, the Cr.P.C.[1] was amended in a massive way in 2009. The main purpose of this amendment was to transfer the task of conducting the criminal trail from the Executive to the Judiciary. After this separation the posts of judicial magistrates are created under the joint control and supervision of the Chief Judicial Magistrates and Sessions Judges and the responsibility of conducting different tasks of criminal proceeding, such as, *taking cognizance of offences, judicial inquiry, recording the statements or confessions under section 164 of the Cr.P.C., taking deposition of the victim or the witnessunder section 22 of the Nari-O-Shishu Nirjatan Daman Ain, 2000, conducting of T.I. P.*[2]*, criminal trial* etc. are vested upon the judicial magistrates. Among all the tasks of a Judicial Magistrate, taking cognizance of offences is one of the most important tasks upon which the proper trail of any criminal case depends to a large extent. Cognizance of offences bridges between the pre-trial stage and the trial stage of the criminal proceeding.

2. Magistrates of Different Classes in Bangladesh

In the light of the Cr.P.C.[3], Magistrates in Bangladesh are generally competent to take cognizance of criminal offences. However, all Magistrates cannot take cognizance of criminal offences. Firstly, it is pertinent to discuss the existing categorization of criminal courts in Bangladesh for the better understanding of this study.

There are two classes of Criminal Courts in Bangladesh, such as, Courts of Sessions and Courts of Magistrates.[4] Magistrates in Bangladesh are of two classes, such as, Judicial Magistrates and Executive Magistrates.[5] Despite

---

[1] Code of Criminal Procedure, 1898.

[2] Test Identification Parade [a procedure in which the alleged offender is brought before the witnesses and victims for identification].

[3] The Code of Criminal Procedure, 1898.

[4] The Code of Criminal Procedure, 1898 section 6.

[5] ibid.

having different perceptions in practice the word "Magistrate" in law refers to a Judicial Magistrate.[6] Judicial Magistrates are of four classes[7], such as,

i. CMM[8] or CJM[9].
ii. Magistrate of the First Class or MM[10].
iii. Magistrate of the Second Class.
iv. Magistrate of the Third Class.

Additional Chief Judicial Magistrate or Additional Chief Metropolitan Magistrate is included within the class of Chief Judicial Magistrate or Chief Metropolitan Magistrate.[11] Judicial Magistrates are appointed from the persons employed in the Bangladesh Judicial Service[12] whereas executive magistrates are appointed from the persons employed in the Bangladesh Civil Service.[13] There is also a provision for the appointment of Special Magistrates[14] who may be appointed from the police officers holding the post not below the grade of an Assistant Superintendent of Police for preserving the peace, preventing crime and detecting, apprehending and detaining offenders or from Executive Magistrates or from Judicial Magistrates.

3. Meaning of "Taking Cognizance of Offence"

Taking judicial notice of an offence by the competent authority at the very beginning before the commencement of a criminal trial is called taking cognizance of an offence though the Cr.P.C. does not define the term "take cognizance of an offence". Its meaning is to be understood by perusing the case laws. Regarding the meaning of the term "cognizance of an offence",

6 ibid section 4A (1) (a) [In this Code, unless the context otherwise requires, any reference without any qualifying word, to a Magistrate, shall be construed as a construed reference to a Judicial Magistrate].
7 ibid section 6(3).
8 Chief Metropolitan Magistrate in Metropolitan Area.
9 Chief Judicial Magistrate in area other than Metropolitan Area.
10 Magistrate of the First Class in Metropolitan Area is called Metropolitan Magistrate.
11 ibid section 6 see explanation.
12 ibid section 11.
13 ibid section 10.
14 ibid section 12.

the honourable Appellate Division observed in the case of **State vs. Amjad Ali**[15] that:

> What we infer in its literal sense of this expression includes:-
> to take notice of an offence with the intention of initiating judicial proceedings in respect of that offence, or to take notice of an offence with a view to taking step to see whether there is any basis for initiating judicial proceedings against the offender in respect of the offence, or to take notice of an offence for other purposes.[16]

It was stated in the case of **State of Karnataka vs. Pastor P. Raju**[17] that cognizance means when the Magistrate or the Court applies his or its judicial mind to the facts mentioned in complaint or police report or upon information received from any person that an offence has been committed. The honourableApex Court opined in the case of **Mohammad Kalu Bhuiyan vs. Special Tribunal**[18] that taking cognizance of an offence is merely the mental decision of a Magistrate or a Judge to take judicial notice of a case. When a Magistrate or a Judge applies his mind to the facts of a case and decides to proceed against the offender with a view to determining the guilt, it is the state where cognizance of the offence is taken. A Magistrate is empowered to take cognizance in respect of an offence and not against any accused person.[19]

From the above observations, it is clear that taking cognizance of offence is a judicial act but not an administrative act because applying the judicial mind or taking judicial notice is the pre-condition of taking cognizance of an offence. From this perspective, it can be correctly assessed that the task of taking cognizance of offenses should always be vested in judges or judicial magistrates, not in any other authority.

---

15 72 DLR AD 113.
16 ibid, para 12.
17 6 SCC (2006) 728.
18 30 DLR (1978) 124.
19 State vs. Amjad Ali 72 DLR AD 113.

4. Scopes of Taking Cognizance of Offence in Criminal Trial of Bangladesh

The Cr.P.C. vests the Magistrates, mostly the Judicial Magistrates, with the power of taking cognizance of offences. However, under certain special laws cognizance of offence is taken by the Judges empowered by those laws. For instance, Sessions Judge of Nari-o-Shishu Nirjatan Daman Tribunal can take cognizance of the offences punishable under Nari-o-Shishu Nirjatan Daman Ain, 2000.

4.1 Taking Cognizance by Judicial/Metropolitan Magistrates

Chief Metropolitan Magistrate, Metropolitan Magistrate, Chief Judicial Magistrate and Magistrate of the First Class are the competent persons for taking cognizance of offences.[20] Moreover, the Government or the Chief Judicial Magistrate may also empower the Magistrates of Second Class or Magistrates of the Third Class to take cognizance of offences in certain cases.[21]

4.1.1 The Effects of Allotment of Police Stations to Courts of Judicial Magistrates

Jurisdiction of a Judicial Magistrate may be defined by the Government or by the Chief Judicial Magistrate subject to the general or special orders issued by the Government in consultation with the High Court Division. In the absence such definition, the jurisdiction and powers of every Judicial Magistrate shall extend throughout the district.[22] Again, the Chief Judicial Magistrate may give special orders as to the distribution of business among Magistrates and Benches consistent with the Cr.P.C. and rules made by the Government under section 16 of the Code.[23] For the purpose of taking cognizance of offences, Chief Judicial Magistrate or Chief Metropolitan Magistrate usually allots a particular Police Station or Thana to a Judicial Magistrate having the power to take cognizance of offences.The allotment of police station is an administrative act which does not affect the cognizance power of the Judicial Magistrates. In a district all Judicial Magistrates of the First Class are not always allotted

---

[20] The Code of Criminal Procedure, 1898 section 190(1).

[21] The Code of Criminal Procedure, 1898 section 190 (2) & 190(3).

[22] The Code of Criminal Procedure, 1898 section 11(3).

[23] ibid section 17.

with the Police Stations. Whenever a Judicial Magistrate of the First Class is transferred, the police station or thana which vested in him is transferred to another Judicial Magistrate Court.

4.2 Taking Cognizance by Executive Magistrates

Inspite of having unequivocal constitutional provision[24] and the explicit decision of the Apex Court to separate the judiciary from the executive, executive officials are still not kept aloof from the criminal trial procedure. Under Mobile Court Act, 2009, the Executive Magistrates have been conferred massive cognizance powers. The schedule of this single Act contains more than 100 pieces of laws. The honourable High Court Division has declared the Mobile Courts, being run by Executive Magistrates, illegal.[25]

4.3 Taking Cognizance by Sessions Judges

The Court of Sessions can take cognizance of offences only when it is expressly provided by the Code[26] or any other law. Generally it can take cognizance of an offence when a Magistrate sends the accused to it.[27] Before sending a case to the Court of Sessions, the Magistrate has to make sure that the case has been completely ready for trial by the Court of Sessions and he has to transfer all the documents of the case, such as, *Medical Report, Charge-sheet, Inquest Report*[28]*, Investigation or Inquiry Report* etc. with the record of the case. In the case of **Mufti Abdul Hannan Munshi alias Abul Kalam and another vs. State**[29] a question was arisen whether the trial of the accused Mufti Hannan was vitiated by reason of not taking cognizance of the offence by the learned Sessions Judge. In order to solve this question the honorable Appellate Division compared the provisions of Bangladesh and India regarding the cognizance of offence by a Court of Sessions. The Cr.P.C. of Bangladesh contains the provision of sending the offence to the Court of Sessions by a

---

[24] The Constitution of the People's Republic of Bangladesh, article 22 (the state shall ensure the separation of the Judiciary from the executive organs of the State).

[25] The Daily Star (13 May, 2017).

[26] The Code of Criminal Procedure, 1898.

[27] ibid, section 193.

[28] An inquest report is a procedural requirement to establish a comprehensive record of the crime scene, the circumstances leading to the death, and any pertinent evidence associated with the case.

[29] 69 DLR (AD) 490.

Magistrate duly empowered in that behalf before taking cognizance of that offence by a Court of Sessions as a Court of Original Jurisdiction.[30] On the other hand, the Code of Criminal Procedure of India contains the provision of committing the offence to the Court of Sessions by a Magistrate before taking cognizance of that offence by a Court of Sessions as a Court of Original Jurisdiction. Comparing the concurrent provisions from two countries the honourable Appellate Division of the Supreme Court observed that:

> The taking cognizance of the offence by a Sessions Judge is not so material. The material fact is that the Magistrate empowered to take cognizance must "send" the case to the Court of Sessions under section 205C(a) of the Code after taking cognizance and performing formalities, and then only the question of taking cognizance of offence by the Court of Sessions comes into play. The question of taking cognizance does not arise in this case for the second time.[31]

4.4 Taking Cognizance by High Court Division

In the sub-continent, the High Court Division of Pakistan[32] and of Sri Lanka[33] possess the power of taking cognizance of offences. Unlike those countries the Code of Criminal Procedure of Bangladesh does not contain any provision for taking cognizance of offences by the High Court Division. However, the High Court Division has the power to issue necessary directions to prevent the violations of law or to enforce the fundamental rights guaranteed by the Constitution of Bangladesh.[34] It can order an authority acting illegally or detaining any person without lawful authority or committing an error of law to follow the proper course of law.[35] These powers of the High Court Division show similarity with the power of taking cognizance of offences directly.

30 The Code of Criminal Procedure, 1898, section 193.
31 Mufti Abdul Hannan Munshi alias Abul Kalam and another vs. State 69 DLR AD 490.
32 The Code of Criminal Procedure, 1898, section 194.
33 the Code of Criminal Procedure, 1979 section 392.
34 The Constitution of People's Republic of Bangladesh, article 102 (1).
35 ibid, article 102(2).

4.5 Limitation Period for Taking of Cognizance of Offence

There is no limitation period for taking cognizance of offences in Bangladesh, while in India the Code of Criminal Procedure, 1973 provides limitation period for taking cognizance of offences[36], such as-

i. If the offence is punishable with fine only, the period of limitation for taking cognizance of offence shall be six months.
ii. If the offence is punishable with imprisonment for a term not exceeding one year, the period of limitation for taking cognizance of offence shall be one year.
iii. If the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years, the period of limitation for taking cognizance of offence shall be three years.

4.6 Cognizance Upon Police Report

The Officer-in-Charge of a police-station can investigate a cognizable case without the order of a Magistrate.[37] A Magistrate empowered to take cognizance under section 190 can also order the Officer-in-Charge of a police station to investigate a cognizable case.[38] However, in the case of non-cognizable offences, the Police Officer has to take permission from a Magistrate to carry out investigation. In this regard, the Magistrate is to be a Magistrate of first or second class and has the power to try such case or send the same for trial.[39]

When the Investigation Officer completes the investigation of a criminal offence, he makes a police report and submits it to the Magistrate.[40] The police report is mainly of two forms, such as, charge sheet and final report. A Magistrate may take cognizance of offence on the basis of a police report.

---

36 The Code of Criminal Procedure, 1973 section 468.
37 The Code of Criminal Procedure, 1898, section 156(1).
38 ibid, section 156(3).
39 ibid, section 155(2).
40 ibid, section 173.

4.6.1 Whether Magistrate Can Take Cognizance of Offence If the Police Submit Final Report

A Magistrate is not bound to accept the final report submitted by a police officer recommending the discharge of the accused, if he finds that there are prima facie materials on record for proceeding against the accused persons. In such a case, he is competent to take cognizance of the case under section 190(1)(b) of the Cr.P.C.[41]

4.6.2 Whether a Magistrate Was Competent to Take Cognizance of Offence on the Basis of a Fresh Police Report

A Magistrate can take cognizance against an accused, who had been discharged earlier by him on the basis of a police report submitted after a fresh investigation into the case. In this case, there is no requirement for setting aside the previous order for discharge of the Magistrate by the Superior Court.[42] Even a Magistrate can take cognizance on the perusal of the police diary which he had not done before although there is no fresh petition of complaint or report by the police and inspite of the fact that he had discharged the accused at the time of the final report.[43]

4.6.3 Whether Cognizance Can be Taken on the Basis of a Police Report Prepared by a Police Officer Not Authorized to Investigate a Non-cognizable Offence

If a Police Officer not authorized to investigate a non-cognizable offence submits a police report, a Magistrate may take cognizance of the offence. This irregularity will not affect the legality of that criminal proceeding later on. In this regard, it was said in the case of **Golam Moula Master and others vs. State**[44] that:

> A mere irregularity, like investigation by an officer not authorized to investigate a non-cognizable offence, does not affect the legality of the proceeding of a Court below. Cognizance under section 190 of the Code of Criminal Procedure on an invalid police report cannot be said to be prohibited. Such a report,

---

41 Abu Bakkar vs. State with Md Bazlur Rahman vs. State 1996 BLD 283.

42 Jafar Ahmed vs. State 26 DLR 211.

43 KhishnaSamanta vs. State ILR (1950) 2 Cal 66.

44 46 DLR HCD 140.

though invalid, may still fall under clause (a) or (b) of section 190 (1) of the Code of Criminal Procedure and the cognizance so taken is only in the nature of an error in a proceeding antecedent to the trial.[45]

The honorable High Court Division also opined that:

The investigation by a Police Officer is an antecedent proceeding. It is neither the foundation stone nor a prerequisite of the proceeding nor a sine qua non of a valid trial in the Court. It is difficult for us to see why such an irregularity should affect the proceeding in a Court or prevent the Court from taking cognizance of the offence under clause (a) or (b) of section 190(1) of the Code of Criminal Procedure or to assess the value of the evidence placed before it in the absence of clear enactment, expressed or implied, preventing the Court from doing so. There is nothing in the law to prevent a police officer from making a complaint when some facts have come to his knowledge even if he cannot investigate them. In any case, no intention can be read into the law that the jurisdiction of the Court would itself be barred when an unauthorized police officer conducted the investigation.[46]

4.6.4 Whether the Magistrate Can Direct the Police to Treat the Petition of Complaint as a First Information Report

When a complaint is filed before a Magistrate, without taking cognizance of the offences, he may send the petition of complaint to the Police for holding investigation treating the complaint as an FIR[47] if it relates to a cognizable offence. Then it no longer remains a complaint case. However, once Magistrate takes cognizance under section 200 of the Cr.P.C. he cannot direct the Police to treat the complaint as an FIR and hold investigation on the basis thereof.[48]

---

45 ibid para 14.
46 ibid para 16.
47 First Information Report.
48 Yakub Ali vs. the State 1 MLR AD 57 para5.

4.7 Cognizance Upon a Complaint

A litigant either himself or through his pleader can directly file a complaint before the Magistrate having power to take cognizance. In that case, the Magistrate has to follow the following procedures:-

Firstly, as soon as a complaint is filed the Magistrate has to record the statements of the complaint and the witnesses (if any and if it becomes relevant) on oath under section 200 of the Cr.P.C. It is called 'examination of the complainant'. If he finds the prima facie truth of the complaint, he can take cognizance of the offence directly or if he does not find any basis of the complaint he may dismiss it directly under section 203 of the Cr.P.C.

Secondly, if the Magistrate thinks fit, he may postpone the issue of process for compelling the attendance of the person complained against.[49] In this case,he may take either of the following courses to ascertain the truth or falsehood of the complaint:

i. he may inquire into the case himself; or,
ii. he may direct an inquiry to be made by any Magistrate subordinate to him; or,
iii. he may direct an investigation to be made by such person as he thinks fit.

Thirdly, after receipt of the report the Magistrate may take either of the following steps:

i. he shall issue summons for the attendance of the accused or may issue warrant according to the fourth column of the second schedule of the Cr.P.C., if, in his opinion, there is sufficient ground for proceeding[50], or,
ii. he may dismiss the complaint, if he considers that there is no sufficient ground for proceeding.[51]

---

49 The Code of Criminal Procedure, 1898 section 202(1).
50 ibid section 204(1).
51 ibid section 203.

Fourthly, if the Magistrate finds that a complaint has been filed in writing before him but he is not competent to take cognizance of the case, he shall return the complaint for presentation to the proper court with an endorsement to that effect. If the complaint has not been made in writing, he shall direct the complainant to the proper court.[52]

It is often found that the complainant mentions the probable sections of the Penal Code or of other relevant laws which cover the offences narrated in his complaint in the heading or inside the complaint. In fact, this is not required for the complainant to file a complaint. In this context, the Lahore High Court observed that:

> The mentioning or non-mentioning of a section in the heading of the complaint is quite irrelevant, because after the evidence is recorded it would be at the time of the framing of the charge that the Court will decide as to what offences are made out on the evidence adduced in the complaint. This is not a stage where this point can be adjudicated upon and I do not consider this to be a good ground for quashing the proceedings or even pronouncing any authoritative opinion on this point.[53]

4.7.1 Examination of the Complainant under Section 200 of Cr.P.C.

Examination of the complainant under section 200 of the Code is a must when a complaint is filed before a Magistrate against the accused either by way of a petition of complaint or by a naraji petition.[54] However, the examination under section 200 is not required before transferring the case under section 192 of the Code if the compliant is made in writing[55] and if the complaint is made in writing by a court or by a public serant acting or purporting to act in the discharge of his official duties.[56] In the case of **Md. Abdul Jabbar Sarker vs. State**[57] the hounarable High Court Division clearly states the procedures that are to be followed in the case of an oral

52 ibid section 201(2).
53 Muzaffar Ahmad vs. Mst. Rehmat Bibi and another 16 DLR WP 145.
54 Abul Halim vs. State 60 DLR HCD 393.
55 The Code of Criminal Procedure, 1898 section 200(a).
56 ibid section 200(aa).
57 64 DLR HCD 103.

complaint and of a written complaint. In the case of an oral complaint, the court is bound to examine the complainant on oath and to record his statement and to take his signature thereon. The purpose of such examination is to enable the court to have a recorded picture of the allegations so as to decide whether to proceed with the case.[58] On the other hand, in the case of a written statement, the court, as per clause (a) of the proviso to section 200(1), is not bound to examine the complainant on oath or his witnesses before transferring the case under section 192 (to another court). The reason is simple: namely, unlike an oral complaint, the court has a written document to consider and decide whether or not to proceed with the case.[59] The court also observes that there is no illegality in not examining a complainant if the court is satisfied upon examination of the written complaint that there is no reason to proceed with the matter. The expression "after considering the statement on oath (if any) clearly indicates, that examination of the complainant is not mandatory.[60]

In the case of **Kazi Farid Uddin and another vs. State**[61] the Bench Clerk of the Special Tribunal No. 03, Chittagong presented a complaint to the learned Metropolitan Magistrate, Cognizance Court No. 7, Chittagong who took cognizance of the offences on the basis of the complaint. The petitioners of this case challenged the legality of this cognizance order passed by the learned Magistrate on the ground that cognizance was taken without examination of the said Bench Assistant of the Tribunal on oath under section 200 of the Code. The Court perusing the provision of clause (aa) of the section 200 disallowed the plea raised by the petitioners.

