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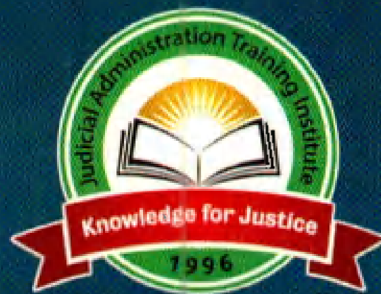

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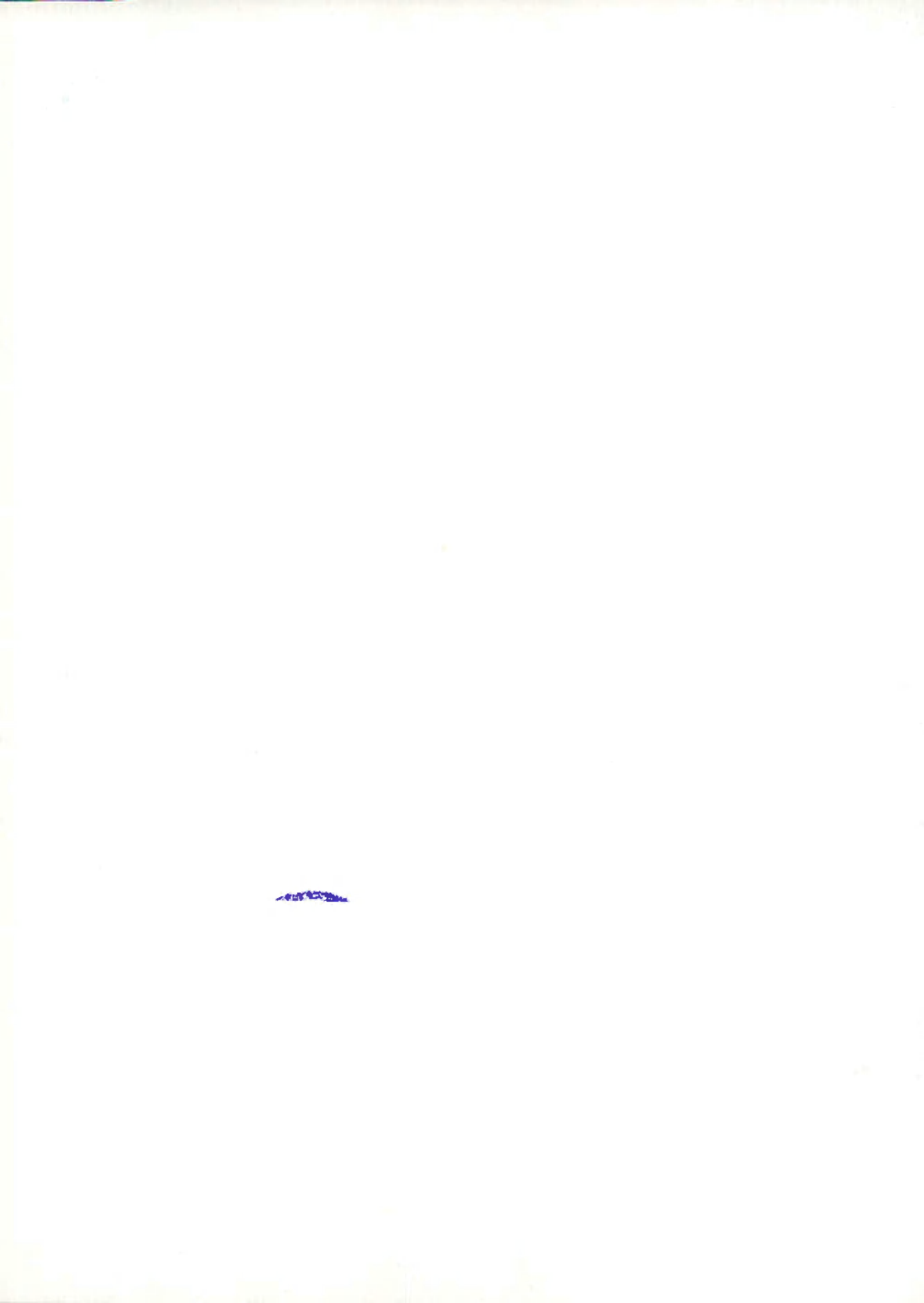

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FOREWORD

Judiciary, one of the three organs of the State, is duty bound to administer justice in the society through establishing and enhancing an effective justice delivery system that is equal, affordable and accessible to all. Judges are the main actors of the Organ and play central role in dispensing its chartered duties of upholding rule of law, fundamental human rights, freedoms, equality and justice in the society. Thus, judges always seem to have the capacity and capability of understanding, applying and enforcing law in the broader context of fact and circumstances of each case and prescribe for available remedial measures or punitive actions in accordance with law. Bearing this in mind, all judges and magistrates exercising judicial functions must strive to attain necessary legal knowledge and skill through professional education, experience and training. Besides, a judge should also explore the other disciplines and branches of knowledge for developing his analytical skill, intellect, reasoning and judicial mind that form the bedrock of a proper judicial decision. This can be augmented through perseverance in self-study and improvising the art of learning through exchanging views and opinions with experts and academics.

In the context of diverse economic and social progress, litigations are also being diversified and becoming complex day by day. Modern scientific and technological innovations in every field of our daily life have also been adding new dimensions in the litigation process and judicial affairs of the state. Now a days, education, knowledge and information are no more a privy to the so-called rich, developed and selected few. Rather it has become a common interest and a viable reach for every knowledge seeker thanks to the development of internet and cyber-network.

In order to keep pace with this changing world, a judge shall not only be acquainted with the recent most development and changes in his professional field but also a responsive, receptive and socially sensitized human being. There is no scope for a judge to be static in his thought and view.

Keeping this in view, Judicial Administration Training Institute (JATI), one of the premier training institutions of the country, has always been striving for imparting better in-service education and training for the judges and judicial magistrates of the sub-ordinate judiciary of Bangladesh. In fact, this is the lone training institutes in the country that conducts the professional trainings of the judicial officers, such as, Foundation Course for newly appointed Assistant Judge and Judicial Magistrates, Judicial Administration Training Course and Refreshers Course for all ranks of judges and magistrates. In addition, the Institute has also been organizing training courses for lawyers, government pleaders, public prosecutors, and the court staffs who are equally responsible and liable for ensuring justice to the litigant people. JATI has so far organized 200 training programmes. These training programmes have

been conducted under a comprehensive training guidelines and modules that aim at ensuring a quality justice system with reasonable time and cost. Moreover, the Institute also organizes short term and intensive workshops, seminars and training sessions on a particular thematic area of law, human rights, gender, ADR and Case management and Court Administration etc.

To conduct the aforesaid training courses, apart from the in-house faculty members appointed from the judges of different tiers, the Chief Justice of Bangladesh, the Minister for Law, Justice and Parliamentary Affairs, Judges of the Supreme Court, former Chief Justices of Bangladesh and former Judges of the Supreme Court, Senior District Judges and other renowned and efficient judicial officers of the Sub-ordinate Judiciary offers their valuable time, guidance and knowledge as the regular resource persons of the Institutes. In addition, the Institute has also a rich list of external faculty and resource persons from reputed lawyers, legal academicians, professors of other disciplines, experts and specialist; particularly in the legal side. They have been contributing immensely to lead JATI a centre of excellence for judicial education in Bangladesh and in the Sub-continent.

The yearly publication of **JATI Journal** is an excellent dimension of dispersing quality education and information to the judicial officers and others associated with the administration of justice in Bangladesh. The present issue of **JATI Journal** is an attempt to continue the ongoing process of encouraging study, research and experiments to the potential scholars among the judges and other professionals and to enlighten our esteemed readers with up-to-date knowledge about dispensation of justice in the ever changing socio-economic perspective of modern life.

The contributors to this journal are the judicial officers and academics of different universities. I am confident that their valuable knowledge and experience expressed in the articles will surely impact on our mission to improve the quality of judicial performance through equipping the judges with tools and techniques for professional competence. I express my sincere thanks and deep gratitude to all of them.

Last but not the least, I express my sincere apology for inevitable mistakes, errors or omissions, if any, despite our best efforts and endeavours. I shall be thankful, if mistakes are brought to our notice. It is expected that suggestions and recommendations from our esteemed readers will enrich the quality of JATI journal in the days to come.

June 2015
Dhaka.

Justice Khondker Musa Khaled
Director General
Judicial Administration Training Institute

The Judiciary in Bangladesh

Justice Khondker Musa Khaled

Judiciary is one of the main three organs of the State having its foundation in Chapter VI containing Articles 94 to 117 of the Constitution of Bangladesh.

In Bangladesh, Judiciary is monolithic in structure. At its top, the Supreme Court of Bangladesh stands which consists of a Chief Justice and a number of other Judges in two divisions, all are appointed by the President of the Republic of Bangladesh from among the senior Judges of the High Court Division to the Appellate Division, and from the experienced Advocates and Senior Judicial Officers (District Judges) to the High Court Division. The Chief Justice is appointed by the President and other Judges are also appointed by him in consultation with the Chief Justice (Article 95). A Judge holds office till he attains the age of sixty-seven years during which he may be removed from office by order of the President on the basis of motion by at least 2/3 majority members of the Parliament on the ground of his physical or mental incapacity or gross misconduct. (Article 96, as inserted by the Sixteenth Amendment).

As stated above, there are two Divisions in the Supreme Court of Bangladesh – High Court Division and the Appellate Division. The High Court Division has both original and appellate jurisdiction. In exercise of the writ jurisdiction (Article 102), the High Court Division may give directions or orders to any person or authority for the enforcement of the fundamental rights guaranteed under Part III of the Constitution on the application of any aggrieved person. The High Court Division has also power to issue writ of Habeas Corpus at the instance of any persons for production of a person illegally detained in custody by any authority and pass order to release him. [Article 102(2)(b)]. It also hears appeals, revision, criminal Misc. case under section 561A of the Code of Criminal Procedure from the orders and judgment passed by the District Courts and Tribunals. It has superintending power over all the District Courts and Tribunals.

Conversely, the Appellate Division only hears appeals from the judgments and orders of the High Court Division (Article 103). An appeal to this Division lies as of right in a case where the High Court Division has sentenced a person to death or to imprisonment for life or has imposed punishment for its contempt. In all other cases, appeals shall lie only if the High

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* *Former Justice, Supreme Court of Bangladesh, presently Director General, Judicial Administration Training Institute (JATI), Dhaka.*

Court Division issues certificate about involvement of substantial question of law or the Appellate Division grants leave to appeal. The Appellate Division has power to review its own judgments or orders (Article 105) and the decision of the Appellate Division is final. It has also advisory jurisdiction that comes into play when advice is sought by the President for giving opinion on any constitutional matter or any legal question of public importance (Article 106).

The judgment passed by the Supreme Court in deciding questions of law and facts, is binding on all courts subordinate to it (Article 111). All authorities, both Executive and Judiciary, are required by the Constitution to act in aid of the Supreme Court (Article 112). Similarly, High Court Division has superintendence and control over all courts and Tribunals subordinate to it. (Article 109)

Under this constitutional mandate and arrangements, the Supreme Court acts as the guardian of the Constitution. It may declare any law void if it finds such law inconsistent with any provision or scheme of the Constitution. The right to move before the High Court Division of the Supreme Court for the enforcement and protection of fundamental rights is guaranteed by the Constitution. This is how the Supreme Court serves as a protector of citizens' right and vanguard of democracy.

The Constitution also provides for the creation of courts subordinate to the Supreme Court (Article 114-116A). Broadly two types of Subordinate Courts exist in Bangladesh - Criminal Courts and Civil Courts established by the Code of Criminal Procedure, 1898 and the Civil Courts Act, 1887, respectively.

Immediately below the High Court Division of the Supreme Court, there are Courts of District Judge in all districts and below the District Judge; there are courts of Additional District Judges, Joint District Judges, Senior Assistant Judges and Assistant Judges. All these Courts, except the Assistant Judges and Senior Assistant Judges, have original and appellate jurisdictions. Constitution of the Civil Courts is prescribed under the Civil Courts Act, 1887. The Assistant Judges may try civil suits of the value not exceeding Taka two lac and Senior Assistant Judges can try suits upto valuation of Taka four lac and other Civil Courts have no such pecuniary limits. Appeals from the Assistant Judges lie to the District Judges, from the Joint District Judges to the District Judges and also to the High Court Division in certain cases, (when value of the property is above Tk. 5 lac) and from the Additional District Judges and District Judges to the High Court Division.

In the Criminal branch of the subordinate judiciary, there is a Court of Session in each Session Division comprising of the area of a district. Below the Sessions Judge, the courts of

Additional Sessions Judges and Joint Sessions Judges are functioning with specific trial jurisdiction. All major offences including murder, dacoity, abduction, sedition etc. are tried by Courts of Session. A Sessions Judge and an Additional Sessions Judge have the power to impose any sentence including capital sentence, while Joint Sessions Judge may pass a sentence of imprisonment for a term not exceeding ten years. Appeals from the judgment of Sessions Judges lie to the High Court Division, but appeals against the sentences of imprisonment for a term not exceeding five years passed by Joint Sessions Judge can be preferred to the Court of Session and exceeding that limit, to the High Court Division.

For the trial of other offences, there are courts of Metropolitan Judicial Magistrate in the Metropolitan areas and courts of Judicial Magistrates in other areas. In the Metropolitan areas, the Magistracy is headed by a Chief Metropolitan Magistrate and in other areas it is headed by Chief Judicial Magistrate. All Judicial Magistrates are classified into Magistrates of the first, second and third class. The maximum term of imprisonment and fine which may be imposed by a Judicial Magistrate of the first class is five years and ten thousand taka, by a Judicial Magistrate of the second class three years and five thousand taka and by a Judicial Magistrate of the third class two years and two thousand taka. Specially empowered Magistrate under Section 29C of the Code of Criminal Procedure can award sentence for 7 years imprisonment. Appeals from sentence passed by the Magistrates of the second and third class lie to the Chief Judicial/Chief Metropolitan Magistrate and can be heard by the Additional Chief Judicial/Additional Chief Metropolitan Magistrate having same powers. Revision from the orders of all judicial magistrates and appeals from the sentences passed by all Judicial Magistrates of 1st Class including the Chief Judicial Magistrate and Additional Chief Judicial Magistrate lie to the Court of Session.

In every District and Metropolitan area, the Government appoints Executive Magistrates from amongst the persons employed in the B.C.S Administration Cadre, and the Deputy Commissioner exercises powers of District Magistrate as Chief of Executive Magistrates in the District. There is also post of Additional District Magistrate in every District to assist him. They are empowered to deal with some preventive sections of the Penal Code and issue search warrant, orders for furnishing security bond to ensure good behaviour, issue orders to prevent local nuisance and apprehended danger, pass orders to keep peace in immovable properties till the dispute is resolved by the civil court, exercise power to compel restoration of abducted female etc. Executive Magistrates are also empowered to deal with cases under the Mobile Court Act, 2009 and punish the offenders in certain circumstances according to law. Though there is a long list of laws in the schedule of the Mobile Court Act, Executive Magistrate constituting Mobile Court cannot hold trial of all offences committed under those laws. According to section 6 of the Mobile Court Act, three conditions are necessary to meet

before imposing any punishment upon the offender; they are – (i) the offence must be within the trial jurisdiction of a Judicial or Metropolitan Magistrate, (ii) it must have to be committed in presence of the Executive Magistrate administering the Mobile Court, and (iii) the accused has confessed his guilt before the Mobile Court. The highest punishment which a Mobile Court can award is two years. Appeal may be preferred to District Magistrate or Sessions Judge as the case may be.

All Judicial Magistrates are appointed by the President on the recommendation of Bangladesh Judicial Service Commission which was established in 2004 and specifically structured in 2007 by two distinct Rules issued by the President under the authority of Article 115 of the Constitution. In exercise of judicial functions, the Judges and Magistrates are independent (Article- 116A).

There are some special criminal courts and tribunals in the country to deal with offences under some special laws. Disputes relating to or arising out of the terms and conditions of service of Government Servants and some other statutory body are dealt with only by the Administrative Tribunals (Article 117). There is also Appellate Administrative Tribunal consisting of a Chairman and two members, and it hears appeals from the decision of the Administrative Tribunals. From the judgment of Administrative Appellate Tribunal appeal lies to the Appellate Division of the Supreme Court directly.

Moreover, there are Special Judges, equivalent to the rank of District Judges, who try offences like bribery, criminal breach of trust, criminal misconduct and schedule offences under Durnity Doman Ain, 2004 committed by the public servants and others. Special Tribunals established under the Special Powers Act, 1974 have exclusive jurisdiction to try offences relating to smuggling, sabotage and adulteration of food, drugs etc. and offences under the Arms Act, 1878 and Explosive Substance Act, 1908.

There are also few specialized courts and tribunals established under several special laws with specific trial jurisdiction. Such as, Taxes Appellate Tribunal hears appeal in income-tax cases, Labour Courts and Labour Appellate Tribunal settle labour disputes. Disputes relating to the enlistment of abandoned property are resolved by the Court of Settlement established under The Abandoned Building (Supplementary Provisions) Ordinance, 1985. Similarly, 'Nari-o-Shishu Nirjatan Daman' Tribunal, Drug Court, Settlement Court under the State Acquisition and Tenancy Act, 1950 are functioning in their respective jurisdiction. Most of these Courts and Tribunals are presided over by the Senior Judicial officers.

Under the Family Courts Ordinance, 1985, there are Family Courts to try cases arising out of family disputes. These courts are presided over by the assigned Assistant Judges. Dissolution

of marriages, restitution of conjugal rights, dower, maintenance, guardianship, custody of children etc. are within the exclusive jurisdiction of Family Courts. The procedure followed by these courts is simple. Settlement of family disputes through compromise, pre-trial and post trial conciliation are encouraged.

For trial of petty civil and criminal matters, there are village courts at the Union and local Government level. A village court consists of the Chairman of the local Union Parishad/ward Commissioner and two members nominated by each party. Here also procedure is very simple and emphasis has been given on amicable settlement of disputes rather than contesting award or punishment. Only compensation can be awarded by these courts. Village Courts are established under the Gram Adalat Ain, 2006.

Bangladesh judiciary is burdened with the problems of backlog of huge cases and high cost of litigation. To combat with these problems, steps are being taken from time to time. Various mechanisms have been developed through the means of legal and judicial reformation. Nonetheless, the problem continues to haunt our judiciary as one of the major stumbling bloek in distributing fair and equitable justice with affordable costs. Thus, more co-ordinated efforts and integrated approach are needed to address the problems. The court has now been empowered to hold trial of a case in the absence of the accused where it is satisfied that the accused has absconded or concealed himself and there is no immediate prospect of arresting him for trial. In such a case, prior notice is necessary to be published in two daily newspapers to ensure his presence in addition to issuance of other processes. If work load for each Criminal Court does not exceed capacity of a Judge, a criminal case may be disposed of by the trial courts approximately within 80-90 days. In order to achieve that goal, effective Court Management and Court Administration (CMCA) system is needed to be introduced and the process of digitalization of the courts is to be enhanced along with the gradual increase of courts and judges.

In civil cases, there is inordinate delay in final disposal. At each stage of the proceeding delay caused is visible. Lot of time is spent for paying deficit court fees and processes, filing written statements, framing of issues, issuing summons, submission of documents, holding investigations etc. To avoid these delays, few commendable legal and judicial reformations have already been introduced. Such as, amendment providing time limit for every stage has been made in the Civil Procedure Code, 1908 to expedite the disposal of a civil suit approximately within one year.

Like every progressive democratic nation, our Constitution vows for the protection and promotion of certain basic human rights as 'Fundamental Rights' and guarantees the enforcement of such rights with necessary legal mechanisms and/or with efficacious remedial

measures. These rights are: (a) Equality before law, (b) Protection against discrimination on the grounds of religion, race, colour, etc., (c) right to get protection of law, (d) equal job opportunity, (e) right to life and personal liberty, (f) prohibition of forced labour, (g) Freedom of assembly, association and speech, (h) Right to property, (i) Freedom of religion, (j) Safeguards as to arrest, detention etc. These fundamental rights are well consistent with the principles laid down in the United Nations Declaration of Human Rights and other prominent UN conventions. No law can be enacted and enforced against any of these fundamental rights guaranteed by the Constitution. Any violation thereof can be called in question before the High Court Division of the Supreme Court and it may pass any order to give effect such right of a citizen. However, there are some exceptions to the equal job opportunity in the service of the Republic to safeguard the interest of backward sections of citizen and ensure their adequate representations in the service and in other areas.

The principles of natural justice, as available in our laws, should be strictly followed in the dispensation of justice. *"None should be condemned unheard"*, is the established principle of Natural justice. Adequate opportunity is given to the accused to defend in the court. In trial of criminal cases and hearing of criminal appeals, the accused is given every opportunity of being heard and he is free to engage any lawyer of his own choice in his defence. The lawyers are well qualified and trained having university degree in law and are licensed in the legal profession by a statutory body named the Bangladesh Bar Council. In the trial of an offence calling for capital punishment, it is obligatory for the state to appoint a defence lawyer at its costs for the accused who fails to engage his defence lawyer. Even an undefended accused in such a criminal case, who remains absconding or absent, is also entitled to get a defence lawyer without any cost from his pocket.

The President has power to grant pardons, reprieves and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority. This is a prerogative of the President as Head of State conferred under Article 49 of the Constitution read with Section 55A Penal Code. But it does not affect, in any way, merit and independence of the Judicial pronouncement.

The rights and interests of the citizens in the civil and criminal matters are supposed to be properly looked into and good provisions, if not adequate, are available for receiving protection and getting relief in the Judicial system of the country. But the question is how far the vast majority of citizens, who are still poor and uneducated, can derive benefit from such provisions of equal justice and other good laws. Unfortunately, they cannot afford to meet high expense of litigation and it causes deprivation of fundamental rights and legal relief. So, adequate measures are required to be taken to ensure enjoyment of fundamental right by every citizen. Otherwise, there shall be discrimination in between the citizens of the same

country in the matter of getting protection of fundamental rights. Rule of law, equality before the law, religious freedom, etc. shall be of no use to the majority citizens, if they cannot go before the court to seek relief in respect of their fundamental rights and other affiliated legal matters. The Government have, however, started providing legal assistance to the poor in a limited sphere. National and District Legal Aid Committees have been formed to serve the purpose. Several N.G.Os are also working with their legal aid programme, which are expected to improve the situation.

Though the problem of backlog of cases is common in many countries of the world including U.S.A, the ratio of yearly increase in the backlog situation is very high in our country. More than 3 million cases are pending in different courts. If sufficient effective measures are not taken with serious commitment, the situation may aggravate further and go beyond control day by day. Thus, (1) Modernization of the trial procedure, (2) use of modern technology in recording evidence, (3) introducing Judicial Affidavit Rule like Philippines (4) distribution of daily work-load according to capability of the Presiding Judges, (5) there should be separate civil and criminal courts manned by different judges, (6) training of the Judges and vesting them with sufficient power to assume effective control in the court-room, (7) curtailment of discretion of the presiding Judges in adjourning the cases frequently and passing orders, (8) encourage resolution of disputes by Reconciliation, Mediation, Arbitration etc., (9) increase number of compoundable offences to cover more area of compromise, (10) introduce plea bargain, (11) impart basic legal education in the schools and raise awareness, (12) simplify system of investigation and trial procedures, (13) creation of separate investigation service etc., may be considered, inter alia, as essential and time bound measures to combat with this pressing problem and ensure quality justice for everybody by improving the overall condition of our Judiciary.

Access to Justice for Women in Bangladesh with particular emphasis on ADR

*Dr. Md. Akhtarzzaman**

Introduction

Formal justice system of Bangladesh remains relatively costly for the vast majority of the public when it comes to both civil and criminal justice. Vulnerable groups *e.g.* women and children, ethnic minorities, the poor, and people with disabilities in particular face tremendous difficulties in accessing timely and affordable justice. Large case backlogs, estimated at over 2.8 million cases, are slowly overwhelming the court administration and undermining access to justice, while reportedly outdated laws, incentives for delay, complex procedures and a lack of capacity, coordination and cooperation between justice sector agencies, particularly in the criminal justice system, combine to create a system that struggles to provide speedy, affordable and trusted outcomes for the public.[1] Access to justice is a precondition to ensure other rights. It is very core to development, poverty reduction etc.

International Perspective of Women Rights

Everyone has the right in all circumstances to be treated with humanity and with respect for the inherent dignity of the human person. Every human person is entitled to be protected by the laws and practices of his/her country of residence. Under International human rights law women and men alike are vested with fundamental freedoms and human rights irrespective of age, sex, religion and race. Women are not exception rather an integral part of humanity. But it has been observed that women's status and rights in different societies are never equal to men who enjoy privileges and higher status over women.

Article 1 of the Universal Declaration of Human Rights proclaimed that human beings are born free and are equal in dignity and rights. On the other hand, Article 2 embodied the principle of nondiscrimination on the ground of sex. Article 3 common to both the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights obligates the State parties to undertake all measures to respect and ensure to all individuals the rights *i.e.* civil, political, economic, social and cultural rights without any distinction on the ground of sex, race, religion or language.

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* *Additional District and Sessions Judge, Now deputed at Judicial Administration Training Institute(JATI), Dhaka as Director (Administration).*

[1] *See Justice Sector Facility Project Concept Paper (2014), p.1*

Besides these, there are number of other international instruments which deal with specific issues relating to women rights.

Women Rights in Bangladesh under the Constitution

In the Constitution of Bangladesh, women have specifically been placed on an equal footing with men in all spheres of public life. This is a guaranteed right and ensured under parts II and III, corresponding to the Fundamental Principles of State Policy, and Fundamental Rights respectively. Thus, with regard to all spheres of public life, the State takes upon itself its responsibility to ensure nondiscrimination among its citizen and maintain gender equality. Article 19(1) provide that the State shall endeavor to ensure equality of opportunity to all citizens. Article 19(2) says that the State shall adopt effective measures to remove social and economic inequality between man and woman and to ensure equitable distribution of wealth among citizens, and of opportunities in order to attain a uniform level of economic development throughout the Republic. Article 27 provides that all citizens are equal before law and entitled to equal protection of law. Article 31 provides that all citizens entitled to equal protection of law. Article 28(2) provides that women shall have equal rights with men in all spheres of the State and public life. Article 28(3) provides that no citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction, or condition with regard to access to any place of public entertainment or resort or any admission or any educational institution. Article 28(4) signifies that special provision can be made in favour of women and children or for the advancement of any backward section of citizens. Article 29(1)(2) prohibits discrimination in public service employment while providing for equal opportunity to women. The Constitution under Article 29(3)(c) explicitly has given the right to the State to reserve certain employment and office to women.

Way to establishing the rights of the women

Violence against women is a common phenomenon in our country in public and private spheres. It is not only an assault but also torture against their essence, physical or mental integrity, or freedom of movement. The Government of Bangladesh took several worth-mentioning steps to protect and prevent violence against women. Women with disability have limited access to justice and no specific guideline for them including treatment and rehabilitation. Women are facing so many challenges to establish their rights in Bangladesh, in spite of that women achieve a lot to progress in their life, liberty and freedom. To establish the rights a woman have to file civil or criminal cases in a court of competent jurisdiction and to wait for years together to get the result. There are lot of impediments for the women and other vulnerable group of people in the way to access to justice.

Access to justice in the formal justice system

Village Court

The activities of Village Court in our country started from long ago. For the easy and speedy disposal of some specific petty cases, the Village Courts Ordinance was promulgated in 1976 and was effective from November 1, 1976. Cases might be filed in the Village Courts for each item prescribed in the second schedule the value of which would not exceed five thousand taka. Again, the pecuniary jurisdiction of the Village Courts with respect to the criminal matters prescribed in the First Schedule was limited up to five thousand taka. For the easy and speedy trial of certain cases and disputes in the root levels and to extend the pecuniary jurisdiction of the village courts socio-economic condition as well as in order to make the previous law up-to-date, the Village Court Act of 2006[2] was passed. This Act is not applicable outside the limits of the jurisdiction of a Union. It has been stated in the preamble that the Act is enacted to provide for the constitution of the Village Courts for the easy and speedy trial of certain cases and disputes under the jurisdiction of each union of the country. No party shall be permitted to engage any legal practitioner to conduct his case before any Village Court.[3]

By observing the Village Court Act it seems that under section 4 in order to settle the disputes in the Village Court any party to the conflict may file an application to the Chairman of the Union Parishad in the prescribed manner and under section 5 such court will be constituted with a Chairman and 4 members where each two will be nominated by the each parties. So, it can be easily said that Village Court is, in fact, a court based on mediation where there is the opportunity to get justice speedy and cheaply and also in a friendly environment. Both the parties agree with the decision of the Village Court as it is found openly and with the presenee of the representatives of both the parties. It helps to create a consensus between or among the parties and a sector to live in an amicable environment. So, it can be easily said that the Village Court is playing a significant role as a court of mediation in the root level.

District Courts

In any democratic society, the rule of law has to prevail and it is the *sine qua non* to do the *summon bonum* to the people of the society. Without an appropriate system for administration of justice, of course through the courts of law, the developing efforts of a nation towards social or cultural advancement would not yield tangible results and thereby its economy would surely be forced to stagnate.[4] Nowadays, it is said that the democracy and development

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2 *Act No. XIX of 2006*

3 *Section 14*

4 *Badruddoza, AKM, 'Scrutiny of Labour Laws for Speedy Trial of Labour Cases' in Shahdeen Malik (ed.) 'Lacunae in Labour Laws: Towards Timely Disposal of Labour Cases' (Dhaka: Bangladesh Legal Aid and Services Trust, 1999), 24*

go side by side. But in the absence of strong, impartial, independent, quick and dynamic judicial system neither democracy nor development can flourish and sustain.[5] Keeping all these in mind, law makers mandated speedy and fair trial in Article 35(3) of the Constitution of the People's Republic of Bangladesh. With the insertion of this provision in our Constitution it has become a citizen's constitutional right to get speedy trial. In spite of the constitutional guarantee, speedy trial, however, remains a far cry for the citizens of Bangladesh due to some practical problems which cause inordinate delay in disposal of cases.

The main obstacles in the access to justice, *interalia*, are:

a) Delay in service of Summons
b) Delay in Filing of Written Statement
c) Delay in Framing of Issues
d) Delay in Examination of Parties by the Courts and Referral to ADR
e) Delay in Discovery, Inspection and Admission
f) Delay in Disposal of Interlocutory Matters and Stay of Proceeding
g) Delay in the Disposal of Miscellaneous Cases and Restoration of Original Suits
h) Delay in examination of witnesses
i) Delay in Delivery of Judgment
j) Delay for Trial of Civil and Criminal Cases by the same Courts
k) Delay for Non-attendance of Witnesses
l) Delay for Economic Interest of the Lawyers
m) Delay for Corruption
n) Delay for Cost of Litigation and Free Legal Aid
o) Delay for Want of Punctuality in Court's Sitting
p) Delay for Pre-occupation of Courts with Criminal Cases
q) Delay for frequent adjournments, etc.[6]

Access to justice in the informal justice system: NGO led Shalish

In our country non- governmental organizations are exercising many informal ways in order to settling the disputes. This system is sometimes called *Salish* and some other times called mediation. Many organizations *e.g.* Madaripur Legal Aid Association (MLAA), Bangladesh National Women Lawyers Association (BNWLA), Ain O Salish Kendra (ASK), Bangladesh Legal Aid and Services Trust (BLAST) etc. are performing their activities in settling the dispute through mediation. These NGOs are working especially on family matters, land related disputes domestic violence, human trafficking and other small causes crimes. Any person of any profession may apply here for legal aid. But comparatively the poor and the vulnarable persons are given privilege. Among them women are firstly preferable.

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[5] *Ibid*

[6] *See, Dr. Md. Akhtaruzzaman, Case Management and Court Administration in Bangladesh, (Dhaka, 2014)*

Access to justice under the existing trial system and ADR

The existing trial system of Bangladesh is mostly depends on the system applied in the Indian Sub-continent by the British Government. Now the then existing laws are exactly or with some changes also applies in Bangladesh. Owing to the lack of the reforms of the political institutions, our legal system could not come out of the clutches of the legacy of the British rule. The adversarial trial systems, feeble court management, shortage of man power are the main reasons to make the litigants bewildered. Delayed justice is the cause of injustice. Prolixity is the major backlogs of our judicial system. Because since 250 years the nature of existing trial system in this Sub-continent is adversarial, competitive, inimical, conflicting and win-loss resulting.[7]

Again Bangladesh is not the only country which faces backlog of cases. It also existed in the developed countries like USA, UK, Canada and Australia. But by introducing the Alternative Dispute Resolution (ADR) system the countries have become able significantly to solve the problems. Facing this crisis of judiciary, the Supreme Court of India in the case of ***PN Duda v. P. Shiv Shankar and others***[8] commented:

> *'It has to be admitted frankly and fairly that there has been erosion of faith in the dignity of the court and in the majesty of law and that has been caused not so much by the scandalizing remarks made by politicians or ministers but the inability of the court of law to deliver quick and substantial justice to the needy. Many today suffer from remediless evils which courts of justice are incompetent to deal with. Justice cries in silence for long, far too long. The procedural wrangle is eroding the faith in our justice system. It is a criticism which the judges and lawyers must make about themselves. We must turn the search light inward.'*[9]

The Court of Appeal of England thinks that the adversarial trial is mostly responsible for the excess expenses and uncertainty to ensure administration of justice. The system also creates fear and confusion in the mind of the litigant people. In the case of ***Burchell*** v. ***Bullard***[10]. Lord Justice Ward commented:

> *'As we have expected, a horrific picture emerges. In this comparatively small case where ultimately only about £ 5000 will pass from defendant to claimant, the claimant will have spent about $65000 up to the end of the trial and he will also have to pay the subcontractor's costs of about £70,000... The defendants' costs of appeal £13,500 for the appellant and over £9,000 for the respondents. A judgment of £5,000 will have been procured at a cost of the parties of about £185, 000. Is that not horrific?'*

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7 *Quoted from the speech given by former Chief Justice of Bangladesh Mustafa Kamal in a training program organized by the Judicial Administration Training Institute, Dhaka.*

8 *AIR 1988 SC 1208*

9 *Ibid*

10 *(2005) EWCA Civ 358*

The above mentioned observations of the Court of Appeal of England indicate how traditional systems waste money and time in conducting cases before the court. In our country, some cases even consume 40/50 years for disposal. The petty cases like the preemption or probate cases sometimes take 30/35 years.

The ancient system of settlement of disputes between or among the parties in lieu of the traditional judicial system is called ADR. In such system, the parties, personally or through their representatives, find the amicable settlement of disputes. In the perspective of Bangladesh ADR is a process of dispute settlement outside the formal judicial system where the parties represent themselves personally or through their representatives and try to resolve the dispute through a process of mutual compromise. It is a non-formal settlement of legal and judicial disputes as a means of disposing of cases quickly and inexpensively."[11] ADR is not a panacea for all evils but an alternative route to a speedier and less expensive mode of settlement of disputes. It is a voluntary and co-operative way out of the impasses.[12]

The main advantage of ADR is that like the normal court system it does not consume huge time which helps to resolve the disputes speedily and cheaply. The ADR system is simple, fast, cheap and not conflicting. The statements of the parties remain surreptitious. The persons who are expert in the concerned disputes are engaged in the settlement process which is more helpful for the parties to get the probable relief. So, both the parties win and the enmity between them comes to an end. The parties get the benefit of expressing their respective statements freely before the mediator which facilitates the quick disposal of the dispute. The plaintiff gets back the court fees which is impossible in the normal court system.

What kind of cases is suitable for ADR?

Cost, delay and complexities are common in the adversarial system of justice. There is no system of resolving the dispute rapidly. To fill up that vacuum ADR system has been introduced. It may be applied in any case where compromise is possible. Primarily ADR may be applied in civil, commercial, industrial, family, banking, performance of contract, interpretation of contract, intellectual property right, insurance, joint ventures, partnership business, professional responsibility, real estate, securities etc. But ADR is treated as the best system with respect to the international commercial dispute. In the case of relatively easier disputes *e.g.* marriage, dower, maintenance, dissolution of marriage, restitution of conjugal rights, guardianship, partition, preemption, performance of contract, succession etc., the ADR system is more fruitful.

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11 *The Daily Star*, 29 April, 2007
12 *Ibid*

Virtually all civil disputes can be resolved by mediation. The remedies available in mediation are potentially far wider than those which can be obtained through litigation as the parties to mediation can agree, or be guided to any resolution of their dispute which they wish. However mediation may be less suitable in cases where:

a) a party is contemplating or facing a large number of similar claims for which it seeks to set some kind of legal precedent;
b) a party is confident it can swiftly vindicate its legal rights and obtain full relief by proceeding to summary judgment; or
c) a party requires speedy injunctive relief.[13]

Disposal of family disputes and ADR

Bangladesh is a democratic country where the majority of persons are Muslim. As like the different sources of Muslim family laws, provisions relating to the conciliation and settlement of disputes have been enumerated in the Holy Quran. It is stated that: "If you fear a breach between them twin (the man and wife), appoint two arbitrators, one from his family, and the other from hers; if they wish for peach, Allah will cause their reconciliation. For Allah hath full knowledge, and is acquainted with all things."[14]

Family Courts were established by the Family Courts Ordinance, 1985[15] and were effective from June 15, 1985. It is observed from the time of establishment that it is only the Family Court where there is the system of resolving disputes through mediation. But due to lack of necessary consciousness, training, inspiration to the litigants about the benefit of such laws etc. are the main reasons for which the Family Court was not able to achieve the expected result. In 2000 for the first time in the Family Courts of Dhaka Judge Court, mediation was introduced for the purpose of resolving the family disputes. Gradually it was expanded in Chittagong on February 12, 2001, in Khulna on September 1, 2001 and in Rajshahi on May 7, 2001. Subsequently such system was introduced in the other courts of the country.

On April 28, 2007 the Bangladesh Legal and Service Trust (BLAST) organized a round-table discussion on *"Family Courts Ordinance, 1985: Observations and Recommendation"* in Dhaka. There Justice Mostafa Kamal commented that the Family Courts was able to resolve 83% cases within two years from its establishment. Justice Mohammad Anwar-Ul-Huq commented that from the year 2000 to 2006 in Chittagong 4275 cases were resolved following mediation from where six crore taka was recovered. At the same time 1237 cases

[13] *Blackstone's Civil Practice,(2004), Oxford University Press, p. 842-843.*
[14] *Sura-Nisa, verse 35*
[15] *Ordinance No. 18 of 1985*

were resolved in Dhaka where six crore taka was recovered. According to him, "Mediation is the best practice in family affairs worldwide.[16] He further said, "The rate of success in mediation is almost 100 percent.[17]

As family issues are personal and emotional those become much more delicate within the court room where both parties are being engaged in a tooth and nail fight against each other. One could not even imagine what type of harassment is going to be borne by litigant people and the presiding judges as well. The Family Court Ordinance, 1985 provided the courts with arms to exercise mediation in suits both at pre-trial stage under section 10 and after closure of evidence under section 13. Careful scrutiny of both sections and underlying philosophy of the enactment remind us the age old proverb "it is better to be late than never." Before taking any stringent decision regarding family matters one should think again & again and consider the issue in a different phenomenon apart from the traditional mind set. To dissolve family issues one should look forward not backward. The courts should focus on the future of that relationship not on past mistakes. All these would only be possible in a friendly and calm environment with the help of neutral personality i.e. the family court judges. The judges should bear in mind that one needs their help and they are sitting in or presiding the chair to spread out the helping hand for both parties. To reconcile the mind set of litigating parties not only the family court judges but also the lawyers have to work from hand to hand rather than fighting hand to hand. In a nutshell, big success of mediation in family suits depends on three-tier co-operation e.g. litigant people, presiding judges and lawyers of the concerned suit. Unfortunately, since the enactment of the Ordinance, the family courts, to some extent, failed to apply these provisions regarding mediation. The reason might be many sided. It may be lack of motivation of the concerned judges and lawyers. It is felt that without their co-operation successful mediation in family suits is not possible. Lawyers have to bear in mind that mediation will not adversely affect them financially but will open up new horizons for them. A successful mediation lawyer will always attract new clients wanting to try mediation who would otherwise have shun the court. Finally and most importantly, the litigant people have to play vital role in re-building their relationship or reaching a suitable conclusion. As mediation allows the parties to retain control of their case and resolve their case utilizing flexibility and creativity. People have to understand that mediation is a win-win process based upon compromise. Moreover, mediated agreements tend to have a higher rate of compliance than court ordered agreements resulting from contested trials.

Describing on the merits of resolving the family disputes by applying mediation Justice K. M. Hasan on his research article *"Introducing ADR in Bangladesh:* Practical Model" mentioned:

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16 *The Daily Star*, April 29, 2007
17 *Ibid.*

"In a conservative country like Bangladesh mediation provides a great opportunity for an aggrieved person who is a woman, to directly participate in the dispute resolution process and voice her grievance. Given the traditional mindset, the female aggrieved parties, in the society, are not prone to expose themselves to public eye by going to court. Mediation by a Family Court removes the risk of such exposure and allows them to participate in their affairs and to settle disputes without being condemned by critical eyes. Direct participation of the female parties to the dispute has thus, to a great extent, facilitated and contributed the success of the program." In the same article Justice Hasan further commented: "An immediate achievement of mediation in the Family Courts is that the success of mediation by a skilled mediation judge reconciles the parties concerned in a shortest possible time. It restructures a family which was on the verge of breaking up. It removes bitterness and replaces peace, harmony and happiness in the family environment and thus avoids ill effects on the other members of the family, specially the children."

Observations on Disposal of family suits through ADR

The ADR practices in Bangladesh initially were praiseworthy. At that time the judges of the Family Courts, Money Loan Courts and other civil courts put their due attention in resolving the cases through ADR. But the following chart regarding ADR in context of family suits will show the poor rate of disposal by the judges through ADR.

Institution and disposal of family suits of 5th Family Court, Dhaka (2000-2009)[18]

Year	Opening balance	Instituted and received	Total	Total disposal	Disposal through ADR	Pending at the end of year	Disposal rate by ADR in context of total disposal (%)	Disposal rate by ADR in context of total suit (%)
2000	X	290	290	91	27	199	29.67	9.31
2001	199	559	758	355	62	403	17.46	8.17
2002	403	482	885	535	73	350	13.64	8.24
2003	350	518	868	485	90	383	18.55	10.36
2004	383	495	878	629	128	249	20.34	14.57
2005	249	652	901	540	91	359	16.85	10.09
2006	359	625	984	568	110	414	19.36	11.17
2007	414	648	1062	586	126	475	21.50	11.86
2008	475	397	872	547	141	325	25.77	16.16
2009	325	1330	1655	828	116	827	14.00	9.00

Rate of disposal in context of total suit is impressive as it is within 9 to 15%. Rate of disposal suddenly decreased in 2009 by 9% but the reason is that the number of total suit increased twice compared to the number of previous year.

From the above discussion it can be said that the family disputes regarding maintenance, dower, restitution of conjugal rights, dissolution of marriage and guardianship and custody of

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18 *See Dr. Md. Akhtaruzzaman, op. cit., p. 338*

children pending before the Family court can easily be resolved by applying mediation. As a result the fruits of cases can easily and speedily be achieved. The mediation activities in Family Court may be more effective and fruitful the combined effort of Judges, lawyers and the litigants.

Adjudication of criminal cases and ADR

Under section 345 of the Code of Criminal Procedure , 1898 courts can adjudicate petty criminal cases on the basis of compromise made by the parties inside or out side the courts. The popular form of ADR in criminal cases is Plea Bargaining which is not available in our criminal justice system. But still the higher courts are encouraging the matter of compromise. In the case of ***Roni Ahmed* v. *State***[19] one Abdul Hakim, the father of the victim, lodged FIR on 8.1.2003 against the accused Roni Ahmed Liton @ Liton Ahmed Roni under section 9(1) of the Nari-o-Shishu Nirjato Daman Ain, 2000 stating *interalia* that the accused is the distant nephew of the informant who used to visit the informant's house and taking this advantage, on 3-6-2003, in absence of the members of the family, raped Tahura, daughter of the informant and left with warning not to disclose it to anybody and if disclosed she will be killed. After this the victim Tahura and her brother went to Dhaka and Tahura joined in service in a Garment Factory. On 25.8.2003 accused with some other persons took the victim against her will to village Hathob of Chowhali police station for some time and married her and left her at his relative's house and from there she was taken to Shashar Kandi and she was tortured by co-accuseds. It is further started that a salish was held to compromise the matter and it was settled that the accused will pay 60,000 as dowry and also give 5 Kedar of land, but the terms of compromise was not complied with fully. Trial court convicted the accused. Appeal was filed by the accused against the order of sentence and conviction. After hearing of the appeal the High Court Division observed:

> *"... the life of baby will become cursed if the appeal is not allowed and the accused is not acquitted. Law also encourages to allow the spouses to live together. It is a fit case for allowing appeal in order to make room for the accused and the victim to live together. It is the duty of the court to encourage settlement of matrimonial matter not to continue dispute between them. This appellant is entitled to justice from the court of law at least on humanitarian ground."*

Access to Justice and Legal Aid in Bangladesh

Lawyers and Legal Aid

Legal aid is the professional legal assistance given, either free or for a nominal sum, to indigent persons in need of such help[20]. Legal Aid is also given from the society for ensuring personal and social justice.

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[19] *61 DLR (2009) 147*

[20] *The New Encyclopedia Britannica, Vol. VI, p. 122.*

The first concept of Legal Aid was found in Roman Empire. Though the idea was growing gradually the concept of Legal Aid finally established after the Second World War in England. As a result the legal structure of England changed greatly. Lawyers of England of that time claimed to the government that, as medical treatment is charitable and it is the moral duty of state so to help a man by the government who cannot file a suit in need of money as a result fundamental rights of those person is violated. Thereafter in the *Magna Carta* of 1215 it was stated, "To no one will we sell, to no one we refuse or delay, right or justice."[21]

Lawyers have been giving Legal Aid greatly in present and past society. Till now in many countries lawyers are giving Legal Aid privately. Lawyers take first step to give Legal Aid in the Indian subcontinent. As a result of their restless effort and eagerness in 1924 Bombay Legal Aid Society (BLAS) was formed. The objective of BLAS was:

> *'...making justice accessible to the poor and reducing the costs of litigation; providing lawyers to the poor on the basis of need ; rendering legal aid gratuitously and to make provision for payment of court fees.'*[22]

To get Legal Aid the appellant will have to produce the legal document with a view to establish his own legal claimant. It is stated in 14th report of Indian Law Commission that at that time government, high Court of Bombay and other Courts sent many people to BLAS for the purpose of giving Legal Aid to those helpless poor people. The object of this organization was charitable in nature.[23]

Government Legal Aid

Article 27 of the Constitution of the People's Republic of Bangladesh guarantees that "All citizens are equal before law and are entitled to equal protection of law". Article 33(1) of the Constitution provides that no person is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice. Despite such provision, a great number of people in Bangladesh are deprived of their constitutional right of access to justice due to poverty faced by them. Most of the people are not only poverty- stricken but are deprived of the minimum basic needs of life. Our poor litigant people, most of whom pass more than half of the year through acute starving condition, cannot afford to reach the doors of law and derive any benefit of their services in many cases and as a result, they silently bear the agonies and burns of injustice done to them in various spheres of life without any legal relief. This is nothing but a negation to them of one of their fundamental rights of equality before law and the equal protection of law.

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21 *See Article-40, Magna Carta, 1215.*

22 *Muralidhar S, Law, Poverty and Legal Aid, 2004, p. 36.*

23 *Ibid*

In order to ensure access to justice to these poor people, the Government of Bangladesh enacted Legal Aid Services Act 2000 (LASA). In terms of LASA, National Legal Aid Services Organization (NLASO) also established to implement the government legal aid program across the country. NLASO provides legal aid to the poor litigants who are incapable of seeking justice due to financial insolvency, destitution, helplessness and also for various socio-economic conditions. The general direction and administration of the affairs and functions of NLASO vests in a National Board of Management. The National Board of Management consists of 19 members chaired by the Minister, Ministry of Law, Justice & Parliamentary Affairs. There are 64 District Legal Aid Committee (DLAC) by which NLASO implements the government legal aid program at district level. DLAC maintains a legal aid fund allocated by the government which is spent for poor litigants upon their applications. There are Upazilla and Union level committees also working to spread the legal aid program at grassroots.