4.7.2 Requirement of Mentioning the Ground of Taking Cognizance of Offence

It is not obligatory for any Magistrate, while taking cognizance of offences, to mention the grounds or reasoning for taking cognizance of offences.[62] However, the Magistrate has to scrutinize whether the descriptions of the offences are inserted in the complaint. Cognizance can

---

58 ibid, para 14.
59 ibid, para 15.
60 ibid, para 18.
61 73 DLR HCD 304.
62 ShainPukur Holding Ltd. Vs. Security Exchange Commission 18 BLD (1998) 61.

not be taken on the basis of a complaint which contains only the sections of the laws without the description of the particular offences.[63]

4.7.3 Scope of Taking Cognizance of Offence While Inquiry or Investigation of the Offence is Pending

When the Magistrate directs an inquiry or investigation under section 202(1) of the Cr.P.C. for ascertaining the truth or falsehood of a complaint, he cannot take cognizance of the offence without receiving that inquiry or investigation report.[64]

4.7.4 Scope of Directing the Person Complained against to Take Part in the Inquiry

Magistrate cannot ask the person complained against to take part in any manner in the enquiry[65] and also cannot call upon him to submit any explanations, accounts, etc.[66]

4.7.5 Scope of Taking Cognizance of Offence on the Same Facts after the Discharge of the Accused Persons

Magistrate can take cognizance on the basis of a fresh complaint after the discharge of the accused persons if it does not amount to the revival of the same proceedings because he takes cognizance of the same offence but in a different case altogether. He is functus officio in so far as the first proceedings are concerned but he is not functus officio in respect of the new proceedings.[67]

4.8 Cognizance Upon Sources other than the Complaint or the Police Report

Apart from the complaint and the police report, a Magistrate may take cognizance of an offence on the basis of either of the following three things:

1. an information received from any person other than a police-officer regarding that offence; or,

---

[63] in Gulab Khan vs. Fuzul Hossain PC RLG (Volume-1, 1968) 730.
[64] Harun Mir and others vs. The State 35 DLR 207.
[65] Appa Rao vs. Janakiammal I.L.R. 49 Madras 918.
[66] Bhiku I.L.R. 39 Cal. 1041.
[67] Abus Salam Master and another vs. The State 35 DLR 140.

2. His own knowledge about the offence; or,
3. His own suspicion that such offence has been committed.[68]

But in the above cases the Magistrate has to inform the accused that he is entitled to have the case tried by another court and if the accused or any of the accused, if there are more than one accused, objects to being tried by him, he shall not try such case and send the case to the Court of Sessions or transfer it to another Magistrate.[69] In the case of **Mirza Muhammad Abbas vs. the State**[70] the Lahore High Court quashed a criminal proceeding where the Magistrate after taking cognizance of an offence under section 190(1)(c) of the Cr.P.C. issued summons to an accused but he did not follow the provisions of the section 191 of the Cr.P.C. The Court in this case relied on the similar findings from the case of **Abdul Sattar Maula vs. The Crown.**[71]

5. Scope of Directing the Judicial Magistrate to Take Cognizance of Offence While Exercising Revisional Power

The Court of Sessions and the honourable High Court Division possess the revisional power under the Cr.P.C.[72] While exercising revisional power, the court cannot direct the subordinate Magistrate to take cognizance of any offence.[73]

In the case of **Abdul Matin vs. State**[74] the hounarable High Court Division declared the order of a Sessions Judge illegal where a Upazila Magistrate was ordered by the Court of Sessions to take actions against the accused persons. The honourable High Court Division in this case directed the Magistrate to make further inquiry into the naraji petition treating it a complaint, examine the complainant and also examine all the witnesses to be produced by the complainant and thereafter dispose of the naraji petition in accordance with law.

---

68 The Code of Criminal Procedure, 1898 section 190(1)(c).
69 The Code of Criminal Procedure, 1898 section 191.
70 16 DLR WP 34.
71 1953 DLR FC 14.
72 The Code of Criminal Procedure, 1898 section 439 & section 439A.
73 Bangladesh vs. Yakub Sarder and others 40 DLR (AD) 246; Yusuf A Hassan vs. KM Rezaul Firdous 48 DLR (AD) 53.
74 42 DLR 286.

6. Disposal of Naraji Petition

Disposal of the naraji petition is a crucial task before taking cognizance of an offence. The term 'naraji' means the disapproval of the investigation report. It may refer either to challenge the police report on certain grounds and to pray for its rejection or to pray for further action by the court and rejection of the report by reiterating the allegations made in the petition of complaint. Naraji petition is a fresh complaint and it is to be considered as a complaint under section 200 of the Cr.P.C. and on receipt of such naraji petition, a Magistrate may take cognizance against such accused persons or may direct further investigation by the police[75] or may discharge the accused persons where no sufficient ground exists.[76]

If the naraji petition is filed after an order of discharge, it will in all probability be treated as a complaint and the person filing the naraji petition will be examined by the Magistrate as a complainant under section 200 of Cr.P.C. But if the naraji petition is filed before an order of discharge has been passed, the Magistrate can take cognizance without examining the complainant if the intention of the appellant appears only to draw the attention of the Magistrate by way of protest, or the Magistrate may treat it as a complaint and examine the complainant, as he thinks fit.[77]

In many cases, naraji petition is filed only to linger the trial or to harass the opposite parties. In those cases, the Magistrate has to dispose of the naraji petition on merit but not mechanically. In order to slow the frequent tendencies of the complainants from filing consecutive naraji petitions and to prevent the causing of procrastination in completion of the investigation and after all, to put off the barriers in the disposal of criminal cases the honourable High Court Division had given some guidelines for the Judicial Magistrates in dealing with the naraji petition, which are, in brief, discussed below:[78]

1. A person though whose name was not in the FIR but later on has been included in the charge-sheet and a person whose name is

---

[75] Shahjahan Ali Mondal vs. Belayet Hossain 47 DLR 478; Nurul Hoque vs. Bazal Ahmed 48 DLR 327.

[76] Rabeya Khatun vs. State 67 DLR HCD 447.

[77] Abu Bakar and others vs. State 46 DLR HCD 684 para 12.

[78] Shah Kutub Uddin Talukder vs. State 70 DLR HCD 618.

disclosed as an accused through judicial inquiry shall be allowed to file Naraji petition.

2. The Judicial Magistrate must go through the police report which includes FIR, statements under sections 161 and 164 of the Cr.P.C., post mortem report, sketch map, medical certificate, seizure list, expert report and Case Diary of Investigation Officer along with the Naraji Petition when the informant or any other aggrieved person whose name is not present in the FIR or charge-sheet as an accused files a naraji petition and the Magistrate must minutely determine the possibility of registering the naraji petition as a CR case before taking resort to section 200 of the CrPC straightforwardly.
3. When a Judicial Magistrate is satisfied that there are ample information and materials before him /her to take cognizance of any offence against a person who has been recommended by the Investigation Officer to be released from the bond or whose name has not been included in the charge-sheet but the applicant of the Naraji petition is raising allegation against the said non-charge-sheeted person, the Magistrate should exercise his/her power under section 190(1) (b) of the Cr.P.C. to take cognizance and, thereby, dispose of the Naraji petition as being not-pressed. In that event, if the order of the judicial Magistrate satisfies the applicant of the Naraji application, the complainant and witnesses of the Naraji application must not be examined under section 200 of the Cr.P.C. and the Magistrate should dispose of the same as being not pressed.
4. Whenever the informant files naraji petition bringing allegation of serious biasness against the police department substantiating strong grounds thereto and prays for judicial inquiry having come up with definite allegation against specified person/s, the Judicial Magistrate should, at first opportunity, treat the Naraji petition as a complaint petition instead of sending it to a different department of police for further investigation and then, if satisfied, either take cognizance directly under section 190(1)(a) of the Cr.P.C. or take recourse to the provision of section 202 of the Cr.P.C.
5. In an appropriate case, a Judicial Magistrate should take aid of experts (forensic, ballistic, hand writing etc.) in carrying out

judicial inquiry with an aim to arrive at a conclusive inquiry report on the offence/s.

6. At the investigation/inquiry stage, a Magistrate should not exclude the name of any person who has been charge-sheeted by the I.O. or whose name comes up in the judicial inquiry.

7. Procedures of Taking Cognizance in Special Cases

A Magistrate has to comply with certain legal requirements before taking cognizance in the following cases:

7.1 Cognizance of Offences Relating to Marriage, Adultery, Defamation and Breach of Contract

In the case of offences under Chapter XIX[79] and Chapter XXI[80] and under sections 493[81], 494[82], 495[83], 496[84] of the Penal Code, 1860 cognizance can only be taken if the person aggrieved by any of such offences files complaint.[85] But any person on behalf of the aggrieved person who is a woman or who is not allowed to appear in public or a minor or a lunatic or idoit may file compliant with the leave of the court.[86] Again, the precondition in the case of taking cognizance of offences under section 497[87] and 498[88] of the Penal Code, 1860 is that the complaint is to be filed by the husband of the woman or in his absence by some person who had care of such woman on his behalf at the time when such offence was committed.[89]

---

79 Criminal Breach of Contracts of Service.

80 Defamation.

81 Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.

82 Marrying again during the life time husband or wife.

83 Marrying again during the life time husband or wife with concealment of former marriage from person with whom subsequent marriage is contracted.

84 Marriage ceremony fraudulently gone through without lawful marriage.

85 The Code of Criminal Procedure, 1898 section 198.

86 ibid section 198 proviso.

87 Adultery.

88 Enticing or taking away or detaining with criminal intent a married woman.

89 The Code of Criminal Procedure, 1898 section 199.

7.2 Cognizance of Offences Relating to Documents Given in Evidence

Section 195(1)(c) of the Cr.P.C. requires that when a party to any proceeding in any court commits an offence under section 463[90] or 471[91] or 475[92] or 476[93] of the Penal Code, 1860 in respect of a document given in evidence in such proceeding, cognizance can only be taken when the compliant is filed by such court or some other court to which such court is subordinate. Similar procedure is to be followed to take cognizance of any offence committed under section 193[94], 194[95], 195[96], 196[97], 199[98], 200[99], 205[100], 207[101], 208[102], 209[103], 210[104], 211[105] and 228[106] of the Penal Code, 1860.[107] A person who is not a party to the proceeding[108] or a witness[109] cannot raise the applicability of the provision of section 195(1)(c) against any proceeding for forgery initiated against him by any person.

In the case of **Mahbubul Alam vs. State**[110] the complainant opposite party no. 02 earlier filed a partition suit before the First Court of Joint District Judge, Dhaka. Then he lodged a complaint before the Chief Metropolitan Magistrate, Dhaka against the accused petitioner under

---

90 Forgery.
91 Using as genuine a forged document.
92 Counterfeiting device or mark used for authenticating documents described in section 467, or possessing counterfeit marked material.
93 Counterfeiting device or mark used for authenticating documents other than those described in section 467, or possessing counterfeit marked material.
94 Punishment for false evidence.
95 Giving or fabricating false evidence with intent to procure conviction of capital offence; if innocent person be thereby convicted and executed.
96 Giving or fabricating false evidence with intent to procure conviction of offence punishable with imprisonment for life or imprisonment.
97 Using evidence known to be false.
98 False statement made in declaration which is by law receivable as evidence.
99 Using as true such declaration knowing it to be true.
100 False personation for purpose of act or proceeding in suit or prosecution.
101 Fraudulent claim to property to prevent its seizure as forfeited or in execution.
102 Fraudulently suffering decree for sum not due.
103 Dishonestly making false claim in court.
104 Fraudulating obtaining decree for sum not due.
105 False charge of offence made with intent to injure.
106 Intentional insult or interruption to public servant sitting in judicial proceeding.
107 The Code of Criminal Procedure, 1898 section 195(1)(b).
108 Muzaffar Ahmed vs. Mst. Rehmat Bibi and another 16 DLR WP 145.
109 Bhag Singh vs. Emperor 67 IO 813.
110 71 DLR HCD 13.

sections 467 and 471 of the Penal Code alleging that the accused with the connivance of the Rajuk officials forged the signature of the complainant. In this case the petition of complaint raised allegations of filing and using of forged documents in the proceedings of a suit. The hounarable High Court Division adjudged this course of proceeding undertaken by the Additional Chief Metropolitan Magistrate, 4th Court, Dhaka as improper by observing that the initiation of a criminal proceedings for forgery at the instant of the complainant-opposite party no. 2 without taking recourse of the procedure provided in section 195(1)(c) of the Code of Criminal Procedure is barred. In the case of **Zakir Hossain and others vs. The State**[111] the honourable Appellate Division stayed a criminal proceeding under sections 420/467/468/471/109 of the Penal Code on the ground that the informant in this case claimed certain documents as forged which were yet to be produced and examined by the Civil Court in a civil suit and the civil suit was instituted earlier before the filing of the FIR in the criminal case.

7.3 Cognizance of Offences Committed by Judges and Public Servants

A previous sanction of the Government is obligatory in the case of taking cognizance of offence against any Judge, Magistrate or Public Servant.[112] However, the following pre-conditions are to be fulfilled to invoke this provision:-

i. The accused person is to be a Judge according to the meaning of section 19 of the Penal Code, 1860;
ii. The public servant is removable from his office with the sanction of the Government;
iii. The offence has been committed in the discharge of the official duty.[113]

The requirement of taking previous sanction of the authority concerned is not an absolute one and it depends on the nature of the purported act. It was said in **Baijnath vs. State of Moddha Prodesh**[114] that:

---

111 43 DLR AD 102.
112 The Code of Criminal Procedure, 1898 section 197(1).
113 ibid.
114 AIR 1966 SC 220.

> It is the quality of the act that is important and if it falls within the scope and range of his official duties the protection contemplated by section 197 of the Code will be attracted.

In order to invoke the section 197, it is required to determine whether the accused public servant has done the act constituting the offence in his official capacity. In the case of **Shahidul Islam (Md) and another vs. State,**[115] which arose out of an incident in which a nine-story multipurpose building named 'Rana Plaza' collapsed, killing 1,136 innocent persons and also injuring more than 1,169 people, the learned Sessions Judge, Dhaka, framed charges against 41 accused persons. The accused petitioners submitted before the hounarable High Court Division that the accused petitioners are public servants and as per section 197(1) of the Code of Criminal Procedure prior sanction of the government is a pre-requisite to start a criminal proceeding against them but no such sanction has been obtained in the present case.[116] The hounarable High Court Division unanimously declared that:

> Being illegally gained over the accused-petitioners allowed the garments factories in question to operate in the accused building in violation of the relevant rules and regulations which contributed a lot in the collapse of the building on the fateful date killing of 1136 innocent persons as well as injuring more than 1169. Such illegal act or omission of the accused-petitioners cannot be branded as an act done in the discharge of official duties in as much as it was not directly concerned with their official duties and, as such, they are not entitled to get any protection under section 197(1) of the Code.

In the case of **HHB Gil vs. The King**[117] it was observed that:

> A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a judge neither acts

[115] 70 DLR HCD 263.
[116] ibid, para 9.
[117] AIR (35) 1948 (PC) 128 (133).

> nor purports to act as a judge in receiving bribe, though the judgment which he delivers may be such an act; nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office.

In the case of **State vs. Salauddin @ Tipu & others**[118] the hounarable High Court Division found the Officer-in-Charge of Ramna Police Station guilty of fabricating false evidence by way of making a photocopy of a GD Entry which was punishable under sections 193, 194 and 195 of the Penal Code, 1860. The hounarable High Court Division stated in its observation that:

> Firstly, an Officer-in-Chief of a police station does not fall in this category as Government sanction is not required for his removal from service. Secondly, in the facts and circumstances of the instant case, the provisions of section 197 would not be attracted in any event since the act alleged to have been done constituting an offence was certainty not done while acting or purporting to act in the discharge of his official duty. In no way does the act of fabricating evidence have any nexus with the official duty of the officer concerned as contemplated in section 197 of the said Code.[119]

7.4 Cognizance of Offences Relating to Contempt of Public Servants

Cognizance of the offences punishable under sections 172 to 188 of the Penal Code, 1860[120] can be taken when the concerned public servant files complaint.[121]

---

[118] 60 DLR HCD 188.
[119] ibid para 49.
[120] Of contempts of the lawful authority of the Public Servants.
[121] The Code of Criminal Procedure, 1898 section 195.

7.5 Cognizance of Offences Against the State and of Criminal Conspiracy

Cognizance of the offences punishable under Chapter VI[122] or IX-A[123] of the Penal Code, 1860 excluding the section 127[124], section 108A[125], section 153A[126], section 294A[127], section 295A[128] or section 505[129] of the Penal Code can only be taken if the complaint is made under the authority from the Government.[130] Similarly, in order to take cognizance of an offence under section 120B[131] of the Penal Code, 1860 the consent of the Government is required.[132]

8. Problems in Taking Cognizance of Offence and Recommendations

While accomplishing the task of taking cognizance, the Magistrates often face certain problems which hamper their effective functioning. It also hampers the fruitful disposal of criminal cases. This study found the following problems, which create barriers in taking cognizance of offenses in various ways. Some recommendations have also been put forward to improve the current situation.

8.1 Defective Police Investigation

Magistrates have to depend mostly on the police report arising out of the police investigation conducted by the different branches of police, such as, Police Station, D.B.[133], CID[134], PBI[135] to take cognizance of any offence. Due to workload, extraneous factors and lack of special knowledge the police cannot complete investigation properly in time. Faulty police report often leads to a false criminal prosecution which causes miscarriage of

---

122 Of Offences Against the State.
123 Of Offences Relating to Elections.
124 Receiving property taken by war or depredation mentioned in sections 125 and 126.
125 Abetment in Bangladesh.
126 Promoting enmity between classes.
127 Keeping lottery office.
128 Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs.
129 Statements conducing to public mischief.
130 The Code of Criminal Procedure, 1898 section 196.
131 Criminal Conspiracy.
132 Code of Criminal Procedure, 1898 section 196A.
133 Detective Branch.
134 Criminal Investigation Department.
135 Police Bureau of Investigation.

justice. In this regard, the honourable High Court Division has commented 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 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.[136]

To address this problem, steps should be immediately taken to train the police officials who conduct criminal investigations and to reduce their workload. A separate team consisting of the members of police, RAB and other experts may be kept solely to conduct investigation of grievous criminal offences in every Chief Judicial Magistrate Court and Chief Metropolitan Magistrate Court under the direct control of the Chief Judicial Magistrate and the Chief Metropolitan Magistrate.

8.2 Absence of a Distinguished Investigating Authority

Besides the Police, the Magistrate may send the complaint for investigation to any suitable person for ascertaining the veracity of the allegations and accordingly, complaints are usually sent to a number of persons including Union Parishad Chairman, Upazila Parishad Chairman, different government officials, such as, Upazila Social Welfare Officer, Upazila Fisheries Officer, Upazila Livestock Officer, Upazila Agriculture Officer, Assistant Commissioner (Land), Upazila Nirbahi Officer, Headmasters of local schools etc. These persons have to carry out the investigation of criminal offences along with their own official tasks. Often, they do not have enough time and adequate knowledge or mental capacity to complete a criminal investigation minutely. As a result, the Magistrates have to face difficulty in taking cognizance of offences on the basis of their hackneyed investigation reports. To overcome this problem,

---

[136] Md. Ali Akbar vs. State 4 MLR HCD 87, Para 12 & 14.

it is essential to establish a separate body of Investigating Officers to conduct the criminal offences in every Chief Judicial Magistrate Court and Chief Metropolitan Magistrate Court under the supervision of the Chief Judicial Magistrate and the Chief Metropolitan Magistrate and moreover, at least one investigating officer may be appointed under the direct control of each Judicial Magistrate and Metropolitan Magistrate exercising the power of cognizance.

8.3 Lack of Judicial Magistrates and Logistic Supports

In certain cases, it becomes necessary for a Magistrate to inquire into the case by himself before taking cognizance of offence. But he cannot conduct inquiry of the case by visiting the places of occurrence due to workload and lack of logistic supports. Adequate number of Judicial Magistrates should be appointed and a separate team of Judicial Magistrates may be formed in every district for conducting judicial inquiry, recording confessional statements under section 164 of the Cr.P.C., and the depositions of the victims under section 22 of the Nari-O-Shishu Nirjatan Daman Ain, 2000. Judicial Officers must be given separate intensive training focusing the stage of taking cognizance of offences before appointing them as Judicial Magistrates.

8.4 Improper Practice of Mobile Courts

Executive magistrates, members of non-judicial body, are exercising the cognizance power indiscriminately through the Mobile Courts. Though it is often argued that mobile courts are necessary for controlling the crimes instantly, trial of any offence in any form without following the proper judicial mechanism and ensuring judicial spirit creates disrespect towards the trail system. Therefore, it is necessary either to stop the existing practice of Mobile Courts or to change this practice by alternative system. In this regard, attention may be paid to strengthen the practice of summary trial under the Cr.P.C by the Judicial Magistrates to dispose of the petty offences quickly.

9. Conclusion

Valiant freedom fighters struggled relentlessly for the independence of our beloved Bangladesh, aiming to emancipate the masses from all forms of discrimination and establish the rule of law in every sphere of life. Without the guarantee of ensuring equity and justice for everyone, their

lofty hopes will never be fulfilled. The Constitution of Bangladesh has 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. A faulty system of criminal adjudication leads to the miscarriage of justice. Chief Justice Burger commented that people come to believe that inefficiency and delayed justice drain even a just judgment of its value.[137] Cognizance of offence is the initial stage of a criminal proceeding. An innocent person may become the easy prey of a false case through an improper exercise of this power. That's why, while taking cognizance, the Magistrates or Judges must be more careful and in this regard, the policy makers have to take adequate measures to improve the present criminal adjudication system by removing the existing problems.

Bibliography

Cases of Bangladeshi Jurisdiction

1. State vs. Amjad Ali 72 DLR AD 113
2. Mohammad Kalu Bhuiyan vs. Special Tribunal 30 DLR (1978) 124
3. Mufti Abdul Hannan Munshi alias Abul Kalam and another vs. State 69 DLR AD 490
4. Abu Bakkar vs. State with Md Bazlur Rahman vs. State 1996 BLD 283
5. Jafar Ahmed vs. State 26 DLR 211
6. Golam Moula Master and others vs. State 46 DLR HCD 140
7. Yakub Ali vs. The State 1 MLR AD 57
8. Muzaffar Ahmad vs. Mst. Rehmat Bibi and another 16 DLR WP 145
9. Abul Halim vs. State 60 DLR HCD 393
10. Md. Abdul Jabbar Sarker vs. State 64 DLR HCD 103
11. Kazi Farid Uddin and another vs. State 73 DLR HCD 304
12. ShainPukur Holding Ltd. Vs. Security Exchange Commission 18 BLD (1998) 61
13. Harun Mir and others vs. The State 35 DLR 207
14. Shahidul Islam (Md) and another vs. State 70 DLR HCD 263
15. Abus Salam Master and another vs. The State 35 DLR 140

[137] Burger, "What's Wrong With the Court; 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).

16. Mirza Muhammad Abbas vs. The State 16 DLR WP 34
17. Abdul Sattar Maula vs. The Crown1953 DLR FC 14
18. Bangladesh vs. Yakub Sarder and others 40 DLR (AD) 246
19. Yusuf A Hassan vs. KM Rezaul Firdous 48 DLR (AD) 53
20. Abdul Matin vs. State 42 DLR 286
21. Shahjahan Ali Mondal vs. Belayet Hossain 47 DLR 478
22. Nurul Hoque vs. Bazal Ahmed 48 DLR 327
23. Rabeya Khatun vs. State 67 DLR HCD 447
24. Abu Bakar and others vs. State 46 DLR HCD 684
25. Shah Kutub Uddin Talukder vs. State 70 DLR HCD 618
26. Muzaffar Ahmed vs. Mst. Rehmat Bibi and another 16 DLR WP 145
27. MahbubulAlam vs. State 71 DLR HCD 13
28. Zakir Hossain and others vs. The State 43 DLR AD 102
29. State vs. Salauddin @ Tipu & others 60 DLR HCD 188
30. Md. Ali Akbar vs. State 4 MLR HCD 87

Cases of Indian Jurisdiction

1. Karnataka vs. Pastor P. Raju 6 SCC (2006) 728
2. KhishnaSamanta vs. State ILR (1950) 2 Cal 66
3. Gulab Khan vs. Fuzul Hossain PC RLG (Volume-1, 1968) 730
4. Appa Rao vs. Janakiammal I.L.R. 49 Madras 918
5. Bhiku I.L.R. 39 Cal. 1041
6. Bhag Singh vs. Emperor 67 IO 813
7. Baijnath vs. State of ModdhaProdesh AIR 1966 SC 220
8. HHB Gil vs. The King AIR (35) 1948 (PC) 128 (133)

Statutes

1. The Constitution of the People's Republic of Bangladesh.
2. The Code of Criminal Procedure, 1898.
3. The Penal Code, 1860.

Article

Burger, **"What's Wrong With the Court; 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).

Books

Haque, Justice Mohammad Hamidul, **"Trial of Civil Suits and Criminal Cases"**, 3rd edition, February 2019.

Raza, K.M. Rasheduzzaman, **"Trial of Criminal Cases and The Relevant Matters"**, 1st edition, 2023.

Halim, Md. Abdul, **"Text Book on Code of Criminal Procedure"**, 9th edition, 2015.

Protection and Voluntary Repatriation of Rohingyas: *Non-refoulement* Obligations and Challenges of Bangladesh

Arif Ahmed*

Abstract

The stateless Rohingyas are the most vulnerable and persecuted group of people in this present world. In the Rohingya refugee crisis mainly three parties are involved, i.e., Bangladesh, Myanmar, and Rohingya themselves all of whom have few obligations under international law. Since 1970s Bangladesh has been sheltering thousands of Rohingya refugees with active protection within its territory. Despite not being a state party to 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, Bangladesh has some essential obligations towards Rohingyas under the norms of customary international law and thus it has been complying these very obligations. Moreover, as the largest recipient State of Rohingyas Bangladesh also has some obligations under its Constitutional law and other statutory laws. This study aims to explore the major challenges and *non-refoulement* obligations of Bangladesh in protecting Rohingyas and ensuring their voluntary repatriation under its statutory laws and international laws. This research is primarily based on the qualitative approach designed with the support of descriptive methods. In conducting this study data have been collected from different primary and secondary resources where an attempt has been made to create the contents coherent yet comprehensive. Though several repatriation agreements have already been accomplished between Bangladesh and Myanmar, implementation thereof remains a far cry owing to Myanmar's hostile approach towards the Rohingyas. This study finds that since amongst three durable solutions, i.e., voluntary repatriation, local integration, and resettlement, the first one is said to be the best one to solve the refugee problems, it would be wise for Bangladesh to implement the repatriation of Rohingyas in order to end the Rohingya issue. Myanmar should also show a positive response in this regard. This research also strives to find out the key challenges for Bangladesh in ensuring the protection of Rohingyas and their return to Myanmar with utmost safety and dignity.

Keywords: Bangladesh, *Non-refoulement*, Obligation, Repatriation, Rohingya, Refugee

---

* Assistant Professor, Department of Law, Notre Dame University Bangladesh and Advocate, Supreme Court of Bangladesh.

1. Introduction

Rohingyas are also the human beings who have become stateless refugees due to few exceptional situations. Rohingyas are amongst the most ill-fated and persecuted ethnic minority groups in this world and their mass influx in Bangladesh has created huge security paradox for their host country.[1] The United Nations (UN) considers the Rohingyas in Myanmar to be "one of the most persecuted groups in the world".[2] Since late 1970s, Rohingya refugee crisis has been a bone of contention between Bangladesh and Myanmar that has been disrupting the bilateral relations between these two countries.[3] Especially, the recent mass influx of Rohingyas from Myanmar to Bangladesh in 2017 has caused huge ramifications in relations between these two States.[4] The 2017 influx also driven the UN and two international Courts to condemn Myanmar for its 'genocidal intent' and crimes against humanity.[5] The brutality against Rohingyas by Myanmar Army was termed as "ethnic cleansing" by Office of the UN High Commissioner for Human Rights (OHCHR).[6] The widespread killing and persecution by Myanmar military forces against Rohingyas forced around 750,000 refugees to enter Bangladesh in less than 90 days in 2017 and the present number is around 900,000.[7]

Again, by mid-August 2018, about 700,000 Rohingyas fled across transnational borders into Bangladesh, following widespread killing in Myanmar and this very recent incident is not the sole in nature; rather such events also took place earlier in several times, looking back to 1978, 1992, 1996, 2012 and 2017 where Rohingyas were compelled to make their destination to Bangladesh.[8] Now, Bangladesh is the largest Rohingya

---

[1] Utpala Rahman, 'The Rohingya Refugee: A Security Dilemma for Bangladesh' (2010) 8(2) *JIRS* 233.

[2] M. Zarni and A. Cowley, 'The slow-burning genocide of Myanmar's Rohingya' (2014) 23(3) *WILJ* 709.

[3] S. N. Parnini, 'The Crisis of the Rohingya as a Muslim Minority in Myanmar and Bilateral Relations with Bangladesh' (2013) 33(2) *JMMA* 281.

[4] S. Banerjee, 'The Rohingya Crisis and Its Impact on Bangladesh-Myanmar Relations' (ORF Issue Brief No. 396, 2020) 1.

[5] UNHRC, Report of the Independent International Fact-Finding Mission on Myanmar (A/HRC/39/64, 2023).

[6] OHCHR, 'Darker and More Dangerous: High Commissioner updates the Human Rights Council on Human Rights Issues in 40 Countries' (OHCHR 2017).

[7] I. S. Fossvik, 'Long-term Solutions for the Rohingya Response' (NRC 2020) para 1.

[8] M. E. Haque, 'Current International Legal Issues: Bangladesh' (2019) 23(2017) *AYIL* 5.

refugee-hosting country in the world.[9] As of 21 June 2018, the total number of Rohingyas reported by location in Bangladesh was 918,936.[10] At present, it is sheltering more than 1.2 million Rohingyas on humanitarian grounds and showing its respect towards the international law.[11] Although Bangladesh has not yet acceded to the 1951 Refugee Convention and its 1967 Protocol, it has been sheltering a large number of persecuted Rohingya for about five decades. This makes it a unique case in the international refugee law regime.

Hence, the prevailing situation in Bangladesh can lawfully be defined as 'protracted refugee situation'.[12] But concerning Rohingya issue, Bangladesh now argues about the 'security problem' of Rohingya's pose, and stresses that this issue has become a vital reason for sending the Rohingyas back to Myanmar. Since March, 2019 Bangladesh is no more receiving the Rohingyas within its territory.[13] This study aims to draw a picture concerning how Bangladesh has relentlessly extended its helping hands towards the Rohingyas during their mass influx in this country and how Bangladesh has been ensuring their active protection through complying its *non-refoulement* obligations under national and international law since their arrival here in 1970s. This study also tries to focus on how Bangladesh has been confronting numerous challenges in dealing with the Rohingya communities and repatriating them to Myanmar since then.

2. Who are the Rohingyas?

The Rohingya is an enigma and a controversial terminology[14] in Myanmar and a dilemma for Bangladesh. The word 'Rohingya' derived from the

---

9 Md. K. H. Arif, 'The Rohingya Refugees in Bangladesh: *Non-refoulement* and Legal Obligation under National and International Law' (2020) 27(4) *IJMGR* 855.

10 ISCG, Situation Report: Rohingya Refugee Crisis (2018) <https://reliefweb.int/sites/reliefweb.int/files/resources/iscg-situation_report-21june2018.pdf>

11 Prothom Alo, 'In Four Years the Number of Rohingya has increased to 1.2 Million' (2022) <https://www.prothomalo.com/bangladesh/uj0cq5yw1k>

12 UNHCR, Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A (2) of 1951 Convention and 1967 Protocol Relating to the Status of Refugees (2003) 4.

13 Y. Gunawan, A.T.T. Rettob, and K. Kalagita, 'The Analysis of *Non-refoulement* Principle towards Rohingya Refugees in Bangladesh' (2020) 5(1) *LMLJ* 13.

14 N. Kipgen, 'Addressing the Rohingya Problem' (2014) 49(2) *JAAS* 234-247.

term 'Rohang', ancient name of the Arakan province of Myanmar.[15] Rohingyas have been living in Arakan for about thousand years.[16] They are ethnic, linguistic and Muslim minority group living mostly in the northern Rakhine State, are considered as illegal immigrants originated from Bangladesh, despite they have settled down in Myanmar for hundreds of years.[17] Rohingyas are now officially termed as 'Forcibly Displaced Myanmar Nationals' (FDMN) by the Government of Bangladesh (GoB)[18] though the scholars of international law conclude that they satisfy the conditions of refugees as per Article 1A (2) of the 1951 Refugee Convention, and are thus deserving of certain rights and protections.[19] To know about who are Rohingyas, their historical backdrop and legal status in international law is essential. The ethnic Rohingyas have lived in Rakhine for centuries, even before Islam arrived in that region at the end of 8th century.[20] Though the majority Rohingyas are Muslims, there are a few Hindus among them. Between 9th to 14th centuries they came into contact with Islam by the Arab traders.[21] In 1784, the Burman King Bodawpaya conquered Arakan and thousands of Rohingyas fled to Bengal.[22] Between 1824 and 1942, Britain occupied Burma (now Myanmar) and made it a province of British India. Then workers were taken to Burma from other parts of British India for infrastructural works and it started a process of Rohingya returning to their own land of Rakhine.[23]

---

15 H. U. Rashid, *Refugee Law* (2nd edn, AGB 2013) 39.

16 Imtiaz Ahmed, *The Plight of the Stateless Rohingyas* (3rd edn, UPL 2019) 13.

17 S. N. Parnini, M. R. Othman, and A. S. Ghazali, 'The Rohingya Refugee Crisis and Bangladesh-Myanmar Relations' (2013) 22(1) *APMJ* 133-146.

18 A. S. Mizan and A. B. Saqi, 'Durable Solutions for the Rohingya Crisis in Bangladesh: A Sociological Enigma' (2020) 18(1 & 2) *BJL* 54.

19 J. Alam, 'The Status and Rights of the Rohingya as Refugees under International Refugee Law: Challenges for a Durable Solution' (2021) 19(2) *JIRS* 131.

20 K. Nemoto, 'The Rohingya Issue: A Thorney Obstacle between Burma and Bangladesh' (1991) <http://www.burmalibrary.org/docs14/Kei_Nemoto-Rohingya.pdf.>

21 M. Yegar, 'The Muslims of Burma: A Study of a Minority Group' (1972) 25 <https://www.netipr.org/policy/down-loads/19720101-Muslims-Of-Burma-by-Moshe-Yegar.pdf.>

22 Dhaka Tribune (Online), 'Timeline: Who are the Rohingya?' (2017) <http://www.dhakatribune.com/world/southasia/2017/08/28/timeline-who-are-the-rohingya/>

23 M. Yunus, 'A History of Arakan, Past and Present' (1994) <https://www.netipr.org/policy/downloads/19940101-Dr-Yunus-History-Of-Arakan.pdf.>

However, the main problem arose after the independence of Burma from Britain in 1948 when the Union Citizenship Act, 1948 was enacted wherein Rohingyas were not included as citizens. The Act allowed only those whose families lived in Burma for minimum two generations to apply for the identity cards.[24] Rohingyas were initially given such identification or citizenship under the generational provision.[25] During that time, few Rohingyas also served in the Parliament but after 1962's military coup in Myanmar things were changed radically for the Rohingyas because all citizens were required to obtain national registration cards. However, Rohingyas were only given foreign identity cards that actually limited their jobs and educational opportunities that they could pursue.[26] On denial of citizenship following military takeover of the country in 1962, Rohingyas were subject to indiscriminate torture and grave violation of human rights in their native Myanmar. It forced them traveling far and wide over the past five decades who desperately kept seeking refuge and a better life.[27] They are stateless, without a legal nationality, and many of them have been forced to migrate to Bangladesh, India, Pakistan, Malaysia, Thailand, and Saudi Arabia.[28]

The Rohingyas are not identified as citizens of Myanmar and that is the main reason behind the violence against them over the last couple of decades.[29] The aftermath of 1977's *nagamin operation*, those who were qualified for citizenship under the Union Citizenship Act, 1948 would no longer be qualified under the Myanmar Citizenship Act, 1982. The Act of 1982 did not recognize Rohingyas as one of the 135 Burmese national ethnic and thus they are not treated as the citizens of Myanmar and

---

24 Dhaka University, *CGS Peace Report: An Initiative of BPO-Bangladesh Peace Observatory* (CGS 2018) 2(1) 17.

25 HRW, 'The Government Could Have Stopped This: Sectarian Violence and Ensuring Abuses in Burma's Arakan State' (2018) <https://www.hrw.org/reports/2012/08/01/government-couldhave-stopped>

26 Al Jazeera, "UN: Rohingya in Bangladesh Need 'Massive' Assistance" (2017) <https://www.aljazeera.com/news/2017/09/rohingya-bangladesh-massive-assistance-170924110654841.html.>

27 T. K. Ragland, 'Burma's Rohingyas in Crisis: Protection on Humanitarian Refugees under International Law Notes' (1994) 14(2) *B. C. Third World L. J.* 301 - 336.

28 S. N. Parnini (n 3) 282.

29 M. B. Mitun, 'Ethnic Conflict and Violence in Myanmar: The Exodus of Stateless Rohingya People' (2018) 25 *International Journal on Minority and Group Rights* 647.

considered worldwide as stateless.[30] The ruling authority recognized only 8 major communities as their nationals along with 135 ethnic communities, e.g. Burman, Shan, Kachin, Karen, Kayah, Mon, Chin, and Rakhaing.[31] Under this Act Rohingyas were declared "non-national" or "foreign residents" and this law categorized three types of citizens i.e., full citizens; associate citizens; and naturalized citizens.[32]

This Act codified the legal exclusion of Rohingyas, making their human rights situation worsen which officially identified only 135 national races that qualify for citizenship. This Rohingya exclusion denied their full benefits of citizenship in what is treated as "nonindigenous ancestry."[33] Because of the Citizenship Act, 1982 Rohingyas became *de facto* stateless.[34] The Act does not comply global standards or Myanmar's international legal obligations in several areas, the most notable is that it discriminates on the grounds of race and religion.[35] The Act is not only a legal mechanism by which Rohingyas experience legalized discrimination, but also it is the "anchor"[36] that holds in place the discriminatory legal framework designed to severely cripple the Rohingya as a group by falsely deemed illegals and non-citizens.[37] Rohingyas satisfy the criteria of refugee definition included in the 1951 Refugee Convention, which raises the issue of the protections to which they are entitled under international law.[38]

---

[30] H. N. Estriani, 'Rohingya Refugee in Bangladesh: The Search for Durable Solutions?' (ACIR 2018) - Politics, Economy, and Security in Changing Indo-Pacific Region, UA, 365.

[31] Yunus (n 23).

[32] SZA Mahmood, "Timeline: A Short History of Myanmar's Rohingya Minority" (2016) *Wall Street Journal.*

[33] M. Faye, 'A Forced Migration from Myanmar to Bangladesh and Beyond: Humanitarian Response to Rohingya Refugee Crisis' (2021) 6(13) *JIHA* 2.

[34] J. Alam, 'The Rohingya of Myanmar: Theoretical Significance of the Minority Status' (2018) 19(2) *Asian Ethnicity* 180 - 210.

[35] Burma Campaign UK, 'Burma's Treatment of Rohingya and International Law' (2013) *Burma Briefing-BHRN.*

[36] B. Zawacki, Defining Myanmar's "Rohingya problem" (2013) 18.

[37] M. Zarni and A. Cowley (n 2) 709.

[38] J. Alam (n 19) 128-141.

3. Rohingya Influx in Bangladesh: Brief Historical Background

Since 1978, the Rohingya, a Muslim minority of Western Burma, have been subject to a state-sponsored process of destruction. Rohingyas have profound historical roots in the borderlands of Rakhine State, Myanmar, and were recognized officially both as citizens and as ethnic group.[39] The first crack of massacre with Rohingyas held in February 1978 when the Myanmar military *Tatmadaw* led *Nagamin* to conduct a survey of the whole nation.[40] In 1977, *Nagamin Census* was led to screen out the foreigners and register citizens, which resulted in persecution of Rohingyas and consequently in 1978 around 200,000 Rohingyas were fled from Myanmar to Bangladesh. Another statistics reveals that in June 1978, a total of 167,000 Rohingyas entered in Bangladesh; since then it is known as a Rohingya-received nation, for the first time in its short history as an independent and sovereign State.[41] The second massacre on Rohingyas took place in 1991 that made 260,000 Rohingyas flee to Bangladesh.[42] Since late 1991, huge numbers of Rohingyas have fled their homes in Burma's northwestern Arakan State seeking asylum in neighboring Bangladesh.[43] A mass influx of more than 300,000 Rohingyas fled persecution in the Arakan State from December 1991 to March 1992.[44] The persecution and genocide occurred with the Rohingyas, but it got the peak in 2012 since when it continued throughout the Rakhine State. The start of extreme violence between Rohingyas and other ethnic groups of Rakhine took place in June and October, 2012.[45] As per UNHRC Report (2018), around 180,000 people were directly affected by the violence of 2012 which made displaced nearly 140,000 Rohingyas.[46] Subsequently,

---

39 ibid, 703.