District Legal Aid Committee and its duties and responsibilities[24]

District Legal Aid Committee (DLAC) consists of the following members-

- District and Sessions Judge – Chairman
- District Magistrate – Member
- Superintendent of Police – Member
- Superintendent of Jail – Member
- District Social Welfare Officer – Member
- District Information Officer – Member
- District Women Affairs Officer – Member
- District Children Affairs Officer -Member
- Chairperson of the District Committee of Jatiyo Mahila Sangstha or a representative of the committee nominated by her – Member
- President of the District Bar Association – Member
- Government Pleader of the District – Member
- Public Prosecutor of the District – Member
- Non-Government Inspector of Jail of the District, if any, and one of such inspectors as nominated by the Government – Member
- Representative from one non-government voluntary organization, if any, nominated by the Chairman – Member
- Metropolitan Sessions Judge (in Metropolitan City) – Member
- Chief Metropolitan Magistrate (in Metropolitan City) – Member
- Metropolitan Police Commissioner (in Metropolitan City) – Member
- Judge of the Nari O Shishu Nirjatan Daman Tribunal or Senior Most Judge of the Nari O Shishu Nirjatan Daman Tribunal (If there are more than one) – Member

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[24] *Section 9, Legal Aid Services Act, 2000*

- Special Public Prosecutor of the Nari O Shishu Nirjatan Daman Tribunal or Senior most among the Special public Prosecutors. (If there are more than one) – Member
- General Secretary, the District Bar Association – Member
- District Legal Aid Officer, Member- Secretary.

The District Legal Aid Committee is responsible to perform the following duties-

a. to provide legal aid to the people who satisfy the criteria as set up by the Board or Government and who are unable to get justice due to financial crisis or due to different socio-economic reasons;
b. to set up the conditions on which a successful applicant will get the legal aid;
c. to take initiative to make the people aware of availability of legal aid;
d. to perform the duty invested by the National Legal Aid Services Organization; and
e. any other activities necessary for the performance of the above mentioned activities.[25]

Who are the members of the Upazila Committee

Upazilla Legal Aid Committee consists of the following members[26] –

- Upazilla Chairman – President
- Upazilla Vice Chairman(Female) – Member;
- Upazilla Agriculture Officer – Member;
- Upazilla Education Officer- Member;
- Upazilla Health Officer – Member;
- Upazilla Social Welfare Officer – Member;
- Officer-in-Charge of Police Station – Member;
- Upazilla Women Affairs Officer – Member;
- Upazilla Ansar and VDP Officer – Member;
- Chairperson of the Upazilla Committee of Jatiyo Mahila Sangstha – Member;
- Representative among Union Parishad Chairmen nominated by the Upazilla Chairman – Member.
- Representative from the UP members (reserved seat), nominated by the Chairman – Member.

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25 *Section 10, Legal Aid Services Act, 2000*

26 *Rule 3, National Legal Aid Services Organization (Upazila and Union Committee constitution, responsibilities, functionsetc.) Regulation, 2011*

- Teacher (Female) from one local educational institution, nominated by the Chairman – Member.
- Representative from one non-government voluntary organization, if any, nominated by the Chairman – Member
- Upazilla Nirbahi Officer – Member Secretary.

Who are the members of the Union Legal Aid Committee

Union Legal Aid Committee consists of the following members[27] –

- Union Parishad Chairman - President
- Three representatives from the UP members (reserved seat), nominated by the Chairman – Member
- Representative from the UP members, nominated by the Chairman – Member
- Teacher (Female) from UP level educational institution, nominated by the Chairman – Member
- One female member of Ansar and VDP, nominated by the Chairman – Member;
- Representative from local market(Hat/Bazar) committee, nominated by the Chairman – Member;
- Representative from one non-government voluntary organization, if any, nominated by the Chairman – Member
- Representative from Jatiyo Mahila Sangstha, nominated by the Chairman of its district committee – Member
- Sub-Assistant Agriculture Officer at Union level- Member;
- Family Welfare Visitor working in the Union – Member
- Secretary, Union Parishad – Member Secretary

Who are entitled to get free Legal Aid

Rule 2 of the Legal Aid Regulations, 2001 enumerates the following categories of persons as eligible for seeking legal aid:

(a) Any insolvent person whose annual average income is not above Tk. 1,50,000/- for Supreme Court matters and Tk. 1,00,000/- for other courts

(b) Freedom fighters disabled, partially disabled, unemployed or unable to make a yearly income above 1,50,000 Taka;

(c) An individual receiving old age allowance;

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[27] *Rule 7, ibid*

(d) Any worker whose annual average income not above Tk. 1,00,000/-;

(e) Distressed mother holding a VGD (Vulnerable Group Development) card;

(f) Women and children victims of trafficking;

(g) Women and children victims of acid throwing by the miscreants;

(h) Allotee of a house or land in a model village;

(i) Insolvent widow, a woman abandoned by husband or a distressed woman;

(j) Disabled person, unable to earn and destitute;

(k) Person unable to protect his/her right in court or to defend him/herself due to financial insolvency;

(l) Person detained without trial and unable to take proper steps for legal assistance;

(m) Person considered by the court as financially helpless and insolvent;

(n) Person recommended or considered by the jail authority as financially helpless and insolvent;

(o) Person who is identified from time to time by the Organization as financially insolvent, destitute and suffered losses due to various socio-economic and natural calamities for the purpose of the Legal Aid Services Act, 2000, and unable to conduct a case to protect his/her rights.

In what type of cases legal aid is provided?

1) Civil cases, such as, land related dispute;
2) Criminal cases, such as, theft/cheating/fraud;
3) Family cases, such as, dower, maintenance;
4) Jail appeals;
5) Any other case fit for Legal Aid.

Procedure for getting legal aid

Under section 16 of the Legal Aid Act, all applications for getting legal aid must be submitted to the concern Legal Aid Committee in a prescribed form which is available in free of cost. If an application is rejected by the District Committee and the person feels aggrieved by the decision, then the applicant may prefer an appeal to the National Legal Aid Board within 60 days from the pronouncement of the decision of the District Committee. The decision of the Board in this regard will be final. Under section 19 of this Act, the legal aid lawyers and the court to whom the applicant is seeking redress will provide all necessary papers and documents related to the case concerned free of cost except the court fees. There is a panel of lawyers including a female lawyer to guide the case under this Act. A group of Panel Lawyers headed by a Coordinator works for the legal aid clients in Bangladesh Supreme

Court. Anyone can apply to the Director, NLASO for legal aid for the cases pending before the High Court Division. Legal aid applications are available at the office of the Jail Superintendent. So anyone can ask from the office for an application form and after filling the said application, s/he can request the Jail Superintendent to send it to the District Legal Aid Office.

Legal Aid under the Code of Civil Procedure, 1908

The role of the Code of Civil Procedure is not significant in the case of providing legal aid to the poor and economically unstable persons. Under Order 33 of the Code, if a person is treated as pauper he is exempted from the court fees only. But the code is silent about the other ancillary costs of a suit. It takes huge time to identify a person as pauper. However, the pauper faces great trouble if the opposite party is economically rich. Except the condonation of court fees the court can't provide any other benefit to the Pauper. That's why the pauper has to bear the maximum costs for the disposal of the cases. Under Rule 1 of Order 33 of the Code of Civil Procedure 1908, a person is a "pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth five thousand taka other than his necessary wearing apparel and the subject-matter of the suit.

Criminal Trial and Legal Aid

The preamble of our sacred constitution revealed that the fundamental aim of our state is to realize a socialist society through the democratic process, a 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. It connotes that every citizen is entitled to get justice and defending oneself before a court of law is the core ingredients for ensuring justice.

Article 33(1) of the Constitution of Bangladesh mentioned that no arrested person shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice. This provision gets its force from the first principle of natural justice- *audi alteram partem* and it constitutionally gives arrested person to defend himself which is recognized as fundamental right. But right to get legal aid does not mention as legal right whereas self-defense is a constitutional right. In Article 39A of Indian constitution mentioned 'free legal aid' and to fulfill the constitutional mandate India has already enacted National Legal Services Authority Act, 1987. In the light of the provisions of Article 27, 31 and 33 of our Constitution, poor and distress litigant people can claim free legal aid from the State and accordingly government has been providing free legal aid in both civil suits and criminal cases under the Legal Aid Services Act, 2000.

Accused persons are given the right of self defence in every case under section 342 of the Code of Criminal Procedure. This right is the fundamental right and no court even denied this sort of right of the accused. This type of right bears so important that if a trial court convicts an accused without examining him under section of 342 of the Code of Criminal Procedure, it vitiates the whole proceedings and only for this reason the appellate court can send the case for remand.[28] In the case of *Sheela Barse* v. *State fo Moharashtra*[29] Supreme Court of India opines that providing free legal aid to the poor litigants and unrepresented accused is included in the matter of democracy and rule of law. The same court in *Hussainara Khatoon* v. *State of Bihar*[30] states, "... An accused, who due to poverty, indigence or an incommunicado... situation, cannot afford legal service is entitled to free legal aid at the cost of the state as part of fair and reasonable procedure under Article 21". In *Suk Das* v. *Union Territory of Arunachal Pradesh*[31] the court describes right to self-defence and right to get free legal aid as fundamental right. In this regard the court expresses, "... Free legal assistance as state cost is fundamental right of a person accused of an offence which might involve jeopardy to his life or personal liberty."

2.9. Statistics of Government Legal Aid Recipients[32]

Year	Female	Male	Child	Total
2009	3175	5953	32	9160
2010	4986	6190	90	11266
2011	6479	6016	73	12568
2012	8078	7325	47	15450
2013	10448	9016	29	19493
2014	14467	10793	23	25283
Grand Total	47633	45293	294	93220

NGO led Legal Aid

Most of the people of Bangladesh are poor and illiterate. They are not enough concern about their right. Moreover they are afraid of file an application to the higher authority though their fundamental rights are violated because of their illiteracy. As a result the mass people take the shelter of the court as a last way. But for the sluggishness of the courts of Bangladesh

28 *Karim @ Abdul Karim and Others V. State, 33 DLR 191*
29 *AIR 1983 SC 378, 380*
30 *AIR 1979 SC 1369*
31 *AIR 1986 SC 991*
32 *Statistics obtained from National Legal Aid Services Organization*

they face huge problems in dealing with their cases. In the meantime the national machinery and non-government institutions are not sufficient for their help. Some non governmental organization such as – Madaripir Legal Aid Association, Ain o Shalish Kendro, Bangladesh Legal Aid and services Trust are endeavoring to give Legal Aid to the people, which is insufficient for the ratio of the population of the country.

Conclusion

Gender specific violence against women and children is now internationally recognized as an impediment to the holistic social, economic, civil, political and cultural advancement of women. The seriousness and endemic nature of the issue has placed it as a priority agenda in all international conferences and work plan of UN development agencies. The government of Bangladesh has adopted its National Plan of Action for the empowerment of women including elimination of violence against women and children. The legal needs of poor women is an important focus of the government legal aid program. The Legal Aid Policy, 2001 make special reference to distressed mothers, women and children trafficking victims, women and children acid victims, insolvent widows and abandoned wives. Access to justice for women depends how one can get legal assistance in conducting her cases in a court of law. On the other hand, it is felt that in getting quick justice the means and methods of ADR can play a vital role in providing justice to the litigants specially for the women. Along with the government every conscious citizen of our country should be aware regarding this issue. Judges, who preside over the courts must be pro-active in the establishment of the rights of the women. The barriers of access to justice should be removed by the concern authorities to achieve the millennium goals of development. Without the cooperation of the women, it is not possible to fulfill the target.

Necessity of legislation for the protection of witness in Bangladesh: A legal study

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Introduction

The witness is universally considered to be one the most instruments to ascertain the truth in civil and criminal proceedings as Bentham says "Witnesses are the eyes and the ears of justice."[1] That is why the protection of witnesses is a demanding task for any legal system in national and international level. The adequate protection of witnesses plays a key role in the successful functioning of the Court, aiming to ensure that witnesses participate and testify freely and truthfully without fear of retribution or further harm. The Court has a duty to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of witnesses. But unfortunately in our country, the trend is such that the witnesses do not wish to come to the courts to give their statements and evidences because of the fact that they feel unsafe. Even if they come to the court, they tend to turn hostile, thereby opening avenues for the aecused to be acquitted. At present, there is no law relating to the protection of witnesses in Bangladesh. So their problem gets doubled since they feel unsecured and at the same time having no remedy for the injuries caused to them because of that insecurity. This study intends to analysis the legal conditions of witness protection in Bangladesh. It also will discuss the necessity of a specific legislation on this area focusing a comparative discussion including international instruments and some laws of different national's legal systems. In addition, it will mention some remedies to remove these hurdles during the administration of Criminal Justice in our country as the way of recommendations at the end of this paper.

Who is a Witness?

The word 'witness' means a person present at some event and able to give information about it.[2] In the Witness Protection Program Act, 1996 of Canadian Legal System says that "witness" means (i) a person who has given or has agreed to give information or evidence, or participates or has agreed to participate in a matter, relating to an inquiry or the investigation or prosecution of an offence and who may require protection because of risk to the security of

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1 *C. Kress, 'Witness in Proceedings before the International Criminal Court: An analysis in the light of comparative criminal procedure', in Fischer, Horst (red.), International and national prosecution of crimes under international law: current developments (Berlin: Berlin-Verl. Spitz, 2001) 309-383, at 333.*

2 *Dorling Kindersley Illustrated Oxford Dictionary, Dorlin Kindersley Ltd. & Oxford University Press, 1998 Edition, Page 958.*

the person arising in relation to the inquiry, investigation or prosecution, or (ii) a person who, because of their relationship to or association with a person referred to in paragraph (iii) may also require protection for the reasons referred to in that paragraph.[3] Therefore, we can define the witness as any person including a child, who is or may be required to make a statement or give evidence or who has made a statement or given evidence, in any investigative or judicial proceedings in relation to the commission of an offence.

Witness Protection

What does actually mean by the term 'witness protection'? To express it very simply, it can be said that witness protection is protection of a threatened witness or any person involved in the justice system, including defendants and other clients, before, during and after a trial, usually by police. While a witness may only require protection until the conclusion of a trial, some witnesses are provided with a new identity and may live out the rest of their lives under government protection. Witness protection is usually required in trials against organized crime, where law enforcement sees a risk for witnesses to be intimidated by colleagues of defendants. It is also used at war crime trials.

Necessity of a particular legislation for the protection of witness

The occurrence of rape generally takes place in closed rooms or in secret places and there is no eye witness available to such occurrence. In this situation, the testimony of a victim is the best and the only evidence that can be obtained by the prosecution against the accused. Even then such witnesses are reluctant to appear before the court for fear of their life and property or that of their families because of the fact that there is no specific provision of law for protection of the witnesses as against threat, intimidation or any inducement of the accused party. As a result, cases of such crimes of heinous nature are resulting in acquittals in most of the cases. Witnesses named in charge sheets of crimes of grave nature, are also subjected to threats, intimidation and harassment by the accused party or their associates preventing them from attending a court or tribunal to give their evidence at the trial of the case.

In certain cases, the witness feels uncomfortable about giving answers in the presence of the offender. It is, therefore, necessary to make a specific enactment providing for the rights and protection of the witnesses against the threats and intimidation, psychological and physical, of the accused party and their associates. Sometimes, it is found that the complainant as witness in court, contradicts his/her own statement made in the First Information Report because of the fear of consequence at the time of his/her returning to home from the court

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3 *Section 2, The Witness Protection Program Act, 1996 of Canada. Available at http://laws-lois.justice.gc.ca/eng/acts/W-11.2/FullText.html last visited on 06 November 2014.*

after giving evidence. In order to facilitate the victim to give his/her testimony in court freely and without any fear or pressure, it is necessary that the witnesses are provided with certain rights and protection. It is said that in our country, in most of the cases involving the rich and influential persons, witnesses turn hostile making the whole process of justice in fructuous. Very often witnesses become untraceable and sometimes they are just eliminated.

The witnesses are also threatened and intimidated by using the subtle means of cross-examination during their deposition before the court thereby rendering the witnesses helpless for lack of their sufficient right to protect themselves under such circumstances although the witnesses should be able to speak before the court to narrate the entire incident in a free atmosphere without any embarrassment. The mere sight of the accused may create an element of extreme fear in the mind of the victim and the witnesses putting them in a state of shock. In such a situation he/she may not be able to give full details of the incident, which may result in a miscarriage of justice. 'The free and truthful participation of witnesses to testify before the Court largely depends on the protective and security measures provided by the concerned Court in any Crimes Tribunals as witnesses always have some reasonable fear to be suffered furtherance by the defense party'.[4] Therefore, there is an urgent need of making a specific law providing for the rights and protection of the witnesses.

Present situation of witness protection in Bangladesh legal system

Though there are many statues and laws in Bangladesh to punish the offenders but there is no law available till to date to protect the witness. Now we will discuss some legislation to analysis the present situation of witness protection in Bangladesh legal system.

The Constitution

The Article 35 of the Constitution of the People's Republic of Bangladesh provides that the accused of a criminal offence shall get a speedy and public trial by an independent and impartial court or tribunal, that they shall in the trial of the case be presumed to be innocent until and unless their guilt is proved by the prosecution "beyond all reasonable doubts". Thus it will appear that the law and the principles of criminal justice are all in favour of the right and protection of the accused. But no specific law is there providing for the rights and protection of the victims and more particularly the witnesses although they are the principal actors for the prosecution to prove its case "beyond all reasonable doubt". A widespread concern has been raised over the lack of rights and protection of the victims and witnesses.

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[4] *Umme Wara, 'Witness Protection and ICT in Bangladesh', A Contrario International Criminal Law, available at http://acontrarioicl.com/2013/04/17/witness-protection-and-the-ict-in-bangladesh/?blogsub=confirming#blog_subscription-3 last visited on 31 October 2014.*

The Evidence Act, 1872

Sections 151[5] and 152[6] of the Evidence Act, 1872 says about the forbiddance of indecent, scandalous and insulting questions of Evidence Act. But these two sections barely suggest inter-court protection only.

The Penal Code, 1860

The Section 506[7] of the Penal Code 1860 provides for punishment for committing criminal intimidation. Criminal intimidation has been defined under section 503 of the Penal Code as 'Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or the omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation'. The aforesaid definition is fairly wide no doubt, but it still falls short of giving sufficient protection to the witness.

ICT Act, 1973

The International Crimes (Tribunals) Act, 1973[8] does not contain any provision regarding witness protection. But the Rules of procedure has been amended in June 2011 where under the new Chapter VIA, a new Rule 58 A(1) has been inserted on Witness and Victim Protection which says "The Tribunal on its own initiative, or on the application of either party, may pass necessary order directing the concerned authorities of the government to ensure protection, privacy and well-being of the witnesses and or victims. This process will be confidential and the other side will not be notified". Sub Rule (2) inserted arrangements of accommodation of witnesses or victims and other necessary measures regarding eamera trial and keeping eonfidentiality as necessary where violation of such undertaking shall be prosecuted under section 11(4) of the Act. The success of these protective measures is yet to be proved especially with regard to the sexual violence witnesses.

However, much has been said by various organizations and persons connected with the field of legal area including Bangladesh Law Commission for enacting a specific law providing for protection and certain rights and benefits for the witnesses of criminal cases particularly involving crimes of grave and violent nature, when their life and property are endangered.

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5 *Section 151 of The Evidence Act, 1872: The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.*

6 *Section 151 of The Evidence Act, 1872: The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.*

7 *Section 506 of The Penal Code, 1860: Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.*

8 *Act No XIX of 1973*

But no specific law has yet been enacted nor has even a scheme or policy or program been made in our country for the rights and protection of the witnesses before, during or after the trial of such cases.

Reports of Law Commission and Proposed Legislation on the Protection of Witness

The Law Commission of Bangladesh has submitted two reports to the Law Ministry on the protection of witness. The First one was submitted in 2006 namely 'Final Report on a proposed law relating to protection of victims and witnesses of crimes involving grave offences'.[9] And second one was submitted in 2011 adding some additional recommendations maintaining the consistent with the first report.[10] In the first report, the Law Commission has proposed a law on the protection of witness and victim.

The proposed law addresses many significant needs of members of this vulnerable group, and acknowledges the importance of support mechanisms that address physical, psychological, and economic wellbeing of victims and witnesses who will testify before the Court. However, the proposed legislation does not provide comprehensive measures compared to those provided by international and hybrid criminal tribunals. So if we want to ensure the safety and security for witnesses of any crime in future, we need to take certain guidelines from the international and tribunals which are consistent and feasible to the present socio-economic context of Bangladesh.

Witness Protection, International Law and Hybrid Tribunal

The Statutes of the Extraordinary Chambers in the Courts of Cambodia (ECCC), the International Criminal Court (ICC), the International Criminal Tribunal for Rwanda (ICTR), the International Tribunal for the former Yugoslavia (ICTY), the Special Court for Sierra Leone (SCSL), and the Special Tribunal for Lebanon (STL) inserted provisions for witness protection where the Rules of Procedure and Evidence provided policies to implement those provisions of the statutes effectively.

The Rome Statute contains important provisions for the protection and support of victims and witnesses. At the investigation stage, *the Prosecutor* required to 'protect the interests and personal circumstances of witnesses, including age, gender as defined in article 7 (3), and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children'.[11] The Prosecutor is entitled to withhold disclosure of evidence if this may lead to the 'grave endangerment' of a witness or

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9 *Report No 74, available at http://www.lc.gov.bd/reports/74.pdf Last visited on 06 November 2014.*
10 *Report No 108, available at http://www.lc.gov.bd/reports/108-Victim.pdf last visited on 06 November 2014.*
11 *Rome statute Art. 54(1)(b).*

his or her family.[12] Article 54(3)(f) provides further that the Prosecutor shall take necessary measures, or request that necessary measures be taken, in order to ensure the protection of any person. Similar responsibilities are imposed by *Trial Chamber.* It should take 'appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of witnesses.' The Court takes into consideration all relevant factors, including age, gender, health, and the nature of the crime, 'in particular, but not limited to, where the crime involves sexual or gender violence or violence against children'.[13] Article 68 of the Rome Statute on the International Criminal Court provides that "the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means".

The *Registrar* gives to Witnesses Unit a statutory mandate dedicated to protecting, supporting and providing other appropriate assistance to witnesses.[14] Artiele 43(6) requires the Registrar to set up the Witnesses Unit[15] within the Registry and in consultation with the Office of the Prosecutor (OTP) to provide protective measures, security arrangements, counseling and other appropriate assistance for witnesses and others who are at risk on account of testimony given by witnesses. The Rules of Court take these provisions into details. Rules 16–19 cover the responsibilities of the Registrar and the VWU (Voluntary witnesses unit). Rules 87 and 88 provide that protective and special measures may be granted by the Chamber. If the prosecution and the defence are necessary parties to the Court's process, witness are *"potential"* parties, because their participation in not *strictu sensu* essential.[16] This does not mean that the witness do not have the right[17] to be protected and participate in the ICC proceedings. The Registry of ICC is responsible for the non-judicial aspects of the administration of the Court's work and for 'servicing of the Court'.

ICTY and ICTR have a directive that the Court shall take measures to protect witnesses. It also contains an explicit provision the witness protection measures shall be incorporated in the Rules of Procedure and Evidence adopted by the judges.[18] The rights of accused to a fair and public hearing are subject to witness protection measures. It also provides for establishment of Victim and Witness Unit offering protective services. It specifies that

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12 *See in the annex Art. 68(5) Rome Statute (RS)*

13 *Ibid.,Art 68(1).*

14 *Art. 43(6) RS; Regulations of the Registry, Reg. 83.*

15 *The Witness Protection Unit currently has 38 permanent staff and four positions funded through General Temporary Assistance (GTA). Seventeen of the staff are based in The Hague, while 25 are located in Central African Republic, DRC, Chad, and Uganda.*

16 *Their presence is not strictu sensu essential just because the Trial can take place without them: this does not exclude, latu sensu, the fundamental importance of victims participation for the development of fair, effective and comprehensive proceeding.*

17 *Preparatory Committee Decisions Aug. 1997, reprinted in: M.CH Bassiouni (ed.), International Criminal Court, Compilation of the UN Documents and Drafts ICC Statute before the Diplomatic Conference, (Consolidated) Draft, p. 108.*

18 *See specifically Articles 14, 19, and in particular Article 21 of the ICTR statute, Articles 15, 20, and in particular Article 22 of the ICTY statute and Rules 34, 53, 69, 70, 75, 77 and 79,ICTR and ICTY*

consideration should be given to employment of prosecutors and investigators experienced in gender-related crimes.[19]

Witness protection in the law of different legal systems

United Kingdom

In the English legal System, threatening to a witness from giving evidence is the contempt of Court. Recently the UK Government has enacted a law known as Criminal Justice and Public Order Act, 1994 which takes the provisions on the punishment for intimidation of witnesses. S.51 of the Act not only protects a person who is actually going to give evidence at a trial, but also protects a person who helps with or could help with the investigation of a crime.[20]

United States of America

In the United States of America, the Organised Crime Control Act, 1970 and later enacted law namely the Comprehensive Crime Control Act, 1984 provides the Witness Security Program. The Witness Security Reform Act, 1984 provides for relocation and other protection of a witness or a potential witness in an official proceeding concerning an organised criminal activity or other serious offence. Protection may also be provided to the immediate family of, or a person closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding.

Canadian Legal System

There is an Act in Canadian legal system namely the Witness Protection Progam Act, 1996. The purpose of the Act is defined in section 3 of the mentioned act thus "to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance in law enforcement matters".[21] Protection given to a witness may include relocation, accommodation and change of identity as well as counseling and financial support to ensure the security of the protectee or to facilitate his becoming self-sufficient. Admission to the Program is determined by the Commissioner of Police on a recommendation by a law enforcement agency or an international criminal court or tribunal.[22] The extent of protection depends on the nature of the risk to the security of the witness, the value of the evidence and the importance in the matter.

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19 *See specifically Articles 15, 16, and 17 of the statute, and Rules 34, 69, 70, 75, and 79*

20 *See the section 51 of the mentioned act in details for further clarification. Available at http://www.legislation.gov.uk/ukpga/1994/33/section/51/enacted Last visited on 05 November 2014.*

21 *Section 3, The Witness Protection Progam Act, 1996 of Canada. Available at http://laws-lois.justice.gc.ca/eng/acts/W-11.2/FullText.html last visited on 06 November 2014.*

22 *Ibid, section 5 & 6*

Australian Legal System

The Australian Witness Protection Act, 1994[23] establishes the National Witness Protection Program in which (amongst others) the Commissioner of the Australian Federal Police arranges or provides protection and other assistance for witnesses.[24] The witness must disclose a wealth of information about himself before he is included in the Program. This includes his outstanding legal obligations, details of his criminal history, details of his financial liabilities and assets etc.[25] The Commissioner has the sole responsibility of deciding whether to include a witness in the Program.

South African Legal System

The Witness Protection Act, 1998 of South Africa provides for the establishment of an office called the Office for Witness Protection within the Department of Justice. The Director of this office is responsible for the protection of witnesses and related persons and exercises control over Witness Protection Officers and Security Officers.[26] Any witness who has reason to believe that his safety is threatened by any person or group or class of persons may report such belief to the Investigating Officer in a proceeding or any person in-charge of a police station or the Public Prosecutor etc.[27] and apply for being placed under protection. The application is then considered by a Witness Protection Officer who prepares a report, which is then submitted to the Director[28].

Recommendations

- Certain rights and protection of witnesses would be granted by enacting a specific law and in doing so; efforts shall be made to balance the rights of the accused with those of the witnesses without losing sight of the public interest involved in the prosecution of those persons who have committed the crime.
- A comprehensive witness protection scheme is now a need of the hour. The aim should be to protect the victims and witnesses and grant them certain rights and benefits to ensure their appearance before the investigative bodies and the courts or tribunals to give their evidence in respect of the alleged crime without fear of threat or intimidation of the accused.

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23 *The Witness Protection Act, 1994, Act No. 124 of 1994 as amended*

24 *Section 4, the Witness Protection Act, 1994 of Australia, available at http://www.comlaw.gov.au/Details/C2012C00732 Last visited on 6 November 2014.*

25 *Ibid, section 6.*

26 *Section 4, The Witness Protection Act, 1998 (Act No 112 of 1998) available at http://www.acts.co.za/witness-protection-act-1998/index.html?act.php last visited on 06 November 2014.*

27 *Ibid, section 7.*

28 *Ibid, section 9.*

- The rights, benefit and protection to be given to the witnesses shall include, among others, accommodation with a secured housing facility, relocation, change of identify as well as counseling and financial support, transport facilities, subsistence allowance, medical treatment and other facilities to ensure the security of the victim and witnesses to facilitate their becoming self sufficient.
- Protection may also be provided to the immediate family of the witness or a person associated with, such witness, if the family or person may also be endangered on account of the participation of the witness in the judicial proceedings. The victim's special right shall include the rights to be rescued immediately after getting the information of the commission of a crime and in case of woman her identity shall be kept confidential and shall not be disclosed to the public or media and right of access to justice, fair treatment and to prompt redress, and to proper assistance in every stage of criminal proceedings and the right to protection of privacy and safety.

Conclusion

In view of the discussions as we have made above, we think that it is high time to consider to legislate a specific law on the witness protection providing for the rights, privileges and protection of the victims and witnesses and where necessary their family members. It was a nice directive from the honorable High Court Division of the Supreme Court of Bangladesh in 2010 in the Case namely-

'BNWLA vs. Government of Bangladesh' that

> *"Government shall take immediate steps to enact law for introduction of witness and victim protection system for effective protection of victims and witnesses of sexual harassment as well as the people who come forward to resist sexual harassment. The law will provide measures for taking account of the mental trauma of the victims and for redressing the same".*[29]

Therefore, we hope that implementing the reports of the Law Commission of Bangladesh and considering above mentioned the judgment of the High Court Division; the government will enact a specific law on the protection of witness in Bangladesh.

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[29] *Bangladesh National Women Lawyers Association (BNWLA) Vs. The Government of Bangladesh (Writ Petition No. 8769 of 2010)*

Introducing Camp Court in Prison: Bangladesh Perspective

*A.M. Julfiker Hayet**

Introduction

This Article suggests that the existing criminal justice delivery system, basically the magistrate courts have no adequate mechanisms for reducing the overcrowding in prisons who are behind the bar for petty offences and languishing long time in the prison, and recommend an alternative solution in the form of conducting "Camp Court" in the prison releasing the poor and unrepresentative offenders who failed to address themselves before the regular criminal courts.

Currently capacity of our prison is 34,167 but the actual prison population is 65,382[1] and unfortunately 64% of them are unconvict prisoners.[2] Of the entire prison population, approximately one-third of the detainees had been convicted. The rest were either awaiting trial or detained for investigation. Due to the severe backlog of cases, individuals awaiting trial often spend more time in jail than the sentence period if they would have been convicted. In most cases, prisoners slept in shifts because of the overcrowding and did not have adequate bathroom facilities. During the year the government ordered the release of 1,000 prisoners to help ease overcrowding.[3]

Criminal Justice System in Bangladesh

Two classes of Criminal Courts are initially liable for dispensation of criminal justice, one is Courts of Sessions and other is Courts of Magistrates.[4] Later one is further divides into four classes, of which Magistrates of the 1st class and 2nd class are entrusted to take cognizance of the offences, and bail matters are mostly disposed off by these classes of Magistrates.[5] Most of the Magistrate courts are overburdened by thousand of cases, and poor and unrepresented criminals charged with petty offences are brought from the prison but due to the workload of courts and lace of sufficient security personnel they are very often produced before the court

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1 *As on 01/10/2014, Source: Prison Directorate, Bangladesh.*

2 *Report of the joint project 'Improvement of the Real Situation of Overcrowding in Prisons' (IRSOP) of Ministry of Home Affairs and German International Cooperation (GIZ).*

3 *US Department of State, Bangladesh Human Rights Report 2010, p. 11, See http://www.state.gov/documents/organization/160056.pdf, visited on 28/01/2014.*

4 *Section 6 of the Code of Criminal Procedure.*

5 *Section 6 and section 190 of the Code of Criminal Procedure. Government may empower 2nd class Magistrates in certain class of cases.*

from the *Hajatkhana/Garod*[6]. 602173 cases were pending in different judicial magistrate courts all over Bangladesh as of December 2007, although 83091 cases were disposed off since separation of judiciary on November 01, 2007.[7] At present approximately 1, 60000 are pending in 37 courts of the Court of Chief Metropolitan Magistrate at Dhaka, one court having 4324 cases on an average; and each and every day one court has to deal more than 150 cases.[8] So the criminal justice system in Bangladesh is malfunctioning to some extent and overcrowding is a common phenomenon in our country.

Reasons for Overcrowding

Arbitrary Arrest

As soon as a person is arrested the criminal process starts. With this arrest police controls of arrestee's body, a court begins to regulate his liberty and the counsels of prosecution and that of defence attempt to continue his detention or secure his release on bail. Police Officer can arrest without warrant under several conditions[9], such as, any person who has been concerned in any cognizable offence, against whom a reasonable complaint and credible complaint has made or a credible information has been received; and against whom a reasonable suspicion exists, which are couched in such wards that there is scope for abuse and colourable exercise of power[10]. Law requires the production of the arrestee before the Magistrate within 24 hours after the arrest[11]. If no bail application is moved and granted, the court may, on application of prosecution make order remanding the arrestee to the police custody for a maximum period of fifteen days at a time[12]. Sometimes detainees are becoming the prisoners of "*on call*"[13] status (i.e. without next court date). During the long period of detention which may range from 1 year to 7 years or more[14]. Amnesty International reports the more that 1500 people are arbitrarily arrested in 2011.[15]

Inadequacy of Bail

Though bail is a right of the detainees charged with bailable offences but inadequate exercise of powers in granting bail is seen due to non-representation and failure of production of sufficient sureties. In petty non-bailable cases one of the reasons for refusing bail is unreasonable and non-judicious objection by the police and the counsels of the prosecution.

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6 *It is the place in court premises where the offenders send from the prison are temporarily gathered together before producing to respective courts.*

7 *Annual Report on the Judiciary, 2007; at p. 92 edited by Ikteder Ahmed, Register, Supreme Court of Bangladesh.*

8 *Information is gathered from the office of the Chief Metropolitan Magistrate Court, Dhaka and some of the Magistrates working therein.*

9 *Section 54 of the Code of Criminal Procedure.*

10 *BLAST VS Bangladesh, 55 DLR 363.*

11 *Article 33(2) of the Constitution of Bangladesh.*

12 *Supra note 10.*

13 *When sessions triable cases have been transferred to trial courts from cognizance court no date for next appearing of the accused has been inserted in the Custody Warrant (C/W), leaving it at the desire of the trial courts. Trial courts after receiving the case record usually issue Production Warrant (P/W). Between these periods the accused persons are termed as 'On Call Prisoners'. Sometimes prisoners are in 'On Call' for long time.*

14 *Report of Bangladesh Jail Reform Commission by Justice F. K. M. A. Munim, Ministry of Home Affairs.*

15 *See http://www.amnesty.org/en/region/bangladesh/report-2011#section-12-4, visited on 28/12/2012.*

There is a misconception in different sectors and people at large that keeping accused persons in jail is favourable to maintain the peace and tranquillity in the society. Once they are released on bail the police feels discouraged and thinks that it would be difficult to secure re-arrest if accused persons flee away. Judiciary thinks that the detainees will not turn up before the court when required by it as many of them do not have any permanent addresses. Sometimes it is hard to find a lawyer surety because in such cases the lawyer who will stand surety for the offender refuse to sign the bail bond unless he is paid a handsome amount. The detainee is thrown at the mercy of his counsel.

Delays in Investigation and Trial

Delays are generally caused in two stages to a pre-trial detainee. One of them exists before the trail starts i.e. during investigation and others arise as soon as trial starts i.e. after framing formal charge. Whenever a person is arrested investigation has to be completed within 24 hours. As per section 173 of the Code of Criminal Procedure police will complete investigation without unnecessary delay and as soon as the investigation is completed police will submit the investigation report before the court. In spite of such legal requirement, quite a number of pre-trail detainees are languishing in prisons without any police report even for a period of two or three years after their arrest. This is gross violation of the right of an arrested person to be tried without delay. One of the main reasons for causing delay in investigation is lack of adequate number of experienced investigating (Sub-Inspector and above) police officers. Moreover, they are busy with several administrative works like maintaining law and order, providing protocol for the VIPs. Metropolitan police spend 40.6% time of a month for keeping law and order, 32.7% time for ensuring the security of VIPs, and 18.4% time for works relating to criminal cases. Police officers of districts and thanas take half of the time of a month for securing the VIPs.[16] Sometimes police maintain choose and pick policy in investigating cases because of political influence or bribe. So the detainees who neither have political influence nor financial ability stay in prison without police report for years together. Delay during trial also happened due to shortage of courts and failure on the part of the prosecution to produce necessary witnesses within time.

Other Reasons

The other causes of overcrowding also includes:

- Perceived crime rate.
- Political unrest between ruling party and the opposition. Ruling party tries to stop the political movement through large scale arrest which is commonly know as "*mass arrest (gono grafter)*".
- Oppressive or intolerant systems or attitudes of people in power.

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[16] *Working Paper on Police Stations, Transparency International Bangladesh, March 4, 2004, pp.1,2. (See Sheikh Hafizur Rahman Karzon, Theoretical and Applied Criminology, 1st Edition (Reprint), Palal Prokashoni, 2011, pp. 322-323).*

- Punitive approaches in sentencing by the courts.
- The number of the accused in pre-trial detention.
- The length of pre-trial detention.
- Erroneously not to suspend or count custodial sentences.
- The length of custodial sentences and how much time is actually served the availability of non-custodial sentences.

Impact of Excessive Pre-trial Detention

Impact on the Rule of Law

The rule of law is fundamental to all open societies. It is also an important aspect of socio-economic development. Excessive pre-trial detention undermines the rule of law by debasing the presumption of innocence, furthering corruption and even promoting criminality[17]. If a defendant is ordered held in custody for indefinite/long time several significant consequences may result. Sometimes detention prior to trial is more than the sentence. This experience encourages the detainees to undermine the rule of law through loss of employment, accommodation, family and other community ties. Around the world million of people are locked up in pre-trial detention because of corruption[18]. Criminal Justice Systems are often warped by bribery and other forms of corruption. The pre-trial stage (from arrest to trial) of the criminal justice process is particularly venerable to corrupt practices and this corruption hits the poor and vulnerable and marginalized. Police, Prosecutor and Judges unhindered by accountability, they can make decision of arbitrary arrest, detention or release based on their ability to pay illegal money. The ability to put cash in right hands often makes the difference between freedom and detention. In one point people become disregard to the Rule of Law.

Impact on the Poor

Ineffective and corrupt penal systems are most damaging to the poorest and perpetuate inequalities in society; conversely, inequalities in society feed unfair and unequal penal systems[19]. Experience from pilot prisons[20] says, those who are in pre-trial detention are of comparably poor health and education status, are likely to have little formal employment and come from fragile family backgrounds. Release from pre-trial detention doesn't depend on the nature of the charge but also on the arguments put forward before the courts. Those with little education are less likely to understand and advocate for their rights. Those with little

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17 *The Socioeconomic Impact of Pretrial Detention: Open Society Justice Initiative, p.17, See: http://www.soros.org/initiatives/justice/articles_publications/publications/socioeconomic-impact-detention-20110201/socioeconomic-impact-pretrial-detention-02012011.pdf, visited on 28/12/2013.*

18 *Ibid, p. 18.*

19 *Ibid, p. 22.*

20 *Report of 'Improvement of the Real Situation of Overcrowding in Prisons' (IRSOP), a joint project of Ministry of Home Affairs and German International Cooperation (GIZ), in pilot prison survey of Dhaka, Kashimpur II&III, Bogra, Madaripur prison.*

family or social support are more likely to lack the means to secure non custodial options, including bail. Those without employment or property are less likely to meet the conditions for sureties.

Impact on Women and Young Detainees

Women and young detainees constitute minority of the pre-trial detention population and as a result their particular needs are often neglected. Yet the physical, emotional and social consequences of incarceration on women are acute and enduring. Issues such isolation from families, mental and emotional health problems, and issues related to pregnancy and childcare, violations of human rights, and limited access to health care and other services are all faced by women prisoners.

Impact on Individuals and Families

Pre-trial detention disproportionately affects individuals and families living in poverty, they are more likely to come into conflict with the criminal justice system, more like to be detained awaiting trials and less able to make bail or pay bribes for their release. Those living in or at the edge of poverty have the fewest resources to handle the socio-economic shocks of pre-trial detention and they are more easily plunges into (or further into) destitution, including hunger and homeless. The socio-economic impact of pre-trial detention falls not simply on the detainees but also affect the detainee's family[21]. Persons detained awaiting trail cannot works or earn income while detained and frequently lose their jobs, often after only a short period away from their works. Pre-trial detainees are not only at risk of losing their employment at the time of detention, but also risk long-term unemployment or underemployment after release. The stigma of detention, combined with lost education or training opportunities severely limits detainee's lifetime income. For every pre-trail detainee who loses his/her job as a result of detention, there is a family paying the price. In some cases, his spouse and even his children must find work to make up for the lost income. But in other cases, his spouse must quick work because of the demand imposed by incarceration, including court appearance, prison visits and taking food and other necessities to the incarcerated spouses. For the already poor, the loss of income can be crippling. For example, a detainee is a farmer; his spouse cannot manage work during his detention, in that case the spouse will be forced to sell family belongings, property etc. which will compel them to fall in extreme poverty.

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[21] *One Aroj Ali (50) and his wife were languishing in Madaripur prison for 6 months in connection with an assault case filed by his full bother. Before the project intervention, his family members had to borrow about 40,000/- from different NGOs to support the family and to bear the incarceration related expenses (lawyers' fees etc.). After getting release from the Jail he maintains his family by pulling rickshaw. But to repay the loan money he had to send his only son to Dhaka to earn losing his education. His wife used to work in different houses as housemaid; she also lost her job during her detention. They are trying to regain the situation but their family has felt in debt meanwhile. See: Supra note 20.*

Prison Related Expenses

Entering pre-trial detention not only limits one's income and earning potential, it actually costs money. Apart from the legitimate payment to the lawyers, courts etc. the detainees need to make some illegal payment for food, accommodation, water, treatment etc. during their imprisonment. On the other hand, the authority is mandated to provide the basic needs (accommodation, food, health, cloth, education etc.) to the detainees, but the costs become high because of the long detention. Unfortunately there is no mechanism in Prison Directorate of Bangladesh to provide the actual daily expenses (for food, accommodation, treatment, cloth etc) for per prisoners, but there is no doubt that the cost is much high, which might be diverted to some potential works like rehabilitation, reforms or reintegration of the detainees.

Impact on Communities and State

Pre-trial detention has an impact on the wider community like other impact on individuals and families. This is particularly clear with regard to the poor, marginalized and vulnerable people. The community impact of excessive pre-trial detention further is the social exclusion of marginalized groups, increase their poverty and make them disempowered. Some marginalized groups are falsely implicated in criminal cases to put in a long incarceration for grabbing their lands and properties. Disease such as TB in prisons is 21 times higher than outside, so the detainees are a huge threat to the community once they are back. For the State, every pre-trial detention means increased expense (direct cost), reduce revenue (indirect cost), and fewer resources for other programs (opportunity costs).[22]

Others Impacts

The other consequences of prison overcrowding are:

- Pose potentially dangerous public health hazards. Overcrowded accommodation acts as an incubator for infectious diseases such as TB and HIV/AIDS.
- Seriously affect the ability of staffs to control crime and violence within the prison walls.
- Create a dangerous environment for prison staffs.
- Raise the risk of mass disturbances in, and outbreaks from, prison.
- Make it impossible to deliver UN defined minimum standards of detention[23] requiring adequate light, air, decency and privacy.
- Violate fundamental human rights, such as, the right to life and to security of the person and freedom from cruel, inhuman or degrading treatment or punishment.

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[22] *Supra note 17, p. 35.*

[23] *The Standard Minimum Rules for the Treatment of Prisoners was adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Geneva. It was approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.*

Alternative Solution

Despite increasing number of arrests, lawful release of them could be possible if police would perform their duty as the law says and criminal courts would minutely examine each and every case having due care. It is hardly possible as the criminal courts are overburdened and overwhelmed. Most of the petty offenders, that is who are charged with theft, assault, public nuisance, narcotics addicts, snatching are basically unrepresented before the court due to their poverty and languish in the jail for long time. To keep them in jail state has to pay lot of money each and every day. Jail authority has no right to make them free except the order of the courts. It is not possible by jail authority to argue or make any sort of report before the court, because there are no legal devices in this regard. To meet this situation a new concept of 'Camp Court' has been developed in different countries around the globe.

The 'Camp Court' in Prison

'Camp Court' is a periodic court presided by judicial officers in the prison dealing with petty cases on the basis of a report prepared by the prison authority regarding the prisoners who are languishing in jail for a period which is either long than the punishment or for a period which is sufficient for the alleged offence and on admitting guilt the accused person may usually be convicted the custody period with a view to releasing him from the prison. Basically this is not a court of trial. It is first developed in State of Bihar, India. Judicial officials periodically visit prisons to review cases and dispense rulings on the spot. These 'Camp Courts' only handle matters involving minor offenders. The courts are seen as a useful way to reduce overcrowding, speed up justice delivery, and restore the 'hope' factor in the life of prisoners.[24]

Prior to the 'Camp Courts', over 12,000 pre-trial prisoners were lodged in various jails of Bihar, waiting to be tried for minor offences. Many had been languishing for more time than the sentences when the local high court directed jail authorities to organize 'Camp Courts' in the State's jails to hasten the disposal of minor cases. The 'Camp Courts' handle only petty offences, such as breach of the peace. The 'Camp Courts' are organized under the auspices of the Bihar State Legal Services Authority, by order of the Chief Judicial Magistrate. Judicial magistrates and executive magistrates of respective districts preside over the 'Camp Courts'. Before each session, a superintendent of the local prison submits a list of prisoners eligible to participate. These 'Camp Courts' have been highly effective at reducing the backlog of simple bailable criminal cases.[25]

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[24] *See: http://www.governancejustice.org/index.php?option=com_content&task=view&id=42&Itemid=56, visited on 16.02.14.*

[25] *Ibid.*

In Malawi, encouraged by paralegals, magistrates have applied this practice. They visit prison to screen the pre-trial caseload and weed out those who are there unlawfully or unnecessarily and fix dates for trial. The exercise has been partially effective in relieving congestion, but its real value lies in restoring prisoners' confidence in the justice system by seeing justice in action and reducing tension inside prison.[26] Paralegals[27] draw up a list of cases deserving attention and forward them to the police and magistrates for appropriate action to be taken when they visit for the 'Camp Court'. Court Users Committees, consisting of representatives from justice institutions providing services in the courts, as well as from civil society organisations, meet regularly to improve coordination in the justice system and to make arrangements for the 'Camp Courts'. The Paralegal facilitate these meetings and act as the secretariat.[28]

In Peshawar, Pakistan a panel of judges headed by the District and Sessions judge, Mohammad Arshad Khan, held a 'Camp Court' inside the district jail and released the eight inmates who were unable to pay their fines. On the directives of Peshawar High Court Chief Justice Ijaz Afzal Khan, 'Camp Courts' were being held inside the jails across the province and inmates involved in minor offensives and crimes were being released.[29]

Is there Provisions for 'Camp Court' in Cr.P.C.