40 AKM Ahsan Ullah, 'Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalization' (2011) 9(2) *JIRS* 139-161.

41 B. Chakma, "Bangladesh State and the Refugee Phenomenon" <http://www.safhr.org/refugeewatch184.htm.>

42 K. Staples, 'Retheorising Statelessness: A Background Theory of Membership in World Politics' (EUP, 2012) <https://www.jstor.org/stable/10.3366/j.ctt3fgsgr>

43 T. K. Ragland (n 27) 301.

44 Ullah (n 40) 139-161.

45 S. Rahman, 'History behind Rohingya Influx in Bangladesh and Application of Remote Sensing in Monitoring Land Use Change in Refugee Driven Area' (Master's Thesis, Deakin University 2020).

46 UNHRC, Report of the Independent International Fact Finding Mission (2018) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFMMyanmar/A_HRC_39_64.pdf>

State-backed organized and systematic persecution occurred in 2017 by Myanmar forcibly displaced around 700,000 Rohingyas from Rakhine to Cox's Bazar.[47] The UN Human Rights Chief categorized these acts as "a textbook example of ethnic cleansing".[48] In this context, identification of the Rohingyas as "Asia's new Palestinians" deserves much significance.[49]

4. Principle of *Non-refoulement*: Evolution and Significance

The principle of *non-refoulement*, meaning "forbidding to send back", first appeared as a requirement in history in the work of international societies of international lawyers.[50] The principle of *non-refoulement* is often referred to as the foundation of international refugee protection.[51] It is considered as a basic principle of international refugee law specifically.[52] The term *"Non-refoulement"* was derived from French word *"refouler"* which encompasses the States' obligation not to expel a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[53] The first mention of *non-refoulement* as a peremptory norm of international law was by the UNHCR ExCOM in 1982.[54]

Before 1930s, the principle of *non-refoulement* did not exist in international law.[55] This principle emerged on international level in Article

---

47 A. H. Mallick, 'Rohingya Refugee Repatriation from Bangladesh: A Far Cry from Reality' (2020) 7(2) *JASIL* 202.

48 N. Nanji, UN Secretary-General urges end to Rohingya violence (2017) <https://www.thenational.ae/world/un-secretary-general-urges-end-to-rohingya-violence-1.628293>

49 I. Ahmed, 'Globalization, Low-Intensity Conflict and Protracted Statelessness/Refugee hood: The Plight of the Rohingyas' <http://programs.ssrc.org/gsc/publications/quarterly13/ahmed.pdf.>

50 T. Molnar, 'The Principle of *Non-refoulement* under International Law: Its Inception and Evolution in a Nutshell' (2016) 1(1) *Cojourn* 51.

51 Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Geneva: UNHCR, 2007) 2.

52 A. Farmer, '*Non-Refoulement* and *Jus Cogens*: Limiting Anti-terror measures that threaten refugees protection', (2008) 23 *GILJ* 36.

53 L. Hyde, 'The Principle of *Non-refoulement* in International Law' (2016) *Rescrptum* 30.

54 ibid, 31.

55 R. L. Newmark, '*Non-Refoulement* run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs' (1993) 71 *Wash U.L.Q* 833, 837.

3 of the 1933 Convention Relating to the International Status of Refugees[56]. The contracting States to that convention undertook not to return refugees across the frontiers of their country of origin.[57] In 1996, the UNHCR ExCOM finally assessed that *non-refoulement* had become a peremptory norm of international law as it "does not permit derogation".[58] This principle is recognized as a non-derogable principle applicable in all circumstances, regardless of the nature of the activities the person concerned may have been engaged in. It relates not only to the State to which the person faces return but also extends to 'any other State where they run a risk of being returned.[59] The principle has achieved the status of *jus cogens* i.e., a peremptory norm of international law from which no derogation is permissible.[60]

In 2001, the principle of *non-refoulement* was officially approved by the contracting States of 1951 Refugee Convention.[61] States that are not parties to the UN instruments are also bound to respect *non-refoulement* as a basic principle of customary international law.[62] This principle is widely considered to be a customary international law, which requires States, regardless of their stand on the human rights and the refugee conventions and on *non-refoulement*, not to force an individual to return or to extradite any individual to a country where their life or personal security is at stake.[63] The principle of *non-refoulement*, which is found under Article 33 of the 1951 Refugee Convention, can be applied for all individuals determined to be refugees under Article 1 of the 1951 Refugee

---

56 Convention Relating to the International Status of Refugees, 28 October 1933, 159 LNTS 199, 205.

57 The Convention Relating to the International Status of Refugees 1933, Article 3.

58 Hyde (n 53) 31; See also: The Vienna Convention of the Law of Treaties 1969. Articles 53 and 64.

59 *Seid Mortesa Aemei v Switzerland* [UN CAT, May 1997] <https://www.refworld.org/cases,CAT,3ae6b69420.html>

60 J. Allain, 'The *jus cogens* Nature of *non-refoulement*' (2001) 13(4) *IJRL* 533.

61 Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, [UN doc. HCR/MMSP/2001/09] (13 December 2001) para 4.

62 A. Duffy, 'Expulsion to Face Torture? Non-refoulement in International Law' (2008) 20 *IJRL* 383.

63 UNHCR, Refugee Protection: A Guide to International Refugee Law (2001). International Helsinki Federation for Human Rights, Anti-terrorism Measures, Security & Human Rights-Developments in Europe, Central Asia & North America in the Aftermath of September 11 (IHF, 2003) 169.

Convention.[64] Article 33(1) of the 1951 Refugee Convention provides, "No Contracting State shall expel or return '*refouler*' a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". Thus, *non-refoulement* hinders involuntary return of refugees 'in any manner whatsoever' to such place where their lives or freedom would be threatened by deportation, expulsion, rejection at the frontier, extradition, or by any other means of forced repatriation.[65] It also covers the asylum seekers, for during an initial period and in proper circumstances. Otherwise, the active protection cannot be afforded to them.[66] The application of this principle is not dependent on any formal determination of refugee status by a State or international organization.[67]

5. *Non-refoulement* Obligations of Bangladesh towards Rohingyas under Its National Laws

When we talk about the 1951 Convention and its application on the Rohingya situation in Bangladesh, most accounts will state, "Bangladesh has not ratified the 1951 Refugee Convention or its Protocol […]." While this statement is factually correct, it does not mean that Bangladesh is devoid of a framework geared towards protecting the refugees.[68] In 2017, the High Court Division (HCD) of the Supreme Court of Bangladesh held in a case, "the 1951 Refugee Convention had become a part of customary international law which is binding upon all the countries of the world, irrespective of whether a particular country has formally signed, acceded to or ratified the Convention or not".[69] Since Bangladesh has not enacted specific legislation in the protection of refugees, it may apply international

---

64 *R v Secretary of State for the Home Dept., ex parte Sivakumaran* (1998) [1 All ER 193 UK HL, 1987].

65 N. Haider, 'Protection of Refugees through the *Non-refoulement* Principle' (2002) 6 (1&2) *Bangladesh Journal of Law* 95.

66 G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 232.

67 Report of the UNHCR [UN doc. E/1985/62 (1985)] paras 22-23.

68 M. S. Hossain, 'Bangladesh's Judicial Encounter with the 1951 Refugee Convention' (2021) 67 *FMR* 59.

69 *RMMRU v Government of Bangladesh* [Writ Petition No. 10504 of 2016].

law to fill that vacuum.[70] Under Article 25 of the Constitution, Bangladesh has its constitutional mandate to respect international law and the principles of the UN Charter, 1945. In light of the compelling argument that the principle of *non-refoulement* is now a rule of customary international law, it is expected that the Supreme Court of Bangladesh adhered to it, given the absence of domestic law contradicting it.[71]

In *Nurul Islam v Govt. of Bangladesh*[72], the HCD reminded the GoB of its constitutional obligations by stating, "Article 25(1) of our Constitution casts on obligation upon the State to respect for international law and the principles enunciated in the UN Charter and the WHO resolutions". Besides Article 25, Bangladesh has a liberal constitutional framework that guarantees in its Part III several fundamental rights drawing from the international human rights discourse even to foreigners or refugees. In Bangladesh, there exist many enactments that are responsible for the regulation and legal protection of Rohingyas, e.g., Foreigners Act, 1946; Foreigners Order, 1951; Foreigners (Parolees) Order, 1965; Registration of Foreigners Act, 1939; Registration of Foreigners Rules, 1966; Passports Act, 1920; Passport Rules, 1955; Bangladesh Passport Order, 1973; Citizenship Act, 1951; Bangladesh Citizenship (Temporary Provisions) Order, 1972; Bangladesh Control of Entry Act, 1952; Extradition Act, 1974; Naturalization Act, 1926; Code of Civil Procedure, 1908; Children Act, 2013; Birth and Death Registration Act, 2004; and Child Marriage Restraint Act, 2017. It should be noted here that the inadequate legal framework concerning Rohingyas in Bangladesh offers a blatant contrast to the fundamental rights under the Constitution and increasingly evolved the principles under international refugee law.[73] The major challenge faced by the Rohingyas in Bangladesh is the lack of legal recognition that puts them on precarious legal footing under the national laws.[74] The legal

---

70 M. M. Hossain and C. Richardson, 'Application of International Law in Bangladesh: An Analysis of the Supreme Court Judgments' (2015) 1 *Jagannath University Journal of Law* 1.

71 M. S. Hossain (n 68) 60, 61.

72 WP 1825 of 1999 (2000.02.07) (Tobacco Advertising Case).

73 N. Mohammad, 'Refugee Protection under the Constitution of Bangladesh: A Brief Overview' (2012) *BRW* 153 <www.mcrg.ac.in/rw%20files/RW3940/12 .pdf>

74 HRW, 'Bangladesh is not My Country: The Plight of Rohingya Refugees from Myanmar' (5 August 2018) <www.hrw.org/report/2018/08/05/bangladesh-not-my-country/plight-rohingya-refugees-myanmar>

framework does not acknowledge Rohingyas as a separate class of people deserving of separate treatment.[75] All new arrivals are officially registered as FDMN, a designation that denies their refugee status and related rights. It also makes them vulnerable to denial of freedom of movement, access to public services, and formal education as well as to arbitrary arrest and exploitation.[76]

6. *Non-refoulement* Obligations of Bangladesh towards Rohingyas under International Law

Bangladesh is neither a party to the 1951 Refugee Convention and its 1967 Protocol nor it is a party to the Statelessness Conventions of 1954 and 1961 as well.[77] Since Bangladesh have not acceded to the 1951 Refugee Convention and its Protocol yet, this country has no legal obligation to deal with the Rohingyas.[78] However, Bangladesh has ratified several other regional and international human rights treaties under which it cannot avoid its obligations. Bangladesh has been a member of Executive Committee of the High Commissioner's Program (ExCOM) since 1995.[79] It is also a member of the Bangkok Principles of Status and Treatment of Refugees, 1966. Bangladesh's membership to the UNHCR ExCOM is indicative of its greater commitment towards the Rohingyas.[80]

Though *non-refoulement* creates economic, social, political, and environmental burdens for host countries especially during the mass influxes of persecuted persons whose determination of refugee status has not yet been accomplished, the UNHCR ExCom concluded that the benefit of Article 33 should not be predicated on formal recognition of refugee status, and that *refoulement* is not justifiable, no matter how debilitating a sudden influx of refugees might be upon a State's resources, economy or political situation.[81] From this viewpoint, Bangladesh is obliged to obey

---

[75] ibid

[76] HRW (n 74).

[77] Y. Gunawan, A.T.T. Rettob, and K. Kalagita (n 13) 19.

[78] H. N. Estriani (n 30) 365.

[79] M. M. Naser and T. Afroz, 'Protection of Refugees in Bangladesh: Towards a Comprehensive Legal Regime' (2007) 18 *Dhaka University Law Journal* 120.

[80] K. H. Arif (n 9) 861.

[81] J. F. Durieux, and J. McAdam, '*Non-refoulement* through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004) 16(1) *IJRL* 4 - 24.

the *non-refoulement* of Rohingyas. Despite Bangladesh is not a contracting State to the 1951 Refugee Convention, the corresponding protection law can overweigh the convention refugee status and protect Rohingyas by the *non-refoulement* principle.[82] Refugees are given significant protection under the 1951 Refugee Convention, which mainly evolves from the Geneva Conventions, 1949 and the international humanitarian law.[83] Though the Rohingyas satisfy the conditions to be regarded as refugees under Article 1A (2) of the 1951 Refugee Convention, and are entitled to certain rights and protections, there exist huge paradoxes concerning the Rohingya refugee status and attainment of their rights in Bangladesh.[84] As a non-state party to the 1951 Refugee Convention, Bangladesh treats them as "short-time arrivals", for whom it does not have strict obligations under the Convention. However, Bangladesh must ensure the rights of Rohingyas under customary international law and other human rights instruments to which it is a party.[85]

7. Key Durable Solutions to Rohingya Refugee Crisis: An Analysis in the Context of Bangladesh

The durable solution to refugee problems is one that terminates the cycle of displacement by resolving their plight so that they can rebuild their normal lives and enjoy all human rights. Seeking and extending durable solutions to refugee problems constitutes an integral part of global protection. Since the launch of UNHCR in 1950, search for durable solutions has been a crucial part of its core mandate. Article 8(c) of the UNHCR Statute, 1950 provides, "The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities". B.N. Stein states, "Refugee problems demand durable solutions is the opening statement of the Principles for Action in the Developing Countries adopted by 1984 Executive Committee of the UNHCR".[86]

---

82 A. K. Khan, 'Caught between Scylla and Charybdis: A Study of Rohingya Repatriation in Myanmar in Light of Theory and Practice from Bangladesh's Perspective' (Master's Thesis, UiO 2018).

83 Goodwin-Gill and J. McAdam (n 66).

84 Alam (n 34) 129.

85 ibid

86 B. N. Stein, 'Durable Solutions for Developing Country Refugees' (1986) 20(2) *IMR* 264.

Traditionally there exist three durable solutions at the disposal of the world community when it comes to settling the disputes on refugee problems: voluntary repatriation, local integration, and resettlement. The order of "preferability" among these three solutions has varied over time; however, voluntary repatriation is generally considered as the "ideal" solution.[87] The UNHCR also offered these three durable solutions to the refugee problems.[88] Modern discourse has shifted attention away from the significance of refugees' rights and toward defining and pursuing 'rights of solutions' to refugeehood through repatriation, local integration, or resettlement.[89] Now, let us discuss the durable solutions to Rohingya refugee problems in Bangladesh that have been attempted for Rohingyas in this country in different times. It is also pertinent to discuss about which durable solution is most suitable for Bangladesh to get rid of the curse of Rohingya crisis forever.

7.1 Voluntary Repatriation

It is lawful for the host country to repatriate refugees to the home country when the reason of flight ceases.[90] Voluntary repatriation is a feasible solution if the country of origin of the refuges assures all types of safety with dignity for the returnees.[91] In the post-Cold War era repatriation is persisted as the best durable solution to refugee crisis.[92] Prior to the 1980s, repatriation was alleged as a permanent solution, which changed in the 1980s to being the preferred, or as termed by the High Commissioner Hartling in the 1970s, 'durable solution'.[93] The UNHCR's approach these

---

87 S. Moretti, 'The Challenge of Durable Solutions for Refugees at the Thai-Myanmar Border' (2015) 34(3) *RSQ* 72.

88 UNHCR, 'An Introduction to International Protection: Protecting Persons of Concern to UNHCR' (Self Study Module 1) (Geneva: UNHCR, 2005).

89 J. C. Hathaway, The Rights of Refugees under International Law (CUP 2005) 913.

90 P. V. Krieken, 'Repatriation of Refugees under International Law' (1982) 13 *NYIL* 93-123.

91 A. Azad and F. Jasmin, 'Durable Solutions to the Protracted Refugee Situation: The Case of Rohingyas in Bangladesh' (2013) 1(4) *JIR* 25-35.

92 J. Fitzpatrick, 'The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection' (1998) 13 *GILJ* 343.

93 Nobel Lecture (1981) <https://www.nobleprize.org/nobel_prizes/peace/lauteates/1981.refugees-lecture.html.>

days is to favor the voluntary repatriation.[94] The UNGA constantly affirmed the UNHCR's function of promoting voluntary repatriation of refugees and, in recognition of the importance of sustainable return, has widened its mandate to include providing assistance for their rehabilitation and dealing with results of their return.[95] The UNHCR ExCom conclusions[96] also affirm international principles governing the voluntary repatriation process and its core elements.[97] In every repatriation "voluntariness" is *sine qua non*, which is not mentioned in the Convention; instead the principle of "safe return" is contained in Article 1(c) of the 1951 Convention.[98]

The key components of voluntary repatriation are physical, legal and material safety, dignity, and reconciliation.[99] In 1980, the UNHCR's ExCom Conclusion No. 18 recognized that voluntary nature of repatriation should always be respected.[100] In 1985, UNHCR's ExCom Conclusion No. 40 elaborated on the definition of voluntariness: repatriation should only occur "at their [the refugees'] freely expressed wish" and should be carried out "under conditions of absolute safety".[101] Though the 1951 Refugee Convention does not clearly address voluntary repatriation, it codifies the principle of *non-refoulement* which strongly reinforces the notion of voluntary repatriation by stating that "no contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened."[102]

---

94 N. Szablewska and S. Karim, 'Protection and International Cooperation in the International Refugee Regime' in R. Islam and J. H. Bhuiyan (eds), *An Introduction to International Refugee Law* (MN Publishers 2013) 203.

95 [UNGA Res.56/137 (2001)].

96 Ex Com Conclusions: 18 of 1980, 40 of 1985, and 74 of 1994, etc.

97 UNHCR Handbook for Repatriation and Reintegration Activities (2004).

98 J. C. Hathaway, 'The Meaning of Repatriation' (1997) 9(4) *International Journal of Refugee Law* 551 - 558.

99 ibid

100 UNHCR Ex Com., 31st Session, No. 18 (XXXI) Voluntary Repatriation, UNGA Doc. No. 12A (A/35/12/Add.1), 16 October, 1980.

101 UNHCR Ex Com., 36th Session, No. 40 (XXXVI) Voluntary Repatriation, UNGA Doc. No. 12A (A/40/12/Add. 1), 18 October 1985.

102 'Convention Relating to the Status of Refugees', under UNGA Res. 429, 28 *UN Treaty Series* (1951) 189.

Both Bangladesh and Myanmar signed repatriation agreements in all influxes of Rohingyas in 1978, 1992, and 2017. An agreement between the GoB and Government of Myanmar (GoM) was signed on 9 July 1978, after the bilateral negotiations took place in Dhaka.[103] In early 1992, Myanmar and Bangladesh governments with the involvement of UNHCR, agreed on a plan to allow the return of some Rohingya Muslims to Arakan.[104] Another repatriation occurred on 22 September 1992, which was accompanied by substantial coercion from Bangladesh[105] and again in October 1992, which was voluntary as per the UNHCR. However, when the repatriation actually took place, Bangladesh entirely excluded the UNHCR from the process and that made the country widely criticize by the world community.[106]

Coming in 1992, GoM signed a MoU with the GoB, agreed to bring back the Rohingyas who could proof the residency of their country though the GoM kept denying their existence.[107] Though there was no substantial repatriation development during 1995 to 2016, from 1992 to 2005 around 2,36,599 Rohingyas were repatriated from Bangladesh to Myanmar.[108] A bilateral repatriation agreement was signed between Bangladesh and Myanmar on 23 November 2017, which is considered problematic due to premature repatriation.[109] Though Bangladesh and Myanmar have entered several repatriation treaties in 2017 and 2018 respectively which set 23 January, 2019 deadline for voluntary repatriation of 670,000 Rohingyas, no implementation thereof has yet been possible.[110] These repatriation attempts by Bangladesh were purely involuntary and amounted to *refoulement*, which is incompatible with the customary international

---

103 See: 1978 Repatriation Agreement (2014) <http://arks.princeton.edu/ark:/88435/dsp01th83kz538>

104 T. K. Ragland (n 27) 302.

105 C. R. Abrar, 'Repatriation of Rohingya refugees' (1995) <http://repository.forcedmigration.org/>

106 K. Nemoto, 'The Rohingya Issue: A Thorny Obstacle between Burma and Bangladesh' in Elusive Borders: Changing Sub-Regional Relations in Eastern South Asia (Japan: IDE 1991) 137 - 155.