The term 'Camp Court' may create doubt in ones mind, but it is a court like others and peculiarity regarding names exists as it works within the boundary of the prison. Usually no lawyer on behalf of the accused persons appear before this court, rather this court act proactively in the aid of the poor accused making a way to set them free from the prison considering the prevailing laws. Other officials like prison staffs, paralegals, human rights activists play a vital role to make it working. Amended Code of Criminal Procedure enumerates provisions for the establishment of Chief Judicial Magistrate Court in every district and Chief Metropolitan Magistrate Court in the metropolitan area having jurisdiction throughout respective area.[30] No provisions are set forth for the places of the magistrate's courts, but in cases of Benches of Magistrates the Chief Judicial Magistrate and Chief Metropolitan Magistrate are given power, subject to government desire to determine the time and places of the bench and the classes of cases to be tried in their respective jurisdiction.[31] So it depends upon the authority to establish *ad hoc* courts in the prison to uphold the

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26 *Ibid.*

27 *Paralegals, like paramedics or bare foot doctors, provide 'first' legal aid to ordinary people. This can be anything from informing them about the law and court procedures to advice and assistance with legal problems.*

28 *See 'Where there is no Lawyer' handbook of The Paralegal Advisory Service Institute, Lilongwe 3, Malawi, p. 15. See also http://www.governancejustice.org/images/stories/pdf/PASI.pdf, visited at 16.02.14.*

29 *See: http://www.dawn.com/2011/08/31/govt-to-settle-kohistan-victims-before-winter.html, visited on 15/02/14.*

30 *Section 11(2) and section 20 of the Code of Criminal Procedure.*

31 *Section 16 and section 21 of the Code of Criminal Procedure.*

humanity of the poor people within the existing framework of laws; and no new laws or establishment in needed on the part of the government. In our existing criminal justice delivery system judicial magistrates have to record dying declaration, conduct test identification parade (TIP) of persons and good as well, destroy prohibited and contraband materials, conduct mobile courts during elections, record evidence and take signature and thumb impression on commission in outside of their regular court works. So conducting courts in the name of 'Camp Court' in the prison for a particular purpose in a day or half day in every week would tremendously make a sense in the mind of people confidence.

How 'Camp Court' will Work

'Camp Courts' are not courts for trial.[32] The ultimate view of the court is to reduce the overcrowding in the prison within the legal framework. Different study reveals that most of the under trial offenders are charged with petty offences and they are usually in the prison for months together. Two different ways this court may work, such as releasing the offenders on bail or releasing on the basis of 'guilty plea'. Apart from these, a number of judicial and quasi judicial works may be done and conducted by the 'Camp Court'.

Release on Bail

Offences are of two kinds regarding bail, one is bailable and other is non-bailable and in case of the former, one can claim bail as of right but later one depends upon the discretion of the court. Granting bail even in bailable offences depends upon certain features, such as furnishing bonds and availability of sureties who are responsible for the appearance of the offenders before the court. Court may release an offender charged with bailable offence on his own bond, but it is rarely exercised as maximum offenders have no permanent address and there are scope of non appearance before the court. Moreover due to poverty these offenders are very often unrepresented before the court and their relatives do not even know the whereabouts of the offenders and as such they are kept in jail for long time, even more than the period of imprisonment, if they would have been convicted. Prison officials may detect this type of offenders and may prepare a list. One copy of this list may be transmitted to the paralegals/human right activists who within short time will visit jail and will interview the offenders; and will collect information and will communicate with their relatives. They will also encourage offenders in pleading guilty in appropriate cases and will prepare a summary. One copy of these lists will be placed before CJM or CMM as the case be, who will examine concerned case records and will fix a date for conducting a 'Camp Court' by magistrates subordinate to him. It is possible for the 'Camp Court' to work accordingly and make bail/release order to the offenders in appropriate cases.

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[32] *Supra note 28, p. 15.*

Release on the Basis of Guilty Plea

When an offender admits his guilt and after recording his admission he may be convicted by the magistrate, if there are no sufficient causes for non-conviction.[33] In petty cases number of offenders are in jail for long time and if they advices properly they definitely plead their guilty before the court. In our adversarial justice delivery system defense lawyers are very reluctant to give advice to their client to plead guilt, rather they are interested to continue the case for long time and gain more and more money. Though our penal laws and criminal justice system have no sentencing policy, it is widely practiced that our courts take lenient view when an offender pleads his guilt before it. There are provisions as incorporated in 2003 for deduction of the custody period from the sentence of imprisonment and custody period being longer than the period of imprisonment mandatory requires immediate release of the offender.[34] So upon admission of the offence in petty cases, 'Camp Court' may award the custody period as sentence of imprisonment enabling his release from the jail. This also encourages other offenders to plead guilty before the court.

Paralegals are working in three pilot prisons– Dhaka Central Jail, Bogra District Prison and Madaripur District Prison and with the legal assistance of three non-governmental organizations named BRAC, Bangladesh Legal Aid and Services Trust (BLAST) and Madaripur Legal Aid Association (MLAA) for the non-represented poor offenders and able to release 1086 offenders till January, 01, 2012 in Dhaka, Bogra and Madaripur, respectively.[35]

Other Functions of the 'Camp Court'

- It should be recognized that mere segregation on the basis of age, sex or the gravity of offence committed does not contribute towards carrying out individualized treatment and programmes for rehabilitation of offenders. On admission into a prison an offender should be diagnosed and classified on the basis of the (a) nature of offence, (b) health, (c) age, (d) security risk, and (e) his individual needs.[36] It is now universally recognised and our jail administration are also trying to keep the offenders according to their offence and other factors as described above and 'Camp Court' may look after the matter.
- A brief review of the chapter on Fundamental Rights in Part III of the Constitution (1972) raises questions whether these penal statutes are in conformity with the rights set down therein. For instance, can it be said that 'all citizens are equal before law and are entitled to equal protection of the law' (Article 27) when poor people (i.e. the majority of

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33 *Section 243 of the Code of Criminal Procedure.*

34 *Section 35A of the Code of Criminal Procedure.*

35 *Figured collected from the leaflet of 'Improvement of the Real Situation of Overcrowding in Prisons' (IRSOP), a joint project of Ministry of Home Affairs and German International Cooperation (GIZ).*

36 *Report of Bangladesh Jail Reform Commission by Justice F. K. M. A. Munim.*

citizens) are 'priced out of the judicial system'[37] because they have to apply to the High Court division of the Supreme Court for protection in case of infringement? The major problem in the realization of this fundamental right lies in the high illiteracy rate and lack of legal access. Particularly the financial inability of a big section of citizens to avail themselves of legal services circumscribes their chances to be equally treated before the law.'[38] 'Camp Court' is supposed to supervise the matter.

- The right to a 'speedy trial'[39] appears to be contradicted by the significant numbers of under-trial prisoners who have been waiting years to come up for trial. 'The volume of backlog of cases, the loopholes and complexity in the procedural laws and case management system and wide-spread corruption and malpractices are among a number of actors which delay and deny access to justice for many. The court machinery is overloaded, slow and not readily accessible to all.'[40] Blockage of cases can be reduced through 'Camp Court'.

- The prohibition against 'torture or to cruel, inhuman or degrading punishment or treatment'[41] appears unheeded by police officers in interviewing a suspect. It is a source of considerable concern for prison officers who have no discretion other than to make room for more and more people in already overcrowded conditions that, on any view, constitute 'inhuman or degrading' treatment. A concern that is shared by senior members of the judiciary 'We all know that one fundamental principle of justice and good governance is to recognize that a person is sent to prison as punishment and not for punishment ... But, unfortunately, our jail systems are being used for inflicting more punishment by denying the minimum standard of living and by treating the prisoners in a manner devoid of human dignity.[42] It can be checked by the 'Camp Court'.

- Fundamental essence of the justice delivery system is that the child offenders alleged to have committed any offence under the Penal Code or any other law are tried by the especially established Juvenile Courts, or in the absence of such court, by the courts empowered by the Act to exercise the powers of the juvenile court. Thus, the justice delivery system for children is different and distinct from the traditional criminal justice system.[43] 'Camp Court' may ensure whether the children are being tried by the appropriate court or not. It also has the scope to examine an offender who is alleged to be a child offender.

- It will reduce the number of "*on call*" prisoners awaiting for trial.

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37 *UNDP Human Security in Bangladesh 2002. See: http://www.undp.org.bd/info/hsr/Chapter%201.pdf, p. 15, 16. visited on 15.01.14.*

38 *Justice Maimur Reza Chowdhury, Second Regional Conference on Access to Justice and Penal Reform, Dhaka, December 2002, see also www.penalreform.org/resources/rep-2003-annual-report02-en.pdf*

39 *Art 35(3) of the Constitution of Bangladesh.*

40 *Justice Maimur Reza Chowdhury, supra note 38.*

41 *Art 35(5) of the Constitution of Bangladesh.*

42 *Justice Maimur Reza Chowdhury, supra note 38.*

43 *Justice M Imman Ali, Towards a Justice Delivery System for Children in Bangladesh, UNICEF Bangladesh, Dhaka, 2010, p. 141. See also www.unicef.org.bd.*

Effect: A Comparative Presentation

Someone might argue that there is nothing new in the concept of 'Camp Court' and regular criminal courts are working in dispensation of criminal justice and thousand of cases have been disposed off each and every day. Perhaps number of courts could be increased and more and more judicial officers could be appointed to reduce the overcrowding. It might bring result, but is it possible within sort time where we are in constraint financially and plenty of resources are needed in this regard. Isn't it easy and smooth to get any possible result using the existing legal provisions and resources? What could be the prospective effects in setting of 'Camp Court', we may summarised it in the following bullet points:

- 'Camp Court' in the prison in every district will help the poor and unrepresentative offenders to have access in the criminal justice delivery system and no intervening actors, such as, lawyers, toughts, police, court staffs able to bar them in appearing before the court.
- Probation as a correctional measure occupies an important place in reformative justice. It seeks to reconcile the conflicting claims of "punitive" and "treatment" reactions to crime.[44] Whereas Parole is a conditional release from imprisonment which entitles parolee to serve remainder of his term outside confines of an institution, if he satisfactorily complies with all terms and conditions provided in parole order.[45] Though there exists provisions of Probation in our country but they are hardly exercised. 'Camp Court' may exercise powers regarding probation and parole in accordance with the rules of the Probation of Offenders Ordinance, 1960.[46]
- Investigating officers have to face different problems while conducting Test Identification Parade (TIP) of the suspected accused persons in robbery or dacoity cases, as because they have to produce suspects, witnesses in a place and then apply for a judicial magistrates. Sometimes it is very difficult to coordinate all the things in a day. So 'Camp Court' may be an alternative, magistrate will be available in the prison and with the help of the prison authority TIP can easily be conducted.
- Huge allegations of corruption are found against the prison staffs and administration of prison. Food and clothing are not properly provided to the inmates of a prison as per sanctions and every year more than hundred prisoners die because of disease and lack of proper medical facilities. Inmates of prisons are not given necessary facilities to meet with their families. But successive government have failed to do better and able to ensure a good prison system in Bangladesh.[47] These types of odds may be turn down through the regular vigilance of the 'Camp Court'.

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[44] *Professor N.V. Paranjape, Criminology and Penology, 10th Edition (Reprint), Central Law Publications, 1999, p. 330*

[45] *Sheikh Hafizur Rahman Karzon, Theoretical and Applied Criminology, 1st Edition (Reprint), Palal Prokashoni, 2011, pp. 322-323.*

[46] *Ordinance No. XLV of 1960, See Vol. XII of Bangladesh Code, Ministry of Law, Justice and Parliamentary Affairs.*

[47] *Supra* note 45, pp. 294, 295.

- Bangladesh inherits penal policy from the British ruler which provides what sort of punishments will be awarded to persons convicted of different kinds of crimes defined by the Penal Code.[48] Our penal policy is combination of retributive, deterrent and preventive philosophy. Scope of reformative or corrective philosophy is so limited that it is not working. It is established that recidivists are not care about reformation and it is not possible to back them in usual course of life. But occasional criminals, criminals for need, minor or petty offenders and those who commit crimes due to environmental factors can be reformed through appropriate methods. Occasional or non-habitual criminals also fear of courts and they often have communication with the courts. In regular courts, there exists a scenario which is not favourable and friendly to these type of criminals, magistrates are presiding upper place enclosed by *'lal shalu'*, lawyers wearing black and white dress always in a hurry, police personnel with their rude and professional behaviour always try to argue that the criminals are the root of all evils and they are spoiling the society and tarnishing the image of the government and try to convince the court to hand down upon the criminals irrespective the weight of particular crimes. These types of occasional and petty offenders may be the subject matter of a 'Camp Court' and a device may be developed to reform and rehabilitate them through lecturing, showing movies and providing alternative livelihood. Different non-governmental actors may play a vital role in this respect.

Recommendations

Existing provisions of law do not debar conducting 'Camp Court' in the prison. To reduce the overcrowding in the prison and many other reasons this court system should be introduced in our criminal justice delivery process. Only to punish the criminals are not the sole responsibility or duty of the criminal courts; ensure justice and uphold the human dignity are also the concern of it.

It will help not only reducing the overcrowding in the prison, but also provide lots of supervisory and quasi judicial administrative tools for ensuring quality of justice and better life for the prison population. It will empower prisoners in conflict with law to understand the criminal laws and procedures, and apply it to their own case to take appropriate measures without having recourse to the formal justice system.

The Government and the Supreme Court of Bangladesh may consider for the introduction of 'Camp Court' in different jail around the country.

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[48] *Supra* note 45, pp. 254.

Cybercrime: Substantively a new challenge for Bangladesh

*Mohammad Saifur Rahman**

ABSTRACT

Bangladesh enacted the Information and Communication Technology Act 2006 (the ICT Act) to regulate the matters related to the digital signature and criminal activities against the information and communications technology. The Government has established a Cyber Tribunal at Dhaka to prosecute an individual for an allegation of commission of offence under the ICT Act. Cybercrime can be committed irrespective of geographical boundaries, which is conceptually a new challenge for the criminal justice system of Bangladesh. Combating against cybercrime requires an appropriate and updated legal framework to deal with the procedures related to investigation of an offence and prosecution of an individual. The analysis of this article will be based on the shortcomings of the ICT Act in criminalizing the conducts as cybercrime.

Introduction

Bangladesh is a country with 37.92 million internet subscribers.[1] The Government of Bangladesh (the GOB) set out a vision to be transform into ''Digital Bangladesh' by 2021.[2] The GOB takes many initiatives for making availability of internet throughout the country. The growing use of internet rapidly increases the opportunity of commission of cybercrime.

The Information and Communication Technology Act, 2006 (Act No. XXXIX of 2006) known as ICT Act is a combination of electronic commerce law and criminal law. The ICT Act has introduced a number of cybercrime in the criminal justice system of Bangladesh. In respect of procedural matters, the ICT Act mainly depends on the existing procedural laws of Bangladesh. The criminal justice system is still inheriting post-colonial legal system which

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[1] *Bangladesh Telecommunication Regulatory Commission, Internet subscribers in Bangladesh (June 2014) <http://www.btrc.gov.bd/content/internet-subscribers-bangladesh-june- 2014>accessed 31 November 2014*

[2] *Ministry of Finance, Journey Towards a Digital Bangladesh (2013) para2.3.2< http://www.mof.gov.bd/en/budget/ebook/digital_journey.pdf> accessed 31 November 2014*

mainly based on old legislations. Therefore, it is a challenge for the criminal justice system of Bangladesh to deal with the cybercrime substantively and procedurally.

Comparative analysis of substantive law

The ICT Act listed a number crime in sections 54 to 67. The ICT Act has not used the terms 'cybercrime' or 'computer crime'. In order to address the cybercrime within that list, it would be useful to compare the ICT Act with a legislation that addresses common categories of cybercrime. In the international level the Council of Europe Convention on Cybercrime 2001 (the Convention) provides treaty based framework for criminalizing a number of conducts against the computer or computer system.[3] The Convention is one of the leading international instruments and it will be worth to compare the provisions of the ICT Act with the Convention.

The Convention categorized cybercrime in three categories: Computer related offence, content related offence and computer integrity offence. In the next discussion the nature of offences under the ICT Act will be compared with the Convention and relevant legislations of UK and U.S.A.

Computer Integrity Offence

Illegal access[4]

Article 2 of the Convention covers offence related to illegal access e.g. hacking, cracking or computer trespass to protect integrity, confidentiality and availability of computer system and data.[5] The ICT Act in two sections address the similar categories of offences that can be committed through illegal access.

Hacking

The ICT Act has criminalized hacking as such: any person through illegal access causes damage to any computer, computer network or other electronic system.[6] It appears from this provision that mere illegal access without causing any subsequent conduct is not a hacking. The main essence of this provision is the commission of subsequent criminal conduct. However, an offence of 'hacking' takes place ''when an individual trespass into a computer or part of a computer system to which that person is not entitle to have access''.[7] Therefore, an illegal access is sufficed to constitute a hacking without requiring the commission of

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3 *Miriam F. Miqelon-Weismann, 'The Convention on Cybercrime: A harmonized implementation of international penal law: what prospects for procedural due process?' in Indira Carr (ed), Computer Crime (Ashgate 2009) 172*

4 *The Cybercrime Convention, art. 2 (the convention used this terminology)(the Convention)*

5 *The Cybercrime Convention, Explanatory Report, [44](the Explanatory report)*

6 *The Information and Communication Technology Act 2006 (BD), s. 56(1)(b), (the 2006 Act)*

7 *Richard W. Downing, ' Shorting up the weakest link: what law makers around the world need to consider in developing comprehensive laws to combat cybercrime' in Indira Carr (ed), Computer Crime (Ashgate 2009) 19*

subsequent criminal conduct. Article 2 of the Convention has criminalized the intentional access to whole or any part of the computer without right as offence. Under the Convention access may take place by ''entering of the whole or any part of the computer''.[8] If access is authorized by the owner or other right holder of the system, there will be no offence.[9]

As such unauthorized access itself is an offence under the Convention, whereas it is not under section 56(1)(b) of the ICT Act. If illegal access itself has not been criminalized, the additional overact would be required to qualify the ''access'' for criminalization of hacking as an offence.[10] This would limit the scope of criminalizing an offence of illegal access to the computer or data held in it.[11] This narrow approach of legislation may not be able to protect information from a hacker who has gained an unauthorised access to a computer.[12]

The abovementioned narrow approach also exists in section 56(1)(b) of the ICT Act. It may probable that during trial the defence will likely to take the opportunity of this provision and in absence of any damage to any computer an accused may likely to be acquitted even if he has gained an unauthorised access to that computer. Therefore, in order to protect the confidentiality of information of any computer or computer system the Government should effectively criminalize an unauthorized access as an offence by an amendment of the ICT Act.

Unauthorised access to protected systems

Section 61 of the ICT Act provides that ''any person who secures access or attempts to secure access to protected system in contraventions of section 47 of this Act, then this activity of his, will be regarded as an offence'' The protected computer has not been defined by the ICT Act. It follows that the controller by Gazette notification may declare any computer or computer network as protected system.[13] The Government may appoint a Controller by publishing a notification in the Gazette.[14] The concept of protected system is analogues to the US 'protected computer'. The Computer Fraud and Abuse Act 1986 (the CFAA) defined a protected computer in a way that a computer exclusively use for the financial institution or US Government for interstate or foreign commerce or communication, including a computer

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8 *The Explanatory report, [46]*
9 *The Explanatory report, [47]*
10 *The Explanatory report, [49]*
11 *Ibid*
12 *Jonathan Clough, Principles of cybercrime (4th Publication, CUP 2013) 95*
13 *The ICT Act, s.47*
14 *The ICT Act, s.18*

located outside the United States for such use.[15] This provision conferred US to extend its extraterritorial jurisdiction for offence against the protected computer.[16]

In Bangladesh it is not clear under what circumstances computer system would be declared as protected system. If it is a protected commuter like in U.S.A, it would include only the computers related to governmental activities. Then access to the governmental computer without authorization will be an offence under section 61 and at the same time the computers of the private users or non- governmental will be outside the scope of the section 61. This approach would limit the scope of criminalizing an offence that concerns unauthorised access to the computers of general public.

On the other hand, alternatively, a computer system can be protected by the security measures. In this regards infringing of the security measure is sufficed to prove the intention of an individual to obtain computer data.[17] In that event the offence of unauthorised access can only be committed by the infringement of security measure. For an instance Lithuania in implementing the Convention in 2007 amended Article 198 of the Criminal Code of the Republic of Lithuania, which requires that the offence of unlawful access can only be committed by damaging the protection means of the information system.[18] Therefore, if any computer system does not contain any security measure, an unauthorized access in relation to that computer system would never be prosecuted. However, in Bangladesh there is no legislation exist that directing to introduce protection means or security measure in the computer or computer system.

Both of these hypothetical situations are likely to arise in absence of further clarification from the Government. These two approaches would limit the scope of criminalizing an offence of unauthorized access. If unauthorized access itself be criminalized irrespective of any computer or computer system then it is not necessary give additional protection to the protected computer. Therefore, the main priority of the Government is to amend the ICT Act to include an unauthorised access itself as an offence irrespective of any computer or computer system.

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15 18 U.S.C. § 1030(e)(2) *(The USA Patriot Act 2001 added the definition of protected computer includes computer outside of USA)*

16 *Paul N. Stockton & Michele Golabek Goldman, 'Protecting cyber terrorists: applying traditional jurisdictional frameworks to a model threat' (2014) <http://journals.law.stanford.edu/sites/default/files/stanford-law-policy-review/print/2014/06/stockton_goldman_25_stan._l._poly_rev._211.pdf>accessed 25 November 2014*

17 *The Explanatory report, [49]*

18 *Darius Saulianas, 'Legislation on cybercrime in Lithuania Development and legal gaps in comparison with the Convention on Cyber Crime' (2010) <http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&uact=8&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.mruni.eu%2Fen%2Fmokslo_darbai%2Fjurisprudencija%2Farchyvas%2Fdwn.php%3Fid%3D269402&ei=mZLiU56ZL-nm7AbEwYGQAQ&usg=AFQjCNEgtW582vC0ZCeLgxOqsLavVnQH6Q>accessed 02 December 2014*

Data interference[19]

Article 4 of the Convention deals with the intentional and without right damaging, deletion, deterioration, alteration or suppression of computer data. Section 54 and 55 of the ICT Act concern the offence related to causing damage to the computer, computer resources and data.

Damage to the computer or computer system

Section 54(1) of the ICT Act provides that a person guilty of an offence if he without permission of the owner or any other person who is in charge of a computer, access to such computer for the purpose to extract data; downloads copies or extracts any data; introduces any computer contaminant like virus or damages any computer. The main element of the section 54 is access to the computer must be taken place without permission which suggests the same was an unauthorised access. The key essence of the computer integrity offence is that ''the access was unauthorized''.[20]

In a hypothetical situation, it would be difficult to establish an allegation under section 54(1) of the ICT Act as: if a person who is authorized to access to the computer downloads data from it and passes the same to another person who is not authorized to access.[21] In this event it might be difficult to bring the charge under section 54(1) of the ICT Act against them as none of them has committed any offence under this provision. This is because the first person is authorized to access to the computer and the second person has not secured any access to that computer at all.

In USA, the CFAA has recognized the abovementioned scenario as ''exceeding authorised access''.[22] The terms exceeding authorised access is defined in such ways as ''access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled to obtain or alter''[23] The term ''exceed authorized access'' is aim to deal with the access of the insiders who are employees using the computer in their employment capacity.[24]

In respect of access by the outsiders which is an access of without permission sometime it may be a problem to establish the intention of the perpetrator to the effect of causing damage. This is because the 'unauthorised access' is not itself an offence under the ICT Act. If unauthorised access itself an offence then establishing the same is sufficed to prove the

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19 *The Convention, Article 4 (this terminology has been used by the Convention)*

20 *Clough (n13) 70*

21 *Department of Justice of US, 'Prosecuting Computer crimes' (Office of Legal Education) (provides a similar example by using character ''A'' and ''B'')17 < http://www.justice.gov/criminal/cybercrime/docs/ccmanual.pdf>accessed 25 November 2014, (DOJ)*

22 *18 U.S.C. § 1030(a)(2)*

23 *18.U.S.C. § 1030(e)(6)*

24 *DOJ (n 22) 5*

intention of the perpetrator. In respect of insiders as described in the hypothetical situation above, the ICT Act should define when an authorised person would exceed his authorised access.

Section 54 (1)(d) of the ICT Act deals with the causing damages to any computer, computer system or computer network, data or computer program resided in that computer is an offence. 'Damage' under this provision ''means to destroy, alter, delete, add, modify, or re-arrange any computer resource by any means''.[25] Undoubtedly everything (e.g. computer parts, program, CD-ROM drive, data, software, networking equipment) within a computer or related to a computer are its resources. The ordinary meaning of this provision suggest two scenarios: firstly causing damage to the physical condition of the computer or network and secondly, causing damage to the data or program resided in the computer.

In US damage under the CFAA includes ''impairment to the integrity or availability of data, a program, a system or information''[26] The damage under the CFAA occurs if data within a computer is interfered.[27] Therefore, the physical damage to a computer is outside the scope of these two provisions of the CFAA.

The objective of article 4 of the Convention is to protect computer data or program from the unauthorized damage or deletion and also to protect integrity of the computer.[28] As such causing physical damage to computer is outside the scope of article 4 of the Convention. However, the ICT Act has criminalized causing mere physical damage to the computer or network as an offence.

In Bangladesh criminal damage to the tangible property is also a punishable offence under section 425 of the Penal Code, 1860 which provides that it is an offence knowingly or intentionally causing wrongful loss or damage to public or any person by destruction of any property or any such change in any property in the situation thereof as destroys or diminishes its value or utility. The punishment for this offence is with imprisonment of either description for a term which may extend to three months or with fine or with both.[29] The wording of section 54 (1)(d) in relation to cause physical damage to computer, computer network or computer system is overlapping with the section 425 of the Penal Code. The punishment under section 54 (1)(d) is with a term of imprisonment up to ten years.[30] Therefore, law

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25 *The ICT Act, s.54 , Explanation [iv]*
26 *18 U.S.C. § 1030(e)(8)*
27 *Clough (n13)117*
28 *The Explanatory report, [60]*
29 *Bangladesh Penal Code 1860, S. 426 (the Penal Code)*
30 *The ICT Act, S.54 (2)*

enforcement agencies may prosecute a perpetrator who causes damage to the physical condition to of a computer in either legislation.

In UK before enactment of the Computer Misuse Act 1990 (the CMA 1990) the criminal conduct of hacker regarding causing damage to the computer program or data had been dealt with the Criminal Damage Act 1971.[31] At present in UK causing damage to the physical condition to the computer is punishable under the Criminal Damage Act 1971 and impairing the contents of the computer is an offence under section 3 of the CMA 1990. In Bangladesh section 54(1)(d) gives a wide power to the LEAs (Law enforcement agency) to bring charge against an offender for a traditional criminal damage in relation to the physical condition of a computer within the ambit of cybercrime, where punishment is higher. For an instance, arguably it is not logical to convict a person for a term of imprisonment up to ten years for breaking the physical structure of a computer. Therefore, the government may follow the policies of UK as discussed above and should keep causing damage to the physical condition of the computer outside the scope of ICT Act.

Tempering with computer source code

Section 55 (1) of the ICT Act provides that a person will be guilty of an offence if he himself or cause other person internationally or knowingly conceal, destroy or alter any computer source code used for a computer, computer program, computer system or computer network, when the computer source code is required to be kept or maintained by any law for the time being in force. The source code includes listing of programmes, computer commands, design and layout and program analysis computer resource in any form.[32] It appears from section 55(1) that the offence can be committed in two ways firstly, the perpetrator may himself can commit the offence, secondly, the perpetrator caused another person to commit the offence.

From the technical point of view, source code is a readable instruction written by the programmers 'directing a microprocessor's operations'.[33] Software is written as source code and a source code can be protected under intellectual property rights e.g. copyright protection or patent protection.[34] Therefore, there is a possibility that interference with the computer source is also come within the purview of the intellectual property law. The similar situation was evident in India in the case of *Sayed Asifuddin and ors vs. The State of Andhra Pradesh*[35]

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31 *Mac Ewan, N. 'The Computer Misuse Act 1990-lession from its past and predictions for its future' (2008) Crim. L.R. 2008, 956*

32 *The ICT Act, s.55 , Explanation*

33 *Shelia F. McShane & Ira J. Hammer, 'Protecting source code' (2005) < http://www.gibbonslaw.com/UserFiles/Image/sourcecode.pdf> accessed 25 November 2014*

34 *ibid*

35 *[2005] CRI LJ 4314(IND)*

where one of the employees of a mobile operator company manipulated the source code of a mobile handset which was used by the rival mobile operator company. He was charged under section 65 of the Information Technology Act 2000 (the IT Act 2000) and section 63 of the Copyright Act 1957. The Court held that a computer program is protected under section 63 of the Copyright Act. The court refused to proceed under section 65 of the IT Act and stated that, ''if a person alters computer program of another person or another computer company, the same would be infringement of the copyright.''

The wording of the section 55 of the ICT Act and section 65 of the IT Act 2000 are similar to each other. In Bangladesh the copyright related matters are governed by the Copyright Act 2000, which defined the 'computer program' as ''a set of instructions expressed in words, codes, schemes or in any other form including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result''.[36] Under this definition the computer source code is likely to be treated as computer program. The infringement of copyright of computer program is punishable offense under section 84 of the Copyright Act 2000. Therefore, if someone alters a computer source code may be charged under section 84 of the Copyright Act. The interplay between the Copyright Act 2000 and the ICT Act in respect to source code would create an obstacle to prosecute a perpetrator for commission of an offence under section 55 of the ICT Act.

In respect of deletion or destroying of the computer source code by an individual is necessarily deletion or destroying of a computer program which is a punishable offence under section 54(1) of the Act. It is not clear as to why the legislators has criminalized the same offence twice in two provisions; however, this would create confusion as to which section would apply in respect of causing damage to the computer program. Therefore, the Government should either keep this provision by introducing an explanation as to why source code is different from the computer program or strike out this provision since causing of damage to the computer program has already been criminalized as an offence by the ICT Act.

Content related offence

Article 9 of the Convention in respect of content related offence concerns the criminal conducts related to child pornography. The ICT Act has criminalized publication of obscene materials as offence. However the Convention has not dealt with the publication of obscene materials or general pornography as offence.

Publishing obscene materials

Section 57(1) of the ICT Act provides that, it is an offence if someone publishes or transmits or cause to be published or transmitted obscene material in the website or in electronic form.

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[36] *The Copyright Act 2000 (BD), s. 2(10)*

The material is obscene if it tends to deprave or corrupt person who are likely to see or hear the same.[37] The distribution, circulation, selling, hiring or making publically available of any obscene representation or objective is an offence under section 292 of the Penal Code. The punishment is for a period of three months of imprisonment or fine or both under section 292 of the Penal Code.

A person if transmits or publishes an obscene material in website, it may be possible to argue that his activities are sufficient to constitute an act of 'circulation of an obscene objective' under section 292 of the Penal Code. The court in setting out test for obscenity under section 292 in the case of *Yaqub Beg Vs State*[38] held that "obscene object has the tendency to corrupt the mind of those who are open to immoral influence". Therefore, publication of obscene material in electronic form or in website, if tends to corrupt the mind of the people is likely to constitute an offence under section 292 of the Penal Code.

The plain reading of section 57(1) suggests that an offence under this section will be committed if publication or transmission occurs in electronic form. This would raise confusion in an hypothetical analysis as: for an instance, if someone downloads obscene material and then transferred it to another person, in that event the first person will be guilty of an offence under section 57(1) of the ICT Act. The second person who has obtained the same from the first person will not be liable. Thereby, mere possession of obscene materials in electronic form or otherwise is not an offence under section 57 of the ICT Act. These will leave a great deal opportunity for the defence lawyers to undermine the prosecution case.

The publication or transmission of child abuse image will get similar treatment under section 57 (1) of the ICT Act like general pornography. Therefore, mere possession of child pornographic image will not be an offence under section 57 (1) of the ICT Act. It should be noted that neither the ICT Act nor the Penal Code has made any distinction between the criminal conduct related to child pornography and general pornography. However, possession of child pornographic image will be an offence under section 292(a) of the Penal Code.[39] Therefore, if someone possesses a child pornographic image he will be punished with a terms of imprisonment of maximum three months.

In describing the impact child pornography in the society, the U.S Supreme Court in *New York v Ferber*[40] case held that the child pornography should be differentiate because "if a child becomes subject of pornographic materials, this would harmful to the physiological,

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[37] *The ICT Act, s.57(1)*

[38] *[1960]12 DLR (West Pakistan) 45*

[39] *The Penal Code, s.292(a) (provides as "whoever ......has in his possession any obscene book, pamphlet, drawing, printing, representation or figure or any other obscene object whatsoever")*

[40] *[1982]458 U.S. 747*

emotional and mental health of that child''. In UK publication or possession of child obscene image is an offence, which is punishable for a period of ten years imprisonment.[41] Whereas, the punishment for publication of obscene material is imprisonment of for a period of three years.[42] The rationale behind these two different regimes is to give more protection to the children from being harmed by the production of child pornography.[43] Article 9 of the Convention obliges the parties to criminalize the producing, offering or making available, distributing or transmitting, procuring or possessing child pornography in a computer system or a computer data storage medium. The convention is an important step in international level for criminalizing computerised child pornography.[44]

In comparison to the international standards Bangladesh stands far behind to it. In India the amendment of the IT Act 2000 has introduced section 67(B) which deals with the child pornography as it has criminalized publishing or transmitting or caused to published or transmitted materials in any electronic form which depicts children engaged in sexually explicit act or conduct.[45] It also includes digital images depicting children engaged in sexually explicit conduct as an offence.[46] The new amendment has similarity with the Article 9 of the Convention. Bangladesh has not brought any amendment in the ICT Act to criminalize distinctly child pornography as an offence. Therefore, the fragile approach of the section 57 (1) of the ICT Act will not give adequate protection to the children against the criminal conduct related to child pornography. The Government in this regard should criminalized production, distribution, making available or possession of child pornography as an offence with imposing rigorous sentence.

Computer related offence

Section 66 of the ICT Act states that it is an offence to use or causes to be used a computer, computer network, computer resources or computer system for facilitating commission of a crime and perpetrator will be punished according to the punishment prescribed for the principal crime. It may possible to commit almost every nature offence ''from fraud to murder'' by using computer.[47] The plain reading of section 66 suggests that the computer or network can be used as tools for commission of every possible offence. As such every offences covered by the Penal Code can be committed by using computer or computer resources. In this event a perpetrator would be prosecuted and punished under the Penal

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[41] *The Protection of Children Act 1978, s. 1 and 6 ; The Criminal Justice Act 1988, s.160(1)*

[42] *The Obscene Publication Act 1959, s.2*

[43] *Andrew Murray, Information Technology Law (first publication, 2010, OUP) 369*

[44] *Dina I. Oddis, 'Combating child pornography on the internet: the Council of Europe Convention on Cybercrime' in in Indira Carr (ed), Computer Crime (Ashgate 2009), 313*

[45] *The Information Technology (amended) Act 2008 (IND), s.67B(the ITAA 2008)*

[46] *The ITAA 2008, s.67B(b)*

[47] *Ian Walden , Computer Crimes and Digital Investigations (1st edn, OUP, 2007) 96*

Code. Therefore, the significance of section 66 of the ICT Act will be diminished and in other word section 66 will be meaningless.

The ICT Act has not criminalized only the use of a computer or computer program as a tool for commission of any offence. In this regards article 6 of the Convention criminalizes production, selling, procurement for use, importing, distributing or making available of certain device including program, password, access code or similar data for commission of offence against the confidentiality, the integrity and availability of computer system or data.[48] A specific intention is required to commit such offences by using the device and this avoid the possibly of over criminalization of activities.[49] Therefore, in order to remove uncertain and possible danger of over criminalization, section 66 should be precise and more specific as to the inclusion of nature of offences and relevant devices or programs otherwise this provision will be ineffective in future.

In respect of computer related fraud, the Convention criminalizes the intentional causing of loss of a property by interfering with the functioning of a computer system, with fraudulent or dishonest intent of procuring of a without right economic benefit for one or another person.[50] The ICT Act has not criminalized any activities as offence that can be committed by interfering with the function of a computer for an unlawful benefit for someone. Therefore, computer related fraud will not be prosecuted under the ICT Act.

Under the Penal Code an offence of fraud can be committed if a person cheats another and then dishonestly induces him to deliver any property to him or any other person.[51] It appears from this provision that an offense of fraud under this provision can only be committed if concerns a human being. Therefore, if someone committed a fraud in respect of computer or computer system, the same will not come within the ambit of this section. In addition, section 378 of the Penal Code provides an offence of theft can be committed if any person dishonestly take any moveable property out of the possession of any person without his consent. This provision also concerns theft of movable property from one individual to another. Computer related fraud often concerns immovable property (e.g. fraudulently obtaining of password or information without right for the benefit of someone). Therefore, computer related fraud cannot be prosecuted under section 378 of the Penal Code.

It is apparent that the existing criminal justice system of Bangladesh has not addressed or identified the computer related fraud as an offence which is one of the fastest increasing

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48 *The Convention, Article 6 and the Explanatory report, [71-72]*

49 *The Explanatory report, [76]*

50 *The Convention, Article 8*

51 *The Penal Code, s 420*

cybercrime in the world. The Government must enact and insert a provision in the ICT Act to address the computer related fraud as cybercrime.

Conclusion

The ICT Act predominately deals with the issues related to digital signature which is commercial matters in nature and as such this legislation is not a classic criminal substantive legislation. Because of the international characteristic of cybercrimes, it would be worth to keep conformity with the leading international instrument in respect of defining crimes or enacting any legislation. The ICT Act has not included every offence which was addressed by the Convention. Although in many aspects the ICT Act has over criminalized many activities as criminal offence, however with the limited nature of offenses, the ICT Act will struggle to combat against the cybercrime.

One of the aim of the ICT Act to ensure ''security of information and communications technology''.[52] In order to achieve that objective it is important to identify criminal conducts in cyberspace or against the communications system. It is also important to avoid confrontation with the existing substantive law in defining a new crime or introducing sentence guideline for it, otherwise the same will give two different results.

At present cybercrime is a common problem for the world, it is also necessary to maintain uniformity with the substantive legislation of other countries in the world. No standard has been set out globally so that a country can evaluate its position in respect of its relevant legislation to combat against the eybercrime. However, as a leading instrument the Convention has a significant value worldwide. It may possible that the Convention will be followed by the most of the countries in the worlds in future.[53] In many aspects ICT Act has failed to meet with the standard of the Convention in respect of criminalizing conducts. The Government should review the existing position of the ICT Act in comparison with the global trends of cybercrime and should initiate a process to amend the ICT Act.

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52 *The ICT Act (at the beginning)*

53 *Downing (n8) 59*

Discretion in sentencing in Bangladesh: Aggravation and Mitigation

*Hussain Mohmmad Fazlul Bari**

Introduction

Though determination of guilt of the accused is fundamentally distinct from the issue of sentencing, in Bangladesh the judgment for both conviction and sentence is delivered simultaneously in a maiden sitting. Our criminal justice system neither allows any separate sentencing hearing nor does it invite any pre-sentencing report on the background of the accused when the trial court pronounces its verdict. The victims of crimes are also typically excluded from taking part any participatory role in the criminal proceedings. Our criminal laws provide for numerical sentencing structure without mentioning any stratification of offence level.

In absence of sentencing guidelines as well as sentencing hearing, the judges often award sentence mechanically in the exercise of their individual sense of unbridled discretion. Consequently, diversity of sentencing decisions arises for similar category of offences. In practice, a wide range of mitigating and aggravating factors stemming from the case laws essentially dominate the sentencing practice in Bangladesh. It may be mentioned here that Penal Code (XLV of 1860) laid the substratum upon which our sentencing is based. Though Probation of Offenders Ordinance 1960 (Ordinance XLV of 1960) was promulgated with a view to having therapeutic approach to the offenders convicted of minor offences, provisions for such suspended sentences remain awfully unexplored. Imposition of recurrent death penalty and long custodial sentence for serious crimes is a discernable hallmark of our sentencing practice which originated from the incoherent colonial codification of penal laws during early 19th century.

Under the above circumstances, an attempt has been made to explore the developments and pertinent issues on criminal sentencing in Bangladesh. In particular, current trends in sentencing discretion are assessed in the light of the precedents. The study finally wraps up with a brief concluding reflection.

Development of sentencing in Bangladesh

In Bangladesh sentencing practice is basically regulated in accordance with the provisions as contained in Penal Code 1860 and other special criminal laws enacted from time to time. It may be noted here that during 1790s to 1820s most norms of criminal laws of India were changed that were later modified, enlarged, systemized and enacted as Penal Code.[1] The

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* *Additional Chief Judicial Magistrate of Kishoreganj.*

[1] *Malik, Shahdeen, Perceiving crimes and criminals: Law making in the early 19th century Bengal, Bangladesh Journal of Law, Vol. 6, Nos. 1&2, Bangladesh Institute of Law and International Affairs (BILIA), Dhaka, June & December 2002, pp. 59-89, at p. 59.*

Code of Criminal Procedure 1898 (Act V of 1898) is the first legislative step to provide for probation scheme.[2] Probation of Offenders Ordinance 1960 was promulgated which dwell upon the issues relating to probation, admonition and conditional discharge of the convict. Subsequently, Children Act 1974 (Act XXXIX) speaks about therapeutic approach as to how a juvenile delinquent will be treated in a sentencing court. In 1980s a plethora of special laws provided for reluctant victim protection procedure as well as recurrent harsh punishments with a view to combating violence against women and children.[3] Though the Code of Criminal Procedure empowers the courts to order for compensation to be paid to the victims of crimes[4]; however, such discretionary powers of the sentencing judges have not been sparingly exercised. In 2010 Domestic Violence Act (Act LIV of 2010) was enacted which provided for the punishment in the form of community service order in case of repeated delinquency on the part of the offender. Recently enacted Children Act 2013 (Act XXIV of 2013) provides for the comprehensive re-formational approach for betterment of the youthful offenders who are in conflict with laws. From time to time, judicial pronouncements endeavour to develop sporadic mitigating and aggravating factors in awarding sentence. In absence of separate sentencing statute, the purpose and principles of criminal sentencing largely emanate from the case- laws.[5]

Repealed provisions

It may be specifically mentioned that in 1978 a provision for separate sentencing hearing was inserted in section 265K (2) for sessions trial which provided that:

'If the accused is convicted, the Court shall unless it proceeds in accordance with the provisions of section 562, hear the accused on question of sentence, and then pass sentence on him according to law.'[6]

Another similar provision was also introduced for trial in Magistrate courts.[7] However, both the sentencing hearing provisions were repealed in 1982.[8]

However, upon query, senior members of the Bar could not recall whether any separate sentencing hearing was held in criminal trials in Mymensingh and Kishoreganj during 1978-

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2 *Code of Criminal Procedure (V of 1898), Section 562.* Such provision was repealed by the *Probation of Offenders Ordinance (XLV of 1960), Section 16.*

3 *For instance, Dowry Prohibition Act (XXXV of 1980), Prevention of Repression of Women and Children Act (VIII of 2000), Acid Crime Control Act, (II of 2002), Prevention of Human Trafficking Act (III of 2012) are few of special laws enacted to combat violence against women.*

4 *Code of Criminal Procedure (V of 1898), Section 545.*

5 *Such precedents are typically referred to as 'guideline judgments'; such a decision on sentencing, being binding and confined to the particular case, is nothing but obiter dicta bearing rather persuasive effects for the future sentencers.*

6 *Such provision was inserted by Law Reforms Ordinance (Ordinance XLIX of 1978).*

7 *Ordinance XLIX of 1978, Section 250K(2) reads thus: 'Where in any case under this chapter, the Magistrate finds the accused guilty, but does not proceed in accordance with the provisions of section 349 or section 562, he shall after hearing the accused on the question of sentence, pass sentence upon him according to law.'*

8 *Ordinance XXIV of 1982.*

1982 when provision for sentencing hearing was in vogue.[9] In *State vs. Mokbul Hossain*[10] and *Nurul Huq vs. The State*[11] it has been held that the question of providing separate sentencing hearing opportunity to the accused, after conviction, under section 265K (2) of the Code of Criminal Procedure, does not arise in a case where a sentence of transportation for life is imposed on a conviction for committing murder, because the sentence of transportation for life is the minimum under the law which could be awarded.

International concern for sentencing

The United Nations congresses discussed the issues relating to sentencing on several occasions. In particular, at the United Nations congress in Cuba in 1990 there were resolutions in developing structures and procedures to ensure that:[12]

(a) *Sentencing principles, explicit or implied, encouraged to be formulated in order to avoid arbitrary disparities in sentences;*
(b) *Judges are encouraged to explain reasons for sentences;*
(c) *Sentencing practices are evaluated;*
(d) *Affirmations of the principle of restraint in the use of custody.*

Sentencing options in Bangladesh

A wide variety of sentencing options are available for the offenders in Bangladesh which may be summarised as follows:

(a) ***Death:*** Death is the most severe form of punishments as prescribed by our statutes. Any sentence of death passed by Sessions Judge or Additional Sessions Judge is subject to confirmation by the High Court Division.[13] Further, death sentence passed by Sessions Judge cannot be executed unless the same is confirmed by High Court Division.[14] For example, Sections 121, 132, 194, 302, 303, 307, 364A, 396 of the Penal Code provides for sentence of death. Though legality and reasonableness of sentence of death is questioned with advancement of modern penology, our apex court held that where law of the land provides for sentence of death in respect of certain offence and one who has been sentenced to death quite in accordance with law for commission of the offence providing sentence of death, the contention referred to the Article 31 of the constitution so far provision thereof relates to right to life is not well founded in law.[15] Punishment for murder is death or transportation for life which is at the discretion of

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[9] *Mr. Fazlul Kabir, Advocate and Mr. Abdul Latif, Advocate who were enrolled in 1973 & 1968 respectively conceded to me that they could not recall whether there was any practice of sentencing hearing in criminal courts in Mymensingh and Kishoreganj during 1978 to 1982.*

[10] *37 DLR [1985] 163.*

[11] *B.C.R [1982] 832.*

[12] See generally, Eighth United Congress on the Prevention of Crime and Treatment of Offenders, UNDOC. A/CONF.144/28 (1990); available at https://www.unodc.org/unodc/en/commissions/CCPCJ/Resolutions_Decisions/Resolutions_1990-1999.html#1990.

[13] *Id., Section 31(2).*

[14] *Id., Section 374.*

[15] *Shaikh Abdur Rahman and others vs. State 12 MLR (AD) 80; Per Md. Ruhul Amin, J, Para 2.*

the court in consideration of the facts and circumstances of the case.[16] The High Court Division held that previously, death sentence was the normal sentence for murder and the court was required to give reasons if the lesser sentence of life imprisonment was given. After the section 367(5), now reasons have to be given in either case- a death sentence is to be justified inasmuch in the same way as the case of lesser sentence of life term imprisonment.[17]

(b) ***Life imprisonment:*** A sentence of imprisonment for life is the imprisonment for the whole of the remaining life span of the convict. For calculating fraction of life imprisonment, life time of the convict is treated to be 30 (thirty) years[18] which is nothing but 'a notional standard' for computation purpose. In fact, imprisonment for life is legally interpreted as the entire life period till the convict breathes his last. Life imprisonment is always rigorous. It was decided by the apex court that normal sentence under section 302[19] is death, but under some extenuating circumstances it may be imprisonment for life, but such sentence can never be 30 (thirty) years taking the aid of section 57.[20] It may be further pointed out that now obsolete sentence of transportation for life shall be construed as a reference to imprisonment for life.[21]

(c) ***Imprisonment:*** It may be either simple or rigorous. It may be of any term as prescribed by law. Imprisonment till rising of the sun is not illegal, but it should only be imposed in exceptional cases.[22] In contempt of court proceedings, there developed a practice in the apex Court to compel the convict to be present in person during the proceedings which is treated as their nominal sentence of imprisonment.[23] It may be added that a sentencing court can order that the convict shall be kept in solitary confinement for certain portion of his sentence of imprisonment.[24]

(d) ***Fine:*** One popular sentencing option is fine, the levying of a monetary sanction. There is no curtailment of personal liberty. It is simple, uncomplicated, adaptable, and popular, because it involves no expense to the public, no burden the prison system, no social dislocation and less stigma than other criminal sanctions. It may also generate revenue. It may be levied as solitary punishment or in conjunction with other available sanctions. Fine is a charge upon the assets of the convict as public dues and it continues even after his death and recoverable from his successor in interest in accordance with provisions as laid in Code of Criminal Procedure.[25] Unpaid fine may be levied within 6

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16 *Nausher Ali vs. State 39 DLR (AD)[1987] 194.*
17 *Abed Ali vs. State 42 DLR (AD)[1990] 171.*
18 *Penal Code (XLV of 1860), Section 57.*
19 *Murder is punishable under Penal Code (XLV of 1860), Section 302.*
20 *Farid Ali vs. State 4 BLC 27, Bhola vs. State 55 DLR [2003] 36.*
21 *Penal Code (XLV of 1860), Section 53A; such provision was inserted by Ordinance no. XLI of 1985.*
22 *5 BCR (AD) 265.*
23 *For example see, State vs. Court Contemner 61 DLR [2009] 104; Per A. B. M. Khairul Haque J.*
24 *Penal Code (XLV of 1860), Section 73.*
25 *Code of Criminal Procedure (V of 1898), Section 386. Also see, Ali Hossain vs. State 52 DLR [1998] 282.*

(six) years commencing from the passing of sentence.[26] Death of the offender does not discharge the liability of fine. Direction to suffer imprisonment in default of fine, is not a sentence *per se* for the offence.[27] If no limit of fine is prescribed, it should not be excessive.[28]

(e) ***Forfeiture:*** It is a form of punishment as prescribed by law. It is altogether different from confiscation which involves nothing but a mode of disposal of seized property. Offence of committing depredation on territories of power at peace with Bangladesh, offence of receiving property taken by war or depredation and offence by public servants for unlawfully buying or bidding for property involve punishment of forfeiture.[29]

(f) ***Conditional discharge after admonition:*** Having regard to age, character, antecedents and nature of crimes and other mitigating circumstances, a sentencing court can make an order discharging the convict after admonition if the first time offender is found guilty of offence punishable with not more than imprisonment for two years. The court may direct him to furnish a bond to the effect that he will not commit the offence again and he maintains a good behaviour during such period not exceeding one year from date of the order.[30] In practice, a recipient of conditional discharge is normally subject to a probation order.