107 Staples (n 39).

108 Refugee Relief and Repatriation Commissioner's Office, MFDM, Dhaka.

109 A. K. Khan (n 82) 3.

110 A. S. Mizan, and A. B. Saqi (n 18) 54.

law.[111] In fact, since 1998 there exists a *status quo* in refugee repatriation process from Bangladesh to Myanmar.[112] Overall, reluctance from the GoM, complexities in verification process, and uncertainty about their safe return have mainly protracted the repatriation process.

7.2 Local Integration

Local integration is a solution where the country of asylum provides the legal residency. It is a legal, economic and social process which grants a wide range of rights to refugees by the host State in allowing them to become less reliant on the State aid and humanitarian assistance, to attain a degree of self-reliance, and to live among the host population without discrimination.[113] In local integration, the country of asylum offers refugees permanent residence with the probability of final citizenship.[114] Local integration is implicit in the duty to implement treaty obligations in good faith under Articles 1(c) (3) and 34 of the 1951 Refugee Convention. However, Bangladesh has categorically stated that local integration of Rohingya is not an option, which is a view largely shared by its peoples.[115] It has never welcomed Rohingyas for local integration after any of the three major influxes in 1978, 1992 or 2017 to Bangladesh.[116] Though Bangladesh recognized Rohingyas as refugees and given refugee status in 1992, the same group has not been granted refugee status in 2017.[117] In 2014, Bangladesh declared its national policy for handling Rohingyas, which concentrated on the provision of temporary humanitarian relief without scope for local integration.[118] Since cooperation of the host State is essential for implementing local integration, these obstacles made local integration of Rohingyas unfeasible in Bangladesh.

---

111 K. F. Farzana, 'Memories of Burmese Rohingya Refugees: Contested Identity and Belonging' (2017) *Palgrave Macmillan*.

112 Ahmed (n 16) 149.

113 Hathaway (n 89) 978.

114 A. Azad and F. Jasmin (n 91) 29.

115 C. R. Abrar, 'Protected Return to Protected Homeland' (2018) <https://www.thedailystar.net/opinion/humanrights/protected-return-protected-homeland-1560379>

116 A. K. Khan (n 82) 53.

117 ibid 67.

118 Staples (n 42) 146.

7.3 Resettlement

Resettlement involves the permanent movement of refugees to a third safe country. Resettlement takes place when refugees are transferred from the host country to a third safe country, which agrees to provide protections. Resettlement has customarily been contemplated either because the host State declines to provide continuing protection or refugees wish to settle elsewhere. According to the UNHCR resettlement is a protection tool for individual refugees whose life, liberty, safety, health or other fundamental rights are at risk in the country of asylum; a durable solution for large numbers or groups of refugees and a mechanism for burden and responsibility sharing among States.[119] The ExCom Conclusion No. 90(LII) acknowledged that relatively small number of refugees get benefit from resettlement process. Under Articles 30 and 31 of the 1951 Refugee Convention, UNHCR pursues resettlement "only as a last resort, when neither repatriation nor local integration is possible." Resettlement had long been seen, in practice, as "the preferred durable solution" to the refugee problem, reflecting the "exilic bias" of the international refugee regime[120], but this perspective would start to change in the beginning of the 1980s.[121] Statistics shows that resettlement is not a common thing for the world and only 1% of the world's refugees are resettled.[122]

The use of resettlement as a strategic tool to provide durable solutions to refugees was first employed by the UNHCR in 2006.[123] Until 2006, resettlement was not considered to be an option for the Rohingyas in Bangladesh. Resettlement from Bangladesh was started in 2006 and peaked with 920 returns in 2010.[124] In November 2010, the GoB

---

119 UNHCR Report, 'An Introduction to International Protection' (2005) 143.

120 G. Coles, 'The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry' in A. E. Nash (edn), *Human Rights and the Protection of Refugees under International Law* (IRPP 1988) 195 - 221.

121 B. S. Chimni, 'From Resettlement to Involuntary Repatriations: Toward a Critical History of Durable Solutions to Refugee Problems' (2004) 23(3) *RSQ* 55-56.

122 A. Mwangi, 'Only 1% of Refugees are resettled – why are we so threatened by them?' (2017) *The Guardian.*

123 UNHCR, 'Bangladesh: An Analysis of Gaps in the Protection of Rohingya Refugees' 2007.

124 E. Kiragu, A. L. Rosi, and T. Morris, 'States of Denial: A Review of UNHCR's Response to the Protracted Situation of Stateless Rohingya Refugees in Bangladesh' (Geneva: UNHCR 2011) 21.

suspended the resettlement operation. According to GoB, it would act as a pull factor for the new waves of refugees from Myanmar. As per Article 12 of the ICCPR, 1966, "any person has the right to decide to leave any country, including a State of asylum". Hence, resettlement must be completed with free consent of the refugees. As a State party to the ICCPR, Bangladesh is obliged to ensure that Rohingya resettlements are free and must demonstrate strong evidence that they are going to have basic privileges in another country.

8. Which Durable Solution is Most Appropriate for Rohingyas in Bangladesh and Why?

The initial repatriations of Rohingyas were not that much voluntary in nature since both the governments and UNHCR were involved in involuntary repatriation process which amounts to *refoulement*. Bangladesh is under an obligation not to involuntarily repatriate the Rohingyas to Myanmar. The Advisory Commission on Rakhine State recommended the GoB and GoM to facilitate voluntary return of refugees from Bangladesh to Myanmar through joint verification.[125] The GoB continues to deny local integration as a durable solution for the Rohingyas, leaving UNHCR with very limited options. Bangladesh is not well placed to cope with this protracted refugee situation because this country is over populated, troubled with poverty, and is adversely affected by climate change and environmental degradations.[126] Therefore, there is a view that Bangladesh could at best be the country of temporary refuge or the country of first refuge.[127] Under the pressure from GoB and GoM, UNHCR is still exploring the possibility of future repatriation.[128]

Repatriation of Rohingyas is promoted as the best solution for refugee hood by the UNHCR and international community.[129] According to GoB, it is the only solution that has been proposed since 1978, when the first

---

125 Advisory Commission on Rakhine State, 'Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State' 2017.

126 A. Azad and F. Jasmin (n 91) 31.

127 Rashid (n 15).

128 E. Pittaway, 'The Rohingya Refugees in Bangladesh: A Failure of the International Protection Regime' in H. Adelman (edn), *Protracted Displacement in Asia: No Place to Call Home* (England: Ashgate 2008).

129 K. F. Farzana (n 111) 80.

repatriation agreement was concluded between Bangladesh and Myanmar.[130] However, presently UNHCR acknowledges that repatriation is not a viable option for the Rohingyas.[131] Amnesty International Report (2004) and stories of persecution of Rohingyas in Myanmar reliably demonstrate that Rohingyas who are forcibly returned to Myanmar will find their lives endangered. Despite the denial from GoB and host community, many Rohingyas have been integrated in the Bangladeshi society illegally collecting NIDs and Passports; and inter-marriage with local Bangladeshis.

In considering the present situation, in future there is little hope for voluntary repatriation of Rohingyas to Myanmar. The Rohingya resettlement to other States seems unlikely as the response is very poor. Other governments are reluctant to get involved in the debate around Rohingyas and they are afraid of secondary movement and further refugee caseload to their territory. In 2007, at first only 23 Rohingya refugees departed for Canada and in November 2010, the GoB suspended the resettlement operation since it would act as a pull factor for the new waves of Rohingyas from Myanmar. Therefore, it seems that repatriation is an appropriate durable solution for the Rohingyas in Bangladesh.

9. Protecting Rohingyas and Ensuring Their Durable Solutions: Key Challenges for Bangladesh

Since the mass influx of Rohingyas, Bangladesh had confronted huge economic, political, socio-legal, and environmental challenges in integrating, repatriating and resettling the Rohingyas, which is discussed under the following heads:

9.1 Economic Challenges

Economic impact of Rohingyas is an alarming issue for Bangladesh's economy. Tourism, economy, and environment of Cox's Bazar are at stake due to Rohingya influx in Bangladesh.[132] Bangladesh is struggling to provide food, social and humanitarian assistance to Rohingyas in a large

[130] UNHCR, 'The State of the World's Refugees, 2000: Fifty Years of Humanitarian Action' (OUP, 2000) 75.

[131] UNHCR 'Bangladesh' in *UNHCR Global Appeal 2008-2009*.

[132] S. M. Ahmad and N. Naeem, 'Adverse Economic Impact by Rohingya Refugees on Bangladesh: Some Way Forwards' (2020) 7(1) *IJSPER* 2.

number.[133] The GoB realized that it is necessary to reduce pressure on the world's largest refugee settlement in Cox's Bazar.[134] Hence, the GoB has set up 120 cluster villages sprawling 13,000 acres island at Bhasan Char at a cost of over Tk. 23 billion for accommodating Rohingyas before their safe repatriation. Bhasan Char or the "floating island" that recently emerged from the sea is located 30 km from the mainland of the Bay of Bengal.[135] Despite reservations from the world community and Rohingyas themselves, nearly 24,000 Rohingyas have been relocated to this island dedicated to host around 100,000 people over there.[136] This huge expenditure is certainly an extra burden and economic loss for Bangladesh.

9.2 Socio-legal Challenge

Despite having enormous limitations, Bangladesh extended shelter to Rohingyas, and this extra population has created a disastrous situation in Bangladesh-Myanmar border. The cheap labor of Rohingya laborers has adversely affected the labor situation of local laborers in Bangladesh. The dreadful living conditions in the camps set up for Rohingyas, together with lack of educational and employment opportunities for them, is leading to criminal activities.[137] Human trafficking of Rohingyas is also increasing, aggravated by their isolation and sense of distraction at the failed repatriation efforts. With the increased number of drug addicts, the GoB is worried about illegal drug trade in the border, which has a long term impact on the internal security of Bangladesh.[138] The Department of Narcotics Control recognized Myanmar border as a vital entry point of illegal drugs. Many young female Rohingyas resorted in illegal sex trade,

---

[133] S. N. Parnini (n 3) 281-297.

[134] B. Adams, 'For Rohingya, Bangladesh's Bhasan Char 'will be like a Prison': Relocating Refugees to Unsafe Island Would Risk Lives, Livelihoods' *HRW* (2019)<www.hrw.org/ news/2019/03/15/rohingya-bangladeshs-bhasan-char-will-be-prison>

[135] Deutsche Welle, 'Bangladesh may "force" 100,000 Rohingya to Resettle on Uninhabited Island' (2019)<www.dw.com/en/bangladesh-may-force-100000-rohingya-to-resettle-on-uninhabitedisland/a50256755>

[136] Dhaka Tribune, '1,200 Rohingyas on Way to Bhasan Char' (2022) <https://www. dhakatribune.com/bangladesh/nation/266786/1-200-rohingyas-on-way-to-bhasan-char>

[137] S. Banerjee, 'Drug trafficking and Rohingya refugees in Bangladesh' (Expert Speak, ORF, 15 March 2019) <https://www.orfonline.org/expert-speak/drugtrafficking-and-rohingya-refugees-in-bangladesh-49005/>

[138] Rahman (n 1) 236.

which have resulted in a high birth rate outstripping the number of deaths and repatriation if combined in recent years.[139] Lack of awareness about family planning in the camps, the Rohingya population are likely to increase in the coming days, which will increase the pressure on food, health and other basic needs.[140]

9.3 Environmental Challenges

Rohingyas constitute the world's biggest and densest refugee camps spread across a few kilometers in Cox's Bazar district which receive constant public attention not only for the worsened living conditions, nonstop intra-camp violence, resource mobilization challenges etc., but also because the gradual expansion of camp posits substantial environmental, biodiversity and socioeconomic challenge to Cox's Bazar.[141] The protracted residence of refugees enhances the rate at which land and resources are used up, a process which hastens environmental degradation and in order leads to greater competition between the natives and refuges for limited land and resources.[142] The existence of huge refugees has had a negative impact on environment because they take over the fragile hills and cut down trees to create homes.[143] Deforestation for settlement and burning of woods will have direct cost implication for the ecology, economy and society. According to Cox's Bazar DC Office, in 2016 the total forest area in Cox's Bazar was 2,092,016 acres, from which 3,500 acres were lost due to Rohingya influx. This loss is tantamount to 1.67% of Cox's Bazar's total forest area and 0.05% of the total national forest area.[144]

10. Concluding Remarks

Bangladesh has an extensive record of upholding humanitarian obligations towards the Rohingya. It has consistently complied with the principle of *non-refoulement*, despite not having a national law on refugees or

---

139 Ullah (n 40) 139-161.

140 F. Khatun and M. Kamruzzaman, 'Fiscal Implications of Rohingya Crisis for Bangladesh' CPD Working Paper 120 (CPD 2018).

141 Mizan and Saqi (n 18) 54.

142 S. Lee, 'When refugees steam: Environmental and Political Implications of Population Displacement' (Cambridge, MA: HUP 2005).

143 Rahman (n 1) 237.

144 Khatun and Kamruzzaman (n 140) 7.

acceding to any relevant international instrument.[145] As a host State Bangladesh has shown huge humanitarian response and immense respect towards the customary international law obligations even more than those who are already high contracting parties to the 1951 Refugee Convention and its 1967 Protocol. Though Bangladesh had extended its hands several times towards the Rohingyas on humanitarian grounds, it had to confront huge challenges since their arrival here. But given those situations, Bangladesh is now highly reluctant to host the Rohingyas anymore. The repatriation agreements signed between Bangladesh and Myanmar will not be the best option unless both the States agree to guarantee the aspects of repatriation based on voluntariness, safety and dignity. The Rohingya crisis will never end since Myanmar still commits grave human rights abuses against the Rohingyas and does not amend its discriminatory Citizenship Act, 1982. Both the GoB and GoM should realize that voluntary repatriation is the preferred durable solution to the Rohingyas. Moreover, with little involvement of the UNHCR in the process of repatriation, the durable solution is only an illusion. The GoB along with the UNHCR should support and encourage the bilateral donor States to continue and extend their hands in bringing a conducive atmosphere for repatriating the Rohingyas to Myanmar.

Bibliography

Books

1. Ahmed I, The Plight of the Stateless Rohingyas (3rd edn, UPL 2019)
2. Farzana K F, Memories of Burmese Rohingya Refugees: Contested Identity and Belonging (Palgrave Macmillan 2017)
3. Goodwin-Gill G S and McAdam J, The Refugee in International Law (3rd edn, OUP 2007)
4. Hathaway J C, The Rights of Refugees under International Law (CUP 2005)
5. Rashid H U, Refugee Law (2nd edn, Anupam Gyan Bhandar 2013)
6. UNHCR, The State of the World's Refugees, 2000: Fifty Years of Humanitarian Action (OUP, 2000)

Book Chapters

1. Coles G, 'The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry' in A E Nash (eds), Human Rights and the Protection of Refugees under International Law (IRPP 1988)

---

[145] N. Mohammad (n 73) 141.

2. Lee S, ‘When Refugees Steam: Environmental and Political Implications of Population Displacement’ (Cambridge, MA: HUP 2005)
3. Nemoto K, ‘The Rohingya Issue: A Thorny Obstacle between Burma and Bangladesh’ in Elusive Borders: Changing Sub-Regional Relations in Eastern South Asia (Japan: IDE 1991)
4. Pittaway E, ‘The Rohingya Refugees in Bangladesh: A Failure of the International Protection Regime’ in H. Adelman (edn), Protracted Displacement in Asia: No Place to Call Home (England: Ashgate 2008)
5. Szablewska N and Karim S, ‘Protection and International Cooperation in the International Refugee Regime’ in R. Islam and J. H. Bhuiyan (eds), An Introduction to International Refugee Law (MN Publishers 2013)

Journal Articles and Conference Papers

1. Ahmad S M and Naeem N, ‘Adverse Economic Impact by Rohingya Refugees on Bangladesh: Some Way Forwards’ (2020) 7(1) IJSPER
2. Alam J, ‘The Rohingya of Myanmar: Theoretical Significance of the Minority Status’ (2018) 19(2) Asian Ethnicity
3. Alam J, ‘The Status and Rights of the Rohingya as Refugees under International Refugee Law: Challenges for a Durable Solution’ (2021) 19(2) JIRS
4. Allain J, ‘The Jus Cogens Nature of Non-refoulement’ (2001) 13(4) IJRL
5. Arif Md. K. H, ‘The Rohingya Refugees in Bangladesh: Non-refoulement and Legal Obligation under National and International Law’ (2020) 27(4) IJMGR
6. Azad A and Jasmin F, ‘Durable Solutions to the Protracted Refugee Situation: The Case of Rohingyas in Bangladesh’ (2013) 1(4) JIR
7. Chimni B S, ‘From Resettlement to Involuntary Repatriations: Toward a Critical History of Durable Solutions to Refugee Problems’ (2004) 23(3) RSQ
8. Duffy A, ‘Expulsion to Face Torture? Non-refoulement in International Law’ (2008) 20 IJRL
9. Durieux J F and McAdam J, ‘Non-refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies’ (2004) 16(1) IJRL
10. Farmer A, ‘Non-Refoulement and Jus Cogens: Limiting Anti-terror measures that threaten refugees protection’, (2008) 23 GILJ
11. Faye M, ‘A Forced Migration from Myanmar to Bangladesh and Beyond: Humanitarian Response to Rohingya Refugee Crisis’ (2021) 6(13) JIHA
12. Fitzpatrick J, ‘The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection’ (1998) 13 GILJ
13. Gunawan Y, Rettob ATT, and Kalagita K, ‘The Analysis of Non-refoulement Principle towards Rohingya Refugees in Bangladesh’ (2020) 5(1) LMLJ
14. H N Estriani, ‘Rohingya Refugee in Bangladesh: The Search for Durable Solutions?’ (ACIR 2018) - Politics, Economy, and Security in Changing Indo-Pacific Region, UA.
15. Haider N, ‘Protection of Refugees through the Non-refoulement Principle’ (2002) 6 (1&2) Bangladesh Journal of Law
16. Haque M E, ‘Current International Legal Issues: Bangladesh’ (2019) 23(2017) AYIL

17. Hathaway J C, ‘The Meaning of Repatriation’ (1997) 9(4) International Journal of Refugee Law
18. Hossain M M and Richardson C, ‘Application of International Law in Bangladesh: An Analysis of the Supreme Court Judgments’ (2015) 1 JUJL
19. Hossain M S, ‘Bangladesh’s Judicial Encounter with the 1951 Refugee Convention’ (2021) 67 FMR
20. Kipgen N, ‘Addressing the Rohingya Problem’ (2014) 49(2) JAAS
21. Krieken P V, ‘Repatriation of Refugees under International Law’ (1982) 13 NYIL
22. Mahmood SZA, “Timeline: A Short History of Myanmar’s Rohingya Minority” (2016) WSJ
23. Mallick A H, ‘Rohingya Refugee Repatriation from Bangladesh: A Far Cry from Reality’ (2020) 7(2) JASIL
24. Mitun M B, ‘Ethnic Conflict and Violence in Myanmar: The Exodus of Stateless Rohingya People’ (2018) 25 IJMGR
25. Mizan A S and Saqi A B, ‘Durable Solutions for the Rohingya Crisis in Bangladesh: A Sociological Enigma’ (2020) 18 (1 & 2) BJL
26. Moretti S, ‘The Challenge of Durable Solutions for Refugees at the Thai–Myanmar Border’ (2015) 34(3) RSQ
27. Naser M M and Afroz T, ‘Protection of Refugees in Bangladesh: Towards a Comprehensive Legal Regime’ (2007) 18 Dhaka University Law Journal
28. Newmark R L, ‘Non-Refoulement run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs’ (1993) 71 Wash U.L.Q.
29. Parnini S N, ‘The Crisis of the Rohingya as a Muslim Minority in Myanmar and Bilateral Relations with Bangladesh’ (2013) 33(2) JMMA
30. Parnini S N, Othman M R, and Ghazali A S, ‘The Rohingya Refugee Crisis and Bangladesh-Myanmar Relations’ (2013) 22(1) APMJ
31. Ragland T K, ‘Burma’s Rohingyas in Crisis: Protection on Humanitarian Refugees under International Law Notes’ (1994) 14(2) B. C. Third World L. J.
32. Rahman U, ‘The Rohingya Refugee: A Security Dilemma for Bangladesh’ (2010) 8(2) JIRS
33. Stein B N, ‘Durable Solutions for Developing Country Refugees’ (1986) 20(2) IMR
34. Ullah AAKM, ‘Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalization’ (2011) 9(2) JIRS
35. Zarni M and Cowley A, ‘The slow-burning genocide of Myanmar’s Rohingya’ (2014) 23(3) WILJ