(g) ***Probation Order:*** The prime intention of the legislature in passing probation law is to give the offender a scope of reformation which is not possible by sending the offender to prison.[31] By placing him on probation the court rescues him from mixing up with spurious connectivity of hardened criminals. Probation system alternately reduces the inmates of prison. According to Probation of Offenders Ordinance, 1960, a court in appropriate cases, can make a probation order i.e. an order requiring him to be under the supervision of a probation officer for such period, not less than one year or more than three years. Such probation order at time may require specific conditions. The convict must furnish a bond, with or without sureties, to commit no offence and to keep the peace and be of good behaviour during such period and to appear and receive sentence if called upon to do so during that period and satisfies the court that he has a fixed place of abode or regular occupation within the local limits of its jurisdiction.[32]

(h) ***Community service order:*** It involves unpaid work at the offender's spare time, under the general supervision of the probation office. According to Domestic Violence Act (LIV of 2010), failing to comply with the protection order or any other order of the court in this proceeding is an offence punishable with imprisonment or fine or both. In

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[26] *Penal Code (XLV of 1860), Section 70.*
[27] *21 DLR 46 (WP).*
[28] *Penal Code (XLV of 1860), Section 63.*
[29] *Id., Sections 126, 127, 169.*
[30] *Probation of Offender Ordinance (XLV of 1960), Section 4.*
[31] *See generally, Qadri, S. M. A., Criminology: Problems and Perspective, Lucknow, 2005, pp. 203-233.*
[32] *Probation of Offenders Ordinance (XLV of 1960), Section 5.*

case of repeated delinquency higher punishment is awarded. However, the Court may direct the delinquent to engage in community service for particular period in lieu of such sentence.[33] It may be borne in mind that not so many cases are filed under provisions of Domestic Violence Act and the issues and relief offered therein are of quasi- civil nature.[34] Our mainstream penal laws do not prescribe such kind of sentence.

(i) ***Compensation order:*** According to Code of Criminal Procedure, when a monetary fine is imposed as the sole or an additional punishment, the court may, at its discretion, direct all or part be paid to the victim.[35] Regrettably this power is sparingly used, and even if it is, compensation is minimal. In many cases, the courts have paid compensation depending upon the number of dependents of the deceased and capacity of the accused to pay. In other special laws compensation is also available as a mode of sentence.[36]

(j) ***Security for keeping peace on conviction:*** The sentencing judge may order a convict of certain offences to execute a bond with or without sureties for keeping the peace during a period not exceeding 3 (three) years.[37]

Though Qadri argued that legislature enjoy unlimited power while declaring punishments of the offences[38], our constitution clearly prohibits cruel and degrading punishment.[39] Therefore, whipping and transportation cannot be said to be legal sentence as such kind of punishment obviously falls within the ambit of cruel and degrading punishment.

Aggravation and mitigation in sentencing

It is axiomatic that in the criminal justice delivery system, sentencing is the cutting- edge of the judicial process. In sentencing an accused, aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.[40] The High Court Division also observed that: *Sentencing discretion on the part of justice is the most difficult part to perform. There is no system or procedure in our criminal justice administration, nor any rule to exercise such discretion. It is also not possible to lay down any cut and dried formula in imposing proper sentence. But the object of sentencing should be to see that crime does not go unpunished and the society have the satisfaction that justice has been done.*[41]

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33 *Domestic Violence Act (LIV of 2010), Sections 30 & 31.*

34 *Out of 6250 cases pending in courts at Kishoreganj Chief Judicial Magistracy, only 2 cases are filed under Domestic Violence Act (LIV of 2010). Nor is there any instance of resorting to community service order in Kishoreganj.*

35 *Code of Criminal Procedure (V of 1898), Section 545.*

36 *For instance, Prevention of Women and Children Repression Act (VIII of 2000), Section 15.*

37 *Code of Criminal Procedure (V of 1898), Section 106.*

38 *Qadri, op. cit., p. 353.*

39 *Constitution, Article 35(5).*

40 *Akbar Ali Lalu alias Roni et al vs. State, Death Reference no. 2 of 2013; Per Moyeenul Islam Chowdhury J (unreported).*

41 *State vs. Mir Hossain et al, 56 DLR [2004] 124.*

Imposition of sentenee obviously requires some sort of justification.[42] Sentencing decisions are influenced by a plethora of factors, many of them are personal to the judges who inflict the sentence. Ashworth identified four group of factors which influence the sentencing judge's decision thus:[43]

- *(i) Views on the facts of the case.*
- *(ii) Views on the principles of sentencing:*
  - *(a) views on the gravity on the offences;*
  - *(b) views on the aims, effectiveness and relative severity of the available types of sentence;*
  - *(c) views on the general principles of sentencing;*
  - *(d) views on the relative weight of aggravating and mitigating factors.*
- *(iii) Views on the crime and punishment:*
  - *(a) views on the aims of sentencing;*
  - *(b) views on the causes of crime;*
  - *(c) views on the functions of courts in passing sentence.*
- *(iv) Demographic features of the sentences: age; social class; occupation; urban or rural background; race; gender; religion; political allegiance.*

It was decided by the apex court that while imposing a sentence it is the duty of the courts to see that sentence is not excessive, but at the same time it should not be so lenient as to compel the injured person to resort to violence, in order to obtain the satisfaction which he expected from the sentence awarded by the court.[44] Though Justice Imman Ali held that our penal policy is essentially reformative[45], in absence of statutory primary rationale actual practice of the sentencing shows some amalgamation of deterrent, incapacitation, just deserts, reformation when the convict is sentenced. In handing down death sentence to one accused who directly triggered blows to a Saudi Arabian diplomat namely, Khalaf, Justice Moyeenul Islam Chowdhury while relying on an Indian decision[46] reiterated that *the judges who bear Sword of Justice should not hesitate to use that Sword with utmost severity, to the full and to the end, if the gravity of the offence so demands.*[47] However, other accused who did not inflict any injuries to victim Khalaf, though involved in the commission of dacoity, were sentenced to imprisonment for life which is termed as deterrent punishment commensurate with their

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42 *For instance, Criminal Rules & Orders (Practice and Procedure of Subordinate Courts), 2009, Rule 179 reads thus: 'The attention of the all Criminal Courts is invited to the necessity of strictly observing the provisions of section (1) of section 367 of the Code, which provide that the judgment must contain the point or points for determination, the decision thereon, and the reasons for the decision.'*

43 *For detail see generally, Ashworth, op. cit. pp. 30-41.*

44 *8 DLR (WP) [1956] 128 (DB).*

45 *Abdul Khalek vs Most. Hazera Khatun 58 DLR [2006] 322.*

46 *Modan Gopal Kakkad vs. Naval Dubey and another 3 SCC (1992) 204 (India).*

47 *Akbar Ali Lalu alias Roni et al vs. State, Death Reference no. 2 of 2013 (unreported).*

culpability and roles in the commission of offence.[48] On another occasion our apex court unequivocally declared that it would be mockery of justice to permit the accused to escape the extreme penalty of law when faced with consistent evidence and cruel act perpetrated by the offenders. To give lesser punishment to the condemned prisoners who stand convicted in a shocking and revolting crime would render the justice system of the country suspect. Sympathy to impose inadequate sentence would do more harm to justice system to undermine public confidence in the efficacy of law.[49]

On a different note, a convict was handed down death penalty who committed the offence taking undue advantage and acting in a cruel manner.[50] Further, Division bench ordered that the activities of the offenders were undoubted premeditated, cold blooded and deliberate, backed by persistent ferocity and as such their elimination from the society is the only solution to preserve and protect the existing norms and thus only proper sentence to be passed against them is one of death.[51] Similarly, in view of the brutality, cold bloodedness and gruesomeness of the murder of the victim, trial court was justified in awarding death sentence to the accused.[52]

It may be now referred to *State vs. Abdur Rahman and others*[53] the Division Bench maintained that the condemned convicts knowingly and deliberately made the criminal conspiracy and in furtherance of common intention generated form the conspiracy, the caused bomb blast leading to the death of the two judges; therefore the offenders deserve no leniency and the sentence of death is the appropriate penalty for them. In *State vs. Moslem*[54] a 7 (seven) years old deaf and dumb girl was raped and then killed by the accused and the court observed that death sentence was the proper sentence as means of social necessity which may deter other potential offenders. The presiding judge also made his anxious observation to the effect that: *Incidents of certain crimes like rape and on many other occasions followed by murder in extremely brutal, diabolical, revolting and dastardly manner, acid burning and dowry death is rapidly growing and is menacing proportion. Social stability and order are required to be regulated by proceeding against the offenders and by imposing proper punishment mandated by law. Society's cry for justice becomes louder and the court must hear the loud cry for justice by society, more particularly, in case of heinous crimes and court should impose proper punishment befitting the crime so that court reflects public abhorrence of crime.*

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48 *Id.*

49 *State vs. Rokeya Begum alias Rokaya Begum and another 13 BLT [2005] 377.*

50 *Abdul Majid vs. Crown 7 DLR [1955] (FC) 11.*

51 *Shaikh Abdur Rahman and others vs. State 12 MLR (AD)[2007] 80; Per Amirul Kabir Chowdhury, J, Para 66.*

52 *State vs. Fazlur Rahman 61 DLR [2009] 169; Per Moyeenul Islam Chowdhury J.*

53 *58 DLR [2006] 615; Per Md. Ali Asgar Khan J.*

54 *55 DLR [2003] 116; Per A. K. Badrul Huq J.*

The High Court Division further opined that sentence is a complex matter and the manner and surrounding circumstances including the motive of crime should be considered before awarding the extreme penalty of the death. In a case the murder was committed in a state of somewhat mental imbalance and frustration arising out of divorce effected by the wife of the accused. The accused was obsessed with the pangs of separation, the prospect of losing his wife for good, that sense of separation haunted him and drove him to take revenge against those who stood in the way. This intoxicating state of affairs robbed him of his rational thinking, forced him to behave in an unnatural manner and his sentence of death penalty was thus reduced to imprisonment for life.[55]

The apex court also unequivocally directed that a judicial officer must come to a proper finding in accordance with law and thereafter impose a sentence which is commensurate with the gravity of the offence with which the accused stands charged.[56]

What are the mitigating circumstances in the exercise of court's discretion is elaborately pointed out in *Jagomohan Singh vs. State of Uttar Pradesh*[57] thus:

(a) the offence was committed under the influence of extreme mental or emotional disturbance;
(b) the age of the accused- if the accused is young or old, he shall not be sentenced to death;
(c) the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society;
(d) in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence;
(e) the accused acted under duress or domination of another person;
(f) the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

In *Major Bazlul Huda vs. State*[58] Justice Surendra Kumar Sinha pointed out the following circumstances in mitigation of punishment:

i) absence of bad intention;
ii) provocation;
iii) self preservation;
iv) preservation of some near friends;
v) transgression of the limit of self defence;
vi) submission to the menaces;
vii) submission to authority;
viii) drunkenness;
ix) childhood.

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[55] *State vs. Abul Kalam Azad 48 DLR [1996] 107; Per Qazi Shafiuddin J.*
[56] *Mostaq Ahmed vs. State 64 DLR [2012] 301.*
[57] *AIR 1973 SC 947 (India).*
[58] *62 DLR [2010] (AD) 1; Per S. K. Sinha J.*

It is also pertinent to refer a case where a 24 (twenty four) years old mother having a child of 4 (four) years was sentenced to death by Court of Sessions. The High Court Division observed that her age, motherhood, her little child, her expression of repentance in the confessional statement, her suffering and the pangs of death for 3 (three) years surely fall within the ambit of extenuating circumstances and accordingly, her death sentenee was modified to a sentence for life imprisonment.[59] Another instance of mitigation has been found where the prisoners were under peril of death sentence for almost three years suffering agony and torments thereby partially purged their guilty. Consequently, sentence of death was commuted to one of imprisonment for life.[60] Similarly, an offender was languishing in death cell for more than 3 years and he has been passing through the agony of death each moment. Accordingly his sentence of death, though justified in view of the brutality of the offence committed, was commuted to imprisonment for life.[61] However, on another occasion the Court held that delay by itself in the execution of sentence of death is by no means an extenuating circumstance for commuting the sentence of death to imprisonment for life. There must be other circumstances of a compelling nature together with delay will merit such commutation.[62]

On another fateful incident, an offence of murder followed a brief tenure of a rancorous married life between the offender and the deceased. The apex court observed that circumstances would have been taken notice of while inflicting proper punishment prescribed under the law.[63] Similarly, Appellate Division[64] also concurred with the findings of High Court Division that the accused was not a hardened criminal. The death of the deceased was caused by him in sequel to bitter matrimonial relationship. The accused has three minor children and an invalid first wife. Thus death sentence was commuted to imprisonment for life.[65] Likewise, the convict was a freedom fighter who was suffering from old age complications and ends of justice would be met if his previous under trial custody was converted to sentence.[66] Furthermore, lack of premeditation, sudden quarrel and heat of passion were considered as extenuating circumstances when sentence of death was reduced to imprisonment for life for the accused who was found guilty of committing man slaughter.[67]

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[59] *Shahjahan Manik vs. State 42 DLR [1990] 465; Per Amin- ur- Rahman Khan J.*

[60] *Abul Kashem vs. State 42 DLR [1990] 387; Per Kazi Ebadul Hoque J.*

[61] *State vs. Ershad Ali Sikder and others 55 DLR [2003] 672; Per Md. Joynul Abedin J. Also see State vs. Zakaria Kabiraj 64 DLR [2012] 523.*

[62] *Abul Khair vs. State 44 DLR [1992] (AD) 225.*

[63] *Dipok Kumar vs. State 40 DLR [1988] (AD) 139.*

[64] *Supreme Court of Bangladesh is divided into two divisions- namely, High Court Division & Appellate Division; See, Part VI of the Constitution.*

[65] *State vs. Azam Reza 62 DLR [2010] (AD) 406; Per M. A. Matin J.*

[66] *A. K. M. Mosharraf Hossain vs. State 65 DLR [2013] 564; Per Abu Bakar Siddique J.*

[67] *State vs. Abdul Aziz Mina 48 DLR [1996] 382; Per Quazi Shafiuddin J.*

In *Machchi Singh vs. State of Panjab*[68] Supreme Court of India classified the cases in which death penalty may be imposed as follows: When the victim of murder is (a) an innocent child who could not have or has not proved even an excuse, much less than a provocation, for murder, (b) the helpless woman or a person rendered helpless by old age or infirmity, (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust, (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

Again, let me delve into sentencing decision in *Bangabandhu Sheikh Mujibur Rahman murder case.*[69] In this case the Appellate Division observed that 11 (eleven) innocent persons were brutally and diabolically murdered. The then President of Bangladesh became a target of vicious intrigue and was murdered by a handful of disgruntled army officers, some of whom were dismissed. With him 10 (ten) other persons including 3 (three) ladies and 1(one) boy were also murdered. The manner in which they were so brutally and mercilessly murdered ripples any consideration of reduction of sentence. As such, none of the accused deserves any leniency in the matter of sentence.[70]

Concluding reflection

There is no gainsaying that a sentencing must be proportionate to the gravity of offence and the degree of the responsibility of the offender. There is also need for some sort of parity in the sentencing of like offenders for the like offences. It may be logically argued that provision for mandatory sentencing hearing is *sine qua non* for proper dispensation of justice and after sentencing hearing the award of punishment would be more meaningful exercise, reflecting upon and balancing the needs of the society, the accused and the victim.[71]

An exhaustive sentencing statute encompassing modern trends and development of sentencing is essential for a balanced society. The proposed statute should aim at enhancing the ability of the criminal justice system to combat crime through an effective and fair sentencing system. Accordingly, an autonomous sentencing commission should be in order. The commission will issue sentencing guidelines to be followed by the sentencing judges which will ultimately ensure consistent application of judicial discretion.[72] It may be mentioned that huge mass of sentencing practice as reflected in the precedents of the Apex

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68 *AIR 1983 SC 957 (India).*

69 *Major Bajlul Huda vs. State 62 DLR [2010] (AD) 1.*

70 Sentencing reasons given by A. B. M. Khairul Haque J., in Bangabadhu Murder Case. See, *62 DLR [2010] (AD) 1.*

71 Ali, Md. Imman J., *op. cit.* p. 23.

72 *In his reply address to felicitation by Supreme Court Bar, Mr. S. K. Sinha, Honb'le Chief Justice of Bangladesh requested the concerned authority for taking immediate steps to formulate the Sentencing Rules containing guidelines in awarding sentences by Criminal Courts [The Daily Star, 21 January 2015].*

Court has developed in a rather inchoate manner. Nevertheless, it is possible to condense such sentencing factors in a well-fashioned sentencing guidelines. Obviously, criminal sentencing is a subjective practice which can never be arithmetically determined. However, sentencing guidelines will surely furnish the judges the ability to impose a 'just sentence' on the offender.

Further, the detection of crimes through a professional investigating agency by resorting to modern technology is of paramount importance to lay the foundation of the criminal cases. Laws and practice also require to be initiated so that witnesses feel comfortable to led testimony against the offender. Alternative modes of non-custodial sentences like community engagements, curfew order, forfeiture, compensation, economic sanction should be high in the agenda of criminal law reforms. Furthermore, introducing plea bargaining and hearing the victims will also ameliorate the sentencing practice. Most importantly, national dialogue should be initiated for creation of permanent prosecution service. Moreover, the sentencing - stakeholders including presiding judges, lawyers, prosecutors, investigators, probation officers and prison- officials should be well- conversant with the scope, philosophy and development of sentencing laws. It should be borne in mind that an accused is constitutionally endowed with the right to fair trial which can in no way be fettered or defeated owing to legal technicalities.[73]

[73] *Constitution, Article 35. Also see generally, Bari, H. M. F., Media trial in Bangladesh: Free press versus fair trial, Media Asia, Asian Median Information and Communication (AMIC) & Nanyang Technological University, Volume 41, Number 2, 2014, Singapore, pp.124-137.*

An Appraisal of the Provisions of Service of Summons in the Light of the Code of Civil Procedure (Amendment) Act, 2012

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Introduction

Service of summons is an obligatory stage of civil litigation. When a suit is instituted in the Court, summons is issued by the Court to the defendant to appear and answer the claim of the plaintiff on the day to be therein specified. Without receiving summons, there is no scope for the defendant to know formally as to the suit instituted against him/her. Prior to commencement of this amendment Act, there were three moods of service of summons in the Code of Civil Procedure, 1908; such as- a) service by the proper officer (Process Server) of the Court or his subordinate[1], b) by registered post with acknowledgement due[2] and c) by affixing a copy of summons in a conspicuous part of the Court-house and also of the house of the defendant, when summons cannot be served in the ordinary way[3]. But due to weaknesses and loopholes of those provisions, in many instances, there were scopes for the plaintiff to obtain exparte decree without serving summons properly upon the defendant following unfair means with the assistance of the Court's staff. This is one of the major causes to create complication in the judicial proceeding as well as backlog in the Courts. Consequently the litigants suffer much in getting justice within a reasonable period of time due to irregularities in case of service of summons. At this backdrop, substantial changes have been made in the Code of Civil Procedure (Amendment) Act, 2012[4] (hereinafter briefly mentioned as 'Amendment Act') as regards service of summons. In this paper, attempt has been taken to evaluate the provisions regarding service of summons as inserted in the Code of Civil Procedure (Amendment) Act, 2012. At end of this paper, some recommends have been made as to how the amended provisions can be made more effective in practice.

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1 *Rule 9 (1) of Order V of the Code of Civil Procedure, 1908 which has been replaced by new Rule 9 (1) by the Code of Civil Procedure (Amendment) Act, 2012.*
2 *Rule 19B of Order V of the Code of Civil Procedure, 1908.*
3 *Ibid, Rule 20 (1).*
4 *Act No. 36 of 2012.*

Summons and it's objectives

The main objective of service of summons is to inform the defendant about the suit instituted in the Court against him/her. Other basic objectives of summons as laid down in the Code of Civil Procedure, 1908[5] are as follows-

1. summons is issued to the defendant to appear in the Court in person or by a pleader to answer all material questions relating to the suit.[6]
2. to inform the defendant of the day fixed by the Court to be appeared before it.[7]
3. to order the defendant to produce all documents in his possession which he intends to rely in support of his case.[8]
4. to order the defendant to produce all witnesses upon whose evidence the defendant intends to rely in support of his case.[9]
5. In fine, summons is issued to ascertain whether the suit will be contested or dispose of exparte.[10]

Importance of service of summons

The defendant, for the first time, after receiving summons of the Court formally comes to know as to the suit instituted against him/her. Without receiving summons, there remains no scope for the defendant to know as to the legal proceedings of the Court commenced against him/her. So proper service of summons to the defendant is a vital part of a civil litigation.

In case of non-service or improper service of summons upon the defendant, the Court directs the plaintiff to take step again for issuing summons upon the defendant. But, in many instances, the plaintiff follows unfair ways with the assistance of the concerned staff of the Court to show the summons has been duly served upon the defendant without serving summons properly with a view to obtain an exparte order/decree. This sort of undue exparte order/decree seriously prejudices the interest of the defendant and, at the same time, causes complications in the judicial proceedings.

When the defendant comes to know about such exparte order/decree of the Court, the defendant takes legal initiatives to get a chance to contest the suit setting aside the disputed exparte order/decree as well as to restore the original suit. In this connection, the defendant may seek remedy under one of the three options- a) institute miscellaneous case under Rule 13 of Order IX[11] or b) institute a fresh suit against the disputed exparte decree in a declaratory

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5 *Act No. V of 1908.*
6 *Rule 1 (2) of Order V of the Code of Civil Procedure, 1908.*
7 *Ibid, Rule 6.*
8 *Ibid, Rule 7.*
9 *Ibid, Rule 8.*
10 *Ibid, Rule 5.*
11 *Rule 13 of Order IX of the Code of Civil Procedure, 1908.*

form[12] or c) institute miscellaneous case for directly setting aside disputed exparte decree within 30 days of passing the said decree[13].

Among these three options, the first two options require recording evidence by the Court and thereafter the Court passes it's formal order after an elaborate discussion on the point whether the summons were duly served upon the defendants or not. In that case, if the Court finds that summons was not served duly upon the defendant, the Court vacates such exparte decree and, at the same time, passes an order for restoration of the original suit.

After setting aside the exparte decree, the original suit starts from it's first stage. But when the opposite party/plaintiff against this order goes to the appellate Court, the original suit takes more long time to be started subject to disposal of the appeal. In this way, the Court spends it's valuable time to resolve the dispute whether summons have been duly served or not. This sort of event actually creates branches of the original suit. At the long interval for disposal of those branches of original suit; the original suit remains untouched by the Trial Court. Actually improper service of summons creates procrastination in disposing of the civil litigation as well as backlog in the Court. Therefore proper service of summons bears a great significance for smooth running not only of a single suit and but also of the administration of civil justice system as a whole.

Salient features of the Amendment Act, 2012

The Code of Civil Procedure (Amendment) Act, 2012 has made substantial changes regarding the provisions of service of summons. In some instances, it has inserted some new provisions in the Code of Civil Procedure, 1908 which are mentioned below in short for convenience of discussion-

- **Summons shall be issued by the officer of the Court**
  This Amendment Act has made a provision that at the time of institution of suit, summons shall be issued by the officer of the Court appointed in this behalf to the defendant.[14]
- **Summons shall be issued within five working days**
  A new provision has been inserted that after institution of a suit, summons shall be issued to the defendant by the concerned officer of the Court within five working days from the date of filing of the suit.[15]

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12 *Section 42 of the Specific Relief Act, 1877.*

13 *Rule 13A of Order IX of the Code of Civil Procedure, 1908.*

14 *Sub-rule 1 of Rule 1 of Order V of the Code of Civil Procedure, 1908. Sub-rule 1 has been substituted by the Code of Civil Procedure (Amendment) Act, 2012.*

15 *Ibid.*

- **Concerned officer shall be liable for misconduct:**
  If the concerned officer of the Court fails to issue the summons within the said period of time, he shall be liable for misconduct.[16]

- **Summons shall be delivered through courier service:**
  Where the defendant or his agent resides within the jurisdiction of the Court who is empowered to accept the summons, the summons shall, unless the Court otherwise directs, be delivered by the proper officer of the Court or one of his subordinates or through courier service.[17]

  In this regard, the District Judge shall prepare a list of courier services (to be updated time to time) and shall inform all the Civil Courts under his administrative jurisdiction about the list.[18]

- **Summons to be served through fax or email:**
  In addition to the above provisions of the service of summons, the Court may on the application of the plaintiff also directs the summons to be served by means of transmission of documents through fax massage or electronic mail service by the plaintiff at his own cost.[19]

- **Summons to be served within 30 days:**
  When a summon is sent to the proper office of the Court or the courier service, he or it shall serve the summon within thirty days from the date of receipt of summon and shall inform the Court in this regard.[20]

- **Misconduct of concerned officer and exclusion of courier service:**
  If the concerned officer or the courier service fails to serve the summons within the said period of time, that officer shall be liable for misconduct and in the case of courier service, the District Judge shall exclude it from the list prepared by him.[21]

- **Permission of plaintiff to effect the service of summons:**
  In addition to the above provisions of the service of summons, the Court may on the application of the plaintiff permit him/her to effect such summons of the defendant and in such a case the Court shall deliver the summons to such plaintiff for service.[22]

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16 *Sub-rule 1 of Rule 1 of Order V of the Code of Civil Procedure, 1908. Sub-rule 1 has been substituted by the Code of Civil Procedure (Amendment) Act, 2012.*

17 *Rule 9 (1) of Order V of the Code of Civil Procedure, 1908. Rule 9 (1) has been substituted by the Code of Civil Procedure (Amendment) Act, 2012.*

18 *Ibid, Rule 9 (4). Rule 9 (4) has been inserted by the Code of Civil Procedure (Amendment) Act, 2012.*

19 *Ibid, Rule 9 (3). Rule 9 (3) has been inserted by the Code of Civil Procedure (Amendment) Act, 2012.*

20 *Ibid, Rule 9 (5). Rule 9 (5) has been inserted by the Code of Civil Procedure (Amendment) Act, 2012.*

21 *Rule 9 (5) of Order V of the Code of Civil Procedure, 1908. Rule 9 (5) has been inserted by the Code of Civil Procedure (Amendment) Act, 2012.*

22 *Ibid, Rule 9A (1). Rule 9A (1) has been inserted by the Code of Civil Procedure (Amendment) Act,2012.*

- **Delivery of summons by the plaintiff:**
  The service of such summons shall be effected by or on behalf of such plaintiff by delivering or tendering to the defendant personally a copy thereof. The person effecting the service shall be considered as a serving officer and the plaintiff shall submit a report to the Court accompanied by an affidavit.[23]

- **Re-issuing of summons by the Court:**
  If such summons, when tendered by the plaintiff, is refused or if the person served refuses to sign an acknowledgement of service or for any reason such summons cannot be served personally, the Court on the application of the plaintiff, re-issue such summons to be served by the Court in the same manner as a summons to a defendant.[24]

- **Summons to be served on adult member:**
  The provision regarding service of summons on *'adult male member'* of the defendant's family has been amended inserting the provision that summons may be served on any *'adult member'* of the defendant's family where the defendant is absent at his residence at the time of service of summons and no agent of him is found on his behalf to accept the summons.[25]

- **Summons to be served through advertisement in newspaper:**
  The provision of substituted service of summons has been amended adding a new provision that summons may be served through publishing an advertisement in a daily newspaper, if the Court thinks fit.
  Where there is a reason for the Court to believe that summons cannot be served on the defendant in the ordinary way for the reasons whatsoever, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous part of the Court-house and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain.
  In addition to the above provision, after commencement of this Amendment Act, now the Court may pass an order to serve the summons by an advertisement in a daily newspaper which has circulation in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.[26]

- **Summons to be served through courier service within the jurisdiction of another Court, in prison and out side of Bangladesh:**
  By this Amendment Act, courier service has also been recognized as a mood of service of summons in the following cases-

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[23] *Ibid, Rule 9A (2) (3). Rule 9A (2) (3) has been inserted by the Code of Civil Procedure (Amendment) Act, 2012.*
[24] *Ibid, Rule 9A (4). Rule 9A (4) has been inserted by the Code of Civil Procedure (Amendment) Act, 2012.*
[25] *Rule 15 of Order V of the Code of Civil Procedure, 1908. Rule 15 has been amended by the Code of Civil Procedure (Amendment) Act, 2012.*
[26] *Sub-rule 1A under Rule 20 of Order V of the Code of Civil Procedure, 1908. Sub-rule 1A under Rule 20 has been inserted by the Code of Civil Procedure (Amendment) Act, 2012.*

a) Where the defendant resides within the jurisdiction of another Court, the summons may be sent by the issuing Court by one of it's officers or by post or through courier service.[27]

b) Where the defendant is confined in a prison, the summons shall be sent or delivered by post or through courier service or otherwise to the officer in charge of the prison for service.[28]

c) Where the defendant resides out of Bangladesh and has no agent on his behalf in Bangladesh empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post or through courier service, if there is postal communication between such place and the place where the Court is situated.[29]

- **Summons to be served out of Bangladesh through fax or e-mail:**

  In addition to the above provisions of service of summons out of Bangladesh, on the application of the plaintiff, the Court may also direct the summons to be served by means of transmission of documents through fax massage or electronic mail service by the plaintiff at his own cost.[30]

Positive aspects of the amended provisions:

Upon a through perusal of the Amendment Act, some positive aspects are found in the amended provisions in case of service of summons and those are as follows-

1. Prior to commencement of this Amendment Act, there was no time-limit for issuing summons by the Court after institution of suit. It is a positive sign that after this Amendment Act, the Court is bound to issue summons within five working days from the date of filing the suit.
2. This Amendment Act has made a penal provision for summons-issuing officer due to non-compliance of issuing summons in time. It provides that if the concerned officer of the Court fails to issue summons within five working days, he shall be liable for misconduct. Actually this provision makes a warning for the issuing officer and also makes constrained him to issue summons within the prescribed period of time which will undoubtedly initiate a smooth running of a suit.
3. For the first time, this Amendment Act has introduced modern technology of communication in the field of service of summons. Courier service, fax and e-mail have been included as moods of service of summons which will ensure speedy service of summons to the defendant and thereby speedy trial must be started.

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[27] *Rule 21 of Order V of the Code of Civil Procedure, 1908. Rule 21 has been amended by the Code of Civil Procedure (Amendment) Act, 2012.*

[28] *Ibid, Rule 24. Rule 24 has been amended by the Code of Civil Procedure (Amendment) Act, 2012.*

[29] *Ibid, Rule 25 (1). Rule 25 (1) has been amended by the Code of Civil Procedure (Amendment) Act, 2012.*

[30] *Ibid, Rule 25 (2). Rule 25 (2) has been inserted by the Code of Civil Procedure (Amendment) Act, 2012.*

4. Before this Amendment Act, there was no time-limit for the Court's staff for service of summons. It is a positive side that this Amendment Act has prescribed thirty days from the date of receipt of summons for the concerned officer of the Court to serve summons to the defendant while the defendant or his agent resides within the jurisdiction of the Court.

5. Moreover, this Amendment Act has provided penal provision for the concerned officer of the Court and also for the courier service for not serving summons to the defendant within the prescribed period of time. For non-compliance of this provision, the concerned officer of the Court shall be liable for misconduct and the courier service shall be excluded from the list prepared by the Court. This provision will undoubtedly ensure service of summons to the defendant within the prescribed period of time and thereby the plaintiff will get rid of waiting uncertain period of time for returning summons after service.

6. It is a good feature of this Amendment Act that it has made the plaintiff entitled to serve summons by himself to the defendant. If the plaintiff is intended to serve summons, the plaintiff himself with the permission of the Court can serve summons to the defendant. Actually the plaintiff, with the strength of this provision, can take the duty of service of summons at his own hand.

7. Prior to this Amendment Act, no adult female member was entitled to receive summons on behalf of the defendant at his absence in residence at the time of service of summons. In that case, only the adult male member of the defendant's family was entitled to receive summons. Consequently service of summons was not possible in many instances for absence of adult male member of the defendant's family. This Amendment Act has eliminated this sort of gender discrimination in case of service of summons. After commencement of this Amendment Act, now any adult member of the defendant's family, irrespective of gender, is entitled to receive summons on his behalf. This provision will, no doubt, make easy the procedure of service of summons in civil litigation.

8. In case of substituted service, publication of advertisement in the daily newspaper has been recognized as a mood of service of summons by this Amendment Act. Now in case of substituted service, in addition to affixing a copy of summons in some conspicuous part of the Court-house and also upon some conspicuous part of the house of the defendant (if any), summons may be served through publishing advertisement in the daily newspaper which has circulation in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain. Actually newspaper is an important printing media to reach information at the door of the people everyday. Therefore, this is indeed an effective way to serve summons through newspaper as a last effort of the Court.

Challenges

Though this Amendment Act has introduced almost all moods of communications regarding service of summons by incorporating necessary provisions in the Code of Civil Procedure, it will face some challenges in case of it's proper application, such as-

Firstly, most of the litigants of our country are uneducated and they reside in the villages. Modern technological instruments like fax and e-mail are not so much familiar to them and also those instruments are not within their reach. Moreover, it is not so easy for the litigants to gain individually a fax machine or computer along with internet connection since these instruments involves financial capacity of the parties to the litigation. However, to avail this opportunity, people of our country at first must be educated and well equipped with the knowledge of technology. The country must be digitalized to get the benefit of service of summons through fax and e-mail. So, this is a challenge for this Amendment Act to serve summons through fax and e-mail within near future in a large scale.

Secondly, it is a legal requirement that a report must be submitted in the Court as to service of summons after serving it to the defendant. But this Amendment Act is silent as to how the report of serving summons to the defendant will be ascertained and also submitted thereof to the Court while it is sent through fax or e-mail.

Thirdly, though courier service is an important communication system, it's local offices have not yet been set up at village level. So service of summons through courier service will not play effective role to the defendant who resides at village where there is no branch of courier service.

Fourthly, this Amendment Act provides an opportunity to the plaintiff to serve summons by himself to the defendant, if he desires. But in a country like ours, generally a person comes to the Court to institute suit against such person(s) with whom he does not have warm and friendly relationship. In such an adverse circumstance, it may not be possible for the plaintiff himself to serve summons to his counterpart and, at this instance, service of summons by the plaintiff himself may not be so much effective. However, this sort of service can be effective where the defendant is a public or private company, institution or person etc. who is impleaded as defendant for holding an office.

Fifthly, this Amendment Act has made a penal provision for the serving officer of the Court or the courier service who shall be liable for misconduct, if he/it fails to serve summons after thirty days from the date of receipt. But this Act is completely silent as to what will be the consequence of service of summons in case of failure of service within thirty days.

Conclusion

The Code of Civil Procedure (Amendment) Act, 2012 has introduced almost all of the means of modern communication with a view to smooth service of summons to the defendant which will, no doubt, play a significant role in speedy trial of civil litigation. The amended provisions will reduce irregularities of the court's staff, lawyers and their assistants in case of service of summons. Moreover, it will reduce the time-span of civil suit to a large extent as well as decrease the harassment of the parties to the suit indeed. Now, in our country, Short Massage Service (SMS) though mobile phone is a very popular means to transmit massage swiftly; but in this Amendment Act SMS through mobile phone as a means of service of summons has been overlooked. It would be better and time-worthy, if SMS through mobile phone was introduced in the Amendment Act as means of service of summons. However, some challenges have been noted in our discussion for proper service of summons, but those depend upon overall development of our country. Though service of summons through fax and e-mail depend on technological expansion in the country and it will take time to be more effective, this Amendment Act has unlocked almost all sorts of ways of technological communications for the plaintiff to send summons to the defendant. Even the plaintiff himself can take the duty to serve summons of his own litigation. Now, the plaintiff is at liberty to follow any of those options to serve summons to the defendant. Because, this Amendment Act says that if summons is served by any of the moods as noted above; it shall be deemed that the summons has been duly served.[31] In fact, this amendment Act reflects a very honest intention of the legislature. It contains no negative aspect for proper service of summons. However, the litigants will be benefited, if the amended provisions are implemented properly in the judicial proceedings. For this, awareness and publicity among the litigants, the court-staff, the lawyers and the Judges will play a vital role. In this connection, wide-ranging publicity through various electronic and printing medias should be initiated concerning the amended provisions. Moreover, strict supervision of the controlling authority of every Court will, no doubt, play an important role for proper application of the amended provisions. It may be better to set up a central monitoring cell, for the time being, to supervise the proper application of the amended provisions. Extensive training and orientation program for the Judges, the Court-staff and the Lawyers is considered necessary to make it a success.

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31 *Rule 31 of Order V of the Code of Civil Procedure, 1908. Rule 31 has been inserted by the Code of Civil Procedure (Amendment) Act, 2012.*

Emergence of crime against humanity to the centrality of the ICC's jurisprudence: contentions and expectations

*Al Asad Md. Mahmudul Islam**

Introduction

'Crimes against humanity' as a form of international crime was first introduced in the realm of positive international criminal law and international judicial process by Nuremberg Charter[1] to deal with the most heinous and inhumane crime of the Nazi Germany to its own people and enemy nationals during the World War II.[2] Especially the appalling form of torture and persecution by the Hitler regime to its Jewish population in the so-called concentration camp and gas chambers that was unheard of in the history of mankind solicited and necessitated the advent of this new form of international crime with the established concept of 'war crimes' in the body of contemporary international criminal law. The definition of 'crimes against humanity' in the Nuremberg Charter was followed by the Tokyo Charter[3] and the Allied Control Council Law No.10 and judicially scrutinised by the respective trial created by those Charters which posed some serious question regarding its limit and demarcation with the other form of international crimes, namely, war crimes and genocide.[4] Further, the establishment of the International Criminal Tribunal for former Yugoslavia (ICTY) in 1993 and International Criminal Tribunal for Rwanda (ICTR) in 1994 by the United Nations Security Council in response to mass crimes in their respective jurisdiction advanced this body of law through the adoption of new definitions and elaborations of 'crimes against humanity' in the course of numerous judicial decisions.

Having this legacy, the Rome Statute[5] created the International Criminal Court (ICC) in 1998 with a view to try the core crimes that includes 'crimes against humanity' with its general definition in Article 7 of the Statute. This definition also followed the structure of its previous definitions by expressing the whole idea into two segment; one, is the 'chapeau' and the other

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1 *Charter of the International Military Tribunal for the Trial of the Major War Criminals, appended to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, UNTS 279, as amended, Protocol to Agreement and Charter, Oct. 6, 1945 (hereinafter Nuremberg Charter).*

2 *Robert Cryer and others, An Introduction to International Criminal Law and Procedure (2nd edn, CUP 2010) 231-32.*

3 *Charter of the International Military Tribunal for the Far East, Jan 19, 1946 (General Orders No 1), as amended, General Orders No. 20, Apr. 26, 1946, TIAS No. 1589, 4 Bevans 20 (hereinafter Tokyo Charter).*

4 *Robert Fine, 'Crime against Humanity: Hannah Arendht and the Nuremberg Debates' (2000) 3 European Journal of Social Theory 293.*

5 *Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90 (hereinafter as Rome Statute).*

is 'the list of inhuman acts'. The chapeau part of the definition that is the contextual aspects of the crime in the ICC regime has also been a subject of constant debate and judicial elaboration like its previous history in the Military and *ad hoc* tribunals. There are now eight situations before the ICC (CAR, Darfur, DRC, Kenya, Libya, Uganda, Mali, and Cote d'Ivoire) in all of which the crime against humanity charges are a basis for the court's jurisdiction. Particularly, in the Cote d'Ivoire, Libya and Kenya situations, crimes against humanity charges constituted the only basis upon which the Court was able to exercise its jurisdiction.[6] In dealing with those situations, the pre-trial chamber of the ICC has confronted with the contentious issues, eg, the correct interpretation of Article 7 of the Rome Statute on crimes against humanity, particularly Article 7's requirement to a 'State or organizational policy'. It also reveals the divergent views among the judges centring on these contextual aspects of the definition.[7] The dissenting opinion of Judge Hans-peter Kaul in the Pre-trial Chamber II's decision in the Kenya situation[8] authorising an investigation to the Prosecutor for the offences committed by a group of members and organisations aftermath the Presidential election in 2007 has attracted much positive scholarly attention and continues to provide objective and effective guidance in the construction of the definition of crimes against humanity.[9]

In this backdrop, this article aims at critical analysis of the gradual emergence of crime against humanity to the centrality of the ICC's jurisprudence. Accordingly the article explores the historical development of the offence crime against humanity and its codification in the Rome Statute and its explanation by various international criminal court in the post ICC era. Particular attention has been given to identify the elusive idea of 'persecution' as an independent crime and its link with the other inhuman acts in constituting these crimes against humanity. This essay concludes with the sum up of the discussions that partly cover the underlying legal implication of the ICC statues and other laws governing crimes against humanity.

Historical development of the offence 'crime against humanity'

The origin of the expressed criminalisation of the conducts that forms this international crime can be traced back in 1915, when Allied Powers of the first World War, Britain, France and Russia issued a joint statement announcing the commission of a 'crime against humanity' in response to the Armenian Genocide by the Ottoman Government and in 1919

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6 *Leila Sadat, 'Crimes against Humanity in the Modern Age' (2013) 107 AJIL 334.*

7 *ibid.*

8 *Situation in the Republic of Kenya, Case No. ICC0-o1/09, Request for Authorisation of an Investigation Pursuant to Article 15 (Nov. 26, 2009).*

9 *Claus Kress, 'On the Outer Limits of Crimes against Humanity: The Concept of Organisation within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision' (2010) 23 Leiden Journal of International Law 855.*

when the Commission on the Responsibility of the Authors of War submitted a report recommending the imposition of individual criminal responsibility for violations of the 'laws of humanity'.[10] This antecedent of the notion of 'crimes against humanity' could not be credited to the whole headway of its appearance in the Nuremberg Charter as its insertion in the charter was initially objected by United States on the ground of its absence of precision and practice in the then international criminal law.[11] Given the volatile colonial rule of Great Britain and France and high handedness of Stalin regime in Russia, these three major Allied Powers of the World War II were also ambivalent to its diction in the Nuremberg Charter fearing its retroactive and overarching application for violation of this prospective principle against their own population even in peace time. At the end, this prohibition against *ex post facto* law and the tenets of the maxims *nullum crimen sine lege* (no crime without law) and *nulla poena sine lege* (no penalty without law) were compromised for addressing the holocaust by the German Military that could not be qualified in the existing principle of 'war crimes'.[12] Thus, article 6(c) of the Nuremberg Charter defines 'crime against humanity' as follows:

> *[M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the law of the country where perpetrated.*[13]

This contour of the 'crime against humanity' provides three striking features. Firstly, it can be committed against any civilian population that constitutes both own or enemy nationals. Secondly, the commission of this crime takes place in the context of an armed conflict and, thirdly, it occurs to a population as opposed to individual that provides some sorts of its scale or spread.[14]

This definition of the Nuremberg Charter was followed with some changes in the Tokyo Charter and in the Allied Control Council Law No. 10.[15] The changes were in the list of inhuman acts that added rape, imprisonment and torture with that of the Nuremberg Charter and it mentions no reference to any war crimes or aggression.[16] Thereafter, save some efforts to define particular crime against humanity such as genoeide, apartheid and enforced

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[10] *M. Cherif Bassiouni, Crimes against Humanity in International Criminal Law (Dordrecht: Martinus Nijhoff, 1992); Geoffrey Robertson, Crimes against Humanity (London: Allen Lane, 1999); Darryl Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93 AJIL 334.*

[11] *Cryer and others (n 2) 231.*

[12] *M. Cherif Bassiouni, 'Crimes against Humanity: The Need for a Specialised Convention' (1994) 431 Columbia JTL 457.*

[13] *Nuremberg Charter, art 6 (c).*

[14] *Cryer and others (n 2) 231.*

[15] *Control Council for Germany, Official Gazzette, Jan 31, 1946, at 50.*

[16] *Cryer and others (n 2) 232.*

disappearance in subsequent international instruments, a long gap was followed to the formulation of a general definition of 'crime against humanity' until the United Nations Security Council adopted the statues of the ICTY in 1993 for the creation of an International tribunal in response to mass crime in former Yugoslavia. Prior to that, the International Law Commission published the Draft Code in 1991 providing a definition of 'crime against humanity' which fell short of covering all legal element of individual responsibility and failed to receive well recognition.[17] Article 5 of the ICTY Statue in defining crime against humanity expressed of the rubric 'when committed in armed conflict, whether international or internal in character, and directed against any civilian population'. This contextual part of the definition did not refer to any war or aggression. Instead, it requires the contextual aspect of an armed conflict, be it international or internal. Thus, the distinction between international and non-international armed conflicts has become irrelevant to crimes against humanity.[18] Accordingly in Prosecutor v. *Kupreskic*, the prosecution withdrew charges from an indictment under Article 2 of the ICTY statute that speaks of the grave breaches of the Geneva Conventions of 1949 and successfully substituted crimes against humanity charges.[19] Similarly, the appeals chamber of ICTY in Prosecutor v. *Kunarac* held that neither the attack nor the acts of the accused needs to be supported by any form of 'policy' or 'plan' which was a requirement for constituting the offence under the customary international law developed from the decision of the military tribunal. According to the appeals chamber-

> *"[T]here was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes'.*[20]

Although this decision of appeals chamber has been criticised for its weakness of reasoning and reference to a list of cases which, on close inspection, turn out not to support the decision,[21] the influence of this decision in explaining the elements of crimes against humanity under the customary international law is immense and attributed with authority in this regard.

The International Crimes Tribunal for Rwanda (ICTR) was established by the Security Council in 1994 following the Rwandan genocide.[22] Article 3 of the ICTR Statutes defines Crimes against humanity under the rubric, 'when committed as part of a widespread or

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[17] *Bassiouni, 'The Need for a Specialised Convention' (n 12).*

[18] *Prosecutor v.Tadic, CaseNo.IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, paras. 76, 78 (October 2, 1995).*

[19] *Prosecutor v. Kupreskic', Case No. IT-95-16, Indictment (Nov. 10, 1995).*

[20] *Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, para. 98 (June 12, 2002)*

[21] *W A Schabas, 'State Policy as an Element of International Crimes', (2008) 98 Journal of Criminal Law & Criminology 981; Kress (n 9) 870.*

[22] *Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, annex (Nov 6, 1994).*

systematic attack against any civilian population on national, political, ethnieal or religious grounds'. Thus it appears from the above definition that the ICTR statues explicit about the contextual requirement by saying the crime as part of widespread or systematic attack and set a new dimension of discriminatory grounds by expressing the said attack on national, political, ethnical or religious ground. In an attempt to explain the term 'widespread or systematic' The ICTR explains in *Akayesu* case that:

> *The concept of 'widespread' may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of 'systematic' may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a State. There must however, be some kind of preconceived the plan or policy.*[23]

It has been stated earlier that the requirement of policy element as mentioned in the last part of the above mentioned excerpt of the *Akayesu* judgment was reversed by the ICTY in the Prosecutor V. *Kunarac* case.[24]

From the above made discussion it appears that the definition of crimes against humanity and its elaboration by the military and *ad hoc* tribunals in the pre-ICC era was inconsistent and diverse.