Newspaper and Blog Articles

1. Abrar C R, ‘Protected Return to Protected Homeland’ (2018) <https://www.thedailystar.net/opinion/humanrights/protected-return-protected-homeland-1560379>
2. Abrar C R, ‘Repatriation of Rohingya refugees’ (1995) <http://repository.forcedmigration.org/>
3. Adams B, ‘For Rohingya, Bangladesh’s Bhasan Char ‘will be like a Prison’: Relocating Refugees to Unsafe Island Would Risk Lives, Livelihoods’ HRW (2019) <www.hrw.org/news/2019/03/15/rohingya-bangladeshs-bhasan-char-will-be-prison>

4. Ahmed I, ‘Globalization, Low-Intensity Conflict and Protracted Statelessness/Refugee hood: The Plight of the Rohingyas’ <http://programs.ssrc.org/gsc/publications/quarterly13/ahmed.pdf.>
5. Al Jazeera, “UN: Rohingya in Bangladesh Need ‘Massive’ Assistance” (2017) <https://www.aljazeera.com>
6. Banerjee S, ‘Drug trafficking and Rohingya refugees in Bangladesh’ (Expert Speak, ORF, 15 March 2019) <https://www.orfonline.org/expert-speak/drugtrafficking-and-rohingya-refugees-in-bangladesh-49005/>
7. Burma Campaign UK, ‘Burma’s Treatment of Rohingya and International Law’ (2013) Burma Briefing
8. Chakma B, “Bangladesh State and the Refugee Phenomenon” <http://www.safhr.org/refugeewatch184.htm.>
9. Deutsche Welle, ‘Bangladesh may “force” 100,000 Rohingya to Resettle on Uninhabited Island’ (2019)<www.dw.com/>
10. Dhaka Tribune (Online), ‘Timeline: Who are the Rohingya?’ (2017) <http://www.dhakatribune.com/world/southasia/2017/08/28/timeline-who-are-the-rohingya/>
11. Dhaka Tribune, ‘1,200 Rohingyas on Way to Bhasan Char’ (2022) <https://www.dhakatribune.com/bangladesh/nation/266786/1-200-rohingyas-on-way-to-bhasan-char>
12. HRW, ‘Bangladesh is not My Country: The Plight of Rohingya Refugees from Myanmar’ (5 August 2018)<www.hrw.org/report/2018/08/05/bangladesh-not-my-country/plight-rohingya-refugees-myanmar>
13. HRW, ‘The Government Could Have Stopped This: Sectarian Violence and Ensuring Abuses in Burma’s Arakan State’ (2018) <https://www.hrw.org/reports/2012/08/01/government-couldhave-stopped>
14. Hyde L, ‘The Principle of Non-refoulement in International Law’ (Rescrptum 2016)
15. Mohammad N, ‘Refugee Protection under the Constitution of Bangladesh: A Brief Overview’ (2012) BRW <www.mcrg.ac.in/rw%20files/RW3940/12 .pdf>
16. Molnar T, ‘The Principle of Non-refoulement under International Law: Its Inception and Evolution in a Nutshell’ (2016) 1(1) Cojourn
17. Mwangi A, ‘Only 1% of Refugees are resettled – why are we so threatened by them?’ (Guardian 2017)
18. Nanji N, UN Secretary-General urges end to Rohingya violence (2017) <https://www.thenational.ae/world/un-secretary-general-urges-end-to-rohingya-violence-1.628293>
19. Nemoto K, ‘The Rohingya Issue: A Thorney Obstacle between Burma and Bangladesh’ (1991) <http://www.burmalibrary.org/docs14/Kei_Nemoto-Rohingya.pdf.>
20. Nobel Lecture (1981) <https://www.nobleprize.org/nobel_prizes/peace/lauteates/1981.refugees-lecture.html.>
21. Prothom Alo, ‘In Four Years the Number of Rohingya has increased to 1.2 Million’ (2022) <https://www.prothomalo.com/bangladesh/uj0cq5yw1k>
22. Staples K, ‘Retheorising Statelessness: A Background Theory of Membership in World Politics’ (EUP, 2012) <https://www.jstor.org/stable/10.3366/j.ctt3fgsgr>

23. Yegar M, 'The Muslims of Burma: A Study of a Minority Group' (1972) 25 <https://www.netipr.org/policy/down-loads/19720101-Muslims-Of-Burma-by-Moshe-Yegar.pdf.>
24. Yunus M, 'A History of Arakan, Past and Present' (1994) <https://www.netipr.org/policy/downloads/19940101-Dr-Yunus-History-Of-Arakan.pdf.>

Reports and Working Papers

1. Banerjee S, 'The Rohingya Crisis and Its Impact on Bangladesh-Myanmar Relations' (ORF Issue Brief No. 396, 2020)
2. ISCG, Situation Report: Rohingya Refugee Crisis (2018) <https://reliefweb.int/sites/reliefweb.int/files/resources/iscg-situation_report-21june2018.pdf>
3. Khatun F and Kamruzzaman M, 'Fiscal Implications of Rohingya Crisis for Bangladesh' CPD Working Paper 120 (CPD 2018)
4. Report of the UNHCR [UN doc. E/1985/62 (1985)]
5. UNHCR Report, 'An Introduction to International Protection' (2005)
6. UNHRC, Report of the Independent International Fact Finding Mission (2018) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFMMyanmar/A_HRC_39_64.pdf>
7. UNHRC, Report of the Independent International Fact-Finding Mission on Myanmar (2023)
8. University of Dhaka, CGS Peace Report: An Initiative of BPO-Bangladesh Peace Observatory 2(1) (CGS 2018)

Thesis Papers

1. Khan A K, 'Caught between Scylla and Charybdis: A Study of Rohingya Repatriation in Myanmar in Light of Theory and Practice from Bangladesh's Perspective' (Master's Thesis, UiO 2018)
2. Rahman S, 'History behind Rohingya Influx in Bangladesh and Application of Remote Sensing in Monitoring Land Use Change in Refugee Driven Area' (Master's Thesis, Deakin University 2020)

Case Law

1. Nurul Islam v Govt. of Bangladesh [WP 1825 of 1999 (Tobacco Advertising Case)]
2. R v Secretary of State for the Home Dept., ex parte Sivakumaran (1998) [1 All ER 193 UK HL, 1987]
3. RMMRU v Government of Bangladesh [Writ Petition No. 10504 of 2016]
4. Seid Mortesa Aemei v Switzerland [UN CAT, May 1997]

Statutes and Conventions

1. Bangladesh Citizenship (Temporary Provisions) Order, 1972
2. Bangladesh Control of Entry Act, 1952
3. Bangladesh Passport Order, 1973

4. Birth and Death Registration Act, 2004
5. Child Marriage Restraint Act, 2017
6. Children Act, 2013
7. Citizenship Act, 1951
8. Code of Civil Procedure, 1908
9. Constitution of the People's Republic of Bangladesh, 1972
10. Convention on the Reduction of Statelessness, 1961
11. Convention Relating to the International Status of Refugees, 1933
12. Convention relating to the Status of Stateless Persons, 1954
13. Extradition Act, 1974
14. Foreigners (Parolees) Order, 1965
15. Foreigners Act, 1946
16. Foreigners Order, 1951
17. International Covenant on Civil and Political Rights, 1966
18. Naturalization Act, 1926
19. Passport Rules, 1955
20. Passports Act, 1920
21. Registration of Foreigners Act, 1939
22. Registration of Foreigners Rules, 1966
23. United Nations Charter, 1945
24. Vienna Convention of the Law of Treaties, 1969

Miscellaneous

1. Advisory Commission on Rakhine State, 'Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State' 2017
2. Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Geneva: UNHCR, 2007)
3. Kiragu E, Rosi A L, and Morris T, 'States of Denial: A Review of UNHCR's Response to the Protracted Situation of Stateless Rohingya Refugees in Bangladesh' (Geneva: UNHCR 2011)
4. OHCHR, 'Darker and More Dangerous: High Commissioner updates the Human Rights Council on Human Rights Issues in 40 Countries' (OHCHR 2017).
5. Refugee Relief and Repatriation Commissioner's Office, MFDM, Dhaka
6. UNHCR Handbook for Repatriation and Reintegration Activities (2004)
7. UNHCR, 'An Introduction to International Protection: Protecting Persons of Concern to UNHCR' (Self Study Module 1) (Geneva: UNHCR, 2005)
8. UNHCR, 'Bangladesh: An Analysis of Gaps in the Protection of Rohingya Refugees' (2007)
9. UNHCR, Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A (2) of 1951 Convention and 1967 Protocol Relating to the Status of Refugees (2003).

Ensuring Road Safety in Bangladesh to Protect the Right to Life: An Analysis of Existing Laws

Md. Minhajul Abedin Chowdhury[*]
Tanzima Akter Sumi[**]

Abstract

The rampant road accidents, reckless driving, and constant disruptions in the transport sector raise serious questions about road safety, the right to life and safe mobility. These are crying needs of the country, as they hamper the economic and practical lives of the people. There are various factors which are concerned with this issue. Violation of laws and lack of proper implementation of the existing legal framework is one of the most important factors. The lives of people including women, children, and pedestrians are not safe on the roads due to the alarming rate of road accidents. While entirely eliminating road accidents through safety measures alone may not be desirable or achievable, significantly reducing their rate is possible. Effective enforcement of traffic laws and public awareness campaigns can play a crucial role in achieving this goal. Besides the legal issues, proper maintenance of roads and highways, arrangement of the training programs for the drivers, zero corruption in this sector and arrangement of sufficient traffic signs, signals, zebra crossings, and foot over bridges for pedestrians, can play a vital role in ensuring road safety in Bangladesh.

Keywords: Road Safety, Law, Traffic, Accident, Punishment

1. Introduction

There are various kinds of hazards which hamper the life of human being all over the world. Besides the natural hazards, man-made hazards also pose a great obstacle to daily life. Road accidents rank among the most concerning man-made hazards, as most of those accidents occur due to negligence of the drivers, passengers or others concerned. To control the negligence of the people different states have enacted different kinds of rules, regulations etc. The main purpose of all the laws is to bring discipline and ensure road safety. But sometimes, those rules, and regulations have failed to control the behavior of the people concerned and to bring discipline to the roads, due either to disobedience or lack of

[*] Assistant Professor, Department of Law and Justice, Bangladesh University of Business and Technology (BUBT).

[**] Assistant Professor, Department of Law and Justice, Bangladesh University of Business and Technology (BUBT).

proper implementation of those laws. Besides the laws, various factors also play a vital role in ensuring road safety, such as training, the behavior and the mentality of the people in society. Bangladesh has enacted a new law, the Road Transport Act, 2018, to replace the previous Motor Vehicle Ordinance, 1983 to ensure road safety in the country and to satisfy the demands of the present society.

2. Objectives of the Study

The main objective of this study is to identify the major causes of road accidents in Bangladesh and explore strategies to ensure road safety. Besides the main object, the specific objectives of this study are:

a) To identify the major causes of road accidents in Bangladesh
b) To find out the existing legal framework for road safety
c) To find out the drawbacks of the existing legal framework and
d) To lay out a suggestion to overcome the existing drawbacks.

3. Present Scenario of Road Safety in Bangladesh

Present condition of road safety is an alarming one and the rate of accidents is increasing day by day. Due to the persistent pressure of the people of different sectors including the recent student movement for road safety, the government enacted a new law, the Road Transport Act, 2018, which came into effect in November 2019, but there have not been any remarkable changes observed in the sector. Alternatively, there has been an increase in the accident rate between 2021 and 2022. As per the diagram (Figure 1) total number of reported accidents in 2022 is 6,749 (six thousand seven hundred forty-nine) which rose from 5,629 (five thousand six hundred twenty-nine) in the previous year. Motorcycle accidents are the leading cause of fatalities, accounting for 35.23% of all reported deaths. Pedestrian fatalities are the second highest, at 24.23% of the total.[1] Recognizing the global importance of reducing road accidents, the United Nations declared 2011-2020 as the "Road Safety Decade." Bangladesh, a signatory to this declaration, has filed to comply with it.[2] The National

---

1 The Business Standard, 08 January,2022

2 Mohammad Mozammel Haque Chowdhury, “Safe Roads: Perspective Bangladesh” Barta24, (Dhaka 21 October 2021) https://barta24.com/details/debates/140353/safe-roads-perspective-bangladesh

Road Safety Council has recently formed a number of committees to reduce the rate of road accidents by 2024 and to ensure the registration for electric vehicles.[3]

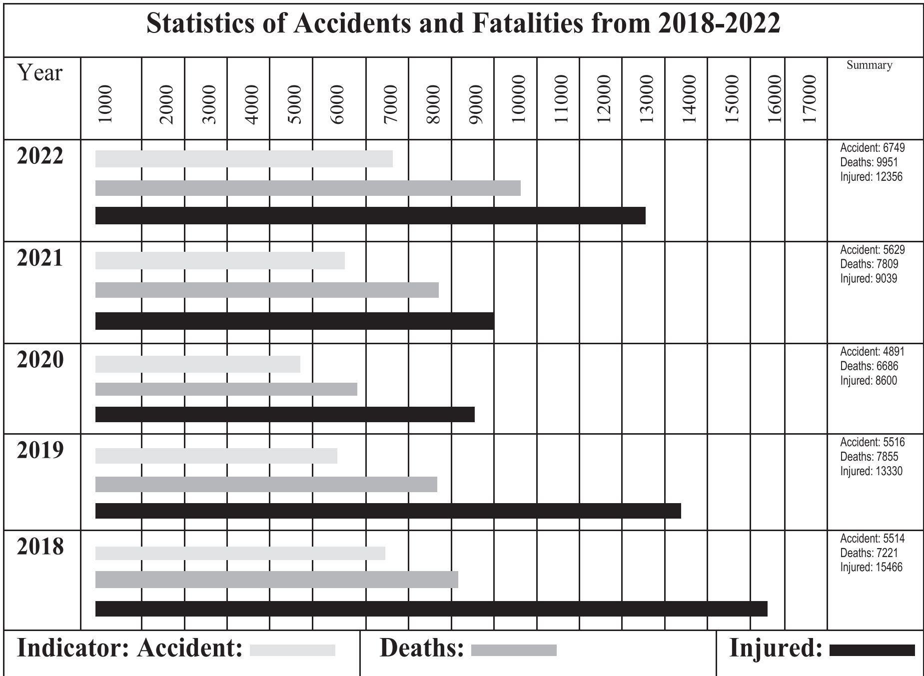


Figure 1: Statistics of Accidents and Fatalities from 2018-2022[4]

4. Major Causes of Road Accidents in Bangladesh

There are various factors which are responsible for the increasing rate of road accidents such as legal factors, safety factors, weather factors, management and monitoring factors, etc. The following discussion explores the specific reasons that contribute to road accidents in Bangladesh.

---

3 https://thefinancialexpress.com.bd/views/columns/road-safety-still-a-distant-dream167465495

4 Passenger Welfare Association of Bangladesh.< https://www.facebook.com/pwab2011o/ > Last accessed on 2nd December 2023

4.1 Unskilled Driver

A noticeable number of drivers in the country appear incompetent. This likely results from the improper issuance of driving licenses, suggesting the method of examination for issuing them may not be up to the mark.[5] Obtaining a driver's license from the Bangladesh Road Transport Authority (BRTA) involves a two-step process. First, applicants must acquire a trainee license. After a three-month period following the issuance of the learner's license, they can then apply for a full driver's license. In this stage, he is required to sit for a nominal written test as well as a viva voce examination followed by a practical test. Regarding the mentioned examination, I have used the term "nominal" in the sense that the whole process can be completed within thirty minutes. Specifically, the time for the practical test is no more than five minutes. So the current licensing process does not adequately assess a driver's ability to operate a vehicle safely and smoothly. As a result, a significant number of people hold driving licenses despite lacking the necessary driving skills.

4.2 Lack of Proper Application of Laws

There are many causes for which traffic laws are not properly functioning in Bangladesh. A major contributing factor is corruption, which has established a mentality among drivers that violating traffic rules can be resolved through bribes. The practice of bribe in this sector has been prevalent since the very beginning of obtaining license and other documentation from the authority concerned and the practice continues on all roads. As a result, it is possible in this country to drive without license, specifically in the district level, where a person can be able to drive without license by providing bribe on monthly basis. In January, 2023 a number of serious accidents have been reported where most of the investigation reports show that driver concerned lacks a driving license but has been driving for a couple of years.

On the other hand, the new Act contains various provision regarding contractor license, contract carriage meter, fare chart, removing the

---

[5] Chowdhury Akterul Alam Md. and Fahim Hasnath, "A Legal Approach to Prevent Road Accident in Bangladesh: Drawbacks and Recommendations", Journal of Law, Policy and Globalization, Vol.81, 2019, Page 61-68 <https://www.researchgate.net/publication/341756369_A_Legal_Approach_to_Prevent_Road_Accident_in_Bangladesh_Drawbacks_and_Recommendations > accessed on 6th December, 2023

establishment near to the highway etc. but no remarkable symptoms of their application have yet been noticed.

4.3 Lack of Consciousness among the People

As noted previously, pedestrians account for a substantial percentage of road accident fatalities, at around 24.23% of all accidental deaths.[6] A significant number of these fatalities likely stem from a combination of both a lack of awareness of traffic rules and negligence. Until consciousness and compliance of the traffic laws are ensured by the mass people, no law shall be able to produce efficient outcome. For instance, on a highway, if a pedestrian suddenly darts across the road in front of a vehicle traveling at 60 kilometers per hour, the driver may not have enough time to stop safely and avoid a collision. Swerving to avoid the pedestrian could also lead to a serious accident.

4.4 Excessive Speed and Rash Driving

Rash driving as well as driving in violation of a speed limit set out by the regulation is a punishable offence under the Penal Code, 1860 and the Road Safety Act, 2018. Despite this, exceeding the speed limit remains a common phenomenon on roads and highways. Even though speeding is a punishable offense, the lack of sufficient equipment like speed cameras and other speed detection tools hinders traffic police from effectively enforcing penalties.[7] Outside of cantonment areas, exceeding the speed limit seems to have become a trend across the country, particularly among young people. This reckless motorcycle driving is a major factor contributing to the high rate of motorcycle accidents.

4.5 Weather Factors

Driving in foggy and rainy weather is quite difficult if the vehicle doesn't contain sufficient necessary tools such as fog remover light, wiper, etc. But some drivers are careless about those tools and cause many accidents. During the rainy season, vehicles carrying soil or other loose materials or lubricated substance often leave deposits on the road, creating a slippery

---

[6] Supra-I

[7] World Bank, "Delivering Road Safety in Bangladesh: Leadership Priorities and Initiatives to 2030." <https://documents.worldbank.org/en/publication/documents reports/ documentdetail/308801581917349576/delivering-road-safety-in-bangladesh-leadership-priorities-and-initiatives-to-2030>

surface. This can make it difficult for drivers to maintain control of their vehicles.

4.6 Lack of Proper Maintenance of Roads and Highways

Roads and highways of this country are not usually repaired at the right time. Specifically, in the rainy season, some large and small holes are created in many roads and highways of the country due to lack of proper drainage system. However, the responsible authorities often fail to ensure the timely repair of these potholes. This results in rainwater collecting in the potholes, creating a hazard for drivers who may not be able to see them.