In the absence of a comprehensive multilateral treaty on crime against humanity and a general definition of this concept for the purpose of those instruments, the adoption of those charters and statues, creation of those Tribunals together with their judgment and reports on crimes against humanity formed the customary international law which, in other words, paved the way for the development of a body of international jurisprudence on crimes against humanity and helped guide in formulation of a comprehensive definition in the Rome Statute, 1998.[25] This has been supported by the creation of the Special Court for Sierra Leone (SCSL) in 2002 in response to the atrocities committed in that country after November 30, 1996.[26] The SCSL statute includes an expanded list of crimes involving sexual violence[27] and omits both the armed conflict requirement and the 'discriminatory intent' provisions found in the ICTY statute. Moreover, the SCSL statute includes no 'State or organizational policy' requirement even though it was adopted four years after the negotiation of the Rome Statute.[28]

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[23] *Prosecutor V. Akayesu, Case No. IT-96-4-A, 1 June (Appeals Chamber), para 580.*

[24] *Kunarac (n 20).*

[25] *Sadat (n 6) 351.*

[26] *Statute of the Special Court for Sierra Leone, Arts. 1(1), 2.*

[27] *Security Council Resolution 1315 (Aug 14, 2000).*

[28] *Sadat (n 6) 339.*

Crimes against humanity in the Rome Statute and its application in the ICC era:

On July 17, 1998, the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) adopted the Rome Statute of the International Criminal Court (ICC).[29] Article 7 of the Statute defines 'crimes against humanity' following the structural model of Nuremberg Charter, Statutes of the ICTY and ICTR.

Paragraph 1 of Article 7 of the ICC which is the chapeau part of the definition starts as follows;

> *For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack;.*

Having the knowledge of the previous approach of defining crime against humanity, it is identified that the contextual aspect of this definition provides four important features of crime against humanity. They are: (1) the absence of a requirement of a nexus to armed conflict, (2) the absence of a requirement of a discriminatory motive, (3) the presence of a 'widespread or systematic attack' criterion, and (4) the knowledge of the act that constitutes the act which is an element of *mens rea*.[30] In order to evaluate the practice of the ICC relating to crimes against humanity, the striking features of this chapeau part of the definition requires a brief discussion.

Absence of armed conflict:

One of the most important features of the definition in the ICC statute is that it makes no reference to a nexus to armed conflict, affirming that crimes against humanity can occur not only during armed conflict but also during times of peace or civil strife. This outcome was essential to the practical effectiveness of the ICC in responding to large-scale atrocities committed by governments against their own populations.[31]

Absence of discriminatory motive:

The ICC statute did not include the discriminatory motive clause as it is found in the ICTR statute which require the crime with a discriminatory motive, ie, that the crime be committed on national, political, ethnic, racial or religious grounds. Though this requirement was not set forth in the ICTY statute, it was also applied by the ICTY in the *Tadic* opinion and judgment because of statements by members of the Security Council and a reference in the report in

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[29] *Robinson (n 10) 1.*

[30] *ibid 46.*

[31] *ibid 47.*

which the Secretary General submitted the ICTY Statute.[32] All participants negotiating the Rome Statute agreed on the requirement of discriminatory motive of the offence of persecution, but majority participants maintained that not all crime against humanity require such discriminatory motive. The absence of this discriminatory motive clause from the definition relieves an onerous and unnecessary burden on the prosecution to prove this crime.[33]

Widespread or systematic attack:

The term 'widespread' calls for large-scale action involving a substantial number of victims, whereas the term 'systematic' calls for a high degree of orchestration and methodical planning.[34] The most controversial and difficult issue in the negotiations on the definition of 'crimes against humanity' was whether these qualifiers should be disjunctive (ie, widespread or systematic) or conjunctive (ie, widespread and systematic).[35] The debates between the two had been resolved by a conceivable reasoning that the concept of an 'attack directed against any civilian population' already addressed the legitimate concerns of the disjunctive test and inserting the subparagraph 2(a) of Article 7, which qualifies the said term as-

> *[A] course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.*[36]

Subparagraph 2(a) of Article 7 affirms that an 'attack directed against any civilian population' involves some degree of scale, as well as a policy element. This policy element in the crime against humanity had been supported by the decisions of the Nuremberg trial and the decisions of the ICTY and ICTR.[37] To reflect these developments, the delegations at the Rome Conference made reference to a state or organizational policy.[38] The connection to a widespread or systematic attack is the essential and central element that raises an 'ordinary' crime to one of the most serious crimes known to humanity.[39] Since this policy requirement had been rejected by the ICTY in *kunarac* case and widely interpreted in its *tadic* case and in the *Akayesu* case of ICTR, the inclusion of this policy requirement in the ICC Statutes resulted in division in the authorities regarding its requirement to constitute the offence.[40] In

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32 *Prosecutor v. Tadic, Opinion and Judgment, No. IT-94-1-T, para. 652 (May 7, 1997).*
33 *Robinson (n 10) 47.*
34 *Prosecutor v. Akayesu, Judgement, No. IGTR-96- 4-T (Sept 2, 1998).*
35 *Robinson (n 10) 48.*
36 *ibid 47.*
37 *Prosecutor v. Tadic, Opinion and Judgment, No. IT-94-1-T, para. 652 (May 7, 1997), at 244, 247*
38 *Rome Statute, Article 7 (2) (a).*
39 *Robinson (n 10) 52.*
40 *Cryer and others (n 2) 237-240.*

this regard the dissenting opinion of Judge Hans-Peter Kaul to the ICC's Pre-trial Chambers II decision in authorising the investigation in Kenya situation is crucial to the understanding of the ICC's practice which has been thoroughly discussed in the relevant part of this essay.

The knowledge of the act or *mens rea*

The definition in the ICC statute confirms that the accused, while not necessarily responsible for the overarching attack against the civilian population, must at least be aware of the attack.[41] Thus any conviction of this international crime must be accompanied by the principle *actus nonfacit reum nisi mens sit rea.*[42]

Thus in a successful trial of crime against humanity, prosecution is only required to establish a link between the accused and the attack on three aspect; (1) that the accused committed a prohibited act, (2) that the objective of the attack was in line with that of the broader attack, and 3) that the accused had knowledge of this broader context.[43] The act of the individual attacker itself need not be widespread or systematic and not he is required to be involved in the formation of any policy of the state or organisation, it is suffice to prove that he committed such prohibited act with the objective and knowledge of the broader attack. Thus crime against humanity may be committed for personal motive.[44]

The Second part of Article 7 of the Rome Statutes sets out the conditions in which enumerated acts are elevated from ordinary crimes to 'crimes against humanity'. The acts enumerated in subparagraphs 1(a) to (k) of Article 7 are murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, enforced disappearance, apartheid and other inhumane acts.[45] It is beyond the scope of this essay to discuss all those inhuman acts. However the underlying principle of the crime of persecution in relation to crime against humanity needs special attention for identifying its different character with the other inhuman acts.

Persecution

Persecution is the 'intentional and severe deprivation of fundamental rights contrary to international law' against 'any identifiable group or collectivity' on prohibited discriminatory grounds.[46] The Nuremberg Charter and the ICTY and ICTR Statutes include persecution on 'political, racial or religious grounds'.[47] Under the Nuremberg Charter, persecution was only

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[41] *Rome statute, Art. 7, para 1.*
[42] *Robinson (n 10) 52.*
[43] *Cryer and others (n 2) 243.*
[44] *ibid 244.*
[45] *Rome Statutes, Article 7 (1).*
[46] *ibid Art. 7(2) (g).*
[47] *The Berlin Protocol of October 6, 1945; Robinson (n 10) 54.*

justiciable where a connection was established between the persecution and other crimes in that instrument. This 'connection' requirement appeared again in the Tokyo Charter but not in subsequent instruments, such as Control Council Law No. 10, or more recently, the ICTY and ICTR Statutes. Given the disputes and two sides of argument centring persecution as an independent crime or an auxiliary crime, the Rome statute took a middle course by requiring a connection between persecution with any other crimes within the jurisdiction of ICC or any act referred to in paragraph 1.[48]

The practice of the ICC relating to crimes against humanity:

The crime against humanity charges have been a useful tool in the *ad hoc* tribunal for trying offences which fallen short of becoming genocide or war crimes. Thus after the creation of the International Criminal Court (ICC) it was expected that this count would have predominance in the upcoming trials in the court.[49] The ICC's decisions on the DRC, CAR and Kenya situation regarding the contextual elements of the crime supports that expectation. Accordingly, the practice of the ICC in the contentious issues centring the definition of the crime against humanity is being evaluated in the following manner:

The *Katanga* Decision:

The *Katanga* confirmation decision on the situation in the Democratic Republic of the Congo was the ICC's first major decision on the application of Article 7 of the Rome statute.[50] The *Katanga* decision accumulated all the elements of 'wide-spread, 'systematic' and 'organisational policy' holding-

> *[I]n the context of a widespread attack, the requirement of an organizational policy pursuant to Article 7(2)(a) of the Statute ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources.*[51]

From the above finding we find that in *Katanga*, the Pre-Trial Chamber of ICC has introduced a new term 'thoroughly organised' for qualifying a widespread attack in support of which no authority was cited. Similarly, a plain reading of the above text suggests that the chamber in contravene with the dictum of Article 7 of the Rome statute construed the meaning of 'widespread or systematic' to 'widespread and systematic'.[52] The Pre-trial Chamber observed,

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48 *Rome Statutes, Article 7, subpara 1 (f).*

49 *Sadat (n 6) 355.*

50 *Prosecutor v. Katanga, Case No ICC-01/04-01/07, Confirmation of the Charges (Sept 30, 2008).*

51 *ibid para 396.*

52 *Sadat (n 6) 359.*

> *[S]uch a policy may be made either by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organised—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion.*[53]

The pre-trial chambers also attempted to elaborate the term civilian population which has not been defined in the Rome Statute. The Chamber held that Article 7 of the Statute affords rights and protections to 'any civilian population' regardless of their nationality, ethnicity or other distinguishing feature.[54] This approach of group identity of the civilian population though not contemplated by the Rome Statute, the relevance of this group identity to the establishment of a civilian 'population' has found its way into confirmation decisions of the Court.[55]

The *Bemba* Decision

In situation to the Central African Republic, the Pre-Trial Chamber II issued a decision confirming some war crimes and crimes against humanity against the Congoiese national Bemba, which followed the *Katanga* decision but narrowed the meaning of 'civilian population' by holding that the civilian population comprises all persons who are civilians as opposed to members of armed forces and other legitimate combatants'.[56] This decision has been criticised since it has not made any observation on the *Martic*,[57] holding regarding the status of individuals who are *hors de combat (*a person who is no longer participating in hostilities, by choice or circumstance).[58] It is therefore uncertain whether the ICC will follow *Martic* on this question.[59]

The Kenya Decision

The Security Council referred the Kenya situation to investigate the post-election violence that gripped Kenya from December 2007 to February 2008, following its presidential election.[60] The Pre-Trial Chamber II authorised the opening of the investigation under article 15 of the Statue and articulated its view as to the legal requirement of the contextual elements of crime against humanity. In the opinion of the majority of judges of Pre-Trial Chamber II,

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[53] *Katanga (n 50) para 396.*

[54] *ibid para 399*

[55] *Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Confirmation of Charges Pursuant to Article 61(7)(a) and (6) of the Rome Statute, para 110 (Jan. 23, 2012).*

[56] *Prosecutor v Bemba, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of Prosecutor Against Jean-Pierre Bemba-Gombo, paras. 72, 205 (June 15, 2009)*

[57] *Prosecutor v. Martic', Case No. IT-95- 11-T.*

[58] *ibid para 306.*

[59] *Sadat (n 6)*

[60] *Situation in the Republic of Kenya, Case No. ICC0-o1/09, Request for Authorisation of an Investigation Pursuant to Article 15 (Nov. 26, 2009).*

the fact that the collective entities behind the post-election violence were not of a state-like nature does not pose an obstacle to considering them as organizations within the meaning of Article 7(2)(a) of the Statute.[61] Judge Kaul disagreed and for this reason dissented from the majority's decision.[62] Both the majority decision and the dissenting opinion raised fundamental questions of substance and method.

The Majority Decision

The majority opinion followed prior ICC decisions on the contextual elements of crimes against humanity, reiterating that the 'attack on the civilian population requirement' is not restricted to a 'military' attack, but could be a 'campaign or operation carried out against the civilian population'.[63] It also followed *Katanga*'s objectionable dictum suggesting that the 'potential civilian victims of a crime under Article 7 of the Statute are groups distinguished by nationality, ethnicity, or other distinguishing features'.[64] The majority opinion based their reasoning on the possible broader implication of the term 'organization' that consists of a reference to an article written by Marcello Di Fillipo[65] and the 1991 Draft Code of Crimes against the Peace and Security of Mankind of the International Law Commission (ILC).[66] To qualify the notion of 'state-like organisation' the majority opinion also resorted to the teleological interpretation of the 'crime against humanity' pointing at the ultimate goal of this law to protect human right.[67]

The Dissenting Opinion

Judge Kaul argued that an organization within the meaning of Article 7(2)(a) of the Statute must,

> *[P]artake of some characteristics of a State. Those characteristics could involve the following: (a) a collectivity of persons; (b)which was established and acts for a common purpose; (c)over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale.*[68]

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61 *Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation in to the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, paras.115–128*

62 *ibid*

63 *ibid para 80.*

64 *ibid para 81.*

65 *M. Di Fillipo, 'Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes' (2008) 19 EJIL 533, at 564–70.*

66 *Situation in Republic of Kenya (n 69) para 91.*

67 *Kress (n 9).*

68 *Kenya decision (n 61).*

His dissenting opinion is based on the reasoning that the wording of the Article 7(2)(a) of the Statute, the principle of strict and contextual construction of the statute as envisaged in the Preamble and Article 22 of the Statute and historical-teleological interpretation of the law of crimes against humanity pointing that the 'the peace, security and well-being of the world' together with 'humanity and fundamental values of mankind' will be at stake by the broader interpretation of the contextual aspect of the crime.[69]

Conclusion

The crimes against humanity has emerged from the shadow of Nuremberg as a contemporary antidote to widespread or systematic human rights violations against civilian populations in today's world.[70] As a matter of fact, it is now sometimes proposed that crime against humanity, once no more than a species of war crime, is in fact the more comprehensive of the two ideas, and should embrace war crimes since it covers atrocities that may occur in either war or peace.[71] The ICC being a permanent international criminal court has been tasked with the challenges involving the interpretation of the definition and scope of crimes against humanity. Since the classification of an act to determine its gravity is an important factor to the imposition of sentence, proper demarcation line between crimes against humanity pursuant to Article 7 of the Statute and other crimes of the statute needs to be drawn along with the ever increasing concept of human rights and international peace and security.[72] However, the divergence of opinions on the different rubric of the definition could be minimised by restrictive interpretation of the term organisation in Article 7(2) (a) of the Statute which is the guideline of the Statutes too. Crime against humanity charge has already become central to ICCs Jurisprudence. Thus the contextual elements of this crime must be construed in a consistent and coherent manner.

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[69] *ibid, Dissenting Opinion of Judge Hans-Peter Kaul, para 59.*

[70] *Sadat (n 6).*

[71] *William J. Fenrick, 'Should Crimes against Humanity Replace War Crimes?' (1999) 37 Columbia Journal of Transnational Law 767; Richard Veron, 'What is Crime against Humanity Is?' (2002) 10 The Journal of Political Philosophy 231*

[72] *Olaoluwa Abiola Olusaniya, 'Do Crimes against Humanity Deserve a Higher Sentence than War Crimes?' (2004) 4 International Criminal Law Review 431.*

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Human Trafficking: Responsibility of the Government of Bangladesh

*Mst. Kanij Fatima**

ABSTRACT

Trafficking of human beings is one of the most heinous crimes committed against human beings with its flagrant disregard for the dignity of the human persons. Vulnerable groups such as women and children are most at risk, as the traffickers pounce and cash on their vulnerability. Usually traffickers target some countries whose economical and social conditions are worse and the geographical situations of those countries indirectly support to the traffickers. Bangladesh is one of those countries which persists the same situation that has turned Bangladesh into transit country for trafficking in persons in Southern Asia and in different Middle East countries. As a Signatory States of the UN Convention Against Transnational Organized Crime and its supplementary Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children Bangladesh has the obligations to undertake cooperation measures and establish policies to respond to trafficking in persons. Different legislative and administrative measures are taken by the government of Bangladesh to deal with human trafficking, especially trafficking in women and children. Government passed different Acts though there are some legislative gaps. Sometimes these were not being effective in stopping trafficking. However, the government of Bangladesh is taking series of plans to remove these heinous crimes. By this paper, I will try to find out the reasons behind trafficking in persons of Bangladesh and to focus on all the initiatives taken by the government to improve its status.

Introduction

The practise encompasses serious violations of human rights and is a scourge that has scarred and continues to scar the dignity of human beings. The practise is often referred to as the" modern day slavery." Women and children are thus exposed to horrendous experiences as prostitutes or objects of sexual gratification, forced labour and involuntary servitude. Historically, human trafficking has been directly associated or afflicted with prostitution and given the ambiguous moral implications of prostitution, the issue of trafficking remained absent from the international political arena for centuries.[1] Usually traffickers target some

* *Senior Assistant Judge of Sylhet.*

[1] *Gekht, A 'Shared But Differentiated Responsibility: Integration of International Obligations In Fight Against Trafficking In Human Beings' (2008)37, D.J.I.L. &p, 29-62, 32.*

countries whose economical and social conditions are worse and the geographical situations of those countries indirectly support to the traffickers. Bangladesh is one of those countries which persists the same situation that has turned Bangladesh into transit country for trafficking in persons in Southern Asia and in different Middle East countries. Generally some crucial questions arise -Why Bangladesh becomes a source country for the trafficking in persons? And what are the initiatives taken by the government to improve its status?

Why Bangladesh becomes a source country for trafficking:

"A girl in the village gave us something to eat and said we could go for a picnic to neighbouring India. Later on we realised that we were drugged. We crossed the border by walking through paddy fields in the night," Monica, 22, told the BBC.[2]

Bangladesh is a very small country in South Asia but it has huge population. India and Myanmar are the border countries of Bangladesh. India is situated in the west, north, and east side, Myanmar is situated in the South-East side and Bay of Bengal is situated in the South side of Bangladesh. Traffickers take the advantages of the geographical location of Bangladesh. Traffickers use different routes for trafficking, for example: over land, by air and water. Bangladesh has 64 districts and among these, twenty-eight districts are the border areas of Bangladesh with India and two districts have borders with Myanmar. Bangladesh and India share a land border of over 4,000 kilometres.[3] There are as many as 20 transit points between Bangladesh and India and traffickers easily traffic women and children through these points. Khulna, Jessore, Satkhira, Rajshahi, Dinajpur, Rangpur, Mymensingh, Comilla, Brahmanbaria, Sylhet, Kurigram, Lalmonirhat, Nilphamari, Panchagarh, Thakurgoan, Naogoan and Chapai Nawabganj have common borders with India and Myanmar. Traffickers frequently used these areas as land routes for trafficking. Cox's Bazar is the place of district of Chittagong and it is an important centre where the children and women are gathered before being smuggled out of the country to Myanmar. It is easy to traffic victims into Myanmar by boat. Another well-known land route is Benapole border, situated in Jessore and through which every year a huge numbers of women, men and children are trafficked into Kolkata (known as The West Bengal, a state of India) and then they are sold and taken to Mumbai and New Delhi and other parts of India. The transportation system from Bangladesh to Kolkata is cheap and comfortable. Generally, air routes are used by the traffickers to traffic into Middle East countries and different parts of the world. Victims are trafficked under the disguise of domestic workers, migrant workers and labours.

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2 *BBC News – 'Bangladesh trafficked women recount ordeal in India' 2012<https:// www.bbc.co.uk/news/world-south-asia-18579318>*

3 *INDIASERVER, 'India-Bangladesh Border Fencing to Be Completed by March 2010, Says BSF Director General' at: <http://www.india-server.com/news/india-bangladesh-border-fencing-to-be-16663.html. >*

A number of unauthorised agencies are working in Bangladesh with illegal documents. These unsafe and undocumented migration leads to trafficking.

Because of geographical, economical and social position, Bangladesh becomes an important source and transit country for trafficking in persons in Southern Asia and in different Middle East countries. Annually a huge numbers of women and girls are trafficked to Asia, Pakistan, Bahrain, Kuwait and United Arab Emirates from Bangladesh. Human rights Groups estimated that this number would be between 10,000 to 20,000.[4] There are different factors that are contributing to trafficking in persons in Bangladesh and these factors are poverty, social exclusion or gender discrimination, widespread illiteracy, lack of awareness and poor governance.[5] Social and economic condition of the rural areas is totally different from the urban areas. About 50% population are living under poverty line and few people have their own land. To get better life and job, poor people are leaving rural areas and this lead to the growth of urban poverty. In a report of the special rapporteur on the human rights aspects of the victims of trafficking in persons especially women and children, 4th Session, Agenda Item 2, 2006, UN, Sigma Huda stated 'socio-economic, political and cultural conditions in many parts of the world make women and children particularly susceptible to being trafficked, thereby fostering the supply side of trafficking.'[6]

Most of the victims of trafficking are women and children because they are more vulnerable. Women in Bangladesh are not a homogenous group. They are of different classes such as rich, middle and poor and from various cultural and ethnic minority groups. Their literacy rate is simply 43.2 percent that is much lower than that of men 61.0. Women mortality rate is higher than the men and the sex ration in the population of 105 men to every 100 women. The patriarchal society thrusts women to be subordinate, dependent and dominated and even creates obstacles to access power and resources. This male dominated society thinks that violence against women is the method to control women. Men think women are their property, their sexual activity and treat them as a commodity not as a human being. Because of this kind of social structure most of the women have the mentality to tolerate torture and to permit inhuman treatment to them and such mentality often leads to abuse and trafficking of women.[7] To get rid of domestic violence and to get better life, illiterate women are often lured and deceived by false promises of good jobs or marriage, and some are bought,

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4 *Sigma Huda 'Sex Trafficking in South Asia, Int'l Journal of Gynecology and Obstetrics' 2006, <http://www.figo.org/files/figo-corp/docs/World%20Report%20Pages%20374-381.pdf. >*

5 *UN.Gift 'Interview with Prof. Md. Zakir Hossain, the Dean, Faculty of Law, at University of Chitagong and Member, Judicial Service Commission, People's Republic of Bangladesh' 2009<http://www.ungift.org/ungift/en/humantrafficking/interview_-human-trafficking-in-bangladesh.html. >*

6 *Sigma Huda* 'UN Special Rapporteur *on* Trafficking *in* Persons' *2006 <http://www.legislationline.org/download/.../4c57f5bb9c3b18d8f03020f85806.pdf>*

7 *Sharmeen A. Farouk* 'Violence against women: a statistical overview, challenges and ... *Bangladesh National Women Lawyers Association (BNWLA)' 2005 <http://www.un.org/womenwatch/daw/egm/vaw-stat-2005/>*

abducted, kidnapped, coerced, threatened with force or placed in debt bondage. Overseas Employment Minister of Bangladesh, Khandoker Mosharraf Hossain said "The saddest part of the trafficking was that much of the rescued girls or young women cooperate the traffickers to cross the border expecting a better life''.[8]

Another reason behind the trafficking is globalization. All the countries are in the competition because of the global network, trade, culture and economic disparities. Corporations and companies now competing in a global marketplace need cheap labour and it does not matter where it comes from. Bangladesh acts an important source of cheap labour.[9] Every year Bangladesh earns lots of remittance through their migrant workers. Bangladesh supplies huge number of labours in different parts of the world especially in Middle East countries. But unfortunately, organized criminals are working very carefully to traffic men and women by exploiting them in the name of providing jobs either with legal or illegal documents. Unsafe and undocumented migration leads to trafficking. Most of the labours find themselves in situations of forced labour or debt bondage where they face restrictions on their movements, non-payment of wages, threats, and physical or sexual abuse.[10] Najma Begum went to Abu Dhabi in 2004 to work as a domestic worker but she was forced to work as a home-based commercial sex worker. Another woman Pakhi Begum was also cheated by local agent. After taking her to Dubai, her agent sold her. She was without money and food even she was not allowed to take rest. When she fell ill, she was sent back Bangladesh without money.

The main purpose of the traffickers is to earn more money easily and to choose those victims who are profitable for their business. After the business of arms and drugs, the Sexual trafficking is the most lucrative and low penalty nature business. Most of the times traffickers make target to the women and children, who are vulnerable and this number is higher than the men. There is a huge demand for Bangladeshi women and female children in the South Asian countries and countries of Middle East. Moreover, women and children are victims of organ trafficking. Indigenous people of Bangladesh who are living in Chittagong Hill Tracks, are also become victims of human trafficking because of political clash, lack of access to modern facilities, land issue, poverty, insecurity.[11]

Responsibility of the Government of Bangladesh

States are 'no longer 'free' to do as they will in the domestic sphere, but are compelled by international law to protect individuals from the violation and abuse of human rights. Under

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[8] *BGB Bangladeshi girls trafficked under honeymoon cover'2012 < http://defence.pk/threads/bangladeshi-girls-trafficked-under-honeymoon-cover-bgb.180927/>*

[9] *Margaret Haerens(Ed), Human Trafficking (Greenhaven Press, 2012)17.*

[10] *Ibid.*

[11] *N. M. Sajjadul Hoque 'Women and Children Trafficking in Bangladesh and Societal Perception towards Victim's Family'2013<http://www.mecon.nomadit.co.uk/.../conference_epaper_download.php5>*

international Human Rights law, state has four obligations and these are obligations to protect, to prevent violation of human rights and to fulfil and to promote human rights. It is a positive obligation of the states to prevent, protect trafficking in persons. This obligation comes from different international instruments. The main contributing factors to trafficking in persons are poverty, social exclusion or gender discrimination, domestic violence, widespread illiteracy, lack of awareness and poor governance. States has obligation to ensure economic, social, cultural rights, civil and political rights under the ICESCR and ICCPR to prevent the foreseeable violations of human rights and trafficking in persons. As a part of international community, Bangladesh has some responsibilities and obligations to address trafficking appropriately. Bangladesh Government took some initiatives to get rid of the problem of trafficking. "States have a responsibility to protect against human rights abuses, including trafficking in persons and exploitation of persons by third parties, including business enterprises and criminal associations, through appropriate policies, regulation and adjudication," UN Special Rapporteur on trafficking in persons, Joy Ngozi Ezeilo, said in her report to the UN Human Rights Council.[12]

Preventive measures

There is a test to measure the obligations of a state. This test is known as 'the Due Diligence Standard'. Under this standard, a state is obliged to exercise a measure of care in preventing and responding to the aets of private entities that interfere with established rights.[13]A state should take all reasonable and appropriate measures to prevent trafficking. Here preventive measure means positive measures to stop future acts of trafficking from occurring. Preventive measures include, addressing the factors that increase vulnerability to trafficking, reducing demand for trafficking and identifying and eradicating public sector involvement in and corruption.[14]

International Human rights law and different International Instruments impose certain obligations to find out the causes and consequences of trafficking. The contributing factors of trafficking are poverty, social exclusion or gender discrimination, widespread illiteracy, lack of awareness and poor governance. About 50% people are living under poverty in Bangladesh. Poor people easily become the victims of trafficking. In order to eradicate poverty, generally a state has three obligations and these are to respect, protect and fulfil. It is the obligation of the Government of Bangladesh not to refrain from interfering with the

[12] *UN news Centre ' Tackling demand key to combating global human trafficking, UN rights expert stresses'2013 <http://www.un.org/apps/news/story.asp?NewsID=45056#.Umzf04FSnVI>*

[13] *Anne T. Gallagher, The International law of Human Trafficking (Cambridge University Press, 2010)241.*

[14] *Ibid, 414.*

enjoyment of social, economic and cultural rights, to prevent abuses of rights by third parties and to take appropriate administrative and other measures for full realization of human rights.[15]

The Government of Bangladesh are working with different UN agencies like UNFPA, UNICEF, World Bank, IMF, UNDP and other NGOs to fight against poverty. UN agencies give technical and financial support to the different NGOs, different organisations of the Bangladesh Government and civil society to eradicate poverty. Credit based income generating activities are the main tasks for helping the poor people to be solvent. Through this credit group the women have access to money.[16] And this situation ultimately makes the women and children more conscious and alert about their rights and which prevents traffickers.

It is the obligation of all sates to enact legislation to eradicate discrimination on account of race, gender and other distinctions.[17] Social exclusion or gender discrimination is a common feature of society of Bangladesh though the Constitution of the People's Republic of Bangladesh ensured the rights of women on the basis of universal principles of equality and participation. The Constitution bans forced and bonded labour (Article 34), imposes a duty on the state to prevent and suppress the prostitution of human beings, and guarantees a number of fundamental human rights (Articles 27-44). In addition, Government of Bangladesh entered into different bilateral agreements with India and other SAARC countries to combat trafficking.

Lack of education is another reason behind trafficking. It is the duty of state to provide education to their citizens. Only education can facilitate the elimination of all causes and consequences of trafficking. When the potential victims are empowered through education, it becomes less likely for them to fall into the hands of traffickers. Bangladesh has done a great job in educating women. In South Asia, Bangladesh was the first country that achieved gender-parity in primary education with effective public policy, resource allocation and strong commitment from public and non-government sectors and specially technical and financial support from UN agencies. UNDP has been working in Bangladesh by creating an education programme aimed at strengthening primary and secondary education. To establish gender equality in education UNICEF and the Ministry of Education established United

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15 *Tom Obokata, Trafficking of Human Rights Perspective: Towards a Holistic Approach (Martinus Nijhoff Publishers, Boston, 2006) 161,163,162*

16 *Sharmeen A. Farouk* 'Violence against women: a statistical overview, challenges and ... *Bangladesh NationalWomen Lawyers Association (BNWLA)' 2005 <http://www.un.org/womenwatch/daw/egm/vaw-stat-2005/>*

17 *Tom Obokata, Trafficking of Human Rights Perspective: Towards a Holistic Approach (Martinus Nijhoff Publishers, Boston, 2006) 161,162,163.*

Nations Girls' Education Initiative (UNGEI) in 2006 in Bangladesh. The Ministry of Social Welfare, Women and Children Affairs, and Primary and Mass Education continued to raise awareness on the trafficking of women and children.[18]

Corruption and trafficking are inter – connected. Under the Trafficking Protocol, a state is bound to take strong measures to criminalize all forms of corrupt practices when committed by public officials and to ensure that their laws are harmonized so as to facilitate co operation.[19]Corruption is a major problem in Bangladesh and it spoils everything. In 2005, Bangladesh was the highest corrupt country in the world. In the Corruption Perceptions Index ranks 2012, position of Bangladesh is 144[20] and this list is prepared by the Transparency International. Some unauthorised recruitment agencies traffic women in the disguise of migrant workers. Different organisations of the Government know that very well but they do nothing because such unauthorised agencies give huge money to those organisations of the government as a bribe. Sometimes they have political backings. There is another allegation against the Police department and Border Guard of Bangladesh to take bribe from the cross-border trafficking gangs and this giving and taking method facilitates trafficking and creates a favourable environment for the traffickers.

Vulnerable to exploitation is not the main cause behind the crime of human trafficking. The principles of supply and demand are also playing an important role to contribute the expansion of this crime industry.[21] Demand means specific desire and preferences of the employers, consumer and third parties for certain types of persons or particular services. "However, the demand side should not be understood merely as the demand for [the] services of victims of trafficking, but rather more broadly, as an act that fosters any form of exploitation that, in turn, leads to trafficking," UN Special Rapporteur on trafficking in persons, Joy Ngozi Ezeilo, said in her report to the UN Human Rights Council.[22] To tackle the human trafficking, it is necessary to find out those factors which are behind the demand and take all appropriate measures. The Government of Bangladesh has taken different steps as a preventive measure. A new National Plan of Action for Combating Human Trafficking for 2012-2014 was circulated by the Ministry of Home Affairs, in January 2012. Training,

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18 *Mohammad Barad Hossain Chowdhury 'Trafficking in Persons in Bangladesh' 2012<http://www.unafei.or.jp/english/pdf/RS_No89/No89_PA_Chowdhury.pdf>*

19 *Anne T. Gallagher, The International law of Human Trafficking (Cambridge University Press, 2010)443.*

20 Transparency *International 'Corruption Perceptions Index' – 2012 < http://www.transparency.org/cpi2012/results>*

21 *Polaris project 'Why Trafficking Exists'2013 <http://www.polarisproject.org/human-trafficking/overview/why-trafficking-exists>*

22 *UN news Centre ' Tackling demand key to combating global human trafficking, UN rights expert stresse'2013 <http://www.un.org/apps/news/story.asp?NewsID=45056#.Umzf04FSnVI>*

including awareness about human trafficking, was provided to Bangladeshi soldiers prior to their deployment abroad on international peacekeeping missions. International organization for Immigration (IOM)is working with Bangladesh government .They are giving training to the judges , magistrates, police and other government officials who are engaging to fight against trafficking. The Ministry of Home Affairs published the Bangladesh Country Report on Combating Trafficking in Women and Children.

Measures to Criminalization of trafficking

It is a central and mandatory obligation of all states to criminalize trafficking. To criminalize trafficking means traffickers should be investigated, prosecuted and appropriately punished. The main objective of this procedure is to end impunity for traffickers and secure justice for victims and ensure that there is no safe place for the traffickers. Bangladesh is obliged under the Trafficking Protocol, the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (SAARC Convention), CEDAW and the Convention on the Rights of the Child (CRC) to criminalize trafficking and other related offences.[23]

Human trafficking is an offence under the Bangladesh legal system. Under the Constitution of the Peoples' Republic of Bangladesh, the Penal Code, 1860, the Suppression of Immoral Traffic Act, 1933 and the Repression of Violence against Women and Children Act, 2000 trafficking is an illegal and punishable offence. The maximum punishment is capital punishment for this crime under Bangladeshi legal system. Bangladesh Government constitutes a special tribunal to adjudicate trafficking cases. The Deputy Attorney General are authorised to deal with the cases of human trafficking. A monitoring cell is established in Police Headquarter to collect data and analyse it regularly. Bangladesh Government enacted Money Laundering Prevention Act 2012 to prosecute criminal outfits involved in human trafficking. In February 2012, the Government of Bangladesh enacted a comprehensive anti-trafficking law Human Trafficking Deterrence and Suppression Act (HTDSA) and began prosecuting cases under the law. But this Act is addressed legislative gaps such as the absence of a prohibition on the trafficking of men. This Act generally prohibits and punishes all forms of human trafficking, though it does not flatly prohibit the fraudulent recruitment of labour migrants; rather, the Act requires the recruiter to have known that the recruited workers would be subject to forced labour. The Government also approved a new anti-trafficking action plan (2012-2014) which incorporated necessary steps to implement the new law. The number of prosecutions increased, but the number of convictions declined as compared to previous years.

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[23] *Anne T. Gallagher, The International law of Human Trafficking (Cambridge University Press, 2010)370,371,372.*

Prosecution		Disposal	
Number of cases lodged	143	Number of cases disposed	38
Number of accused arrested	455	Cases ended in Conviction	09
Number of cases Charged	70	Cases ended in acquittal	29
Final Report Submitted	39	Persons Convicted	14 Death sentence nil
Under Investigation	34	Persons acquitted	70

Source : Bangladesh Country Report, 2011, Combating Human Trafficking, Ministry of Home Affairs, Government of the People's Republic of Bangladesh, pp1-2.

The Government of Bangladesh did not investigate or prosecute government officials suspected of trafficking-related complicity.[24] Victims always dare to file complaints and they fear negligence and harassment in police station, courts and society. Victims lose their desire from further proceeding because they don't get proper remedy. It is impossible for the judges to give proper remedy without sufficient evidence. Sometimes, the offender may manage the police and witnesses to say that the offence did not happen and the case is not pursed further. Lengthy procedural system and backdated laws always discourage women from taking legal action and enforcing their rights in the court.

Measure of Protection

Under different international instruments, a state has a responsibility to protect the victims of trafficking. *Article 6(3) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons* gives some guideline to provide assistance and protection to the victims. It is the obligation of the state parties to provide appropriate housing, counselling and information, in particular as regards to their legal rights, in a language that the victim can understand, medical, psychological and material assistance, and employment, educational and training opportunities.[25]

Victims are afraid to come before the court. Sometimes they get threat from the traffickers. To ensure perfect criminal investigations or proceedings, it is necessary to enact witness and Victims protection Act.[26] United States, UK and other developed countries have legislation

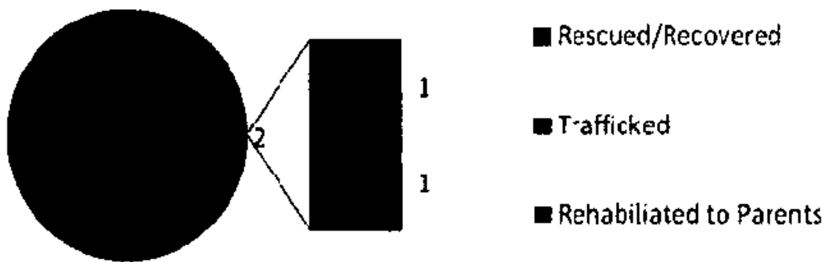
24 *Mohammad Barad Hossain Chowdhury 'Trafficking in Persons in Bangladesh' 2012<http://www.unafei.or.jp/english/pdf/RS_No89/No89_PA_Chowdhury.pdf>*

25 *Art 6 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime.*

26 *Tom Obokata , Trafficking of Human Rights Perspective: Towards a Holistic Approach(Martinus Nijhoff Publishers, Boston, 2006) 153*

like this. Government of Bangladesh is still trying to pass such kind of legislation. No important initiatives are taken by the government of Bangladesh in identification of the trafficking victims and Bangladesh has no specific procedure to refer victims of trafficking to protective services. Only the immigration police identified trafficking victims at international airports by checking passports and questioning potential trafficking victims. They work with the Ministry of Expatriate Welfare's Vigilance Taskforce. There is uncertainty about the numbers of identified trafficking victims. The following chart below shows the distribution of rescued/recovered victims in 2011.

Trafficking in Persons



Source: Bangladesh Country Report, 2011, Combating Human Trafficking, Ministry of Home Affairs, Government of the People's Republic of Bangladesh, pp 1-2.

In above figure, it is found that 181 victims were identified by the government in 2011. Of them only 98 were rescued and 96 victims out of 98 were handed over to the parents. Two were rehabilitated; one by an NGO and other one by the government.[27]Unregistered Rohingyan refugees (trafficking victims) were detained indefinitely for their lack of documentation. The government did not provide temporary or permanent residency status for these trafficking. There is an allegation against the officials working at some Bangladeshi embassies abroad who were mostly unresponsive to complaints; attempts to seek restitution abroad were rare.

However, there are some achievements of Bangladeshi Government regarding the measures of protection of the victims. Bangladeshi women usually work as domestic servants in abroad; some find themselves in situations of forced labour or debt bondage where they face restrictions on their movements, non-payment of wages, threats, and physical or sexual abuse and some find themselves as a victim of trafficking. To protect the rights of the women

[27] *Mohammad Barud Hossain Chowdhury 'Trafficking in Persons in Bangladesh'2012<http://www.unafei.or.jp/english/pdf/RS_No89/No89_PA_Chowdhury.pdf>*

migrant, the UN Women in Bangladesh has been working with the Ministry of Expatriates' Welfare and Overseas Employment, Ministry of Law, Justice and Parliamentary Affairs since 2005. UN Women also works with the Bureau of Manpower Employment and Training (BMET) to help women migrants. Bangladesh Government established its first resource centre with the assistance of the UN Women. This resource Centre provides correct information about migration to the women who want to go abroad. The Ministry of Expatriate Welfare's Vigilance Task Force continued its work to improve the oversight of Bangladesh's labour recruiting process ahead of a future merger with a Monitoring Wing.[28]UN Women has planned along with the government and civil society, to rehabilitate the women who are returned after suffering painful life in abroad. In addition, UN Women ran a 26 episode programmes in local dialects on the national radio in Bangladesh to create awareness among people about trafficking.[29]

Bangladesh police is an important department of the Government of Bangladesh, which established Victims Support Centre on 17th February, 2009. This centre is run by a joint partnership of the Bangladesh Police and other ten Nongovernment Organizations. The main functions of this centre are to provide professional and timely service to the victims, to play an important role in safeguarding victims and in protecting their legal rights, to combine efforts of both Government and Nongovernment institutions and ensure best services for the victims and to protect victim from repeat victimization.[30]

Conclusion

Trafficking of human beings, especially of women and children has been considered as a scourge of mankind as it tears to shreds the dignity and worth of a person or a human being. Bangladesh becomes the target of the traffickers because of its economical and social conditions are worse and the geographical situations indirectly support to the traffickers. All these situations have turned Bangladesh into transit country for trafficking in persons in Southern Asia and in different Middle East countries. The international community had attempted to address this atrocious crime through a number of international instruments. Though Bangladesh has not yet signed the trafficking Protocol, it has taken different measures which do comply with all the purposes of the Trafficking Protocol to combat the problem of human trafficking seriously.

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28 Ibid

29 *UN Women 'Empowering woman migrant workers in Bangladesh' 2012* <http://www.unwomensouthasia.org/2012/un-women-in-bangladesh-empowers-the-woman-migrant/>

30 *Dhaka Metropolitan Police 'Victim Support Centre' 2013 <http://www.dmp.gov.bd/application/index/page/victim-support-center>*

Moreover, Bangladesh is one of the member states of SAARC. Though SAARC member states have population of about 1.5 billion, it is relatively weak and ineffective body. The Government of Bangladesh took the responsibility for elaborating the first draft of the Convention and second version of the Convention was produced by India. At the tenth SAARC Summit that draft Convention was considered and finally at the eleventh SAARC Summit, the SAARC Convention on Preventing and combating trafficking in Women and Children for prostitution was adopted. One of the purposes of this SAARC Convention is to promote regional cooperation to effectively deal with the prevention, interdiction and suppression of trafficking and the repatriation and rehabilitation of victims. As a member state Bangladesh has wide opportunity to establish cooperation in relation to investigations, inquires, trials and other proceedings.[31]

However, according to the 2013 Annual Trafficking in Persons Report (TIP) report of the US State Department, Bangladesh is in the position of Tier – 2. Bangladesh has failed to improve its status because of the inadequacy of the law enforcement efforts and institutional weaknesses.[32] Moreover, Bangladesh does not fully comply with the minimum standards for the elimination of trafficking. Government of Bangladesh is still trying to fight against trafficking by enacting different contemporary. The UN Special Rapporteur (SR) SR Rashida Manjoo concluded her 10 day visit to Bangladesh, from 19th to 29th May 2013. She noted, 'One of the main reasons for the dismal condition of women according to her was 'the absence of effective implementation of existing laws, the lack of responsive justice systems, and impunity for acts of violence'.[33] When any violations of international law take place, it is the responsibility of the concern state to cease the unlawful conduct, and ensure that it will not repeat the illegal actions in the future. Now the time has come to eliminate human trafficking by effective implementation of the existing laws, in order to establish the rule of law, justice, and the respect for human dignity and the worth of all persons as mandated by the Constitution of the Peoples' Republic of Bangladesh.

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31 Anne T. Gallagher, *The International law of Human Trafficking* (Cambridge University Press, 2010) 128.

32 *US Department of State* 'Trafficking in Persons Report' 2013 <http://www.state.gov/j/tip/rls/tiprpt/2013/>

33 *United Nations News* Centre – 'Bangladesh must address lack of '*2013 <http:/ www.un.org/apps/news/story.asp?NewsID=45037>*

Food Adulteration: The Bangladesh Paradox

*Md. Mahboob Sobhani**

Introduction

We, the people of Bangladesh are living on adulterated food. Bangladesh is over burdened with laws for safety and security of food but irony is that food is most unsafe in Bangladesh. The food safety situation in Bangladesh is at an alarming stage due to food adulteration, use of toxins, pesticide residues, microbiological contamination, veterinary drug residues and heavy metals. It is paradoxical to say that the safety of food cannot be ensured due to the dilemma of existing legal paradigm in Bangladesh. In the upcoming segments the writer tries to focus on various issues of one of the fundamental impediments regarding food safety i.e. 'food adulteration' in Bangladesh.

Defining Food Adulteration & Other Issues

Food is essential for every living being on earth. Biologically, food can be defined as edible or potable substance (usually of animal or plant origin), consisting of nourishing and nutritive components such as carbohydrates, fats, proteins, essential mineral and vitamins, which (when ingested and assimilated through digestion) sustains life, generates energy, and provides growth, maintenance, and health of the body.[1]

From Bangladeshi context, legal definition of food is only given in section 3(5) of the **Pure Food Ordinance, 1959** (amended in 2005)[2] (next written as PFO) -

"Food" means any kind of edible oil, fish, fruit, meat or vegetable or any other article used as food, drinking water or any other drink for human consumption other than any drug, and includes ice, aerated water, carbonated water or any substance whether processed, semi processed or raw or any substance which has been used in the manufacture, preparation or treatment of food and those articles which will be notified by the Government from time to time, and

(a) any substance which is intended for use in the composition or preparation of food,
(b) any permitted flavouring matter or any spice or condiment, and
(c) any food grade colouring matter, preservative, anti oxidant and other additives intended for use in food;'

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* *Special Metropolitan Magistrate of Pure Food Court, Dhaka City Corporation, Dhaka.*

[1] *http://www.businessdictionary.com/definition/food.html#ixzz3HES8EAuf, accessed on 20/10/2014*

[2] *THE PURE FOOD ORDINANCE, 1959 (EAST PAKISTAN ORDINANCE NO. LXVIII OF 1959).*

On the other hand, in Bangladeshi legal paradigm, in a strict sense, the word `food adulteration' has not been defined in any law of the land. Nonetheless, section 3(1) of PFO has disclosed circumstances under which an article of food shall be deemed to be **"adulterated"** if-

(a) any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength, or
(b) any substance has been substituted wholly or in part for it, or
(c) any of the normal constituents has been wholly or in part abstracted so as to render it injurious to health, or
(d) it is mixed, coloured, powdered, coated or stained in a manner whereby damage or inferiority is concealed, or
(e) it does not comply with any standard provided by or under this Ordinance or any other law for the time being in force, or
(f) it contains or is mixed or diluted with any substance in such quantity as is to the prejudice of the purchaser or consumer or in such proportion as diminishes in any manner the food value or nutritive qualities which it possesses in its pure, normal, undeteriorated and sound condition, or
(g) it contains any poisonous or deleterious ingredient including radiation which may render it injurious to health, or
(h) it is not of the nature, substance or quality which it purports to be or which it is represented to be by the manufacturer or the seller;'

The word **'adulterate'** implies an element of deceit. According to the definition of Chamber's Dictionary it means `*to debase, falsify by mixing with something inferior or spurious*'[3]. A substance added to a food-item to reduce its quality in order to increase its quantity is called as an adulterant.

Hence, the term **'food adulteration'** can be simply defined- as an act of intentional debasing the quality of food offered for sale either by the admixture or substitution of inferior and substandard substances or by the removal of some valuable ingredient. The nature and extent of adulteration varies from country to country on the basis of municipal law. If a food exceeds tolerances and regulatory limits of the country, it will be considered adulterated.[4]

It is to be noted that the basic contention of the term `food adulteration' is fully relevant and inter-related with the terms/factors like `food safety'[5] and `food security'[6].

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3 *The Chambers Dictionary, Available at http://en.wikipedia.org/wiki/Chambers_Dictionary, accessed on 19/09/2014*
4 *ibid*
5 *Food safety is the assurance that food will not cause harm to the consumer when it is prepared or eaten according to its intended use.*

Objectives of Food adulteration

Food adulteration may occur for the following reasons in a nutshell- **(i)** to increase the bulk and reduce cost, with intent to defraud the consumer, **(ii)** to increase the quantity and make more profit, **(iii)** to increase the shelf life of food items, **(iv)** to attract the consumers, **(v)** to increase the profit margin on the expense of the health of public or consumer; etc.

Nature of Food adulteration in Bangladesh

Adulteration may occur in following three basic patterns-

a) By ***adding*** anything(adulterants) with food to deteriorate from the nature, substance and quality of the food desired by the purchaser;
b) By ***removing or reducing and substituting*** any ingredient from food to deteriorate from the nature, substance and quality of the food desired by the purchaser;
c) By ***false representation*** of a completely different item to be a food of specific kind.