4.7 Lack of Proper Planning of Roads

Improved road and highway design can contribute to a reduction in accidents, as poorly designed turns and intersections can be significant risk factors. A number of sharp curves in roads and highways may be decreased by proper road and highway planning.

5. Existing Legal Framework of Bangladesh

The Road Transport Act, 2018 is the key law to ensure road safety in Bangladesh. Besides this Act, various rules, regulations, policies, and directives issued by the Bangladesh Road Transport Authority (BRTA) also play a crucial role. Notably, The Road Transport Rules, 2022, are key subordinate legislation. The Ride Sharing Service Policy, 2017 is an important instrument considering the increasing demands of the ride sharing services, and at present remarkable number of vehicles serve the transport services through various national and international ride sharing companies. Impliedly, the Constitution of the People's Republic of Bangladesh as well as the Penal Code, 1860 contain the provisions to ensure road safety.

5.1 The Constitution of the People's Republic of Bangladesh

The Constitution of the People's Republic of Bangladesh guarantees the right to life as a fundamental right.[8] This implies that a death caused by negligence, including negligence of a person or authority, could be considered a violation of this fundamental right. In a leading case of Dr.

---

[8] Article-32 of the Constitution of the People's Republic of Bangladesh.

Mohiuddin Farooque V. Govt. of Bangladesh,[9] the Supreme Court of Bangladesh provides a clear concept regarding the right to life. Right to life includes all the rights which are necessary to lead a life without any hampering.

5.2 The Penal Code, 1860

In section 279, the Penal Code criminalizes rash driving and riding in public spaces to ensure road safety. As per this section "whoever drives any vehicle so rash or negligent as to endanger human life or likely to cause hurt or injury to any other person shall be punished with imprisonment for a period of three years or with a minimum fine of one thousand taka or with both"[10]**.** This section also provides that driving at a speed exceeding the limit prescribed by any rules or regulations is also considered rash driving for the purposes of this section.

This Code also provides, in section 304B, the punishment for causing death by rash driving or riding on a public way. The section states: "whoever causes the death of any person by rash driving or negligent act not amounting to culpable homicide shall be punished with imprisonment for a term which may extend to three years or with fine or with both.[11] Besides the above punishment, if anyone intentionally caused the death of any person by rash driving may be punished for murder or culpable homicide.

5.3 Road Transport Act, 2018 and Road Transport Rules, 2022

By repealing the Motor Vehicle Ordinance, 1983, the Parliament enacted this Act[12] to comply with the Constitution (Fifteenth Amendment) Act, 2011 and to overcome the defects of the previous Ordinance. This Act elaborately defines the various terms which are relating to the road transport as well as provides an extended form of punishment for the offenders. This Act provides remedial measures for the aggrieved staff of the transport as well as for the passenger. This Act also established some unique features, such as the concept of a trustee board for providing

---

[9] Dr. Mohiuddin Farooque Versus Government of the People's Republic of Bangladesh, 48 DLR (HCD), (1996) 438.

[10] The Penal Code, Act no. XLV of 1860.

[11] Ibid

[12] Road Transport Act, 2018. Act no XLVII of 2018.

compensation, the opportunity for review and appeal for aggrieved persons, and addressing the issue of contract carriage meters and the digitalization process.

5.3.1 Analysis of Punishment

The Act[13] provides an aggravated form of punishment compared to the previous Ordinance. Both kinds of physical and pecuniary punishment can be imposed under this Act. Except in case of the punishment for causing death by accident, the highest punishment under this Act is three years imprisonment[14] and five lac taka fine[15]. In case of a repeated offense by the same offender, the punishment shall be double the previous one. For example, if someone is convicted of imprisonment for three years or a fine of five lakh taka, they will be sentenced to six years or a fine of ten lakh taka for a subsequent offense.[16] However, the Act vests significant discretionary power with the enforcing body regarding the imposition of fines and punishments. Notably, only three sections[17] determine the minimum punishment, while the rest do not specify a minimum.

As a result, the enforcing authority misuse their discretionary power and sometimes they mislead the people by imposing the maximum punishment without justifying the grounds and nature of the commitment of offence. To some extent, the aggravated form of punishment can be a burden considering the socioeconomic conditions of the country. For example, under Section 79, if someone uses a private vehicle for commercial purposes, they may be punished with imprisonment for a period extending up to three months, a fine of twenty-five thousand taka, or both. The section only mentions the highest punishment and doesn't mention the minimum, which means the minimum punishment could be a fine of only one hundred taka. However, the problem is that enforcing agencies always emphasize the highest punishment, neglecting the minimum, which misleads the general public. Under Section 105 of the Act[18] punishment for causing death by accident is imprisonment for a term which may

---

[13] Ibid
[14] Section-84 of The Road Transport Act,2018
[15] Section-69 of The Road Transport Act,2018
[16] Ibid
[17] Section-69,73 and 84 of The Road Transport Act,2018
[18] Ibid

extend to five years or fine of taka five lac or both and this section overrides the section 304B of the Penal Code, 1860[19] regarding the punishment but refer the same section to demine the definition of death and injury. Though this Act increases the punishment for accidental death but not up to the mark comparing with the increments rate of other punishment. This is because until 1985, under the Penal Code of 1860, the punishment for causing death by rash driving and negligence was imprisonment for a term that could extend to seven years. However, it was reduced by the Military Government of Hossain Mohammad Ershad due to a truckers' protest that year. On the other hand, this Act provides a new concept of punishment that means reduction of points of drivers. Under this Act, each license carries twelve points. For various offenses, points may be deducted as punishment. If any license holder's points reach zero due to deductions, the license will be treated as absolutely revoked. But it is very difficult to implement this kind of punishment, because remarkable number of driving licenses are not digitalized.

5.3.2 Implementation Procedure

The Implementation procedure of this Act is somehow different from other statutes because there are dual modes of implementation of punishment. Generally, the prime responsibility of implementing of this Act is vested upon the police, but the police can only impose fines and deduct points from driving licenses as punishment, but this Act contains imprisonment also as a mode of punishment. Besides the police, the Bangladesh Road Transport Authority (herein after referred as BRTA) and the Executive Magistrates also play vital role in the implementation of this Act. BRTA plays a role in issuing licenses and other documentation, such as registration certificates, fitness certificates, and tax tokens. It also acts as a policymaker as well as a negotiator. Executive Magistrates implement the provisions of this Act through mobile courts. Sometimes, mobile courts are conducted jointly by Traffic Inspectors of BRTA and Executive Magistrates. On the other hand, cases for accidental death, injury and for some other offences also required to be filed before the Criminal Court.

The problem lies in the significant variation in fines, ranging from 200 to 5,000 taka or 500 to 25,000 taka. This inconsistency creates confusion

[19] The Penal Code, Act no. XLV of 1860

among law-abiding citizens about how the fines will be implemented because socioeconomic conditions are a major factor in enforcing legislation. Some experts predict that a failure to successfully implement this Act could lead to a surge in bribery and corruption. The experts' prediction may come true. Two and a half years have already passed since this Act came into effect, but so far (January 2023), no significant changes have been observed in this sector. The higher penalties may only affect state revenue and increase the discretionary power of enforcing agencies. This Act requires a minimum educational qualification of passing class eight to become a driver. However, due to a lack of proper implementation, this requirement may not prevent illiterate people from obtaining a license.

This Act also introduced a procedure for review and appeal in Chapter Twelve for aggrieved persons.[20]. The Act allows aggrieved persons to file a review application for any punishment decision, except compensation for injuries or death caused by accidents, with the BRTA within thirty days of the enforcing agency's decision. If further dissatisfied with the review decision, the aggrieved party may appeal to the Secretary of the Department of Road Transport and Highways within thirty days of the review decision.[21] This chapter bears a great value, because the appellate body is necessary to review the decision of the lower level executive body.

5.3.3 Remedial Measures

Chapter nine of the Road Transport Act[22] provides the compensation for the injured person or his family in case of injury or death caused by accident. It also stated the constitution of a pecuniary aids fund as well as insurance for passenger safety. The pecuniary aids funds shall be run by a board of trust constituted by the Chairman and representative of the BRTA, Deputy Inspector General of Highway Police, representative of the ministries concerned, departments and association of transport owners and passenger welfare. The trustee board is a body corporate and having perpetual succession and head office of this trust shall be situated in Dhaka and branch office may be established in other places. The fund of this trust

[20] Road Transport Act, 2018. Act no XLVII of 2018
[21] Rule-160 of The Road Transport Rules,2022
[22] Ibid.

shall be collected from the vehicle owners annually or once. The amount of contribution by different classes of vehicle is also stated in the rules.[23] In case of death, injury, or other qualifying circumstances, the injured person or their representative may apply for financial compensation before the chairman of the trust within 30 days[24]. The trust will assess the compensation amount and, upon board approval, disburse it to the applicant. If the applicant is dissatisfied with the awarded amount, they may file an application for review before the board. If the applicant is not satisfied with the decision of the review, then he may file an appeal before the Secretary, Road Transport and Highways Department[25]. The Road Transport Rules[26] prescribe criteria to determine compensation amounts. For accidental death, the amount may be TK 500,000. In cases of permanent organ loss due to an accident, the amount may be TK 300,000. For serious injuries that prevent the person from returning to their normal life, the compensation may be TK 300,000. For serious injuries where the person can recover with treatment, the amount may be TK 100,000. The Board may increase or decrease these amounts from time to time, subject to prior approval of the government.[27]

5.4 Highways Act, 2021

By repealing the Highways Act, 1925 parliament enacted a new Highways Act in the year of 2021 to ensure the safe movement and development of better transport system of the country[28]. This Act empowers the concerned body to impose restrictions on the movement of certain vehicle classes on highways. These restrictions may include prohibiting slow-moving vehicles, such as three-wheeled vehicles, and disallowing subways from connecting to highways.[29] Development of infrastructures in the nature of shops, markets are prohibited in the vicinity of highway[30]. In case of violations of any restrictions as prescribed by this Act, an offender may be liable for fine of an amount of TK 5000 (five thousand) to TK

---

23 Rule-143 of the Road Transport Rules, 2022
24 Rule-150 of the Road Transport Rules, 2022
25 Rules-152 of the Road Transport Rules, 2022
26 The Road Transport Rules, 2022
27 Rule-149 of the Road Transport Rules,2022
28 Long title of the Highways Act,2021
29 Section-9 of the Highways Act,2021
30 Ibid

500,000(five lac)[31] and for establishing any establishment in the vicinity of Highway an imprisonment of not exceeding two years may also be imposed in addition to the fine. This Act defined the Express Way[32] and provisions thereof to ensure the interval-free movement of intercity transports of the country. It also provides the Intelligent Transportation System (ITS)[33] to adopt the artificial intelligent in the transport management system of Bangladesh. Under this enactment, a bundle of duties are imposed upon the Department of Road and Transport. These include planning and implementation of the highway network, ensuring the maintenance, establishment, and development of highways considering the concept of sustainable development, ensuring safe highways, advising the government on matters of infrastructural development of highways and expressways, and ensuring special arrangements for using the highways for children, women, and handicrafts. However, due to a lack of sufficient manpower, cooperation, and management, the department has sometimes failed to perform its functions properly.

5.5 Bangladesh Road Transport Authority Act, 2017

This Act[34] contains a series of functions of the Authority to ensure the safe transport and better services to the passengers. Under this Act, the authority is empowered to issue driving license, fitness certificate, road permit and registration of vehicles[35]. The authority is also responsible for monitoring passenger and goods carriage services, making reports on road accidents, determining the maximum load and height of vehicles, and determining public transport fares etc. Ensuring road safety in this country depends to a great extent on the proper functioning of the authority.

5.6 Ride Sharing Service Policy, 2017

Considering the increasing rate of ride sharing services, the government framed this policy to ensure the safety of transport service users. This policy provides a set of rules for both service providers as well as for the service receivers. Article- 'A" of the policy contains the general principles of using this service and Article- "B" provides a set of duties for the

---

31 Section-14 of the Highways Act,2021
32 Section-2(5) of the High Ways Act,2021
33 Section-4(14) of the High Ways Act,2021
34 Act no.17 of 2017
35 Section-8 of the Bangladesh Road Transport Authority Act,2017

service providers. This policy should be converted into statute by adding some other necessary provisions. Otherwise, a large portion of the public transportation system will remain beyond government control, which would hamper road safety in the country.

5.7 National Road Safety Strategic Action Plan

Bangladesh has updated its National Road Safety Strategic Action Plan to align with national efforts to achieve the Sustainable Development Goal (SDG) of reducing road accidents by 50%. This plan focuses on addressing specific priority actions. However, the last Strategic Action Plan's vision of achieving a 50% reduction in accident fatalities fell short due to gaps related to uncertainties in vehicle safety, road user safety regulations, and post-crash response services.[36] According to the draft of the 9th National Road Safety Strategic Action Plan, a more realistic vision is proposed for 2021-2024. It aims to reduce road accident fatalities and injuries by 20-25% by 2024, with a further reduction to 50% by the end of 2030.[37]

6. Institutional Framework

Institutional Framework in Bangladesh Context		
	Major Areas of Road Safety	**Concerned Institutions**
1.	**Planning, Management and co-ordination of Road Safety**	➢ National Road Safety Council (NRSC) ➢ Roads and Highways Department (RHD) ➢ Bangladesh Road Transport Authority (BRTA) ➢ Local Government Engineering Department (LGED) ➢ Accident Research Institute (ARI)

[36] "World Bank. 2020. Delivering Road Safety in Bangladesh: Leadership Priorities and Initiatives to 2030. World Bank, Washington, DC. © World Bank. https://openknowledge.worldbank.org/handle/10986/33338 License: CC BY 3.0 IGO."

[37] https://www.thedailystar.net/news/bangladesh/crime-justice/news/bsf-seizes-record-4149-kg-gold-near-benapole-border-3077171

		under BUET
2.	**Road Accident Data System**	➢ Police ➢ Bangladesh Road Transport Authority (BRTA) ➢ Accident Research Institute (ARI) under BUET
3.	**Road safety Engineering**	➢ Roads and Highways Department (RHD) ➢ Bangladesh Road Transport Authority (BRTA) ➢ Local Government Engineering Department (LGED) ➢ Dhaka Transport Coordination Authority (DTCA) ➢ Dhaka City Corporation (DCC)
4.	**Traffic Legislation**	➢ Ministry of Communication (MoC)
5.	**Traffic Enforcement**	➢ Bangladesh Road Transport Authority (BRTA) ➢ Police
6.	**Driver Training and Testing**	➢ Bangladesh Road Transport Authority (BRTA) ➢ ARI (BUET) ➢ Dhaka City Corporation (DCC)

7. Findings

Road accident is a direct threat to the right to life, safe mobility, and most preciously to the overall economic growth as well as sustainable development of Bangladesh. The reasons behind the increased rate of these road accidents are clearly visible and require immediate solutions. These solutions should involve proper planning, legal obligations, and successful implementation. Considering the objectives of the study the main findings are:

i) The implementation procedure of the existing laws is rigid one as there are multiplicity of the proceedings and various agencies

are involved with the implementation procedures which create confusion among the mass people.

ii) The existing laws are not properly functioning due to corruption and lack of consciousness among the people.

iii) The new Act grants vast discretionary power to enforcement agencies. While the Act prescribes severe punishments, it lacks minimum and maximum limits. This ambiguity creates opportunities for enforcement bodies to misuse their power.

iv) There are no adequate measures in place throughout the country, especially at the district level, to control excessive speed of vehicles and rash driving.

v) The urgent repairing and monitoring system of the road and highway are not well established.

vi) Due to a lack of proper planning, unreasonable curves and risky points on roads and highways haven't been identified and addressed.

vii) Adequate signs and measures are not available to create consciousness among the pedestrians.

viii) Lack of proper coordination among different agencies involved in the process of road safety planning, management, monitoring, data collection, and implementation.

8. Recommendations

Despite having an existing legal framework and institutional arrangements, road safety remains a continuous concern in Bangladesh, a country committed to making safe roads a prerequisite for continued development. While Bangladesh has already made some progress in ensuring road safety, there is also significant scope for improvement. Here are some recommendations to consider:

i) To ensure the easiest way to implement the existing laws of road safety, the implementing bodies and agencies should be more clearly specified.

ii) To ensure the proper implementation of the new law through effective measures, and by removing the malpractice of corruption in this sector. Additionally, we should ensure that drivers are skilled, vehicles are fit to run on the road, and vehicles possess all necessary documentation.

iii) To create awareness among the people including the drivers and pedestrians about the traffic rules and regulations.
iv) To ensure the timely repair and maintenance of the busiest roads and highways, and to identify risky curbs and spots along these roads and highways.
v) To ensure consistent speed limits for vehicles throughout the country and to arrange the necessary instruments for enforcement.
vi) To ensure the installation of necessary traffic signs, signals, road dividers, speed bumps, footbridges, underpasses, and zebra crossings to save pedestrians' lives.
vii) To maintain an authentic database of road accidents, incorporating data from all reliable sources and concerned agencies. This will strengthen research efforts to identify emerging challenges and inform effective strategies to achieve the targeted goals and outcomes outlined in the national road safety strategic action plan.
viii) To develop legal and moral obligations, as well as accountability, for all related agencies within the road safety system. This can be achieved by reviewing and reforming the existing legal and institutional framework to ensure the time-bound success of the system.
ix) To address specific considerations within the current UN Global Plan for the Decade of Action for Road Safety (2011-2020) and evaluate our progress on the five specified pillars.

9. Conclusion

In the present context to uphold the remarkable progress of the national economy along with sustainable development for the protection of civil and political rights relating to life, health, and other facilities, there is no alternative to ensure road safety and reduction of accidents, deaths, and other injuries. From that perspective, this study tried to find out the major causes which are treated as the prime obstacles in ensuring road safety, specifically focusing on the drawbacks of the existing legal framework as well as providing suggestions for overcoming it. The origin of the law is to control social norms and behaviors, but sometime it fails to do so. Unless the law's acceptability is ensured in society, effective feedback remains unexpected. Despite the newly enacted Road Transport Act, 2018 and its Rules of 2022, Bangladesh still faces significant road safety challenges, including indiscipline, high mortality rates, and injuries. This

necessitates proper enforcement of existing laws, a review and evaluation of the national action plan, and a massive public awareness campaign.

References

1. Chowdhury Akterul Alam Md. and Fahim Hasnath, A Legal Approach to Prevent Road Accident in Bangladesh: Drawbacks and Recommendations, Journal of Law, Policy and Globalization, Vol.81, 2019, Page 61-68.
2. Constitution of the People's Republic of Bangladesh.
3. Delivering Road Safety in Bangladesh: Leadership Priorities and Initiatives to 2030.
4. Dr. Mohiuddin Farooque Versus Government of the People's Republic of Bangladesh, 48DLR (HCD), (1996) 438.
5. https://barta24.com/details/debates/140353/safe-roads-perspective-bangladesh.
6. https://thefinancialexpress.com.bd/views/columns/road-safety-still-a-distant-dream167465495.
7. https://www.thedailystar.net/news/bangladesh/crime-justice/news/bsf-seizes-record-4149-kg-gold-near-benapole-border-3077171.
8. Passenger Welfare Association of Bangladesh.
9. Road Transport Act, 2018. Act no XLVII of 2018.
10. Road Transport Act, 2018. Act no XLVII of 2018.
11. The Bangladesh Road Transport Authority Act, 2017 Act no.17 of 2017.
12. The Business Standard, 08 January, 2022.
13. The High Ways Act, 2021
14. The Penal Code, Act no. XLV of 1860
15. The Penal Code, Act no. XLV of 1860.
16. The Road Transport Rules, 2022.
17. World Bank. 2020. Delivering Road Safety in Bangladesh: Leadership Priorities and Initiatives to 2030. World Bank, Washington, DC. © World Bank. https://openknowledge.worldbank.org/handle/10986/33338 License: CC BY 3.0 IGO."

Exploring Comparative Constitutional Law and Its Significance in the Bangladesh Constitution by Analyzing Multi-Jurisdictional Cases

Sharara Mehnaz Khan*

Introduction

The comparative study approach is now required in all studies of human civilizations because the scale of human life is no longer confined by national divides, but is as broad and free as the expanse of space. Studying different countries' political and legal systems increases international understanding. The significance of comparative constitutional law develops from assessing the effectiveness with which the world's numerous constitutional orders acknowledge and improve an equal legal order, despite its distinct political, social, local, historical, and other circumstances. Different communities confront different challenges, but the human needs and capacities with which they must contend are quite similar. Comparisons have the advantage of highlighting the similarities and differences of the circumstances and subjects surrounding them. Conducting constitutional comparisons opens a scope to enhance its functions, rules, principles of its own legal system in light of the experience of others. The Constitution of Bangladesh has undergone several changes, some of which have been influenced by notable cases from other jurisdictions. These changes have automatically opened the scope of comparative constitutional law to come into play.