Firstly, ***adding adulterant*** in food is the main cause of food adulteration. The addition of adulterant in food may be intentional or unintentional. Generally the adulterate addition is intentional. The major reason for the intentional addition of these adulterants is for increasing the profit margin on the expense of the health of the consumers. Adulterants can be following types-

i. **Solids** like sands, chalk-powder, crushed rocks, seeds of similar crops, bricks powder, wood powder, tamarind seed powder, detergent powder etc. are mixed with grains or with powdery substances to increase the weight;
ii. **Chemicals** are applied to increase the shelf of processed or semi-processed food item such as *formaldehyde* (formalin), *calcium Carbide, ethylene, urea, artificial sweeteners* etc. Some chemicals are used for ripening of fruits and vegetables. Industrial-grade calcium carbide may also contain traces of *arsenic* and *phosphorus* which makes it a human health concern.[7]
iii. **Preservatives** means, as per the **rule 2 (g)** of the **Pure Food Rules, 1967** '*any substance which is capable of inhibiting, retarding or arresting the process of fermentation, acidification or other decomposition or deterioration of food.*' It is a substance that is added to food to prevent decomposition by microbial growth or by undesirable chemical changes.[8]

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[6] *The World Food Summit of 1996 defined food security as existing "when all people at all times have access to sufficient, safe, nutritious food to maintain a healthy and active life". Available at http://www.who.int/trade/glossary/story028/en/, accessed on 28/10/2014*

[7] *Per, Hüseyin; Kurtoğlu, Selim; Yağmur, Fatih; Gümüş, Hakan; Kumandaş, Sefer; Poyrazoğlu, M. Hakan (2007). Calcium carbide poisoning via food in childhood. The Journal of Emergency Medicine 32 (2): 179–80.*

[8] *http://en.wikipedia.org/wiki/Preservative, accessed on 24/10/2014.*

iv. **Coloring/flavoring reagents** are textile and synthetic colors, dyes and pigments, toxic artificial flavor etc. and these are added to give an attractive appearance and scent of food to allure the purchasers.[9]

v. **Pesticides and Insecticide** are used at the time of farming of the plants or herbs for the purpose of the pest control. DDT (*di-chloro di-phenyl tri-chloro ethane*), various chlorinated aromatic hydrocarbons and synthetic organic compounds tend to persist in the vegetables or plants as a residue and become concentrated in animals and human being in the food chain. This is an example of unintentional way of food adulteration.

Secondly, adulteration may also happen by ***removing*** or ***reducing*** and ***substituting*** a fair part or any ingredient of the food item, for instance- removing milk fat from the cow or buffalo milk to lower down its quality. Any food item (i.e. Sweetmeat, Channa, Curd, Yogurt, Cream etc.) made from that kind of cow or buffalo milk never can reach the food value and fall short of specified milk fat required and eventually results in adulterated food.

Thirdly, sometimes a completely different kind of thing can be represented as food item of a specified kind. For example- condensed milk as we know it in our country has no element of milk at all in it. BSTI's license conditions requires that- the condensed milk must contain 8% milk fat, extracted either from cow or buffalo milk,[10] while PFO requires 27% of milk concentration. In our country the condensed milk producing companies producing and marketing condensed milk made from ***palm*** or ***soya bean fat***. Then water, palm stearin (instead of edible palm oil) and sugar are added to make condensed milk which is simply poisoning the people as the palm stearin is not edible; it is used in detergent making![11]This matter is challenged by a Writ Petition and is pending for decision of the Court.

Food Adulteration: How & When Caused?

Food adulteration is an unethical business practice. It may occur at any time or any layer along the entire supply chain of the food, from producer to consumer or from `Farm to Fork'. Analysis reveals that food or food product may reach to its consumer by any of the following ways mentioned in the table.

Table 01: 'Distribution of Food from the Farm to the Fork'

Farmer / Producer	***Farmer/ Producer***	***Farmer/ Producer***	***Farmer/ Producer***
			To Agents/Brokers;
			To Manufactures;
		To Wholesalers;	*To Wholesalers;*
	To Retailers;	*To Retailers;*	*To Retailers;*
To Consumers.	*To Consumers.*	*To Consumers.*	*To Consumers.*

9 *http://apjcn.nhri.org.tw/server/info/books-phds/books/foodfacts/html/maintext/main8b.html.accessed on 24/10/2014.*

10 *http://www.dhakatribune.com/food/2014/aug/11/saga-so-called-condensed-milk#sthash.3Jr1o1KZ.dpuf, accessed on 24/10/2014.*

11 ibid

From the table we see, any food or food product may reach from its farmer or producer- **(1)** Directly to the hands of the consumers or **(2)** Firstly to *retailers* and then to consumers or **(3)** Firstly to *wholesalers*, then to *retailers* and at last to consumers or **(4)** Firstly to *local agents* or *brokers* then to *manufacturers* later on to *wholesalers*, then to *retailers* and at last to consumers etc.

So, any one or several of the farmer/producer, retailer, wholesaler, manufacturer, agent/broker may cause the adulteration of food along the whole supply chain for extra profit making. Say for an example- mangos are collected from various gardens *(from farmers)* of Rajsahi and Chapainababgonj districts by the local agents. Before shipment some of mangoes may made calcium carbide or/and formalin tainted by the dealers. Same may be done during the change made in between the wholesalers and retailers. Besides, food adulteration may also happen at **(a)** Primary production stage; **(b)** post-harvest food handling, preservation, processing, packaging, transport, storage and distribution stage; **(c)** food services sector- fresh produces, semi-processed, processed, ready to eat (RTE), hotel, restaurant, street foods etc.

Effects of Food Adulteration

Followings are the probable results of food adulteration-

- Consumers are cheated by the traders. Consumers take impure, unsafe and incomplete food;
- Reduces the quality of the food and this weakens the health of the consumers and thereby increases the cost for healthcare;
- Regular intake leads to many health problems from curable to incurable disorders and can ruin one's lifestyle and life as well. Use of non–permitted chemicals causing a number of diseases including cancer, convulsion and miscarriage, respiratory problem, disorder of some organs of the body. Consumption of adulterated food items may precisely cause asthma, sore throat, larynx constriction, bronchitis, skin infection, allergic reaction, diarrhea, haematuria, circulatory failure, numbness, dizziness, kidney failure, stomach, cancer, nervous disorder and other diseases;
- Adulteration in food also decreases our moral and social values. A large number of people and companies are engaged in this kind of black business of adulterated food production, manufacture, wholesaling and retailing. The entire chain makes involved a lot of people in a criminal act which requires a tremendous government effort with a proper infrastructure to combat this.

Table 2: 'List of injurious adulterants in food and their health effects.'

Name of adulterants	Applied food Item	Harmful effect
Formalin	Fish fruit meat and milk	Throat cancer kidney cancer, blood cancer, asthma, and skin diseases.[12]
Poisonous colouring agents like auramine, rhodomine B, malachite green, and Sudan red	Applied on food item for colouring, brightness, and freshness,	Damage liver and kidney, and cause stomach cancer, asthma, and bladder cancer.[13]
Colouring agents chrome, tartzine, and erythrosine	used in spices, sauces, and juices, lentil, and oils	Cause cancer, allergy, and respiratory problems.[14]
Calcium carbide	Mango, banana etc	Causes cancer in kidney, liver, skin, prostate, and lungs.[15]
Rye flour	Used in barley, bread, and wheat flour	Convulsion and miscarriage.[16]
Hormone	Cauliflower, pineapple	Causes infertility of women.[17]
Agino moto or monosodium glutamate	Used in Chinese restaurant food item.	Cause nervous system disorder and depression.
Urea	Puffed rice and rice.	Nervous system damage and respiratory problem.[18]
Sulphuricacid	Used in milk for condensation	Causes damage to the cardiac system.
Brick powder, saw dust	Chilly powder	Stomach problem.
Non permitted dye like mentanil yellow	Turmeric powder	Carsinogenic.[19]
Used tea leaves processed and coloured	Tea	Liver disorder.[20]
Non permitted coalter dye, (mentanil yellow)	Sweets, juice, jam etc	Toxic and carsinogenic.
Artificial colours such ascopper, zinc or indigo based dyes	Soft and hard drinks	Toxic.

12 *'Health Hazard of Formalin', http://www.dhakatribune.com/food/2013/jun/15/formalin-fruits-can-be-fatal, visited on 07/11/2014.*

13 *http://en.wikipedia.org/wiki/Tuberculosis, visited on 07/11/2014.*

14 *Food Adulteration Rings Alarm Bell, Thursday, /11/08/2011, http://archive.thedailystar.net/newDesign/news-details.php?nid=198096, visited on 07/11/2014.*

15 *ibid*

16 *ibid*

17 *ibid*

18 *ibid*

19 *ibid*

20 *ibid*

Governance & Legal Framework to combat Food Adulteration in Bangladesh

In Bangladesh the governance and legal frame work to combat food adulteration can be described under the following heads:-

International Commitments of Bangladesh

'Right to Food' is an economic, social and cultural right.[21] Food means and includes that food which is free from adulteration of any kind. So, being signatory and ratifying various international instruments, Bangladesh guarantees 'Purity in Food'. These instruments are **(i)** the Universal Declaration of Human Rights (UDHR), 1948, **(ii)** the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, **(iii)** the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1989 and **(iv)** the Convention on the Rights of the Child (CRC) 1990.

Constitutional Mandate

Right to food is ensured under the 'Provision of basic necessities' of our Constitution. According to **Article 15** speaks 'It shall be a fundamental responsibility of the State to attain, ... a constant increase of productive forces and a steady improvement...with a view to securing to its citizens-(a) the provision of the basic necessities of life, including *food*, clothing, shelter, education and medical care.'[22] **Article 18(1)** speaks 'the state shall regard the raising of the level nutrition and the improvement of public health as among its primary duties'.[23] Both the articles imply food safety requirements for consumers.

Basic laws about food safety

The Pure Food Ordinance (Amendment in 2005) and **Pure Food Rules, 1967** these two statutes provide basic framework of food law that includes scope, definitions, administration and enforcement guidelines etc. for the food safety in Bangladesh. **Food Safety Act, 2013, a** very comprehensive law covering almost all sides of legal paradigm of food safety and security in Bangladesh was passed by the legislature in October, 2013 which is yet to come in operation. Preparation of rules under this law is going on. The previous two laws will be repealed when this Act will be operative. Salient Features of this Act are as follows-

(i) Responsibilities as to Safe Food- a. General responsibilities, b. Specific responsibilities, (ii) Prohibitions on management of Safe Foods and various food hazards like heavy metal, pesticides, preservatives, formaldehyde, DDT etc. (iii) Both civil and criminal liabilities for manufacturers, producers and business operators of safe food, (iv) Provision of very high fine as punishment

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21 *Golay, C. and Ozden M., The Right to Food, Part of a series of the Human Rights Programme of the Europe-Third World Centre (CETIM) Annex 2: list of states parties to the international covenant on economic, social and cultural rights (ratification by 151 States), p. 19, 23, 35, 43.*

22 *Constitution of the People's Republic of Bangladesh, 1972, Article 15*

23 *Constitution of the People's Republic of Bangladesh, 1972, Article 18*

(minimum taka 03 lakhs) and most of the offences are made non-bailable in the eye of law, (v) Provision for separate administrative action against any person or body corporate etc.

Subsidiary laws

There are a number of laws which partially and/or specially address some other food safety issues, such as- (1) S.272 and S.273 of the Penal Code, 1860, (2) Control of Essential Commodities Act, 1956, (3) Food (Special Courts) Act, 1956, 4) Cantonments Pure Food Act, 1966, 5) Pesticide Ordinance, 1971, (6) S.25C of Special Powers Act 1974, (7) Fish and Fish Products (Inspection and Control), Ordinance, 1983, (8) Bangladesh Standards and Testing Institution Ordinance, 1985, (9) Iodine Deficiency Disorders Prevention Act, 1989, (10) Mobile Court Act, 2007, (11) Consumers Rights Protection Act 2009, (12) Local Government (City Corporation) Act 2009, (13) Local Government (Paurashava) Act, 2009, (14) The Water Act, 2013, (15) Alternative of Breast Milk, Baby Food and Commercial Produce of Supplement for Baby Food and Food Staffs(Control of Marketing) Act, 2013, (16) Enrichment of Vitamin 'A' in Edible Oil Act, 2013.

It is important to note that, use of such a large number of laws for a single purpose like food safety in Bangladesh is quite unusual and unprecedented in the whole world.[24]

National situation of Food Adulteration

The present national scenario of food adulteration and various hindrances of the state mechanism to combat it are as follows:

Major Food Groups commonly associated with adulterants

Food adulteration has reached to a dangerous level posing a serious health hazards in Bangladesh. Staple food item in the market like rice, fish, fruits, vegetables, spices, milk and milk products, sweetmeats etc. are adulterated. Edible oil, ghee, butter oil, mustard oil are adulterated with hydrogenated oil, animal fats and rep seed oil. Banaspathi is added in ghee. Artificial sweeteners and flavours, non-permitted or excess colors are added to the Confectionery and bakery. Textile dyes to beautify the sweetmeats. Fat is extracted from milk and water is added and synthetic milk (liquid detergent, sugar, water, vegetable fat, urea etc.) is in the stores. Powder milk is adulterated with melamine. Condense milk is made using stearin and without any element of natural milk.[25] Formalin and DDT is applied on fish to increase their shelf life, ethylene and calcium carbide on fruits for quick ripening or delay ripening, urea to whiten the puffed rice. Carboxyl methyl (CMC) is used in lieu of liquid

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[24] *M S Siddiqui, 'Bangladesh has highest number of food safety laws in world', The Daily Ittefaq, June 30, 2014, http://www.clickittefaq.com/in-the-news/bangladesh-highest-number-food-safety-laws-world, Visited on 27th September, 2014)*

[25] *Adulterated condensed milk floods market, Kamran Reza Chowdhury, The Independent, 21/01/2003, (in archive), visited on 23/10/2014*

glucose or sugar syrup in preparation of soft drinks. Fruit juices are prepared by using artificial and prohibited ingredients instead of using original fruit juice.

Overlapping of laws

Laws for criminalizing offences of food adulteration are overlapped. Sections 272 and 273 of the Penal Code, 1860 make food adulteration an offence. Sections 6(1)(a), 6A and 7 of the PFO also try the same offences. Again, it is became punishable under Section 25C of the Special Power Act, 1974 where punishment of death penalty or imprisonment for life or 14 years and fine is prescribed for the parallel provisions of aforesaid. Simultaneously, section 41 of the Consumers Right Protection Act, 2009 includes the same offence over again. This multiplicity of laws creates confusion in the mind of manufacturers, processors, retailers or even to the law enforcers to realise which law deals with a particular food safety issue.

Whole country is more vulnerable than the capital

Situation of food adulteration is graver in rest of the country than capital Dhaka. As per section 3(7) of the PFO, City Corporations of Dhaka, Chittagong, Rajshahi, Barisal, Khulna, Sylhet or any other city corporations or pourashavas being the local/municipal authorities have to have food testing laboratory of their own to analysis or to do bacteriological or other examination for food samples collected within their local areas by the sanitary inspectors. But the reality is, Dhaka South and North City Corporations have only one lab. For the outer Dhaka metropolitan city and other 63 districts, city corporations, pourashavas or the Civil Surgeon offices the Public Health Food Laboratory situated at Mohakhali, Dhaka is the only institution for the same purpose. It is a mammoth task for the only laboratory to test and certify such a huge number of food samples within a short time.

All the other few food laboratories under various government or autonomous organisations are also situated either in Dhaka or neighboring Dhaka. Very few of those are operating down to the regional and district level. Sanitary inspectors in those areas feel discouraged to collect food samples which are of naturally decoying in short time as so can be decoyed or spoiled in the transit of package and time taken for lab test. Thus cases under the PFO are rarely filed to the cognizance Courts in those areas bringing the culprits involved in sin of food adulteration, which exposes food safety in a very critical condition.

Facts of Formaldehyde (Formalin) Myth

Formalin is the most common phenomenon in food sector in Bangladesh. The prime caption of a renowned daily of Bangladesh on Sunday, September 14, 2014 was that-

'Equipped with unfit gear for detecting formalin in food items, law enforcers embarked upon a massive drive in June, 2014 and destroyed mainly truckloads of fruits, achieving next to nothing.[26]'

That year in June to July a significant number of fruits like mango, jackfruit, litchi etc. and fruits imported cross borders were destroyed countrywide(heavily in Dhaka City) by mobile Court in collaboration with the police, labelling those fruits to be formalin tainted. But, Scientists at the Bangladesh Council for Scientific and Industrial Research (BCSIR) have found that *'formalin detector machine "Formaldehyde Meter Z-300" is not appropriate for testing fruits as it can give wrong information about the presence of formalin in fruits since the machine was made to measure presence of formaldehyde in the air'.*[27]

Scientist of BCSIR commented so in response to an order passed on July 21, 2014 to conduct laboratory test of that machine in a writ petition filed on July 9, 2014 to a Bench of Hon'ble Justice Salma Masud Chowdhury and Hon'ble Justice Md. Habibul Gani of the High Court Division.

By the amendment of PFO in 2005 section 6A was inserted to penalize the *use* of any poisonous or dangerous chemicals or ingredients or additives or substances like formalin etc in any food and *sale* of that food. To be an offence under this section, only presence of formalin in food is sufficient; ratio or any percentage of its presence is irrelevant. Truth is that it is not legally possible to prosecute anybody, under any law of the land as presently there is no scientific way to detect formalin in food or fruit in Bangladesh. Hence, despite a significant number of issues of formalin apprehension being resolved in the mobile Court, not a single case was ever reported to the Court of original jurisdiction **(Pure Food Court)** anywhere in Bangladesh. It is a paradox that the hyper-action of law enforcers is nothing but a battle fought in confusion, which actually leads to a critical miscarriage of Justice.

Bangladesh Standard Testing Institute (BSTI) versus Pure Food Laws: A Dichotomy of Standard?

Analysis reveals that in several occasions food articles were sent for examination, the public analyst certified them as 'adulterated' but surprisingly, many of those food products are found to be passed the BSTI tests. It reveals an ostensible conflict of standard between the BSTI and the opinion of public analyst appointed under the PFO.[28] However, we came to

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[26] *Report published on The Daily Star, available on http://www.thedailystar.net/print_post/confusing-battle-fought-so-far-41567, accessed on 16th September, 2014.*

[27] *Source- http://www.dhakatribune.com/safety/2014/sep/24/bcsir-finds-formalin-detector-%E2%80%98inappropriate%E2%80%99#sthash.WJwAMHGS.dpuf. Visited on 27.09.2014.*

[28] *Khan, Nazrul Islam, Food Adulteration: A review of the prevailing legislations, an article published in Dhaka courier, on Thursday, May 17th, 2012 available at: http://www.dhakacourier.com.bd/?p=6090#sthash.fIABg62A.dpuf. accessed on 27/10/2014*

know that the **PFO** and the **Pure Food Rules, 1967** are the basic and fundamental laws to directly operate the legal functionaries to curb and remedy for the widespread evil of food adulteration and thereby to protect and preserve public health.[29] We observe, the very first sentence of the Ordinance is- *'An Ordinance to provide for the better control of the manufacture and sale of food for human consumption,'* which implies the intention for its enunciation. Only these ordinance and rule are prescribed to commonly deal with issues of adulteration of food i.e.- defining the various offences relating adulteration of food (**Sections 3 and 6 to 37**); regulations of the judicial tools; establishment, power, function and jurisdiction etc. of Pure Food Court (**Section 41**); appointment of the public analyst (**Section 4**); inspection and seizure of food sample(**Sections 34 to 39**); analysis of sample and certification thereto (**Sections 28 to 33**); process of institution of prosecution (**Section 40**); trial procedure of cases filed, prescribe punishment for the offence defined (**Section 44**); setting general principles and rules, a schedule of the **rules** with a chart of 107 food products describing the specific standards and parameters etc. **Public Health Laboratory Mokhali, Dhaka** and **Public Health Food Laboratory of Dhaka City Corporation** are established under these rules to analyse food and issue certificate thereto. There certificates are directly admissible in a legal proceedings. Test report from any other government laboratory be also admissible by law if done following the standards and parameters of the Pure Food Rules.

Whereas the ordinance of **Bangladesh Standards and Testing Institution(BSTI)** relates to establishment of an institution for standardization, testing, metrology, quality control, grading and marking of goods. BSTI sets the standard and issues certificate only for business or commercial purpose for various products in which some are food items. Currently there is a list of 155 products brought under mandatory certification marks scheme in which food and agricultural products are only 64 items.[30]

Section 47(1) of the PFO states that

'Inconsistency or conflict of provisions of this Ordinance with provisions of other Acts.

47. (1) If, in any area in which this Ordinance is in force, any provision of this Ordinance is inconsistent with any provision of any other Act which is in operation in such area, the provisions of the other Act in their application to such area shall to the extent of the inconsistency be void and the provisions of this Ordinance shall prevail.'

This stanza of the PFO gives this law supremacy over any other law in force relating the various issues of food safety in Bangladesh. Any provision of law inconsistent with the

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29 *Masud A.R., 'The Pure Food Laws', 1st Edition, September, 1995, page 2*

30 *http://www.bsti.gov.bd/cert_mark_productList.html, visited on 4/11/2014.*

ordinance is void to that extent and this law will prevail. As the PFO is the ultimate law for food safety there is no scope to follow any other standard(s) i.e. BSTI etc to certify any food whether it is adulterated or not. Because the purposes of BSTI and that those of PFO is completely different. Therefore, BSTI cannot declare a product as fit for consumption or adulteration and it is not BSTI's responsibility also.

It is a matter of great disorder that BSTI issues fitness certificate for food items analyzing them by parameters and standards different from those of Pure Food Rules. This certificate issuing for food items by BSTI overlooking a pre-fixed standards set by government under the Pure Food Rules are totally inconsistent and found void in law. So, the legal provision is that for certification of any food and food products as 'Pure' or 'Adulterated', it is mandatory for BSTI or other authority that to follow the principles and parameters of standard set by the Pure Food Rules with collaboration of PFO.

Being a Presiding Judge of Pure Food Court in Bangladesh, it is observed that the producers or manufacturers of the adulterated food items, very often take the plea in this Court that *'the product obtained the clearance or certificate from the BSTI, why they will be vexed under PFO?'*. A good number of cases of this Court are also challenged by filing writ petition to the Hon'ble High Court referring to the same plea. They try to represent this point as ***'dual standard or dichotomy of standard'*** for analysising food in Bangladesh. The writer hopes that the para above clearly answers this question negating the claim of these big shot companies. Eventually the agents, retailers, wholesalers of the food or food product being the *bonafied* purchasers from their importer, producer or manufacturer suffer a lot in the implementation of legal mechanism.

Delicate Food Analysis In Laboratories

The analytical facilities and arrangements for testing adulterants in Bangladesh are considered to be weak. While there are a number of laboratories undertaking food analysis, most are only testing food for proximate or compositional parameters. Analysis results of all the laboratories are admissible in the eye of law if done as per the parameters and standards of Pure Food Rules, 1967. We have following laboratories to mitigate the various issues of analysis regarding food safety-

1. **Bangladesh Standard and Testing Institution (BSTI)** does food analysis only for the purpose of *quality certification* and *standardization*.[31]
2. **The Public Health Laboratory** performs food analyses associated with the Pure Food Rule to support national network of Sanitary Inspectors responsible for oversight of a safe food supply of whole of Bangladesh except the Dhaka metropolitan area.

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31 *http://www.bsti.gov.bd/about.html, visited on 29/10/2014*

3. **The Public Health Food Laboratory of Dhaka City Corporation** provides the certificate of analysis or bacteriological or other examination as per Pure Food Rule for food samples collected within the Dhaka metropolitan area.
4. **Bangladesh Council for Scientific and Industrial Research (BCSIR)** better known as `science laboratory' has a wide range of test and analysis facilities for scientific, industrial and technological research only.[32]
5. **The Central Food Testing Laboratory** has a limited scope focusing primarily on a limited range of physicochemical attributes of food grains.
6. **The Plant Protection Wing Laboratory** provides quarantine services for imported plant and food products (fruit, vegetable etc.) and
7. **Livestock Services Laboratory** performs quality assessment of animal vaccines and drugs, disease investigation in animals, and quality assessment of poultry feeds.

Pure Food Court: So Far a Successful Story

Pure Food Courts are established under section 41 of the PFO having a Metropolitan Magistrate or a Senior Judicial Magistrate as the presiding judge for the Court. Among the Courts of whole of Bangladesh only in Dhaka Metropolitan Magistracy we have three special Courts to deal with the matters arising out of various food safety and food adulteration issues. The next paras give a glimpse of the activities of these Courts to ensure the justice regarding various issues of food adulteration and others.

Along with the retail sellers, the manufacturers and producers, specially the owners of some big shot companies were punished meeting justice. Lot of products of popular brands upon which the mass people confidently rely are found sometimes adulterated. In many cases these big companies take the refuge of filing writ petitions challenging the sample collection and food analysis procedure and the same is inconsistent with BSTI standards. Previously a detailed discussion is made on it. Now let's have a look to reveal the real stories of the products of popular brands names which are sued before these Courts:

Table 03: 'List of Companies sued and convicted'

Name of the company or brand	Products	Total cases filed against
Pran Agro Ltd; Pran RFL Group	Holud(Termaric)(1),Mustard Oil(1),Bason(1),Tomato sauce (4),Tomato Ketchap(1), Chatni(1).	09(nine)
Tanvir Master Oil(Fresh-Meghna Group)	Soybean Oil(5),Dalda(1)	06(six)
City Group Ltd(Teer)	Soybean Oil(3),Dalda(3)	06(six)

[32] http://www.bcsir.gov.bd/aims-and-objectives.php. visited on 30/10/2014

Name of the company or brand	Products	Total cases filed against
Grameen Danon Foods Ltd.(of Dr. Md. Yunus)	Shakti Doi(1)	01(one)
Onnopurna Oil Mill(Shuresh Mustard Oil)	Mustard Oil(4)	4 (four)
Name of the company or brand	**Products**	**Total cases filed against**
Abdul Monem Ltd.(IGLOO)	Icecreem(4),Ghee(1)	5 (five)
ACI Food Ltd.(Shopno Super Shop)	Mustard oil,Rosgolla	2(two)
Rahim Afroze(Agora Super Shop)	Honey,Ghee	2(two)
Nondon Mega Shop	Tomato Sauce	1(one)
Ahmed Food Products	Tomato sauce	4 (four)
Bangladesh Edible Oil Ltd(Rupchand)	Soyabean Oil	2(two)
Super Oil Refinery(Pusti Soyabean)	Soyabean Oil	2(two)
Seven Garden Bitumin and Edible Oil(Veola)	Soyabean Oil	2(two)
Akij Food & Beverage(Farm Fresh)	Curd(2),Milk	3(three)
Acme Ltd.	Mineral water,Mustard oil	2(two)
Polar Ice cream	Ice cream	2(two)
Quality Ltd.	Ice cream,Soyabean Oil	2(two)
BRAC(Araang Doi)	Curd	4 (four)
Anil Ghosh Bagha Bari Ghee	Ghee	1(one)

This list of *manufacturers* and *producers* can go quite a long. The renowned chain super shops and malls, most of the popular restaurants, sweetmeat shops, bakery etc of Dhaka city are also sentenced for selling or retailing adulterated food.

Importantly, no offence under section 6A of the PFO for selling formalin, calcium carbide or DDT tainted food, fruits, vegetables, fish etc. ever reported in the Pure Food Courts anywhere in Bangladesh. Because the kits or tools used for detecting formalin etc is not fit for doing so.[33]

Whereas the mobile Courts conducted by the various authorities are recklessly doing the same without realizing the real contentions of the law. Law enforcers should always keep in mind that the Pure Food Courts are the only Court of original jurisdiction to try any matter arising out of the Pure Food laws and the Mobile Court driven activities never can be a judicious solution to combat food adulteration. Thus, Pure Food Courts performing its duty as much it is entrusted with. It is duty of the prosecution to prosecute someone before a Court

[33] *Report submitted by the BCSIR to the Hon'ble High Court in relation to a writ filed.*

and let the Court do it's part. Judicial activism is still a myth for the context of food sector in our country.

How to control or minimize Food adulteration

It is hard to eradicate Food adulteration from a third world country like Bangladesh. Nonetheless, following observations may lead the path to combat food adulteration:

i. The consumers must give up the compromising attitude towards food adulteration;
ii. Implementation strategies of laws must be outlined clearly for a better enforcement regime so that all instances of non-compliance can be easily identified and action taken promptly by the authority;
iii. Pure food Courts being the Courts of original jurisdiction, only deal with the PFO. Every Pure Food Court must be given power to take cognizance and trial any complaint under all the food related laws of land[34]. Thus it will be a single forum to deal with all related matters of food sector;
iv. Government must take the PFO as the only governing law of the food sector in real essence. BSTI's interference in setting standard or procuring parallel certificate of standard of food in breach of the PFO must be stopped;
v. Food Safety Act, 2013 and concerned rules of the Act and Formalin control Laws should be made operative as early as possible;
vi. Government must ensure transparency and accountability in inspection procedure, analysis of food and prosecution method. Credible laboratory services for food analysis and risk based food inspection system to be in place;
vii. Well equipped laboratories for every kind of food analysis such as- tests for formalin, carbide, DDT, preservative and color check, with skilled personnels must be established in each district all over Bangladesh;
viii. Power of cancellation of the trade license or to make such recommendation to the concerned for persistent offenders(the manufacturer/owners of the companies) should be given to the Pure Food Courts;
ix. Awarding exemplary punishment to those who contaminate food items with formalin and other toxic chemicals the penalties need to include rigorous imprisonment for long periods and relatively heavy fines. Even life sentences should be considered in cases weighing the consequences of the offences on victims;
x. Carriage of food specially fruits, fresh vegetables, milk, fish etc should be given preference at the time of transportation as if those can reach the destination without delay. Then it will be no more required to add preservative, formalin, DDT etc to increase the life shell of that food;

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[34] *Names of all the food related laws are mentioned before.*

xi. Control of food adulteration in Bangladesh is a multi-sectoral responsibility. Fifteen ministries are involved in food safety and quality control and ten ministries are directly involved in food inspection and enforcement services. The roles and responsibilities of the concerned ministries and agencies must be clear and should cover the whole food chain from farm-to-table. The National Food Safety Advisory Council (NFSAC) needs prompt action for overall coordination for food safety and food control at the national level;

xii. The government and regulatory bodies must be driven by professional obligations not by media propaganda;

xiii. Every issue of food adulteration brought before the law, should be resolved as per the provision of law and must not be resolved in whim and confusion;

xiv. Creation of Mass communication, motivation, awareness and training of food producers, operators, consumers against the use of formalin and other chemical substances in food items;

xv. Persuasive measures like caution notice, improvement notice may be involved in the enforcement mechanism. Steps must be taken to overcome Poor knowledge of standards, laws/regulations among the producers and consumers;

xvi. Inclusion of courses regarding the fatal impacts of food adulteration in curriculum at different levels.

Conclusion

We, the people of Bangladcsh have thc every legitimate expectation to get the food free from adulteration as of our constitutional right. This is the responsibility of the state apparatus to ensure that for the common people. Food adulteration can be substantially combated by the legal paradigm presently we have with few renovations of law. But it is very important, how these laws are being implemented by the state. No more hyperactive drives without following the spirit of law by thc Mobile Courts are expected, because judicially established Courts are there to act under the protocol of law. The manufacturers and producers should not hanker after money by the way of delivering adulterated food to the innocent people. Let us live and let others live on food free from adulteration of any kind. As Virginia Wolf, famous English writer said while describing food as medicine – 'One cannot think well, love well and sleep well, if one has not dined well.'

'Reasonable Doubt' in Criminal Cases: A Legal Analysis

*Abul Hasanat**
*NargisAktar***

Introduction

In the democratic states, criminal justice system exists mainly for preventing crimes, and remedying or mitigating the grievances of the victims and their relatives. Bangladesh as an inheritor of British legal system follows adversarial justice system in which a judge is principally like an umpire or a neutral body. In such system an accused is presumed to be innocent until he is proved guilty upon evidence. Therefore, the criminals need to be punished through a trial procedure involving recording of evidences and the appreciation and consideration of such evidences. In order to get the accused convicted and sentenced, the prosecution shall prove his guilt beyond any reasonable doubt.[1]In UK jurisdiction, proof beyond reasonable doubt means the proof which makes one sure of the defendant's guilt and a very commonly used instruction in US jurisdictions is "proof beyond reasonable doubt is proof that makes you firmly convinced of the [accused's] guilt."[2] Therefore, the evidences produced by the prosecution must ensure such standard as will prove the accused's guilt beyond reasonable doubt. Otherwise, the accused persons finally find themselves acquitted having the 'benefit of reasonable doubt'.[3]But it is not easy to determine reasonable doubt in many cases. In this study, I made an attempt to explain the concept of 'doubt' and 'reasonable doubt' in criminal cases and to analyse how 'reasonable doubt' is determined in criminal case adjudication. In addition, I shall examine judicial approach to the concept of reasonable doubt in the light of relevant judicial decisions in Bangladesh.

'Doubt' and 'Reasonable Doubt' in Criminal cases

While lawyers argue and judges write judgments in criminal cases, many of them explain that the prosecution has failed to prove the concerned case beyond 'doubt', and so the accused is entitled to the benefit of 'doubt' in that case. However, there is clear and practical distinction between the terms 'doubt' and 'reasonable doubt'. 'Doubt' means feeling of uncertainty or suspicion. This doubt can be reasonable or imaginary. In this world of human beings, there

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* *Senior Judicial Magistrate of Gazipur.*
** *Senior Assistant Judge, now deputed at Bangladesh Parliament Secretariat as Law Officer.*
1 *See Muslim Uddin Vs. State 7 BLD (AD) 1.*
2 *See "Beyond Reasonable Doubt: Factors Impacting Jurors' Interpretation of Criminal Standards of Proof" at http://www.crim.cam.ac.uk/research/beyond_reasonable_doubt/[last accessed on 20 October, 2014]*
3 *See Soleman Vs. The State 10 BLD (HCD) 179.*

are very few things which we know with absolute certainty. Therefore, around all things in life are open to some reasonable or imaginary doubts. However, while proving a criminal case, the Court must consider only the 'reasonable doubts' not the 'imaginary doubts'. That is, the accused in a criminal case shall get not the benefit of any imaginary doubt but the benefit of reasonable doubt only.[4] In a criminal case, reasonable doubt indicates an honest doubt of the accused's guilt for which a reason exits in the light of the nature and quality of the evidence.[5]

British Courts had followed the above view for long. In *Miller Vs. Minister of Pensions*[6], the House of Lords has stated that the proof of a criminal allegation need not reach certainty rather it shall carry a high degree of probability, and proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. In this case, Lord Denning says,

> *"It is true that under our existing jurisprudence in a criminal matter, we have to proceed with presumption of innocence, but at the same time, that presumption is to be judged on the basis of conceptions of a reasonable prudent man. Smelling doubts for the sake of giving benefit of doubt is not the law of the land."*

Bangladesh Supreme Court especially the Appellate Division has adopted the similar view in adjudicating the criminal cases. For example, in a murder case[7], the accused person caused death of a person by giving dagger blows causing multiple injuries. He was admitted to hospital where his surgical operations took place but he died. In this case, the trial Court found the accused persons guilty. However, the High Court Division on appeal declared them not guilty on the ground that the victim might have survived in the absence of those operations or in the event of any successful operations---which created some faint doubt in favour of the accused persons. But, in the appeal, the Appellate Division reversed the decision holding the view that some unfounded suspicion entered the minds of the Judges of the High Court Division. Regarding the suspicion or faint doubt, the Appellate Division has observed:

> *"[...] suspicion is not substitute of evidence. In a criminal case, the accused is entitled to benefit of doubt, but it is only reasonable doubt which is considered to be a ground for giving its benefit to the accused for the purpose of acquittal. A faint doubt means a doubt which got no reasonable basis and as such no benefit or such doubt is contemplated in law."*

Similarly, in *Al-Amin vs. State*[8] the High Court Division has held the principle, *inter alia*, that the prosecution's duty to prove a case beyond doubt does not imply that it should be

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4. *See details, 7 BLD (AD) 265; 11 BLD (AD) 2; 15 BLT (AD) 101; 5 BLD (AD) 294.*
5. *See People Vs. Barker, 153 N.Y. 111, 115 (1897); State vs.Medina, 147 N.J. 43, 60 (1996).*
6. *(1947) 2 ALL ER 272.*
7. *7BLD (AD) 265.*
8. *51 DLR (HCD) (1999) 155.*

proved beyond shadow of doubt, and doubt must not be imaginary in nature but be relied upon the supportive evidence on record. The High Court Division has stated:

> *"The principle of benefit of doubt accepted in England as a matter of public policy is available to an accused on the same ground or to the same extent in our country. Proof beyond reasonable doubt does not mean proof beyond shadow of a doubt. This doubt is not an imaginary doubt. Benefit of doubt to the accused would be available provided there is supportive evidence on record. For creating doubt or granting benefit of doubt, the evidence is to be such which lead to such doubt."*[9]

Indian Supreme Court has also followed that principle established by the British precedent. In a recent Indian case, *Iqbal Moosa Patel Vs. State of Gujarat*[10]the Supreme Court of India has held the principle that it is true that the prosecution is required to establish its case beyond a reasonable doubt, but that does not mean that the degree of proof must be beyond a shadow of doubt. In this case the prime question was whether the appellants are entitled to the benefit of doubt. On consideration of the entire documents adduced by the prosecution against the accused, the Court has decided that the accused appellants could not made out a case for granting the benefit of reasonable doubt in their favour.

Similar view has also been adopted in *Sucha Singh &Anr. Vs. State of Punjab*[11] in which the Supreme Court of India has explained the above principle in the following words:

> *"[...] Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice according to law. Prosecution is not required to meet any and every hypothesis put forward by the accused. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.[....]Proof beyond reasonable doubt is a guideline, not a fetish."*

Therefore, law does not require the prosecution to prove a criminal case beyond all possible doubts because absolute certainty is unattainable in matters relating to human affairs.[12]Rather the prosecution's case must be proved to the extent that there is no "reasonable doubt" in the mind of a reasonable person that the accused is guilty. In *United States* v. *Savulj*[13], One US Federal Court has commented:

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9 *Ibid at para 97.*
10 *(2011) 2 SCC 198.*
11 *(2003) 7 SCC 643.*
12 *Victor Vs. Nebraska 511 U.S. 13, 17-20 (1994).*
13 *700 F.2d 51, 69 (2nd Cir. 1983); See also, e.g. SAND, L. B., SEIFFERT, J. S., LOUGHLIN, W. P. & REISS, S. A. (2002) Modern Federal Jury Instructions, Instr. 4-2.*

> *'It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitates to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs."*

Therefore, the accused can have the benefit of doubt in a case when there is any cogent reasons. Imaginary doubts of any kind must not favour the accused of a criminal case.

Determining Reasonable Doubt in Criminal Cases

Probably it is one of the hardest tasks to determine reasonable doubt in a criminal case in which adequate evidences have been adduced. In determining whether the prosecution has proved the accused's guilt beyond reasonable doubt, one should be guided solely by a full and fair evaluation of the evidence on record. Therefore, the reasonable doubt in accused's guilt is decided upon careful evaluation of the relevant evidence not upon baseless speculations.[14]However, this evaluation of evidence must not be influenced by any bias, prejudice, sympathy or by personal desire or to avoid an unpleasant duty.[15]

Similarly, in no case the accused's guilt would be proved merely on whimsical assumptions and speculations but fairly and squarely on evidence on record. In *Nasir and Nasir vs. State*[16] the High Court Division has been of the view that an accused's guilt cannot be based merely on high probabilities but on the clear evaluation of the relevant evidence, otherwise the golden rule of benefit of doubt will be reduced to naught. The Court has also held in another case,[17] that benefit of reasonable doubt can be presumed only on the basis of supportive evidence. Again, if the defence case gets any corroboration from the evidence adduced by the prosecution, it can be stated that reasonable doubt has arisen.[18] In addition, if the defence version of the case appears to be true from the appreciation of the whole evidence on record, the accused should be given benefit of doubt.[19]

A reasonable doubt may be evaluated from the evidence, the lack of evidence, or the nature of the evidenee.[20]A judge may assess the same evidence differently and adjust the burden of

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[14] *See Victor Vs. Nebraska 511 U.S. 19, 20 (1994); People Vs. Barker 153 N.Y. 114-115 (1897); It has been held that a reasonable doubt is not a mere whim, guess or surmise; nor is it a mere subterfuge to which resort may be had in order to avoid doing a disagreeable thing; but it is such a doubt as reasonable men may entertain, after a careful and honest review and consideration of the evidence in the case.*

[15] *Ibid.*

[16] *9 BLD (HCD) 502; See also, PLD 1970 (SC) 10.*

[17] *Al-Amin Vs. State 51 DLR (HCD) (1999) 155.*

[18] *Justice Mohammad HamidulHaque (2010), Trial of Civil Suits and Criminal Cases, Dhaka, p. 194.*

[19] *Ibid.*

[20] *See Supra note 2.*

proof on the basis of his personal experience.[21] However, the information about the accused's previous criminal history or racial identity should not be taken into account in determining the degree of doubt in an accusation.[22] Probability of doubt may also depend on the degree of confidence on the police, prosecutor and the justice system as a whole, although such confidence or feelings about these matters may vary from one community to another.[23] Degree of doubt may also have an impact from the perception of danger of the moment, for instance, increasing of sex crimes or robberies publicized by media.[24] Similarly, probability of doubt may decrease in an American case where the accused is charged with attempting to commit terrorist acts in post 9/11 period.[25] Although the assumption of future dangerousness of the accused may influence a judge in determining the guilt of accused, it should not be accepted as a relevant factor in determining the reasonableness of doubt in a case.[26]In fact, criminal cases have many layers of complexity regarding facts, motives, identification, intention, and witness credibility. Final decisions come from a complex synthesis of various kinds of doubt.[27]

Judicial Approach to Reasonable Doubt in Bangladesh

Like the USA, UK and India, Bangladesh also follows the rule of caution in criminal cases that the prosecution must prove its case beyond reasonable doubt. Bangladesh Supreme Court has decided in which situations and circumstances in a case the accused persons shall be entitled to benefit of the rule of reasonable doubt.

In a murder case[28], the Appellate Division has decided that the accused is entitled to the benefit of doubt because there are a good number of material discrepancies, contradictions and omissions in the evidence of the eye witnesses who have been examined before the trial Court. In another case,[29] the High Court Division has held that reasonable doubt has arisen about the prosecution case from the facts that a series of contradictions has been found in the evidences of the prosecution witnesses, and neither any tenant nor any disinterested neighbor nor micro-driver nor the owner of the house has been examined in trial.[30]In other words, reasonable doubt may be presumed in a case in which important witnesses like the

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21 *See, J.B Weinstein and I. Dewsbury (2007), Comment on the meaning of 'proof beyond a reasonable doubt', Oxford University Press.*
22 *Ibid.*
23 *Cf. KALVEN JR., H. & ZEISEL, H. (1966) The American Jury. Little Brown and Company, pp. 453–463.*
24 *See details, J.B Weinstein and I. Dewsbury (2007), Comment on the meaning of 'proof beyond a reasonable doubt, Oxford University Press.*
25 *Ibid.*
26 *Ibid.*
27 *Ibid.*
28 *15 BLT (AD) 101.*
29 *Mahmud Ali Kader and another Vs. State 4 BLC (HCD) 224.*
30 *See also Pear Ali Khan Vs. The State 7 BLT (HCD) 59.*

investigation officer, medical officer and material witnesses are not examined.[31] An accused may be acquitted on the ground of benefit of doubt in a case which has not been proved either by direct evidence or by indirect evidence or by circumstantial evidence.[32] Accordingly, no accused shall be convicted on mere surmises and conjectures or on any analogical deductions. Therefore, an allegation of possessing and controlling arms and ammunitions must be proved beyond reasonable doubt with cogent and reliable evidence. That is, reasonable doubt may arise in a case in which unimpeachable evidence is adduced by the prosecution.[33] Since the prosecution failed to prove the alleged injury on the faces, cheeks or breasts of the rape-victims and the medical board did not detect any trace of sexual violence on them, the allegation was not proved beyond reasonable doubt.[34] The evidence of the prosecution witnesses that at dead of night they have recognized the accused by torch and hurricane[35] or by moonligbt[36] cast reasonable doubt about the allegation against the accused. If a missing link is found in the chain of circumstances after scrutiny of the circumstantial evidences in a case, it can be decided that the prosecution has failed to prove the allegation beyond reasonable doubt.[37]

Again the omission of vital information in First Information Report (FIR) may create reasonable doubt in a case. In *The State Vs. Syed HabiburRahman @ Rocket*[38] the High Court Division has held that a vital piece of information that the condemned prisoner was seen standing and then carrying the victim girl on his shoulder on the bank of a river was not mentioned in FIR--- creates reasonable doubt on the allegation against the eondemned prisoner. In *SirajMiah and others Vs. the State*[39] the Appellate Division is of the view that the complainant's failure or omission to go to police station which is very near to the place of occurrence of burning a hut creates reasonable doubt in favour of the accused persons.

Conclusion

In all democratic justice systems an accused is presumed to be innocent until he is proved guilty. His guilt must be proved beyond reasonable doubt upon evidence on record. However, proof of accused's guilt beyond reasonable doubt does not imply the proof of guilt beyond any shadow of doubt. Therefore, an accused in criminal case shall get not the benefit of any imaginary doubt but the benefit of 'reasonable doubt' only. Reasonable doubt is measured

31 *See MonsurulHossainVs. State 10 BLC (HCD) 421; State Vs. Sarwaruddin 5 BLC (HCD) 451; NawsherMollah Vs. State 3 BLC (HCD) 251; Kamal Vs. State 3 BLC (HCD) 498.*
32 *ZahirulAlam Kamal and another Vs. State 1 BLC 325.*
33 *TareqHabibullah Vs.The State 11 BLD (HCD) 240.*
34 *Abdul Aziz and anotherVs. State 2 BLC 630.*
35 *Abu Bakkar and others Vs. the State 5 BLT (HCD) 133.*
36 *Jamir alias Jamiruddin Vs.The State 9 BLD (HCD) 474.*
37 *Nuru and another Vs. The State 1 BLC 582; See also MillonSamadar Vs.The State 8 BLT (HC) 21.*
38 *4 BLC (HCD) 545.*
39 *39 DLR (AD) 56.*

upon careful evaluation of the relevant evidences. That is, reasonable doubt may be evaluated from the evidence, the lack of evidence, or the nature and quality of the evidence. Probability of doubt may also depend on the degree of confidence on the police, prosecutor and the justice system. However, the information about the accused's previous criminal history or racial identity, and the assumption of future dangerousness of the accused should not be taken into account in determining the reasonableness of doubt in any accusation. However, final decisions as to reasonable doubt come from a complex synthesis of various kinds of doubts in a case.

Both Divisions of the Bangladesh Supreme Court have declared in which situations and circumstances in a case the accused persons shall be entitled to benefit of the rule of reasonable doubt. Reasonable doubts may arise in criminal cases in which reliable, unimpeachable or important evidence is not adduced. Omission in examination of important witnesses like medical officer, investigation officer, local and neutral witnesses in a case may create reasonable doubt on allegation against the accused persons. Reasonable doubt may also be presumed if serious contradictions and inconsistencies are found in the evidences, or a missing link is found in the chain of circumstances after scrutiny of the circumstantial evidences adduced by the prosecution in a case. Again reasonable doubt may also arise in a case in which defence version of the case is supported by the evidence of the prosecution. However, the Court should always remember a clear distinction between reasonable doubt and shadow of doubt that may arise from imaginary thoughts and beliefs. Otherwise, criminal justice system may ultimately lose its credibility and competence in ensuring rule of law in the country.

Fair Trial Rights and International Crimes Tribunal, Bangladesh (ICT-BD): A comparative analysis

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Introduction

Unlawful and arbitrary curtailment of right to life and liberty are the most common type of human rights violation throughout the world. Norms of the International Human Rights Law (Hereinafter IHL) deals with these issues. 'Right to a fair trial' is one of the most important and significant norms of IHL, designed to protect individuals from being deprived of their fundamental rights and freedoms unlawfully or arbitrarily.

Right to a Fair Trial nm

'Right to a fair trial' includes determining rights, duties and criminal charges of an individual in a 'Suit at law'. Question may arise what is 'Suit at law'? Suit at law refers to various court proceedings including administrative proceedings.

Origin of Fair Trial Rights

Attributes that assess the fairness of a trial are numerous, complex and constantly evolving. Question is what is the legal origin of these attributes? The possible answer is, the origin of Fair Trial Rights may be found in various treaties and documents (Having binding and non-binding obligations). Human rights treaties to which the state is a party may constitute binding obligations, but in case of non-binding documents they can be taken to express the direction in which the law is evolving[1].

Before discussing about the fair trial attributes let us have a look which are the legal origin of those attributes. The norms from which fair trial attributes evolved are originated from the following undisputed legal documents:

1. The laws of the country in which the trial is being held:
    (i) Constitution of that state, specially its provisions on human rights and the judicial system.

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[1] *Non-binding documents of relevance to the conduct of criminal proceedings and to ascertaining fair trial standards include: the Basic Principles for the Treatment of Prisoners[hereinafter Basic Principles on Prisoners]; Standard Minimum Rules for the Treatment of Prisoners[hereinafter Standard Minimum Rules]; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[hereinafter Body of Principles]; Basic Principles on the Role of Lawyers[hereinafter Basic Principles on Lawyers]; Basic Principles on the Independence of the Judiciary[hereinafter Basic Principles on the Judiciary].*

(ii) Its Penal Code, Code of Criminal Procedure; statutes on the establishment and jurisdiction of the courts and on the public prosecutor's office, and

(iii) Landmark court decisions pertaining to human rights, particularly in common law countries.

2. The human rights treaties to which that country is a party[2], and
3. Norms of customary international law[3].

Amongst the human rights treaties and norms of customary international laws, International Covenant on Civil and Political Rights (bereinafter ICCPR) , Universal Declaration of Human Rights (hereinafter UDHR), Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter torture convention) are the most important documents, which contain several relevant provisions in assessing the fairness of a trial.

Fair Trial Attributes

According to Manfred Nowak's Commentary, 'The right to a fair trial on a criminal charge is considered to start running not only upon the formal lodging of a charge but rather on the date on which state activities substantially affect the situation of the person concerned.[4]' Depending on the circumstances of the case fair trial rights could obviously coincide with the moment of arrest.

That is to say, fair trial guarantees must be observed from the moment the investigation against the accused commences until the criminal proceedings, including any appeal, having been completed.

As ICCPR contains most of the relevant provisions regarding fair trial rights we will take ICCPR as the 'Litmus', and will take the acid test of International Crimes Tribunal, Bangladesh (hereinafter ICT-BD)[5] to assess whether ICT-BD is in full conformity with the international standards of fair trial or not.

Categories of Fair Trial Attributes

We can classify the attributes of fair trial rights into three different time periods in a trial process. Though the differences between these three stages may be blurred sometimes, but they are significantly interconnected. Violation of rights during one stage may have an incorrigible effect on another stage. For the purpose of identifying which issues will be of

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2 *http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_4.html.*

3 *UDHR, Torture Convention etc.*

4 *Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary (N.P. Engel, Arlington: 1993) [hereinafter Nowak Commentary], at 244.*

5 *www.ict-bd.org*

particular interest during different time periods of the trial process articles and relevant norms of the ICCPR and other documents can be divided into the following three categories:

(i) Pre-trial Rights
(ii) In-trial rights
(iii) Post-trial rights

Pre-trial Rights

Attribute No.1: The prohibition on arbitrary arrest and detention

Article 9(1) of the ICCPR[6] provides that "everyone has the right to liberty and security of person." The liberty of a person has been interpreted narrowly, to mean freedom of bodily movement, which is interfered with when an individual is confined to a specific space such as a prison or a detention facility. Under Article 9(1) "No one shall be subjected to arbitrary arrest or detention" and "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

Whether ensured in ICT-BD or not?

This particular right has been ensured by the following provisions:

* Prohibition of arbitrary arrest, as one can only be arrested or be detained only by the Order of the Tribunal issued under the International Crimes (Tribunals) Act, 1973 (Hereinafter ICTA)[7] and International Crimes (Tribunal-1/2) Rules of Procedure, 2010/2012 (Hereinafter ROP) respectively, [Rule 9 of ROP][8]
* Right to seek bail. [Rule 34(2) of ROP]
* Right to bail if investigation is not completed within a specified period [Rule 9(5) of ROP]
* Discharge an accused if the Tribunal finds insufficient grounds to continue the trial [Rule 37 of ROP]
* Prohibition of prosecution on frivolous charges [Rule 29(1)]
* Right of the accused to explain charges [Section 17(1) of ICTA]

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6 *See also European Convention, supra note 2, Article 5(1); African Charter, supra note 2, Article 6; American Convention, supra note 2, Article 7(1)-(3); and Statute of the International Criminal Court [hereinafter ICC Statute]*

7 *www.bdlaws.minlaw.gov.bd*

8 *In exercise of powers given under section 22 of the International Crimes (Tribunals) Act,1973 (Act XIX of 1973), both the Tribunal promulgated the International Crimes Tribunal-1 Rules of Procedure, 2010 and the International Crimes Tribunal-2 Rules of Procedure, 2012 respectively for smooth functioning and keeping pace with the main spirit of the ICTA.*

Attribute No.2: Right to know the grounds for arrest

Article 9(2) of the ICCPR provides that "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." These provisions have been interpreted to mean that anyone who is arrested must be informed of the general reasons for the arrest "at the time of arrest," while subsequent information, to be furnished "promptly," must contain accusations in the legal sense.

However there must be sufficient information to permit the accused to challenge the legality of his or her detention.[9] A written arrest warrant is not unconditionally required, but the lack of a warrant may, in some cases, give rise to a claim of arbitrary arrest.

According to Article 33(1) of the Constitution of the People Republic of Bangladesh (hereinafter Constitution of Bangladesh), 'No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.'

Whether ensured in ICT-BD or not?

At the time of arrest, the accused individuals are duly furnished copy of the Order of the Tribunal setting out reasons for such issuance of arrest-warrant. The prescribed form of the warrant of arrest (see ROP: ICT-BD Form no.03) specifically mentions that the person is charged with offence punishable under Section 3 of the Act which affirms the jurisdiction of the Tribunal and specifies the crimes. Therefore, at the time of arrest, the accused knows exactly under which provision of the ICTA he/she has been arrested. The matching provision is set out in Rule 9(3) of the ROP which provides- "at the time of executing the warrant of arrest under sub-rule (2) or later on, copy of allegations is to be served upon such person.

Further, Rule 18 (4) provides: "The Chief prosecutor shall file extra copies of formal charge and copies of other documents for supplying the same to the accused(s) which the prosecution intends to rely upon in support of such charges so that the accused can prepare his defense."

In addition, Rule 9(3) of Rules of Procedure further ensures full disclosure of accusations against the accused. It states that "At the time of executing the warrant of arrest, under sub-rule 2 or later on, a copy of allegations is to be served upon such person"

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9 *The European Court of Human Rights (Fox, Campbell and Hartley (18/1989/178/234-236), August 30, 1990, para 40).*

Attribute No.3: The right to legal counsel

The right to be provided and communicate with counsel is the most scrutinized specific fair trial guarantee in trial observation practice, because it has been demonstrated to be the one that is most often violated. Principle 1 of the Basic Principles on Lawyers states that "all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.[10]" This right is particularly relevant in case of pre-trial detention.

Additionally, Rule 93 of the UN Standard Minimum Rules for the Treatment of Prisoners (1955) provides that: "For the purposes of his defense, an untried prisoner shall be allowed to…receive visits from his legal adviser with a view to his defense and to prepare and hand to him confidential instruetions…Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official."[11]

Paragraph 9 of General Comment 13 on Article 14 of the Covenant provides that:

> *"…this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgment [sic] without any restrictions, influences, pressures or undue interference from any quarter."*[12]

Principle 18 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment further provides that a detained person is entitled to communicate and consult with his legal counsel (paragraph 1) and the right to do so without censor shall not be suspended or restricted save in exceptional circumstances (paragraph 3)[13].

According to General Comment 20 on Article 7 of the Covenant, the Committee observed that the provision of legal assistance is relevant to prevent against incommunicado detention and maltreatment in custody. Specifically the Committee stated at paragraph 11[14].

Whether ensured in ICT-BD or not?

This particular right has been ensured by the following provisions:

With the provision of engaging legal counsel under Section 17(2) of ICTA and appointing defense counsel at state's expense under Rule 43(1) of the ROP and Section 12 of ICTA this right has been guaranteed.

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10 *http://www.unhchr.ch/html/menu3/b/h_comp44.htm*

11 *http://www.unhchr.ch/html/menu3/b/h_comp35.htm*

12 *http://www.unhchr.ch/tbs/doc.nsf*

13 *http://www.unhchr.ch/html/menu3/b/h_comp36.htm* .

14 *Supra note 12*

Attribute No.4: The right to be promptly brought before a judge

Article 9(3) of the Covenant guarantees the right for "...anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power".

According to the jurisprudence of the Committee the intention of the protection under Article 9(3) is "...to bring the detention of a person charged with a criminal offence under judicial control".

The right under Article 14(2) of the Covenant provides a number of separate and distinct rights and the central purpose of the right(s) is to prevent individuals from being arbitrarily deprived of their liberty and to ensure that the period of detention following arrest is kept as short as possible.

According to article 33(2) of the Constitution of Bangladesh 'Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.'

Whether ensured in ICT-BD or not?

Under the Rule 34(1) & (2) of ROP this right has been guaranteed as stated below-

Rule 34(1):" The police shall produce the arrested accused direct before the Tribunal within 24(Twenty-four) hours of arrest excluding the time needed for the journey".

Rule 34(2): "When the accused is produced before the Tribunal under sub-rule (1) he shall be sent to the prison if he is not enlarged on bail by the tribunal."

Attribute No.5: The prohibition of torture and the right to humane conditions during pre-trial detention.

Article 10 of the ICCPR provides in paragraph 1 that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

Article 7 of the ICCPR prohibits torture or cruel, inhuman or degrading treatment or punishment and is a norm of customary international law that also belongs to the category of *jus cogens.*

Under Article 2(2) of the Torture Convention no exceptional circumstances whatsoever, "whether a state of war or a threat of war, internal political instability or any other public

emergency" may be invoked as a justification of torture.[15] State parties are obliged to take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under their jurisdiction [Article 2(1)]. Furthermore, according to Article 2(3), superior orders may not be invoked as a justification of torture.

Whether ensured in ICT-BD or not?

During every interrogation, the Tribunals, as a matter of practice, have always ordered that the counsel of the accused and a doctor be present at the place of interrogation and both be allowed to consult and examine the accused before, after and during mandatory intervals.

In case of one accused, the Tribunal allowed such an interrogation to take place at the comfort of the home of the accused where he was on bail, in the presence of a physician and his counsel. Such orders are unprecedented where a person accused of crimes as serious as international crimes has been allowed to be interrogated under such conditions. This is how the accused individuals are generally treated by the International Crimes Tribunals of Bangladesh.

Even with the provision of appointing defense counsel at state's expense under Rule 43(1) and Section 12 of ICTA this right has also been guaranteed.

Attribute No.6: The prohibition on incommunicado detention

The Human Rights Committee (Hereinafter HRC)[16] has found that incommunicado detention may violate Article 7 of the ICCPR which prohibits torture, inhuman, cruel and degrading treatment. Principle 19 of the Body of Principles states that a "detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations." At a minimum, the right to communicate with the "the outside world" includes the right to communicate with a detainee's family, a lawyer and a doctor.

Principle 16 of the Body of Principles requires that the family of any arrested or detained person must be notified promptly of the arrest and the location of their family member. If the detainee is moved to another facility the family must be notified of that change. A detainee cannot be denied the right to communicate with his family and counsel "for more than a matter of days." Furthermore, where the detainee is in pre-trial detention he or she is entitled to visits by family and friends, subject only to restrictions "*necessary* in the interests of the administration of justice and of the security and good order of the institution."

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15 *http://www.unhchr.ch/html/menu3/b/h*

16 *Supra note 12*

Whether ensured in ICT-BD or not?

During every interrogation, the Tribunals, as a matter of practice, have always ordered that the counsel of the accused and a doctor be present at the place of interrogation and both be allowed to consult and examine the accused before, after and during mandatory intervals.

Even with the provision of appointing defense counsel at state's expense under Rule 43(1) and Section 12 of ICTA this right has also been guaranteed.

Right to eat own selected menu for foods provided by the prison authority as well as accused's families are also ensured in the ICT-BD.

Attribute No.7: The right to legal aid

The Judicial Committee of the Privy Council in the case of *LaVende* has consistently held that "...it is imperative that legal aid be available to a convicted prisoner under sentence of death, and that this applies to all stages of the legal proceedings"[17].

Whether ensured in ICT-BD or not?

With the provision of appointing defense counsel at state's expense under Rule 43(1) of ROP and Section 12 of ICTA this right has been guaranteed.

In-trial Rights

Attribute No.1: The right to a competent, independent and impartial Tribunal established by law

Article 14(1) of the ICCPR provides that the basic institutional framework enabling the enjoyment of the right to a fair trial is that proceedings in any criminal case (or in a suit at law) are to be conducted by a competent, independent and impartial tribunal established by law. It can be tested in a variety of way.

In General Comment No. 13, the Human Rights Committee stated with regard to the creation of military and other special Tribunals that

"The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.[18]"

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[17] *R. LaVende v. Trinidad and Tobago (Views adopted on 29 October 1997), in UN doc. GAOR,A/53/40 (vol. II), p. 12, para. 5.8; emphasis added.*

[18] *United Nations Compilation of General Comments, p. 123, para. 4.*

The Committee has also made it abundantly clear that the "***right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception***[19]". It is further beyond doubt that the basic fair trial guarantees laid down in article 14 must be ensured even in severe crisis situations, although the Committee has accepted "that it would simply not be feasible to expect that all provisions of article 14 of the Covenant can remain fully in force in any kind of emergency".[20] However, it has not yet defined what aspect, or aspects, of the fair trial guarantees might possibly not be applicable in public emergencies threatening the life of the nation.

In assessing impartiality, the following important points may be considered:

a. whether the court is biased with regard to the decision it takes;

b. whether the court allowed itself to be influenced by popular feeling or by any outside pressure whatsoever; and

c. whether the court based its opinion on objective arguments on the ground of what had been put forward at trial.

Whether ensured in ICT-BD or not?

The ICTA, through amendment in 2009, guaranteed independence of the Tribunal under Section 6 (2A) which reads as:

> *"The Tribunal shall be independent in exercise of its judicial functions and shall ensure fair trial."*

This provision was specifically introduced to protect the Tribunals from potential political or other influences by imposition of this positive duty to act independently.

Section 6(2A) of the ICTA obliges the Tribunals to ensure fair trial in recognition of the obligation under the Constitution of Bangladesh as well as under international instruments to which Bangladesh is a party to, including the ICCPR.

Attribute No.2: Presumption of innocence

The presumption of innocence acts primarily as a procedural safeguard against arbitrary decision making by the authorities in the absence of a finding of guilt by a court of law and acts as an extension to the general right to a fair criminal trial.

According to Article 14(2) of the ICCPR, "Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law." As a basic

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[19] *Communication No. 263/1987, M. González del Rio v. Peru (Views adopted on 28 October 1992), in UN doc. GAOR, A/48/40(vol. II), p. 20, para. 5.2; emphasis added.*

[20] *See UN doc. GAOR, A/49/40 (vol. I), p. 5, para. 24.*

component of the right to a fair trial, the presumption of innocence, *inter alia*, means that the burden of proof in a criminal trial lies on the prosecution and that the accused has the benefit of the doubt. Under Article 11(1) of the UDHR this right is also guaranteed.

Whether ensured in ICT-BD or not?

This particular right has been ensured by the following provisions enumerated in the ROP:

- Presumption of innocence [Rule 43(2)]
- Burden of Proof on prosecution beyond reasonable doubt (Rule 50)
- In addition, with the common practice apparent in the judgments pronounced, as 'failure to prove the plea of alibi and or the documents and materials by the defense shall not render the accused guilty'.

Attribute No.3: The right to prompt notice of the nature and cause of criminal charges

According to Article 14(3) of the ICCPR, In the determination of any criminal charge against him/her everyone shall be entitled, in full equality "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.

Whether ensured in ICT-BD or not?

This particular right has been ensured by the following provisions:

Section 16(2) of the ICTA 1973:"A copy of the formal charge and a copy of each of the documents lodged with the formal charge shall be furnished to the accused person at a reasonable time before the trial; and in case of any difficulty in furnishing copies of the documents, reasonable opportunity for inspection shall be given to the accused person in such manner as the Tribunal may decide." The following rights are also included for-

- Disclosure of evidence [Section 18(4) of ICTA] and entitlement of having copy of formal charge together with documents collected during investigation,
- Notice to the defense in case of inclusion of additional witnesses by the prosecution [Section 9(4) of ICTA]
- Adequate time for preparing defense [Rule 38(2) of ROP]
- Right to inspect documents [section 16(2) of ICTA]

Attribute No.4: The prohibition on retroactive application of criminal laws

Article 15(1) of the ICCPR which embodies the principle *nullum crimen sine lege* (a crime must be provided for by law), can in fact be taken as a point of departure in any consideration of the fairness of a trial. In the broad sense, it expresses the principle of legality, according to

which, "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed" [Article 15(1)]. In the narrow sense, it is aimed at prohibiting the retroactive application of substantive criminal law and thus chronologically precedes a determination of the procedural fairness of a trial pursuant to Article 15(1).

Whether ensured in ICT-BD or not?

A central tenet of human rights law that applies directly to the international criminal law system is the principle that prohibits retroactive application of crimes and penalties. To incur criminal responsibility, behaviour must be prohibited and carry criminal sanction at the time of conduct. This is known as the principle of legality or *nullum crimen sine lege* and *nulla poena sine lege*. The principle of legality is an important principle in international criminal law, given the often imprecise nature of the sources of ICL (*e.g.* customary international law).Though the ICTA was enacted on 1973(after the liberation war of 1971) , but this retroactivity was not barred according to the principle of ICL. This will be clear from the following discussion.

The provision of article 15 of the International Covenant on Civil and Political Rights are as follows:

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

(2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Theoretically, according to this principle, if conduct is not criminal under national laws, this will not necessarily bar a person from being tried for that conduct under international law.

So, from the above discussion it is evident that Principle of Legality has not been violated in the ICTA, but rather this principle has been followed well enough.

Attribute No.5: The prohibition on double jeopardy

The prohibition of *ne bis in idem* or of double jeopardy is aimed at preventing a person from being tried and punished for the same crime twice.

According to Article 14(7) of the ICCPR, "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country"

Whether ensured in ICT-BD or not?

The law is very clear that an accused cannot be tried twice of the same offences described under section 3(2) of the ICTA. According to Rule 43(3):

> *"No person shall be tried twice for the same offence described under section 3(2) of the Act"*

Attribute No.6: The right to adequate time and facilities for the preparation of a defense

Article 14(3)(b) of the ICCPR provides that in the determination of any criminal charge against him or her everyone is entitled "To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing." The right to adequate time and facilities for the preparation of a defense applies not only to the defendant but to his or her defense counsel as well and is to be observed in all stages of the proceedings.

Whether ensured in ICT-BD or not?

Under the following provisions enumerated in the ICTA and ROP this right has been guaranteed-

* Engaging legal counsel [Section 17(2) of ICTA]
* Appointing defense counsel at state's expense [Rule 43(1) of ROP and Section 12 of ICTA]
* Right to conduct own defense [Section 17(2) of ICTA]
* The Tribunal may allow appearance of foreign counsel defense if Bangladesh Bar Council (i.e. the regulatory authority for practicing lawyers) permits so (Rule 42 of ROP)
* Right of the accused to explain charges [Section 17(1) of ICTA]
* Availing serviees of an interpreter [Section 10(3) of ICTA],
* Full opportunity to present the case of the defense including the right to cross examine prosecution witnesses [Section 17(3) of ICTA],
* Right to call their own defense witnesses [Section 10(1)(f) of ICTA]
* Right of the accused to produce evidence in support of his defense [section 17(3) of the ICTA],

Attribute No.7: Equal access to, and equality before, the courts

The first sentence of Article 14(1) provides that "All persons shall be equal before the courts and Tribunals" and has been interpreted to signify that all persons must be granted, without discrimination, the right of equal access to a court. "To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him" [Article 14(3)(e)]. While article 8(1) of the American Convention on Human Rights speaks of 'Due guarantees'.

Provision relating to this right is guaranteed in the Constitution of Bangladesh as follows-

Article 27: "All citizens are equal before law and are entitled to equal protection of law".

Article 31: "To enjoy the protection of the law, and to be treated in accordanee with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law."

Whether ensured in ICT-BD or not?

The ICTA and the Rules of Procedure framed there under, and the judicial practices adopted by the Tribunals guarantees one of the key aspects of fair trial and that is the 'equality of arms'. Provisions that have been guaranteed this right are:

In the ICTA

(i) Section 9(4): Notice of additional witnesses to be served to the defense.
(ii) Section 10(1)(f): Right to call their own defense witnesses.
(iii) Section 10(3): Availing services of an interpreter
(iv) Section 16(2): Right to inspect doeuments
(v) Section 17(2): Engaging legal counsel and Right to conduct own defense
(vi) Section 17(3): Right of the accused to produce evidence in support of his defense
(vii) Section 21 : Right to appeal against both conviction and sentence

In the ROP

(i) Rule 26(3) : Review of the decisions of the Tribunal
(ii) Rule 38(2) : Adequate time for preparing defense
(iii) Rule 42 : The Tribunal may allow appearance of foreign counsel defense if Bangladesh Bar Council (i.e. the regulatory authority for practicing lawyers) permits so.
(iv) Rule 43(1) : Provision of appointing defense counsel at state's expense
(v) Rule 58A: Provision of witness and victim protection
(vi) Rule 58A(3): Provision for proceedings in camera

Attribute No.8: The right to a public hearing

Article 14(1) of the ICCPR also guarantees the right to a public hearing, as one of the essential elements of the concept of a fair trial. However, it also permits several exceptions to this general rule under specified circumstances. The public may be excluded for reasons of "morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires." The public may also be excluded "to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Whether ensured in ICT-BD or not?

Trials before this Tribunal take place openly so that justice is not only delivered in public but it is also seen to be delivered. Anyone, including observers from international community and the media is free to attend the sessions of the Tribunal, observe its proceedings, and report. There is no restriction whatsoever as regards such attendance except that of the limitation of seating arrangement. Rule 43(4) of ROP ensured this right.

Attribute No.9: The right to defend oneself in person or through legal counsel

Article 14(3)(d) of the ICCPR states that everyone shall be entitled, in the determination of any criminal charge against him/her "To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

While Article 6(1) of the European Convention on Human Rights does not expressly mention a person's right to participate in his or her trial, the European Court of Human Rights has held that the existence of this right is "shown by the 'object and purpose of the article taken as a whole[21]'".

Although the international monitoring organs have not yet developed any theory around trials *in absentia*, it appears that they might accept that such trials may be held in special circumstances. This is at least clear with regard to the International Covenant on Civil and Political Rights, from the Committee's General Comment No. 13 on article 14, which states that "when exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary". Consequently, while such trials do not ipso facto constitute a violation of article 14 of the Covenant, the basic requirements of a fair trial must be maintained; a trial *in absentia* is thus only compatible with article 14 when the

[21] *Eur. Court HR, Brozicek Case v. Italy, judgment of 19 December 1989, Series A, No. 167, p. 19, para. 45.*

accused has been summoned "in a timely manner and informed of the proceedings against him" and the State party itself "must" in such cases show that the principles of a fair trial were respected[22].

Whether ensured in ICT-BD or not?

This right has been guaranteed under following provisions enumerated in the ICTA and ROP:

Section 17(2): Engaging legal counsel and Right to conduct own defense.

Rule: 43(1): Provision of appointing defense counsel at state's expense.

Rule 43(4): Right to engage counsel at own choice.

Attribute No.10: Reasonable length of detention

Article 9(3) of the Covenant and Article 5(3) of the European Convention further provides for the right to a trial within a reasonable time or to be released on bail pending trial.

Whether ensured in ICT-BD or not?

This right has been guaranteed under following provisions enumerated in the ROP:

The Rules of Procedure authorizes the Tribunal to release an accused provisionally on bail. Under Rule 34 (2), when the accused is produced before the Tribunal following arrest, "he shall be sent to prison if he is not enlarged on bail by the Tribunal."

Rule 34(3) provides further power release the accused on bail, which reads as follows:

> *"At any stage of the proceedings, the Tribunal may release an accused on bail subject to fulfillment of some conditions as imposed by it, and in the interest of justice, may modify any such conditions on its own motion or on the prayer of either party. In case of violation of any such conditions the accused may be taken into custody canceling his bail."*

Rule 9(5): Right to bail if investigation is not completed within a specified period.

Attribute No.11: Freedom from Self-incrimination and right to silence

Article 14(3)(g) of the Covenant guarantees the right not to be compelled to testify against oneself or to confess guilt.

General Comment 13 to Article 14 of the Covenant observes that Article 14(3)(g) guarantees the right of freedom from compulsory self-incrimination and that the law should require that evidence provided through such methods or any other form of compulsion is fully unacceptable. Further, General Comment 13 observes that in order to safeguard against such practice judges should have authority to consider allegations at any stage of the prosecution.

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22 *A. Maleki v. Italy (Views adopted on 15 July 1999), in UN doc. GAOR, A/54/40 (vol. II), p. 183, paras. 9.2-9.3.*

Whether ensured in ICTA or not?

Under the following Rules of the ROP this right has been guaranteed-

* Protection against self-incrimination [Rule 43(7)]
* Safeguards related to confessional statements [Rule 25(2) &Section 14(2)],
* Confessional statements must be voluntary and made before a judicial entity [Section 14(2)]
* Prohibition of self incrimination or making confession [Rule 43(7)]

Attribute No.13: The right to an interpreter

In the determination of any criminal charge against him/her everyone is entitled "To have the free assistance of an interpreter if he cannot understand or speak the language used in court" [Article 14(3)(f)].The right to an interpreter may also be claimed by a suspect or an accused being interrogated by the police or by an investigating judge in the pretrial phase.

Whether ensured in ICTA or not?

Under section 10(3) of the ICTA this right has been guaranteed.

Attribute No.14: The right to a trial without undue delay

In the determination of any criminal charge against him/her, everyone shall be entitled "To be tried without undue delay" [Article 14(3)(c) of ICCPR].

Whether ensured in ICTA or not?

This particular right has been ensured by the following provisions:

Sections 11(3)(a), 11(3)(b) and 21(3) and 21(4) of the ICTA contained the related provision stated below-

A Tribunal shall -

11(3)(a) Confine the trial to an expeditious hearing of the issues raised by the charges,

11(3)(b) take measures to prevent any action which may cause unreasonable delay, and rule out irrelevant issues and statements.

According to the section 21(3) an appeal under sub-section (1) or (2) shall be preferred within 30 (thirty) days from the date of judgment.

According to the section 21(4) the appeal shall be disposed of within 60 (Sixty) days from the date of its filing.

And in the recent judgment delivered by The Honorable Appellate Division of the Bangladesh Supreme Court in the Criminal Review Petition No.17-18 (Arising out from the Chief Prosecutor Vs Abdul Quader Molla Case at ICT-BD) opined that both the parties have the right to file a Review petition from a judgment on Appeal under the International Crimes (Tribunals) Act, 1973 within 15 (Fifteen) days, and should be disposed of on priority basis.

Post Trial Rights

Attribute No.1: The right to appeal

"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher Tribunal according to law" [Article 14(5) ICCPR]. The right to appeal is aimed at ensuring at least two levels of judicial scrutiny of a case, the second of which must take place before a higher Tribunal. The UN Human Rights Committee (hereinafter: Committee) has considered a number of communications relating to criminal appeals. It has consistently held that the standards set out in paragraphs 1 and 3 of Article 14 of the ICCPR apply not only to hearings at the first instance, but also to appeals.

Whether ensured in ICTA or not?

This particular right has been ensured by the following provisions:

According to the section 21(3) of ICTA an appeal under sub-section (1) or (2) shall be preferred within 30 (thirty) days from the date of judgment.

According to the section 21(4) the appeal shall be disposed of within 60 (Sixty) days from the date of its filing.

And in the recent judgment delivered by The Honorable Appellate Division of the Bangladesh Supreme Court in the Criminal Review Petition No.17-18 (Arising out from the Chief Prosecutor Vs Abdul Quader Molla Case at ICT-BD)[23] opined that both the parties have the right to file a Review petition from a judgment on Appeal under the International Crimes (Tribunals) Act, 1973 within 15 (Fifteen) days, and should be disposed of on priority basis.

Attribute No.2: The right to a reasoned judgment

Although not expressly mentioned in the main human rights treaties, the right to a reasoned judgment is inherent in the provisions regarding a 'fair trial', including the right to a public judgment. Article 22(2) and Article 23(2) of the respective Statutes of the International

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[23] *http://www.supremecourt.gov.bd/web/judgments.php?div_id=1*

Criminal Tribunals for Rwanda[24] and the former Yugoslavia[25] both stipulate that the judgments of these Tribunals "shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended". According to article 74(5) of the Statute of the International Criminal Court[26], the decisions of the Trial Chamber "shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's finding on the evidence and conclusions".

Whether ensured in ICTA or not?

This particular right has been ensured in the ICTA by the following provisions:

Section 20. (1) The judgment of a Tribunal as to the guilt or the innocence of any accused person shall give the reasons on which it is based:

> *Provided that each member of the Tribunal shall be competent to deliver a judgment of his own.*

(2) Upon conviction of an accused person, the Tribunal shall award sentence of death or such other punishment proportionate to the gravity of the crime as appears to the Tribunal to be just and proper.

Additionally, it is evident that these provisions were not confined only in the ICTA but the honorable Appellate Division of the Supreme Court of Bangladesh (hereinafter the honorable Appellate Division) and both the honorable International Crimes Tribunal (hereinafter honorable ICT-1 and ICT-2 respectively) have engraved the sign of accomplishment of these provisions in their pronounced judgments i.e. the judgment of the Criminal Appeal Nos. 24-25 of 2013 (Arising out of ICT-BD Case no 02 of 2012, The Chief Prosecutor Vs Abdul Quader Molla)[27] pronounced by the honorable Appellate Division; the judgment of the ICT-BD(ICT-2) Case No.04 of 2013(The Chief Prosecutor Vs Syed Md. Qaiser)[28] delivered by the ICT-2. In both the aforementioned judgments sentences were awarded by majority views and accordingly separate observation were written by the honorable Justice having dissenting view.

So, it is well apparent that the 'Right to a reasoned judgment' has actionably espoused in this ongoing trial.

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24 *www.unictr.org*
25 *www.icty.org*
26 *www.icc-cpi.int*
27 *http://www.supremecourt.gov.bd/web/judgments.php?*
28 *http://www.ict-bd.org/ict2/judgments.php*

Conclusion

This article has explained the prime rights that must be effectively ensured to both the accused and victims from the beginning to end of the trial proceedings. It has also shown the indispensable role to be played by the domestic Tribunals in the fair administration of justice in the new-fangled path of prosecuting International Crimes by using the domestic machinery. The rights dealt with in this discussion are manifold and it is difficult, or even impossible, to single out some as being more important than others. These rights indeed form a whole, and, together with the other rights, constitute the foundation on which a society respectful of human rights in general, including the rule of law, is built.

So, from the above comparative discussion it will not be untrue and misleading to say that, the on-going trial in the International Crimes Tribunal, Bangladesh is in full conformity with the international fair trial standards.

Instream Uses of Water Law-A Comparative Analysis between California and Bangladesh

*Farjana Yesmin**

Introduction

Water is the most important resource in the world. Life is impossible without it and it is essential for almost every human activity.[1] It has been said that "civilization has been a permanent dialogue between human beings and water."[2] How water is allocated and used is a reflection of human priorities.[3] In this particular human concern there are lots of differences between California and Bangladesh but one thing is very common and that is, we need to protect instream flow for preserving fisheries & water quality. Bangladesh is a riverine country.[4] About 800 rivers including tributaries flow through the country constituting a waterway of total length around 24,140 km.[5] It has been known that the out flow of water from Bangladesh is the third highest in the world, after the Amazon and the Congo systems.[6] On the other hand, California's principal river systems are formed by the Sacramento and San Joaquin rivers and their tributaries, which drain the Great Central Valley.[7] The Sacramento, the longest river within the state, flows generally southward for 607 km (377 mile) from its source at the base of Mount Shasta in the southern Cascade Mountains to its junction with the San Joaquin.[8]

The early history and development of both Bangladesh and California was dependent on instream water uses and so minimum instream flow is essential here for sustenance of the fisheries, navigation and overall ecosystem. Instream values in the California are facing a crisis.[9] Industrial, municipal, and agricultural growth has significantly depleted instream flows with devastating consequences for instream values.[10] The effect of diversions on Salmon and Steelhead in California demonstrates the severity of the situation.[11] Similarly

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* *Senior Judicial Magistrate of Mymensingh.*

1 *Michael F. Browning, "Instream Flow Water Rights in the Western States and Provinces," 56 Rocky Mountain Mineral Law Institute, 9-1 (2010)*

2 *id*

3 *id*

4 *http://www.banglapedia.org/httpdocs/HT/R_0208.HTM*

5 *id*

6 *http://www.discoverybangladesh.com/meetbangladesh/river_lakes.html*

7 *http://wiki.answers.com/Q/What_are_the_major_rivers_and_lakes_in_California*

8 *id*

9 *Paul R. Williams & Stephen J. McHugh, "Water Marketing and Instream Flows: The Next Step in Protecting California's Instream Values," Stanford Environmental Law Journal, 1990*

10 *id*

11 *id*

Bangladesh shares fifty four rivers with upstream country India and so India's diverting normal water flow through dams & our own unplanned water uses has made our rivers dry up, our irrigation system destroyed and life killed in our water bodies.

A new demand to leave water instreams rather than diverting it for what has historically been viewed as more "beneficial" uses in California & Bangladesh and the resulting laws and regulations, present increasing hurdles for new water development projects and greater obstacles for the conversion of existing water rights to new uses. In my writing I will focus on this demand by explaining the nature & historical development of instream flow water rights and the existing flow protection mechanisms in these two States.

The Nature of Instream Flow Water Rights

Instream flow water rights are known by different names in different states: minimum stream flows, environment flows, minimum desirable flows, base flows, reservations, and preservation flows.[12] Although some nuances exist among these terms, all of them essentially refer to the amount of water that is required, by law, to be left un-diverted in a stream.[13]

Why leave water instreams? The most ready answer is "fish need water too".[14] Instream flows provide a wide range of public benefits, supporting river recreation (from white water boating to swimming and wading), fish and wildlife habitat, water quality, riparian areas, and scenic beauty.[15]Indeed, most instream flow water right programs began as, and many are still limited to, efforts to protect sport fisheries.[16] However, as human understanding of the dynamics of natural ecosystems has increased, many other benefits of instream flows are being recognized.[17] Streams support riparian corridors along their banks, which include shrubbery, trees, plants, and animals that in turn support a wide diversity of other plants and animals. Such ecosystems not only have aesthetic value, but also more tangible benefits including providing buffer areas for floods, enhancing water quality by natural filtering and biological processes, and maintaining stream channels.[18]

In California increasing emphasis is placed on protecting instream uses – fish, wildlife, recreation and scenic enjoyment – surface water allocations are administered under ever-tightening restrictions, posing new challenges and giving new direction to the State Board's water right activities.[19] Under the public trust doctrine, certain resources are held to be the

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12 *supra note 1*
13 *id*
14 *id*
15 *Reed D. Benson, "Adequate Progress," or Rivers Left Behind? Developments in Colorado and Wyoming Instream Flow laws since 2000*
16 *supra note 1*
17 *id*
18 *id*
19 *http://www.waterboards.ca.gov/waterrights/board_info/water_rights_process.shtml*

property of all citizens and subject to continuing supervision by the State. Originally, the public trust was limited to commerce, navigation and fisheries, but over the years the courts have broadened the definition to include recreational and ecological values.[20]

In a landmark case, the California Supreme Court held that California water law is an integration of both public trust and appropriative right systems, and that all appropriations may be subject to review if "changing circumstances" warrant their reconsideration and reallocation. The courts also have concurrent jurisdiction in this area. At the same time, it held that like other uses, public trust values are subject to the reasonable and beneficial use provisions of the California Constitution.[21]

On the other hand, in Bangladesh capture fishery and small scale navigation are the instream water direct uses on which many riparian poor rely for their livelihood but not too much legal steps have been taken to protect the instream flow here.

Historical Development of Instream Flow Water Rights

In California, the prior appropriation doctrine serves as the basis for surface water allocation.[22] The tenets of appropriation originated in the customs of California's miners who needed large amounts of water for hydraulic mining, but were often located far away from water sources.[23] Mining tradition established that the first miner to divert a set quantity of water and put it to use had a priority right to that water.[24] Following miners could also establish rights to specific quantities of water from the same watercourse, but only in so far as their diversions did not interfere with the exercise of previously acquired or senior rights.[25] The doctrine of prior appropriation seeks to provide as much certainty as possible to each water right holder.[26]Under the auspices of prior appropriation, the state encouraged substantial diversions of water without regard for instream values.[27]

In 1872, the California Legislature extended explicit recognition to prior appropriation.[28] In 1926, Southern California Edison was unable to build a hydroelectric power plant because a court upheld a riparian landowner's right to the uninterrupted use of spring flood water for overflow irrigation.[29] In 1928, the California Constitution was amended to prevent similar impediments to water development. Article 10, Section 2 of California's Constitution now

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20 *id*

21 *Id*

22 *supra note 9*

23 *id*

24 *id*

25 *supra note 9*

26 *id*

27 *id*

28 *id*

29 *id*

requires that all uses of water be limited to the "reasonable" amount of water needed for a "beneficial use."[30]

In fact, from the 1848 gold rush through the first half of this century, there was no significant attempt to integrate the protection of instream values into California water allocation.[31] Allowing substantial diversions of water notwithstanding their effect on instream values occurs simply because "California water law is designed to allocate rights of diversion rather than to ensure the integrity of natural stream flows." [32]

In contrast the historical development of instream water rights in Bangladesh is different from California. Here in order to understand instream water rights we have to take a look in the history of water rights. The Indus Valley Civilization flourished around 2500 BCE.[33] Water was vital for the civilization and was used primarily for human personal use and irrigation.[34] The most important structure in the city of Mohenjodaro was the Great Bath, which had water channels leading to and from it.[35] From the sixteenth century onwards, European colonialism began in India.[36] British colonial water law had two main strands. First, control over water and rights to water were regulated through the progressive introduction of common law principles, emphasizing the rights of landowners to access water.[37] For surface waters, riparian rights allow a landowner the right to take a reasonable portion of the flow of a watercourse.[38] For groundwater, landowners had a virtually unlimited right to access water under their holdings.[39]

Later on East Pakistan Water and Power Development Authority more widely known as EPWAPDA was created in January, 1959 (EP Ordinance No. 1 of 59) for unified and coordinated development and utilization of water and power resources in the country.[40] After the independence of Bangladesh in 1971, the Authority was restructured into two organizations dealing with water and power separately on the 31st May, 1972 as Bangladesh Water and Power Development Boards.[41] Taking into considerations further the rapidly changing dimensions of water resources development, the government thereafter constituted

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30 *id*
31 *id*
32 *id*
33 *http://www.ielrc.org/content/a0901.pdf*
34 *id*
35 *id*
36 *id*
37 *id*
38 *id*
39 *id*
40 *http://archive.thedailystar.net/newDesign/news-details.php?nid=122025*
41 *id*

Bangladesh Water Development Board on the 11th July, 2000 as a fully autonomous organization with fresh mandate.[42]

The BWDB's water development projects provided increased flood-free secured land for agriculture, enhanced degree of safety to human lives, livestock, settlement, industry and infrastructure.[43] Undeniably true that inadequate consideration has been given by the water professionals to the sustainability of rivers or canals and their water quality in designing a water development project for consumptive or non-consumptive use of water culminating in fatal disruption of stream's hydraulic equilibrium.[44]

Instream Flow Protection

Current mechanisms for protecting instream values from new diversions.

All surface water rights obtained since 1914, except for riparian rights, are conditioned on issuance of a permit or license by the Board.[45] "In determining the amount of water available for appropriation for other beneficial uses, the board shall take into account, whenever it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources."[46] The Board's determination of public interest is based in part on California Department of Fish and Game minimum flow recommendations.[47] Additionally, the Board must consider the instream flows needed to support the "uses specified to be protected in any relevant [federal or state] water quality control plan.[48]

This process provides insufficient protection of instream values because many instream uses of water which do not fall into the fish and wildlife context are not ensured adequate representation.[49] The application process also fails to provide a "categorical directive to protect instream uses."[50] Indeed, the Legislature has established two diversionary uses, municipal consumption and irrigation, as the "highest" and next "highest" uses of water. These uses make up over ninety percent of California's present water use. [51]

The California Water Code requires the Board to consider instream values when it determines whether water is available for appropriation, but it provides no mandate to affirmatively protect such values.[52] For this reason the water rights application process is inherently biased against instream flows. When the Board determines the quantity of water available for

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42 *id*
43 *id*
44 *id*
45 *People of the State of California v. Shorokow,26 Cal.3d 301,605 p.2d 859,162 Cal.Rptr.30 (1980)*
46 *Cal. Water Code Section 1243*
47 *id*
48 *id*
49 *Supra note 9*
50 *id*
51 *id*
52 *id*

appropriation, it does not consider whether diverters are making the best use of their water, but rather assumes categorically that currently diverted water is unavailable for appropriation.[53] There is no mandate to set aside an amount of water to satisfy instream flow needs, so when the State water Resources Control Board (SWRCB) decides whether to approve a proposed diversion, "the focus of the Board's analysis is a weighing of the reasonableness of the proposed appropriation against the reasonableness of maintaining a certain level of instream flow protection."[54]

Even in the rare cases where the SWRCB rejects an application in order to maintain instream flow levels, the unappropriated water remains subject to future diversion.[55]

Unlike California the current mechanisms for protecting instream values from new diversions in Bangladesh are not mentionable as the National Water Policy, 1999 and the National Water Management Plan, 2001 by National Water Resources Planning Organization (WARPO) under the Ministry of Water Resources are the current water related documents. The goal of the national Water Management Plan is to implement the National Water Policy and contribute to national economic development through national management of water resources, in a way that protects the natural environment and improves the quality of life for the people of Bangladesh.[56] There is no specific provision here about the protection of instream values.

Governor's Commission proposals for protecting instream values from new diversions.

In 1978, the Governor's Commission recommended that California establish a minimum streamflow program.[57] Unlike the current regime where all unallocated water is available for diversion, a minimum flow program specifies a quantity of water to remain instream.[58]

The Commission also addressed a proposal for allowing the Board to issue appropriative rights for instream flows.[59]

By contrast, a reallocation of water through the purchase of currently diverted water to augment depleted instream flows would neither tie-up unallocated water, nor constrain future water development.[60]

In Bangladesh, the cabinet just approved the draft of 'Bangladesh Water Act-2013' aiming to ensure proper utilization of water resources in February 11th, 2013.[61] " After due notice and

53 *id*
54 *id*
55 *id*
56 *http://wreforum.org/resources-bangladesh*
57 *Supra note 9*
58 *id*
59 *id*
60 *id*
61 *http://archive.thedailystar.net/newDesign/news-details.php?nid=268791*

hearing, minimum stream flows for rivers and streams and minimum water levels for lakes shall be established by the WARPO for the protection of the environment, control of pollution, navigation, salinity control, and general public use."[62]

Protecting Instream Values through Administrative and Judicial Modification of Water Rights

a) Current law providing for protection of instream values through modification of existing water rights.

When the SWRCB issues a permit, it reserves jurisdiction by including a condition that allows it to later reopen the permit and rewrite specific terms to account for changing needs and conditions. This policy is not immune from the criticisms made of other applications of the Board.[63]

As regards Bangladesh the draft emphasizes on water distribution which could also mean commercialization and the draft provides the Ministry of Water Resources the authority to formulate guidelines to identify specific areas for different kinds of economical activities related to water resources but no provision was kept to take public opinion.[64] Moreover, though the draft has a provision to identify areas facing water crisis, there is nothing on how to recover from such crisis. The proposal to reduce pressure on groundwater in National Water Policy 1999 is also absent in the draft.[65]

b) Recent judicial expansion of the State's authority to modify existing water rights: the public trust doctrine.

The California Supreme Court has held that the State of California holds its waters in trust for other public uses as, principally eertain environmental uses.[66] This principle –that the state holds its waters in trust for public uses-is generally referred to as the public trust doctrine.[67]

In National Audubon Society v. Superior Court, the California Supreme Court held that the public trust doctrine applies in the water rights context in California.[68] But the Court did not consider whether the state has authority to reconsider past water rights decisions under traditional water rights law-as opposed to the public trust doctrine-even though the issue was presented to it.[69]

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62 *Section 48 of Draft Bangladesh Water Act*
63 *Supra note 9*
64 *http://archive.thedailystar.net/newDesign/news-details.php?nid=226951*
65 *id*
66 *Marks v. Whitney, 491 p.2d 374,378-80 (Cal.1971)*
67 *id at 378*
68 *National Audubon Society v. Super.Ct.,658 p.2d (Cal.1983)*
69 *Roderick E. Walston, California Water Law: Historical Origins to the Present, Whittier Law Review (2008)*

In the draft Bangladesh Water Act it is stated that-"Appropriation will be guided by the availabilities of both surface and ground water resources and based on demand and priority responding to the national and community interest."[70]

It has also been asserted that-"The Government, for reasons of public policy or public interest, may declare waters not previously appropriated, in whole or in part, exempt from appropriation for any or all purposes and, thereupon, such waters may not be appropriated for those purposes."[71] So, here also public trust doctrine will get statutory recognition.

The next step in protecting Instream Values

To facilitate market-based reallocation of diverted water to instream flows for the protection of instream values, the California Legislature should consider the following reforms:

A. Increase the security of appropriative rights reallocated to increase instream flows

B. Expedite reallocation of appropriated water to instream flows

C. Facilitate reallocation of water developed and distributed by irrigation districts

D. Encourage conservation of water developed and distributed by irrigation districts

E. Encourage conservation and facilitate reallocation of water developed and distributed

F. Encourage conservation and facilitate reallocation of inefficiently used water

In Bangladesh if the draft water law comes to force it will help to protect instream values. The other important thing is despite sharing fifty-four rivers with India; Bangladesh has only one water sharing treaty with it, on the River Ganges, which was signed in 1996.[72] But India removed the guarantee and arbitration clauses regarding minimum water from the treaty.[73]On sharing of common rivers, Article 9 of the 1996 Ganges Water Treaty makes it obligatory for India to conclude water sharing agreements with Bangladesh on principles of equity, fairness and no harm to either party.[74] But the real picture is different. Although a thirty-year water treaty has been in effect between the two countries since 1996, India has been diverting water according to its will, depriving Bangladesh from its just share during dry season.[75] The trans-boundary rivers flow through Indian territory, but India did not come into agreement with Bangladesh on the blockage or diversion of river water although an Indo-Bangladesh Joint River Commission (JRC) has existed since 1972.[76] India constructed the Farakka Barrage in 1975 in order to divert a portion of dry season flow to increase the navigability of Calcutta

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70 *Section 16 of the Draft Bangladesh Water Act.*

71 *id section 18*

72 *http://archive.thedailystar.net/newDesign/news-details.php?nid=204197*

73 *id*

74 *id*

75 *id*

76 *id*

port.[77] When the Barrage went into operation in 1975, the fresh water supply of the Ganges decreased considerably, with a number of consequent effects in the south-west part of Bangladesh.[78] Moreover, agriculture, navigation, irrigation, fisheries, forestry, industrial activities, salinity intrusion of the coastal rivers, ground water depletion, river silting, coastal erosion, sedimentation as well as normal economic activities have been adversely affected.[79] If India implements Tipaimukh dam project, the downstream Meghna river will lose its water flow and the country will gradually turn into a desert amid acute water crisis.[80] Therefore, Bangladesh needs transboundary water policy immediately.