Therefore, the comparative study has influenced the Constitution to outline its basic principles, their powers and functions in a more precise way.

Key Developments in Comparative Constitutional Law Today

Considering the growing significance of comparative law in today's society, it is reasonable to say that it has a significant influence on the constitutional issues it addresses, both in the public and private spheres. Before understanding how the constitution is compatible with the present comparative approach, it is necessary to look at how comparative law was

* Lecturer, Department of Aviation and Space Law, Bangabandhu Sheikh Mujibur Rahman Aviation and Aerospace University, BSMRAAU, Dhaka.

applied while drafting the constitution. It is apparent to borrow thoughts and notions from various areas of various constitutions across the world.

Because of this, scholars who study broad comparative law have approached the topic of autochthony using the titles "transplants" and "borrowings" in their research. Comparative constitutional law can be thought of as a sub-field of comparative law that focuses on this aspect of the subject. In the political arena of Bangladesh, there were many heated debates on seemingly insignificant matters, including the role that international element played in the writing of the Constitution.[1]

Constitutionalizing of Bangladesh

The Constitution of Bangladesh is supreme. Bangladeshis must identify the country's core political ideas and safeguard people' rights. Bangladesh is governed by a Democratic Republic. Pakistan's national and provincial assemblies were elected in December 1970, and it was determined that they would function as constituents. By offering a six-point program-based protest, the Awami League secured a majority. However, the sine die delays of the first Constituent Assembly session resulted in the formation of the Movement for Non-Cooperation, and the military's use of force in its suppression that resulted in the war for Bangladesh's sovereignty.

The Constitution of Bangladesh was adopted on 4 November 1972 and enacted on 16 December 1972.[2] The Constitution is the strongest proof of Bangladesh's unity, independence, and republic, which were based on the fight for national liberation, leading to the People's Republic of Bangladesh. This war is defined not just by the well-organized political party movements but by the enormous sacrifice of the populace at large. This led to a major success, as Bangladesh was the first South Asian country to complete its constitution. Only after 325 days of her liberation, Bangladesh was able to give herself a complete constitution.

---

1 Preeti Kana Sikder, 'The Role of Comparative Law in the Making of the Constitution of Peoples' Republic of Bangladesh' (2017) JUJL <https://www.academia.edu/34851611/The_Role_of_Comparative_Law_in_the_Making_of_the_Constitution_of_Peoples_Republic_of_Bangladesh> accessed on 28 November 2023

2 Dr. Muhammad Ekramul Haque, 'Formation of the Constitution and the legal system in Bangladesh: From 1971 to 1972: A critical legal analysis' (2016) 27(1) DULJ 41

It should be mentioned that few of the other significant instruments were in force that held similar value before the formation of Constitution of the People's Republic of Bangladesh, namely:

(i) The Proclamation of Independence, 1971,
(ii) Laws Continuance Enforcement Order, 1971,
(iii) Provisional Constitution of Bangladesh Order, 1972,
(iv) The Constituent Assembly Order, 1972 and
(v) The Constituent Assembly of Bangladesh (Second) Order, 1972.[3]

The Constitution of Bangladesh is the combined expression of all of these instruments that were in force during that time.

Use of CCL in cases from the history of Bangladesh Constitution

It is vital to concentrate on jurisprudential notions in judicial decision making and how they are used in Bangladesh. The preamble to the Constitution of Bangladesh states, "It shall be a fundamental aim of the State to realize through the democratic process a socialist society, free from exploitation, in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens." However, the constitution does not define or pursue Rule of Law. This is acknowledged by evolving Rule of Law borders.

The rule of law was defined by the Chief Justices of England and Wales. They recognized the difficulty of defining the rule of law in England. It is more logical to allow judges to define the phrase.[4] As a result, a concept of the rule of law might be adapted to new circumstances by employing specific examples. The true legal proposal must be decided by the courts based on what the legislators referred to as the law while establishing the legislation. Judges might utilize concepts like justice, equality, and fairness to identify the true concept of law. The total of these ideas is best stated in our understanding of legality and the rule of law, the fundamental premise of a democratic court that every valid statute must strive toward.

---

3 ibid

4 Muhammad Ekramul Haque,' The preamble of the Constitution of the People's Republic of Bangladesh: An analysis from legal perspective' (2004) 15(2) DULJ 107

This thought symbolizes the aspiration of law. Integrity, morality, and justice are ways judges might uphold ideals and principles to preserve law. The jurisprudence must be enriched, not just the constitution but all branches of law that are in force of a country by such comparative analysis with legal notions of other countries globally.

ESCR & CPR part of the constitution

A Constitution is the basis of all statutory (public and private both) laws. It guarantees the human rights which are so fundamental that without them the democracy, sovereignty will only be as a skeleton without its flesh and blood. The Constitution of Bangladesh mentions both the economic, social, cultural rights and civil & political rights in its second and third part. Rights under part II of the Constitution are legally non-enforceable as they are more of ESCR nature. Whereas, rights under part III are legally enforceable in any court and violation of these rights constitutes legal bindings. Comparing the Constitution of Bangladesh and the Constitution of India, the longest written constitution in the world, it's seen that India has also narrowed down the scope for judicial enforceability of the ESC rights called as the directive principles in part IV of the constitution. But the Constitution of Bangladesh is more lenient as it gives the scope to enforce the rights indirectly through Article 7(2) where it is said that any law being inconsistent with this Constitution be void to the extent of its inconsistency. This is called the Constitutional supremacy clause for negative enforcement. It gives a clear scope for all to seek redress in case breach of any rights of part II. Comparing to the Constitution of India, there's no textual scope to seek remedy in case of any breach of the directive principles in part IV. When any question raises about the negative enforcement of these rights, it is to be looked at the constitutional texts and provisions. Referring any Indian case where such ESC rights were not enforced due to the rigidity will be an abusive constitutional borrowing.[5]

In **Kudrat-Elahi case**, Justice Naimuddin Ahmed from the High Court Division (HCD) created a hypothetical situation where in his hypothesis

---

[5] Muhammad Ekramul Haque, 'Legal and Constitutional Status of The Fundamental Principles of State Policy as Embodied in the Constitution of Bangladesh' (2005) 16(1) DULJ 45

first supported the supremacy clause, Article 7(2) saying as we have enough texts to enforce our fundamental principles, there's no need of any foreign case reference in this regard. Any such foreign case referral will be counted as an abusive constitutional borrowing.[6] J. Naimuddin's model is not supported by any of the jurists and is being criticized till date for such hypothesis. This is the power of comparative constitutional law as judges can refer their point of view and compare different legal perceptions around the world with each other and transplant the new idea in their jurisprudence as well.

Article 102, Public Interest Litigation (PIL), and *Locus Standi*

Part III of the Constitution of the People's Republic of Bangladesh, which gives fundamental rights to Bangladeshis, also includes right enforcement mechanisms and remedies. Article 44, a fundamental right, directs the High Court Division to enforce such rights under article 102 clause (1). Article 102 (1) states, "The High Court Division may give such directions or orders to any person aggrieved 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 of the fundamental rights conferred by Part III of this Constitution."[7] If the claimant has 'sufficient interest' in the claim, he has *locus standi* to request a hearing and can be considered aggrieved. Now what is 'sufficient interest' will fundamentally depend on the co-relation between the subject brought before the court and the person who is presenting it. Determining whether a person has substantial interest in a claim rest on the court's judgment. This case was considered as a Public Interest litigation, which originated from 1960s 'public interest law'. It embraces the rights and plights of minorities, race and gender relations, ethnic groups, governmental illegality, environmental pollution, public health, product safety, consumer protection, social exploitation, etc.

In **Benazir Bhutto v Federation of Pakistan**, it was held that the power under Article 184(3) of the Pakistan Constitution (similar to Article 102 of the Bangladesh Constitution) cannot be considered to be exercised solely at the instance of an "aggrieved party" in adversary proceedings; PIL can

---

[6] Kudrat-E-Elahi Panir vs. Bangladesh, (1992) 44 DLR (AD) 319

[7] The Constitution of the People's Republic of Bangladesh 1972, Ar:102(1)

be used.[8] Comparative Constitutional Practice transplanted PIL from USA & Pakistan to Bangladesh (Similarly, **Dr. Mohiuddin Farooque v Bangladesh and others** case).

The concept of '*locus standi*' and 'sufficient interest' was first introduced to Bangladesh's judiciary in the **Kazi Mukhlesur Rahman** Case. Yet it's unclear from which discipline this system was transplanted. **Blackburn Case, 1970** established that "anyone with a sufficient interest can litigate." Interest and sufficient interest differ slightly. Interest means benefiting from a claim. Sufficient interest is necessary for a hearing but not for a final remedy. Bangladesh Supreme Court took a liberal stance on 'any aggrieved individual' in this case, influenced by the Blackburn Case and the USA's Public Interest Litigation procedure. This matter was decided by transplanting and Comparative Constitutional Law. As the case was first rejected in High Court Division on the basis of *locus standi* and later accepted in contrast of the HCD decision to hear in Appellate Division by comparing USA and UK practice over the same matter, there is no place to deny the great influence of Comparative Constitutional Law to influence Supreme Court of Bangladesh on liberalizing *locus standi*.[9]

Judicial Review, *Suo Moto*, Written Application- under Article 102

In **Tayeeb and Ors. Vs. Government of the People's Republic of Bangladesh and Ors**. case, Comparative Constitutional Law influenced HCD's *suo moto* application of Article 102 of the Bangladesh Constitution in this case. Article 102 of the Bangladesh Constitution allows anybody to come to the HCD and investigate if there's any breach of the fundamental rights mentioned at Part III of the Constitution. The fundamental questions in this case were whether the HCD may be considered "any person" and whether a newspaper article could be considered an "application" for the purposes of Article 102 of the Bangladesh Constitution. In reference to the necessity for "any individual" to invoke Article 102 of the Bangladesh Constitution, HCD cites US practice in **Marbury vs. Madison**, where Chief Judge Marshal utilized the authority of Judicial Review derived indirectly from judicial responsibility mentioned in Article III's Judicial Power clause. Judicial review was born from the case itself. This was *suo*

---

8 PLD 1988(SC) 416

9 *Kazi Mukhlesur Rahman Vs. Bangladesh and another* [1974] 26 DLR (AD) 44

moto notion where the court explored beyond Marbury's petition. Accordingly, this might be seen as ‘Judicial Transplantation’, which establishes HCD as 'any person' in Bangladesh's Constitution. HCD then discussed international Constitutional experience by quoting **Charles Evans Hughes' 1908** quote:

1) Constitution is what the Judge says it is, and
2) The Judiciary is the guardian of people's liberty and property under the Constitution.[10]

Article 102 of Bangladesh's Constitution requires-
1) An application and
2) An affidavit.

Bangladesh employed judicial transplanting by adjusting **Sheela Bose vs. Maharashtra** and **Mukesh Kumar vs. M.P.** These cases expanded its jurisdiction by accepting petitions under Article 32 of the Constitution not only from associations, organizations, individuals interested in a common cause, advocates, even journalists, but also on the basis of letters written by such persons complaining of ill treatment of under-trial prisoners or women in police custody. Also, court adopted Indian Case's principle of expediting the affidavit process in order to guarantee poor people's access to justice. **Sampal Lal v. W.B.** Using Comparative Constitutional Law, a newspaper article was considered an 'application' under Article 102 of the Bangladesh Constitution without violating the Constitution.[11]

Detention & Compensation for Detention

In **Mrs. Aruna Sen vs. Govt. of the People's Republic of Bangladesh** case, Chanchal Sen, the son of Aruna Sen, was held under section 3(1)(a) of the Special Power Act, 1974, after he was detained under section 54 of the Code of Criminal Procedure on March 30, 1974. The legality of Chanchal Sen's arrest and imprisonment was contested in the writ petition.

---

10 *Mohammad Tayeeb vs Government of People’s Republic of Bangladesh* [2001] 54 DLR (AD) WP 5897

11 Amena Jahan Urmy, Abue Jawfore Taufique Ahamed Ahade, ‘Constitutional Transplantation of the Indian Judicial View: Introducing Suo Moto Writ in Bangladesh’ (2020) 11 Pen Acclaims <http://www.penacclaims.com/wp-content/uploads/2020/07/Amena-Jahan-Urmy.pdf> accessed on 28 November 2023

Section 3(1)(a) of the Special Power Act, 1974 allows for the detention of a person based on the Executive's Satisfaction. On the recommendation of the Advisory Board, the individual can be further analyzed beyond the 180-day limit. Article 33(4) and (5) of the Constitution of Bangladesh provide legal justification for each of these steps. Here the judiciary has no authority to participate in executive matters. In neither the provision nor in the legislation, the judiciary is mentioned. As a result of the 1973 adoption of this specific clause, the normal court process was bypassed. Here Article 33(4), (5) of the Bangladesh Constitution does not refer to Judicial Satisfaction, but rather Executive and Advisory Board Satisfaction. The judiciary, on the other hand, states that no satisfaction in the law is subjective but objective. In a democracy, if the executive's satisfaction is based solely on subjective criteria, then the act is arbitrary. Satisfaction that is based solely on one's subjective feelings is known as subjective satisfaction. When it comes to satisfaction, however, every positive feeling is subjective unless it is sufficed as long as the reasons were sound. As far as preventive detention is concerned, the judiciary's job is to determine whether or not the executive and advisory boards' reasons for holding a person are sufficient. If this is the case, the judge has the authority to direct the executive to release the detainee if a sufficient amount of evidence exists to warrant his arrest. According to Lord Atkin's enunciation that every imprisonment without trial and conviction is *prima facie* unlawful and the burden is on the detaining authority to justify the detention by establishing the legality of its action under the principles of English law, the British case **Liversidge vs. Anderson** introduced the idea of judicial cross-checking on executive satisfaction in the matter of preventive detention.[12]

Public Law Compensation

Bilkis Akhter Hossain vs. Bangladesh case made Public Law Compensation a Constitutional Remedy in Bangladesh. **Mrs. Aruna Sen vs. Gov. of the People's Republic of** Bangladesh 27 DLR 1975 established that court may use judicial review power to evaluate executive's grounds for detaining a person under Specials Power Act. In this case, a similar method was used to determine if the executives'

---

[12] *Aruna Sen v. Government of Bangladesh* (1975) 27 DLR(HCD) 122

compliance with detaining the detenu was justified. By analyzing the detention order and grounds, the court confirmed that the imprisonment was illegal and without jurisdiction. For infringement of Part III of the Bangladesh Constitution's right to life and right to movement, the court allowed 100,000/= taka in compensation and a release order, saying they could only encourage him with money. This established a precedent for Public Law Compensation. However, enabling Public Law Compensation is a product of Comparative Constitutional Law called Constitutional Borrowing. This notion is influenced by the Indian Judicial Practice. In **Ruhul Shah vs. State of Bihar and Others**, the Supreme Court of India ruled that it has writ jurisdiction over Habeas Corpus cases. In **Smt. Nilabati Behara vs. State of Orissa**, it was held that a claim for Public Law Compensation for breach of human right and fundamental human right and freedom granted by the constitution is an acknowledged remedy for enforcement and protection of such right.[13]

Later, in **Z.I. Khan Panna vs. Bangladesh**, Z.I. Khan Panna claimed if individuals face losses, they need to have monetary compensation as a legal remedy. Subsequently, the court determined that victims should pursue individual remedies on a case-to-case basis rather than receiving compensation for a bulk of individuals.[14]

Concluding Remarks

From this case-based study it's clear that most of the development of our constitutional law using comparative constitutional law and comparative analysis has been done from the influence of foreign case laws, judgments & constitutional provisions and their interpretations. Use of Comparative Constitutional Law doesn't make the supreme law null and void; rather it enhances the jurisprudence making its jurisdictions wider Judiciary and judges also play an important role in this. They have the power to interpret the texts of the provisions of the Constitution. Judges have the power of judicial review, maintain rule of law, and entertain *suo moto* cases. Thus, using Comparative Constitutional Law helps the judiciary to keep the

---

13 *Bilkis Akter Hossain v. Government of Bangladesh* (1997) 17 BLD (HCD) 344

14 *Z. I. Khan Panna v. Bangladesh and others, [2016]* 7 SCOB (HCD) 7

executive body in its track by acting as a supervisory body. Using of Comparative Constitutional Law doesn't necessarily need to amend the Constitution every time a case with new notion is established. The Comparative Constitutional Law enhances a country's Constitution simply by analyzing its texts, what's written inside it and implementing. Cases from foreign jurisdictions play an important role in applying Comparative Constitutional Law.

NOTES FOR CONTRIBUTORS

1. The submission must be original and it has to be submitted exclusively to JATI Journal and to that effect, a 'Submission Declaration' is to be given (specimen below).

2. The submission must not contain any obscene, defamatory nor discriminatory material against any specific cast, race and religion of profession.

3. The Editorial Board will review submissions on scope, content, structure, research, analysis, creativity and accomplishment of purpose. So, publication is not guaranteed.

4. The Editorial Board may edit submissions for clarity, accuracy and style. Authors may be asked to make changes.

5. Plagiarism will immediately disqualify the submission for consideration and should be avoided for possible civil and criminal liability.

6. Submission for publication will be taken as acceptance of the terms in this note.

SUBMISSION DECLARATION

I/we.. am/are hereby declaring that the article/writing/work submitted for publication in the JATI Journal, Volume XXIII has not been published previously and it is not under consideration for publication elsewhere. I further declare that the publication of this article, writing/work is approved by all authors and tacitly or explicitly by the responsible authorities where the work was carried out and that, if accepted, it will not be published elsewhere including electronically in the same form, in English or in any other language, without the written consent of the copyright-holder.

Dated:

Signature
Name:
Designation:
Work Station:
Mobile No:
E-mail:

GUIDELINE FOR SUBMISSION

1. The submission can be in the form of articles, case notes, book reviews and responses to scholarly legal works already published.

2. The submission must be in English. Except for naming any law or quoting any sections from any Act or legislations, the use of *Bangla* should be avoided.

3. The submission must acknowledge the contribution of other research work, paper, journal, book or resource materials used and, therefore, comply the referencing and bibliographical instructions of **Oxford University Standard for Citation of Legal Authorities (OSCOLA).**

4. Length of the submissions (exclusive of footnotes):
   - Articles: 5000 (five thousand) to 8000 (eight thousand) words ±10%;
   - Case Notes: 2500 (twenty-five hundred) to 4000 (four thousand) words ±10%;
   - Book Review: 2000 (two thousand) to 3000 (three thousand) words ±10%;
   - Response: 3000 (three thousand) to 3500 (three thousand and five hundred) words ±10%.

5. The recommended font is Times New Roman. Font size in the text must be 12 whereas a larger font (14/16) can be used for headings.

6. All papers must contain a cover page that includes the title of the paper, name, designation, workplace, contact number and any other important piece of information that fully disclose author’s personal and professional capacity.

7. The cover page must be followed by an ‘Abstract’ summarizing the major aspects of the entire paper in a single paragraph of no more than 300 words.

8. Manuscripts for publication must be submitted both in hard and soft form. Hard copies are to be sent to the Director (Research and Publication), Judicial Administration Training Institute, 15 College Road, Dhaka-1000. The soft copies of the same are also to be sent to **research.publication.jati@gmail.com**.

Judicial Administration Training Institute

The Judicial Administration Training Institute, shortly named as JATI, is the only training institute in Bangladesh which provides training to the judges and judicial magistrates, government pleaders, public prosecutors and the court support staff. This statutory organization has been established in 1996 with the task of imparting legal knowledge and practical skill of administering courts and attached offices to the members of the subordinate judiciary and other stakeholders of the justice sector for bringing positive change in the justice delivery system in Bangladesh. The JATI has been trying to achieve the objectives by arranging various types of training programme, conference, workshop, symposium, etc. for the target groups. It also publishes an yearly journal on the contemporary judicial issues, complexities of laws and their application in practical field.