Conclusion and Recommendations

As streams and rivers provide ecosystem goods and services of tremendous value to the quality of life the need to protect instream flow is as important as our existence. California's administrative and judicial modification of water rights can be an example for Bangladesh to follow. And recent judicial expansion of the State's authority to modify existing water rights under the public trust doctrine is also very encouraging. Federal and state water management institutions are seeking to facilitate water marketing as a means of meeting the state's growing and changing demand for water. Recently enacted policies, intended to facilitate water marketing generally, can also be used to effect transactions to transfer water from existing diversions to instream flows. By removing the scope for commercial is action of water in the draft Bangladesh Water Act 2012 and ensuring accountability at all times, presenting a complete picture to the people, making people's participation compulsory while determining the right to water and considering industrial and commercial institutions as consumers instead of users Bangladesh can make the dream of instream flow a reality.

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77 *id*
78 *id*
79 *id*
80 *id*

Commercial Arbitration as a Source of International Business Dispute Resolution

*Md. Anayet Ullah**

PRELUDE

Historically *Arbitration was practiced by the Greek city-states, and in the Middle Ages high ecclesiastical authorities were called upon to settle controversies.*[1] *With the development of the modern system of nation-states arbitration has been evolved, however, arbitration was less frequently used until the 19th century when the settlement by arbitration of the famous The* Alabama Claims Award[2]*brought this practice back into general use. Arbitration, international, is a quasi-judicial process by which international disputes - where a foreign element*[3] *exists - are settled peacefully, generally through the use of an arbitration tribunal. International Commercial Arbitration is styled as international, not because sovereign nations participate, but because the parties, the facts, or the legal effects of the dispute extend beyond a single jurisdiction. The expenses, delay and complexity of a court action are normally avoided in the case of arbitration procedure. In addition to, arbitration provides a degree of privacy, informality and convenience that cannot be matched by the more traditional court room atmosphere. International conventions, treaties*[4] *and in particular New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 promoted by the United Nations Commission on International Trade Law (in short 'UNCITRAL'), 1985 (hereinafter referred to as 'the Model Law') together with legislations based on the convention have provided facilities for the enforcement of foreign arbitral awards, having greater range and flexibility than that exist in regard to court judgments. Of course, this is an important consideration in cases where the assets of parties may be situated in different countries. Thus the advantages of arbitration attract parties towards it and while entering into economic agreements, they often include arbitration clauses in their agreements to ensure that any dispute can be solved without recourse to litigation. Arbitration is most commonly used for the resolution of commercial disputes particularly in the context of international business transactions.*

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* *Assistant Judge of Bhola.*

1 *See J. H. Ralston, International Arbitration from Athens to Locarno (1929).*

2 *USA Vs. UK, Moore, 1 Int.Arb., 1872.*

3 *For foreign elements see Rahman, Dr. Mizanur. International Law in a Changing World, Dhaka: PalalPrakashani, (Reprint 2007), p.18.*

4 *The most notable one of these is the Charter of the United Nations (Article 33).*

Guiding documents on international commercial arbitration

Arbitration Agreement is the heart of commercial arbitration. This agreement is basically framed as per wish of the parties to the international business transaction keeping eye to the existing public and/or state policy. However, the guiding documents on International Commercial Arbitration are *inter-alia* (i) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the 'New York Convention'), (ii) UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006 (commonly known as the 'Model Law'), (iii) UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014), (iv) UNCITRAL Arbitration Rules, (vi) Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules (as revised in 2010), (vii)Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006), (viii) UNCITRAL Notes on Organizing Arbitral Proceedings (1996), (ix) Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules.[5]

Definition Clause

Arbitration

Arbitration is a consensual means of dispute resolution by non-governmental decision makers and produces a definitive and binding award which is capable of enforcement through national courts.[6] It may also be defined as "the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law."[7] Arbitration basically is a means of dispute resolution amicably in which parties to a contract select a neutral arbitrator (or a panel of arbitrators) to present their dispute for a legally binding ruling.

Commercial Arbitration

In respect of Commercial Arbitration, the term 'commercial' has been given a wider meaning, irrespective of their contractual or non-contractual nature, so as to cover matters arising from all relationships of a commercial nature[8] and the 'commercial activity' means either a regular course of commercial conduct or particular commercial transaction or act.[9]Hence, the commercial arbitration usually refers the arbitration that resolves the

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5 *For details, pls visit <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html>.*

6 *Cary. B. Born, International Commercial Arbitration in the United States: Commentary and Materials, The Netherlands: Kluwer law and Taxation Publishers, 1994, p.1.*

7 *Halsbury's Laws of England, Butterworths, 4th edition, 1991, para 601,332.*

8 *Note to A.1 of the Model Law provides an illustrative list of relationships to assess as 'commercial'.*

9 *MOL,INC. Vs. The PEOPLES REPUBLIC OF BANGLADESH;14 Envtl.L. Rep.20,656.*

dispute(s) of any kind arising out of a commercial nature i.e. sale of goods, carriage of goods, carriage of passengers etc.

International Business Dispute

In international business, the parties and/or subject matter of the dispute involves in different jurisdiction. In this case, the resolution of any dispute falls within the province of private international law or the conflict of laws. 'Conflict of laws' refers to the variation between internal laws of two countries on the same matter.[10] Consequently, a business dispute ought to be presumed international where the parties[11] or subject matter of the disputes, due to existence of a foreign element, are of different countries as well as different jurisdictions invoking the question of either choice of law rules (also named conflict of laws) or foreign law. Every system of law applied in foreign country is usually considered to be foreign law that is a question of fact of a peculiar kind requires proof of foreign law.[12]

BASIC FEATURES OF INTERNATIONAL COMMERCIAL ARBITRATION

International commercial arbitration is held in place by four basic features **which are** as follows:-

The Agreement to Arbitrate

International commercial arbitration is founded on the consent of the parties to the dispute. There are two classical forms of arbitration agreements; namely the arbitration clause which refers future disputes to an arbitration. The other is the submission agreement which is usually formulated after a dispute has arisen and the parties agree to arbitrate. The non-conventional form is the 'Standing Offer' in Bilateral Investment Treaties (BIT's) between states.[13] By invoking the standing offer in a BIT, when disputes arise; private companies are able to initiate arbitral proceedings against sovereign states. Generally, without a valid arbitration agreement, an arbitral award may not be enforced under the New York Convention.

The Choice of Arbitrators

The parties have the choice in appointing their own arbitrators, who may be experts in international arbitration and or persons with requisite trade or industrial experience in the

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[10] *Cheshire, G C. Private International Law, London: Oxford, 4th Edition, 1995, p 3.*

[11] *For the definition of national of another contracting state, see Article 25(2) of International Centre for the Settlement of Investment Dispute (ICSID), 1965.*

[12] *For proof of foreign law, pls see SCHMITTHOFF'S EXPORT TRADE, THE LAW AND PRACTICE OF INTERNATIONAL TRADE; edited by LEO D'ARCY, CAROLE MURRAY & BARBARA CLEAVE, 10th edition (2000), London: SWEET & MAXWELL, p.408.*

[13] *Redfern, Alan, Hunter, Martin, Law and Practice of International Commercial Arbitration, London, Sweet & Maxwell, 2003, p. 78.*

subject matter of dispute.[14] By this, trade usages and conventions are brought to bear on the final awards delivered by such arbitral tribunals.

The Decision of the Arbitral Tribunal

It takes the form of an award which is final and binding,[15] if it is not non-binding arbitration in nature. As compared to judgment of a court, arbitral awards are not subject to formal appeals, though such decisions could be challenged on the grounds *inter-alia* public policy, the tribunal was not established in accordance to the agreement of the parties.

The Enforcement of the Award

Arbitral awards are enforceable like court judgments. Where a losing party defaults in satisfying an award, the victorious party can enforce it in the court of the country where the losing party has its assets located. The uniqueness about arbitral awards is that it can be enforced internationally under the New York Convention unlike a judgment of a court. This makes international commercial arbitration attractive to the international business community.[16]

Arbitration agreement

Drafting of the Arbitration Agreement/Clause

Though there is no hard and fast rule or frame for drafting a contract, a standard contract in the eye of international community should contain *inter alia* the clause of commencing date, subject matter, right and liabilities of the parties, *force majeure,* termination, renewal, dispute settlement procedure, applicable law. If there is no arbitration clause in the contract and the party prefers arbitration after the dispute has arisen, he will be at the mercy of the other party or parties. When a dispute has occurred, there is more often it seems that at least one party having an interest in making procedures difficult or even impossible. Therefore, the best thing to do, in order to make the arbitration appropriate, is to include the arbitration clause already in the contract right from the start even in a Memorandum of Understanding, Heads of Agreement, Gentlemen's' Agreement or what-ever with due care and precise terminology. When drafting, negotiating and closing international commercial contracts, one of the important questions for the transaction lawyer to be answered, will therefore be: do I (*proposeto*) include an arbitration clause and, if so, what kind of clause? Or do I prefer to insert a clause making a state court exclusively competent? If so, which court? A counter

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14 *Article 10 (1) of the Model law.*

15 *Article 29, 30 & 3, ibid.*

16 *Ibid., Article 35 (1) provides that An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced.*

claim is also allowable in arbitration if it is within the ambit of the arbitration clause.[17] Article 1(2) of the Model Law sets a MODEL ARBITRATION CLAUSE (as for example) in the wording of "any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at presence in force" affixing a note thereto. As other cases of arbitration, here the parties also may choose term of the clause if it is not otherwise invalid. The ambit of arbitration clauses varies and much depends upon the wording of such clauses which should not be defective.[18]

Validity and Interpretation

Agreements are generally divided into two types: (i) Normal Contract containing an Arbitration Clause, & (2) Submission Agreement. The former is the far more prevalent type of arbitration agreement. Sometimes legal significance attaches to the type of arbitration agreement. For example, in certain Commonwealth countries it is possible to provide that each party should bear their own costs in a conventional arbitration clause but not in a submission agreement. In keeping with the informality of the arbitration process, the law is generally keen to uphold the validity of arbitration clauses even when they lack the normal formal language associated with legal contracts. Clauses which have been upheld include: "arbitration in London - English law to apply" in *Swiss Bank Corporation v Novrissiysk Shipping*,[19]"suitable arbitration clause" in *Hobbs Padgett & Co v J C Kirkland*, (1969)[20], "arbitration, if any, by ICC Rules in London" in *Mangistaumunaigaz Oil Production v United Kingdom World Trade*.[21] The arbitrators "must not necessarily judge according to the strict law but as a general rule ought chiefly to consider the principles of practical business."[22]

A particular submission may be held invalid on some grounds which may have no effect on the validity of the general agreement to arbitrate. The reverse is also true that a general arbitration agreement may be held invalid without frustrating a particular submission launched under that agreement.[23] However, in most Common Law countries the courts have accepted that a contract can only be declared void by a court or other tribunal; and if the contract (valid or otherwise) contains an arbitration clause, then the proper forum to determine whether the contract is void or not is the arbitration tribunal.

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17 *Supra note 13, 1999, p.242.*
18 *Schmitthoff, C.M. "Defective Arbitration Clause", 1975, J.B.L. p.9.*
19 *1 Lloyd's Rep 202.*
20 *113 SJ 832.*
21 *1 Lloyd's Rep 617.*
22 *Pls see Norske Atlas Insurance Co v London General Insurance Co (1927), 28 Lloyds List Rep 104.*
23 *1 Lloyd's Rep 403.*

Conflict of laws,[24] choice of law, and autonomy of parties

The question of Conflict of Laws or Choice of Laws arises where a foreign element exists. Contract may be governed by the law of the country where the business run or by the International law or customs or by domestic law and by defaulting the international law including international decision. *Lex sites*, *lexforie* and *lex cause* have also an impact to resolve the disputes in conflict of laws. Moreover, where there are no specific clauses in the contract then the law of the defendant's country may be applied or the law of the country where the contract was signed or most part of the contract executed. In conflict of law, the following issues are to be followed very carefully for securing the interest for the parities.

Applicable Law

The core point of arbitration in international commercial arbitration is the intention of the parties if not otherwise defective. The tribunal shall decide the dispute in accordance such rules of law as may be agreed by the parties.[25] Here we may find two significances that is (i) freedom of parties, and (ii) wide range of options by using the term 'rules of law'.[26] We may also find out two basic principles from the Rome Convention in which the parties may expressly or impliedly[27] choose the law governing the contract subject to some limitations and in absence of this choice, the contract will be governed by the law of the country with which it is mostly connected.[28] However, arbitration is subject to different laws. These may be summarized as (i) the law governing the arbitration agreement; (ii) the law governing the arbitral tribunal and its proceedings; (iii) the law governing the substance of the dispute; and (iv) the law governing recognition and enforcement of the award.

Choice of Law

Generally speaking, international arbitral rules allow parties as to agreement containing an arbitration clause to choose the substantive law of any particular jurisdiction to govern the disputes. Even though the parties have such power they often specify "the general principles of law". A major problem arises when the parties fail to select an applicable law by agreement. It was stated in the *Saphire Arbitration* that a tribunal "must look for common intention of the parties and use the connecting factors generally used in doctrine and in case law and must disregard national peculiarities". When there is no express choice of the proper law, the court will consider whether it can ascertain from the legal terminology in which the

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24 *For 'Conflict of Laws in International Trade', see Islam, Mohammad Towhidul. "The Modus Operandi of International Trade Law Rules: A Critical Overview", the Dhaka University Studies, Part F, Vol. XVIII(1), June 2007, pp.70-72.*

25 *Article 28 of the Model Law.*

26 *Ara, Raushan. &Razi, SikderMahmudur, "UNCITRAL MODEL LAW AND ARBITRATION LAW IN NBANGLADESH. AN ANALYTICAL STUDY OF MAJOR DISPARITIES", the Dhaka University Studies, Part F, Vol. XVIII (2), December 2007, p. 145.*

27 *Article 2.1 of the UNIDROIT Principles.*

28 *For proof of foreign law, see supra note 12, p. 412.*

contract is drafted, the form of documents involved in the transaction, the currency in which the payment (if any) is to be made, the use of a particular language, a connection with a preceding transaction, the nature and location of the subject matter of the contract, the residence of the parties etc. The decision of the court of Appeal in *Deutsche Schachtbau - Und Tiefbohrgesellschaftu v. R Al-Khaimah National Oil Co.*, indicates that, where parties do not permit their contract to be governed by the law of any particular country, a provision that the contract shall be governed by - "Internationally accepted principles of law governing Contractual relations" - will not be rejected on the common law ground of uncertainty or public policy. The same position was confirmed by the late Professor Clive Schmitthoff.[29] When parties prefer a national law, the arbitral tribunal has to follow that national law. But when parties substitute a national law with some non-national standard [i.e. general principles of law, *lexmercatoria*, or the law of international trade], the arbitral tribunal has to follow then only to a non- national standard without reference to any national law.

Choice of Law as Autonomy of Parties

Parties' autonomy, subject to some restrictions/grounds on public policy or state sovereignty, is well recognized in the international business communities. The very beginning (Article 1.1) of the UNIDROIT (The International Institution for the Unification of Private Law.) Principles very clearly affirms that "The parties are free to enter into a contract and to determine its content." However, this autonomy in determination of applicable law is limited by a number of factors. These factors may inclusively include the intention expressed is *bona fide* and legal, not *mala fide* and illegal, and is consistent with public policy. The choice must be made in good faith with sincere, honest, genuine and legitimate intention devoid of fraud or duress.[30] In other words, where the consent of one party to the choice is obtained through the manipulation of the other party, or the chosen law is unrelated to the contract, the choice of law is not *bona fide*.[31] The court will refuse to apply any choice of law which is contrary to the public policy of the jurisdiction concerned.[32] Besides public policy, the question of state immunity may also arise when an enterprise contracts with a foreign State or a foreign State corporation and disputes occur. Here two theories are advanced those are *absolute immunity* and *restrictive immunity*. A distinction is drawn between acts in the exercise of sovereign authority *(acta jure imperii)* and ordinary commercial jurisdiction *(acta jure gestionis)*.[33] Immunity is accorded to the former but not to the latter.[34] Most of the domestic courts, as for example English court, recognize a foreign law if it is not defective on the ground of public

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[29] *Schmitthoff, Clive Choice of Law in International Commercial Law, 6 J.B.L. 169 (1987).*

[30] *P. North, Private International Law Problems in Common Law Jurisdictions, MartinusNighoff Pub.(1993) p.112.*

[31] *Golden Acres Ltd. v. Queensland Estates Pvt. Ltd.(1969) QLD R 378.*

[32] *P. Nygh, 'The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort' (1995/96)251Academic de Droit International 314, 376-97.*

[33] *See Kuwait Airways Corp. v. Iraqi Airways Co. (1995), 1 W.L.R. 1147 at 1160.*

[34] *I CongresadelPartido(1983) 1 A.C. 244.*

policy.[35] However, under common law rules the English courts will not enforce a contract to break the laws of the friendly state or where its performance is illegal by the law of the place where it is to be performed.[36]

Arbitral tribunal

Composition

The term arbitral tribunal is used to denote the arbitrator or arbitrators sitting to determine the dispute. Chapter III of the Model Law, Articles 7-12 of ICC (International Chamber of Commerce) among others contain a number of detailed provisions on number, appointment, challenge, challenge procedure, termination of mandate, and replacement of an arbitrator. The approach of the Chapter consists of recognizing the freedom of the parties subject to fundamental requirements of fairness and justice and where the parties have not used their freedom or a particular issue has not been covered, the Model Law ensures, by providing a set of suppletive rules that the arbitration may commence and proceed effectively to the resolution of the dispute.[37] However, the parties' autonomy in determining the number of arbitrator, procedure etc are duly recognized all over the world. In the event of failure of parties[38] to choose the number, the Model Law sets the number of arbitrators as three and provides suppletive rules for the commencement and continuation of arbitral process. Of these three arbitrators, each party appoints one and these two arbitrators jointly appoint the third. Failure in this regard will entitle the tribunal or any other competent authority to appoint the third arbitrator provided a party requests it to do.[39]

Jurisdiction of Arbitral Tribunal

The arbitral tribunal may rule on its own jurisdiction[40] including any objections with respect to the existence or validity of the arbitration agreement. A decision by the arbitral tribunal that the contract is null and void shall not entail *epso jure* the validity of the arbitration clause.[41] The arbitral tribunal's competence to rule on its jurisdiction is subject to judicial control for keeping the balance and also to provide safeguard against probable dictatorship, waste of money, dilatory tactics. Three procedural safeguards are available in this regard as (i) 30 days is permissible for resort to court, (ii) the decision for the court is not appealable, and (iii) the tribunal has the jurisdiction to continue the proceeding and make an award while the matter is pending before the court.[42] Moreover, where the arbitral tribunal combines its

[35] *For exclusion of foreign law, see supra note 12, p.430.*
[36] *Regazzoni v. K.C.Sethia Ltd. (1958) A.C.301 and for exceptions to the Regazzoni, see supra note 12, p.434.*
[37] *Supra note 26, p.142.*
[38] *For multiple parties, see Article 10 of the ICC Rules.*
[39] *Article 11 of the Model Law.*
[40] *Article 21 of the UNCITRAL Arbitration Rules, 1976.*
[41] *See Clause (2) of Article 16 of the Model Law & also 1 Lloyd's Rep 142.*
[42] *Ibid, Article 16.*

decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available.[43]Unless the parties agreed otherwise, the arbitration tribunal may, at the request of a party, order of any interim or conservatory measures it deems appropriate.[44]

Procedure

Autonomy of the parties to determine the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional domestic concepts.[45] Sometimes parties may not be consensus on rules of procedure and consequently another complexity may arise leading the dispute to the highway of lengthy process of the court pausing extra burden of money, waste of time, and risk for the reputation. To remove, at least reduce, this unexpected threat and to pave the way of arbitration, Chapter V of the Model Law provides the legal framework for a fair i.e. equal treatment and effective conduct of the arbitral proceedings. ICC Rules also lay down the procedure of arbitration, in particular, in respect of place, governing rules, language, applicable rules of law, timetable, new claims, establishing the facts, hearings and closing of the proceeding.[46] Further, UNCITRAL Arbitration Rules, (1976) also provide 16 articles (in Section III) for arbitral proceedings in respect of different issues out of which statement of claims (Article 18), statement of defence (Article 19), amendment to the claim or defence (Article 20), further written statement (Article 22), interim measures of protection (Article 26), experts (Article 27), waiver of rules (Article 30) ete are distinguished from those of the former twine.[47]

Arbitration award

Types of Award[48]

Although arbitration awards are charaeteristically an award of damages against a party, in many jurisdictions tribunals have a range of remedies that can form a part of the award. These may include (i) Payment of a sum of money (conventional damages); (ii) The making of a "Declaration" as to any matter to be determined in the proceedings. In some jurisdictions, the tribunal may have the same power as a court to order a party to do or refrain from doing something ("Injunctive Relief "), to order Specific Performance of a Contract and also to order the Rectification, setting aside or cancellation of a Deed or other document. In other jurisdictions, however, unless the parties have expressly granted the arbitrators the right to decide such matters, the tribunal's powers may be limited to deciding whether a party is

[43] *Ibid, AA 34 & 38.*
[44] *See Article 23 of the ICC Rules.*
[45] *Supra note 26, p.144.*
[46] *For details see Articles 13 to 22 of ICC Rules.*
[47] *For details see Articles 15 to 30 of UNCITRAL Arbitration Rules.*
[48] *For details, <http://www.informationdelight.info/information/entry/arbitration> was searched at 10.40 p.m. of 29th October, 2014.*

entitled to damages. It may not have the legal authority to order injunctive relief, issue a declaration, or rectify a contract, such powers being reserved to the exclusive jurisdiction of the courts.

Recognition and Enforcement of Foreign Arbitral Awards

A valid arbitral award is usually final, un-appealable and binding upon the parties who voluntarily execute it. Any refusal to give effect to an arbitral award may lead to its enforcement through a court order. The New York Convention is most widely accepted treaty that regulates the recognition and enforcement of arbitral award outside the seat of arbitration.[49] It seeks to provide common legislative standards for the recognition of arbitration agreement and court recognition and enforcement of foreign and non domestic arbitral award. Its principal aim is that foreign and non-domestic arbitral awards will not be discriminated and an ancillary aim is to require the courts of Parties to give full effect[50] and applies to (i) awards made in a State other than the State where the recognition and enforcement is sought; and (ii) awards not regarded as national awards in the States where there are recognition and enforcement is sought (Article 1). The central obligation imposed upon the parties is to recognize all arbitral awards within the scheme as binding and enforce them, if requested to do so, under the *lexfori*.

The Model Law rules (Article 35) follow closely the New York Convention in respect of recognition and enforcement of arbitral awards. An arbitral award, irrespective of the state in which it was made, is binding and enforceable. Conditions for obtaining enforcement require a party to apply in writing to a competent court together with the award and the arbitration agreement. The onus of proof lies upon the defendant to show that the award cannot be recognized and enforced. In international commercial arbitration place is chosen taking into consideration of *Forum Convenience* for which the Model Law treats irrespective of issue where they were rendered. However, a question may arise as to the practical difference, if any, between Model Law and the New York Convention in recognition and enforcement of arbitration awards, in particular grounds for setting aside. Ara and Razi very succinctly but nicely pointed out this answer. Firstly, the grounds relating to public policy, including non-arbitrability, may be different in substance, depending on the State in question; Secondly, grounds for refusal of recognition or enforcement are valid and effective only in the State (or States) where the wining party seeks recognition.[51]

The International Convention for the Settlement of Investment Disputes (ICSID) also tells about recognition and enforcement of arbitral awards. Article 54(1) provides as follows:

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[49] *ICSID Case No.ARB/81/1, (1986), 25 ILM 1441.*
[50] *Introduction of the New York Convention.*
[51] *Supra note 26, p.148.*

> *Each contracting State shall recognize an award rendered pursuant to this convention as binding and enforce the pecuniary obligations imposed by the award within its territories as if it were a final judgment of a court in that state. A Contracting State with a federal constitution may enforce such award, as if it were a final judgment of a court of a constituent state.*

Article 54(2), on the other hand, prescribes the procedural paperwork that a party seeking recognition or enforcement must do in the territories of a contracting state in order to satisfy the obligations of such states under Article 54(1). The effectiveness of measures of execution against a state depends, therefore, upon the immunity rules prevailing in the country in which execution is sought. The holder of a recognized ICSID award has an executory title, especially if the losing party is a state party to the dispute, mainly because of the doctrine of immunity from execution. The jurisprudence arising from ICSID awards tends to differentiate between immunity from enforcement and immunity from execution, *inter-alia*, in *Liberian Eastern Timber Co. v. Government of Liberia (Leteo v. Liberia.).*[52]There appears to be no uniform interpretation of the sovereign immunity doctrine in the domain of the domestic law of member states to the ICSID Convention. There are two possible ways to remedy this situation those are waiver of immunity and espousal of a claim by the investor's State.[53]

Advantages and disadvantages[54]

Parties often seek to resolve their disputes through arbitration because of a number of perceived potential advantages over judicial proceedings;

a. The privilege of choosing the applicable law on the substance;
b. Confidentiality;[55]
c. The possibility of resolving the disputes on documents only;
d. Arbitrators with an appropriate degree of expertise can be appointed in highly technical matter;
e. Arbitration is often faster and may be cheaper than litigation;
f. The arbitral process enjoys a greater degree of flexibility than that of the courts; and
g. Because of the provisions of the New York Convention, 1958 arbitration awards are generally easier to enforce abroad than court judgments.

However, some of the disadvantages of arbitration can be that:

a. The parties need to pay for the arbitrators which add an additional layer of legal cost;
b. In case of multiple arbitrators on the panel, juggling their schedules for hearing dates can lead to delays;

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52 *Liberian Eastern Timber Co. v. Government of Liberia (Letco v. Liberia). 650 F.Supp. 73 (S.D.NY 1986)*

53 *Article27(1) of the ICSID Convention.*

54 *For details, see the paper titled "INTERNATIONAL COMMERCIAL ARBITRATION, especially ICC ARBITRATION" distributed at the Denver General Meeting on September 14th, 2006.*

55 *See Expert report of Stephen Bond in Esso/BHP v.Plowman(1995) 11 Arbitration International No.8 at 273.*

c. In some legal systems, arbitral awards have fewer enforcement remedies than judgments;

d. Arbitrators are generally unable to order interlocutory measures against a party, making it easier for a party to take steps to avoid enforcement of an award;

e. Rule of applicable law is not binding, and arbitrators not subject to overturn on appeal may be more likely to rule according to their personal ideals;

f. Large corporations may exert inappropriate influence in consumer disputes pressuring mediators to decide in their favor or lose future business.[56]

Conclusion

Though mediation, arbitration, mini-trial, conciliation and ombudsman strategy are the most commonly used in alternate dispute resolution mechanisms, resorting to arbitration is going faster than others in the international business communities. Arbitration, a *quasi- judicial* process[57]seems to be the first step towards privatization of justice since it acts as an alternative to resolution through national courts.[58] Here, the arbitrator, if the parties leave the choice of law to him, decides issues relying on law (*lexmercatoria*) or equitable principles (*ex aequoet bono*). An equity clause does not mean that the arbitrator may disregard the law and a clause purporting to him this power would be void;[59] though, in principle, questions of fact are decided by the arbitration. But the problem arises in case of dual prone tendency where a party desires to go to arbitration and appoints his arbitrator where more than one is required while the other party is unwilling to do so. Under these circumstances, the former party may serve the defaulting party with notice to appoint an arbitrator and if the defaulting party has not done the same within the stipulated time[60] the party who appointed an arbitrator may appoint his arbitrator as sole arbitrator and his award is binding upon the parties. Compared to litigation, arbitration is the result of consent between the parties who can reach to an agreement for arbitration either before or after the dispute has arisen.[61]

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56 *<http://www.reference.com/browse/arbitration>; visited on 11.35 p.m. of 26th October, 2014 in quest of advantages & disadvantages of arbitration.*

57 *Alam, Naser. Independence and Impartiality in International Arbitration-AnAssesment, Commissioner, International Chamber of Commerce Bangladesh, available at <www.transnational-dispute- management.com> as viewed on 10.50 p.m. of 29th October, 2014.*

58 *Templeman and sellman et al, 1999, p.328.*

59 *See Eagle Star Insurance Co. Ltd. V. Yuval Insurance Co. Ltd. [1978], 1 Lloyd's Rep. 357.*

60 *A standard & well drafted agreement/contract usually contains a clause mentioning the stipulated time in this regard.*

61 *Supra note 24, p.75.*

Human Rights and Development: Points of Intersection

*Abdullah Al Yousuf**

ABSTRACT

This article aims to establish the hypothesis that human rights and development have intersecting points. I also tried to establish that there is no dichotomy between human rights and development. After accomplishing the research, I must say, for the realization of all human rights, it must be considered that all human rights including the right to development are inherent to the human dignity of every person. Exclusion of one right lacks the realization of the other rights though the current economic arrangement prevails in the global magnitude creates a strong dichotomy between the global market thinking and human development paradigm. The problem requires a resolution which leads adoption of a new strategy which would foster participation, ownership and embraces the private and public sectors, the community, families and individual; and place the human person at the centre of the development paradigm.

Introductory note

There was a trend in international regime to define the human rights in terms of civil & political rights and Economic & Social rights and considered development as third generation right. The definition of human rights favoured by the industrialised countries focused on its civil and political dimensions. Developing countries, for their part, called into question this limited definition for failing to recognise the right to development as a fundamental human right. In recent times the issues of development and human rights have been thrust to the forefront of global discourse.

The human right and development (HRD) was first proclaimed in the 1986 General Assembly's Declaration on the Right to Development. It is therefore essential to read the Declaration as a human rights instrument, and to pay close attention to the specific duties, it imposes on both governments and international bodies (including the UN High Commissioner for Human Rights, UNDP and the World Bank) to promote and protect human rights in and through the processes of development. Thus, the Declaration is concerned with the rights of individuals and people, not states.

The broad purpose of this article is to assess the intersecting points of human rights and development. In doing so, I have discussed the evolution of development in human rights

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* *Assistant Judge of Mymensingh.*

concept, the aforesaid intersecting points, some current influencing facts where these issues are converged, the theoretical and legal basis of the right to development as a human right, short analysis of Rights Based Approach (as it is evident that this development model properly address the converging issues of human rights and development) and remedies of the problems based on the findings of this article.

Title Analysis: Human Rights and Development: Points of Intersection

In recent times the issues of development and human rights have been thrust to the forefront of global discourse. There is now a general consensus that these issues are inseparable and need to be fully and properly addressed to ensure that humanity continues to survive in an enabling and equitable environment that guarantees a good quality of life, social justice and equity. This is not a mere coincidence. Evidence abounds to demonstrate that development without a human face is not sustainable.[1]

Evolution of the Discourse on the Interrelationship between Human Rights and Development:

Development and human rights have been approached from different perspectives and subjected to different interpretations. Even so, many attempts were made in the past to link the two concepts. Some of the most detailed debates occurred during the discussions on the UN Development Decades, which implicitly sought to achieve international agreement on the relationship. While there was general acknowledgement of the need to support development activities, the industrialised countries demonstrated a preference for keeping issues pertaining to human rights distinct from those of development.[2]

The definition of human rights favoured by the industrialised countries focused on its civil and political dimensions. In essence, human rights was considered to be limited to a set of rights covering the rights to life, liberty, safety, due process, freedom from arbitrary arrest, free press, and freedom of expression – rights that have more or less become synonymous and indistinguishable from those existing within Western civilisation and democracy. Developing countries, for their part, called into question this limited definition for failing to recognise the right to development as a fundamental human right.[3]

This position was implicitly reflected in several proposals that were made in the 1970s and 1980s for industrialised countries to set aside at least one percent of their GNP to support development activities. Apart from a few Nordic countries, the international community did

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1 *Babashola Chinsman E. Oladipo , K. Kamaluddeenat Conceptual Issues in Human Development and Human Rights, at session 1 of Oslo Symposium,Friday,02 October,1998*

2 *Ibid*

3 *Ibid*

not respond favourably to these appeals. However, the industrialised countries continued to reaffirm their commitment to development cooperation while maintaining their stand on separating development from human rights.[4]

The human right to development (HRD) was first proclaimed in the 1986 General Assembly's Declaration on the Right to Development. The preparation of the Declaration was marred by an unnecessary politicisation of the deliberations leading to confusion over its content. However, the UN World Conference on Human Rights (Vienna), the International Conference on Population and Development (Cairo), the World Summit for Social Development (Copenhagen) and the Fourth World Conference on Women (Beijing) – by consensus – have reaffirmed the right to development as a "universal and inalienable right and an integral part of fundamental human rights" law.[5]

It is therefore essential to read the Declaration as a human rights instrument, and to pay close attention to the specific duties it imposes on both governments and international bodies (including the UN High Commissioner for Human Rights, UNDP and the World Bank) to promote and protect human rights in and through the processes of development. Thus, the Declaration is concerned with the rights of individuals and people, not states.[6]

Defining Human rights, Right to development and Human development

Human Rights

The definition of Human rights is mentioned nowhere in the mainstream declarations or International Covenants. The following definition of human rights is found in the Glossary on Human Rights and Human development of UNDP Human Development Report of 2000:

Human rights are the rights possessed by all persons, by virtue of their common humanity, to live a life of freedom and dignity. They give all people moral claims on the behaviour of individuals and on the design of social arrangements and are universal, inalienable and indivisible. Human rights express our deepest commitments to ensuring that all persons are secure in their enjoyment of the goods and freedoms that are necessary for dignified living.

The right to Development

Article 1 of The Declaration on the Right to Development defines the right to development, which is as following:

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4 *Ibid 1*

5 *James C. N. Paul, Incorporating Human Rights into Mainstream "Human" Development Strategies: Why? and How? Oslo Symposium, 2 October, 1998*

6 *ibid*

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

Another definition of the right to development is noteworthy here, which is as follows:

The right to development is a fundamental right, the precondition of liberty, progress, justice and creativity. It is the alpha and omega of human rights, the first and last human right, the beginning and the end, the means and the goal of human rights, in short it is the core right from which all the others stem grow.[7]

Several provisions in the Covenant on Civil and Political Rights are relevant in relation to the right to development as a human right. Reference can be made to article 1 on the right of all peoples to self-determination, a provision common to both of the Covenants of 1966, as well as to ICCPR Article 25 on rights of participation, Article 3 on the equality of men and women, and many others. When combined with treaty provisions on economic and social rights these rights form a sound basis in existing international human rights treaties for the right to development as a human right (i.e., a right enjoyed by individuals, essentially together with other members of their nation or other community). The primary duty-holder of the right to development is the state or the community of states.[8]

Human Rights and Development: The Points of Intersection

From the above discussion, following points are found to be intersected by human rights and development:

Both are founded on human dignity: human development and human dignity:

The Universal Declaration of Human Rights, 1948 in its preamble, recognized that the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.[9]

The aforesaid recognition is reiterated in the first paragraph of the Preamble of The International Covenant on Civil and Political Rights, 1966.

Parties to The Vienna Declaration and Programme of Action, 1993 emphasised in its Article 55 that one of the most atrocious violations against human dignity is the act of torture, the

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7 *Mohammed Bedjaoui, The Right to Development, in Bedjaoui (ed.), International law: Achievements and Prospects 1177 (1991), at 1182.*

8 *Professor Martin Sceinin, Interdependence issues under the Covenant on Civil and Political Rights ,Oslo Symposium,02 October,1998*

9 *Universal Declaration of Human rights,1948, Preamble, paragraph 1*

result of which destroys the dignity and impairs the capability of victims to continue their lives and their activities. It reaffirmed in its Article 56 that, freedom from torture is a right which must be protected in all circumstances. From the aforesaid article, it is conducive to understand that the aforesaid declaration upholds the human dignity in both human rights and development paradigm.

Human person is the central ohject of both

The human person is the central subject of development and should be the active participant and beneficiary of the right to development.[10] In preamble of the same declaration uttered that "Development" must be seen as "a comprehensive economic, social, cultural and political process which aims at the constant improvement of the wellbeing of the entire population" and as "the free and complete fulfillment of the human person"[11]

In the Article 2(1) of the same declaration uttered that for the realization all human rights and freedoms along with right to development, all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development. Thus it is crystal clear that human person is the central object of both human rights and development.

Human person should be the principle beneficiary and active participant of both:[12]

The above contention is also affirmed by The United Nations Millennium Declaration. In its Principle 25, the state parties agreed to work collectively for more inclusive politieal processes, allowing genuine participation by all citizens in the party states. Article 1(1) of Declaration on the Right to development,1986, agreed that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

From the above mentioned citations, it is pretty convincing to say that human person is the principle benefieiary and active participant of both human rights and development.

Right to development is also a universal and Inalienable right and integral part of fundamental human rights:[13]

The Declaration on the Right to Development, 1986 in its Article 6(2) affirmed that all human rights and fundamental are indivisible, inalienable and interdependent. Besides this, The Vienna Declaration and Programme of Action, 1993 also recognized all human rights as

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[10] *The Declaration on The Right to development,1986, Article 2(1)*

[11] *Ibid, Preamble, paragraph 2*

[12] *ibid*

[13] *Supra note 17, Article 2(1)*

universal, indivisible, interdependent and interrelated.[14] It also affirmed that the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and integral part of fundamental human rights.[15]

Both have the common object of human development:

The goals laid down by the International Law of Development (e.g., "human-centered, participatory, sustainable and poverty-focused development," generated and administered through "good" and "democratic" governance) are also, of course, staples of today's policy rhetoric. One need only to read numerous key documents of the UNDP, UNICEF, the World Bank, OECD, bilateral agencies, and the "UN Agenda for Development."

"Human rights" have been added to this panoply of goals – as indispensable, interdependent ends and means of "development" as now conceived. Yet we have seldom seen any careful statement which explains just why human rights are so essential to the realisation of today's new paradigm of development.

The exercise and enforcement of universally recognised rights is essential to the realisation of human development, which was defined and mandated by the 1986 Declaration on the Right to development long before that concept became a transcendent goal in UNDP circles. Indeed, the key components of "human development" can best be understood by recourse to human rights standards; for example, the duty of states to "capacitate" and "empower" people by providing for effective participation and for education oriented towards competence in all spheres; the duty to provide for "progressive realisation" of rights to food security, health, work and fair and safe workplace conditions and decent human habitats; the duty to provide for "equal opportunities" in all sectors to women, youth and minorities; the duty to respect the language and cultures of all peoples; and the duty to secure personal security, property and liberty, including freedom of movement. Thus, human rights provide essential conditions for "human" development.[16] Human rights and human development share a common vision and a common purpose- to secure freedom, well-being and dignity of all people everywhere, to secure freedom from discrimination, freedom from want, freedom to develop and realize one's human potential, freedom from fear, freedom from injustice and violations of rule of law, freedom of thought and speech and to participate in decision-making and form associations and freedom for decent work.[17]

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[14] *The Vienna Declaration and Programme of Action, 1993, Article 5: All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.*

[15] *Ibid, Article 10*

[16] *See note 5 at page 2*

[17] *UNDP Human Development Report,2000: Human rights and human development, overview, page 1*

As right to development is integral to fundamental human rights,[18] it is conducive to draw an end from the above discussion by saying; human development is an intersecting concern of human rights and development.

Facts concern hoth human rights and development:

Globalisation:

The globalisation that took place in the last twenty years places the development and human rights concern well outside the traditional state-centric framework.[19]

Globalisation puts the development and human rights efforts of the developing countries to considerable threat. In the words of former UN Secretary-General Kofi Annan:

"The combination of underdevelopment, globalization and rapid change poses particular challenges to the international human rights regime. The pursuit of development, the engagement with globalization, and the management of change must yield to human rights imperatives rather than the reverse"[20]

For the developing countries the threats are multiple; they have to concentrate more to industrialization to increase their output in the very competitive national and international market and such an emphasise very likely to hamper the human rights reports of the country concerned. Most of these countries are unable to build industrial enterprises on their own resources and technology and consequently they are very much exposed to the heavy burden of foreign debts; and they are lacking in infrastructure to keep the environment safe in the industrialization process.

The global economic system, espoused by the multi-lateral lending institutions, limits policy choices of developing country governments (Padma Bridge, IMF teler dam baralo). Even in democratic countries, real or perceived economic realities have led to limited options in the democratic process. Parliamentary and public debates become irrelevant, as governments need to obey fiscal imperatives, negotiate adjustment packages and reach agreement on aid packages through closed-door decision making.

To make globalization as a benefit for every state irrespective of developed and developing, a new strategy of development should be adopted which would seek to achieve, not just GDP growth, but society wide change. The strategy should foster participation and ownership and should embrace public and private sectors, the community, families and the individual. This

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[18] *See note 21, Article 10 at page 7*

[19] *Henry J.Steiner, International Human Rights in Context: Law, Politics, Morals, Oxford, 2000, p.1307*

[20] *UN Doc.A/54/1 (1999), paragraph 275*

approach would place the human person at the centre of the development paradigm. The basis for this approach would be an emphasis on the human rights objectives of development.[21]

UNDP Human Development Report, 1992 concentrated on Human development and global market. It ended with following propositions:

1. Markets are thc means. Human development is the end
2. The richest 20% of the world's people are at least 150 times richer than the poorest 20%
3. Global markets do not operate freely. This, together with the unequal partnership, costs the developing countries $ 500 billion a year- 10 times what they receive in foreign assistance.
4. It is essential to combine global efficiency with global equity.

Democracy, Human Rights and Development

The Universal Declaration on Democracy was adopted in 1997.The declaration starts with basic principle. As an ideal, dcmocracy aims to protect and promote the dignity and fundamental rights of the individual, instill social justice and foster economic and social development. Democracy is a political system that enables people to freely choose an effective, honest, transparent and accountable government. Everyone has the right to participate in the management of public affairs. Likewise, everyone has the right to access information on government activities, to petition government and to seek redress through impartial administrative and judicial mechanisms.[22]

The democracy-human rights relation was recognized long ago when the UDHR introduced democracy by stating that[23] 'the will of people shall bc the basis of authority of government.' The introduction of development as a third point to this relationship is of recent origin. Several reasons may be identified behind this:

Firstly, there is no stable relation between democracy and economic growth or between democracy and degree of income inequality but therc is evidence that democracy is not an obstacle to economic growth or a fair income distribution. And moreover, the relation between democracy and human development is stable over time.[24]

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[21] *Mary Robinson, Constructing an International, Financial, Trade and Development Architecture: The Human Rights Dimension, Zurich, 1 July 1999*

[22] *UNDP Human Development Report, 2002, Key principles of democracy—the Inter-Parliamentary Union's Universal Declaration on Democracy, Box 2.3, p.55*

[23] *The Universal Development of Human Rights, 1948, Article 21(3). This definition was later strengthened and elaborated by the Vienna Declaration and Programme of Action, Article 8, according to which democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all respects of their lives.*

[24] *Svante Ersson and Jan-Erik Lane, Democracy and Development: A statistical Exploration in Adrian Leftwich(ed.), Democracy and Development: Theory and Practice, Polity Press, 1996*

Secondly, democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.[25]

Thirdly, democracy and transparent and accountable governance and administration in all sectors of society are indispensable foundations for the realization of social and people-centered sustainable development.[26]

Fourthly, democratic and participatory governance based on the will of the people best assures fundamental rights and freedoms.[27] In addition to this, in Article 24 of the same declaration[28] reiterates to promote democracy and strengthen the rule of law, as well as respect for internationally recognized human rights and fundamental freedoms, including the right to development.

Governance as a feature of development

Good governance is not a new concept in development discourse but it is only in the recent times that incentive systems and governance structures, in the sense of economic and political institutional arrangements, have been playing a significant role in the analytical discussion of underdevelopment. Corruption, overcentralisation and internal conflicts are inevitable outcomes of continuing absence of good governance structures or government without human face.[29]

Provisions regarding governance in the mainstream Declarations:

Such provisions may be found in other instruments, for example, the Charter of the United Nations,[30] The International Covenant on Civil and Political Rights,[31] the International Covenant on Economic, Social and Cultural Rights,[32] the Convention on the Rights of the Child,[33] and the Commission on Human Rights Resolution 2001/72

- Governance officials must be accountable for their actions through clearly formulated and transparent processes, and more particularly the legitimacy of government must be regularly established through a well-defined open process of public choice.[34]

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25 *Vienna Declaration and Programme of Action, Article 8*

26 *Copenhagen Declaration, Article 4*

27 *United Nations Millennium Declaration, Article 6.*

28 *Ibid Article 24*

29 *Pronob Bardhan, The role of governance in economic development: A Political Economy Approach, Development Centre of OECD, 1997*

30 *Article 1(3), 55, 56*

31 *Article 1(2)*

32 *Article 1(2)*

33 *Article 4*

34 *Universal Declaration of Human Rights, Article 21. Other provisions regarding governance enshrined in Article 7-11, 19, 20, 22-25*

- The formulation, adoption and implementation of policy, legislative and other measures at the national and international levels are required to insure the full exercise and progressive enhancement of the right to development[35]
- Democracy, transparent and accountable governance and administration in all sectors of society are indispensable foundations for the realization of social and people-centered development.[36] Transparent and accountable governanee and administration in all public and private national and international institutions are important for human development.[37]
- Democratic and participatory governance based on the will of the people best assures fundamental freedom.[38] Success in meeting the objective of human development depends, *inter alia*, on good governance within each country.[39]

Thus the concept of good governance has the following attributes:[40]

1. Transparency
2. Responsibility
3. Accountability
4. Participation
5. Responsiveness to the needs of the people.

Economic growth

Human development requires economic growth- for without it, no sustained improvement in human well-being is possible.[41] Improvements in human development have clearly been possible even in times of economic setback. The record of economic growth and human development over the past 30 years shows that no country can follow a course of lopsided development for such a long time- where economic growth is not matched by advances in human development or vice versa.[42] UNDP Human Development Report, 2010 confirmed with new data and analysis that[43] "Human development is different from economic grow substantial achievements are possible even without fast growth."

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35 *Declaration on the Right to Development, Articles 2, and 10. Other provisions regarding enshrined in Articles 3 and 8 of the declaration*

36 *Copenhagen Declaration On Social Development, Article 4*

37 *Ibid, Article 26(n)*

38 *United Nations Millennium Declaration, Article 6*

39 *Ibid Article 13 It also depends on good governance at the international level and on transparency in the financial, monetary and trading systems. We are committed to an open, equitable, rule-based, predictable and non-discriminatory multi-lateral trading and financial system..*

40 *As clarified by the work of the Commission of Human Rights in its 2001/72 resolution*

41 *UNDP Human Development Report,1991: Financing Human Development: Overview, page.1*

42 *UNDP Human Development Report, 1996: Growth for Human Development: Overview, page.5*

43 *Overview of the report, page.5*

To ensure that these links work efficiently and effectively in both directions, policy-makers need to understand how the links connect. Some of the most important issues determining how growth contributes to human development:[44] "Equity, job opportunities, access to productive assets, social spending, gender equality, population policy, good governance, an active civil society.

Various Development Models and Right Based Approach:

As we have seen various models of development have been introduced and tested in the last half of 20th century. The most common thing among these models was negative aid conditionalities otherwise their difference from each other was huge. These models were not flexible enough to coup with various socio-economic structures of different developing countries and consequently they produce little success.

The Development models, their ends and addressing of human rights issues are given below:

Basic needs model

This model was introduced by Field Marshal Ayub Khan, which concentrated on promotion of basic rights excluding the other rights. Thus it addressed human rights issues partially.

Economic growth model

Concentrated on economic growth, required rapid industrialization which was impossible for developing and underdeveloped countries. Thus, it referred human rights issues very partially.

Good governance model

Introduced by World Bank, concentrated on economic growth. Nowhere in the model mentioned about human rights.

Sustainable development model

Concentrated on economic growth and protection of environment. Where the developing countries cannot guarantee the fundamental rights to their citizen, spending for environment put an extra burden on them, thus, it failed to produce viable solution.

Rights Based Approach

Failure of the other models paved the way to adopt a model which would foster participation and ownership and embrace the private and public sectors, the community, families and individuals; and place the human person at the centre of the development paradigm. The right based approach put emphasis on the human rights objectives in development discourse.

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[44] *Ibid, page.6*

"A rights based approach is a conceptual framework for the purpose of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. The rights based approach integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development."[45]

It should be emphasized that the heart of a human rights approach must be the legal character of the international treaties that create rights and duties. This legal character distinguishes obligations and rights from charity and needs. Whoever wants to apply this approach must understand and accept this legal character. And this can be done by an explicit recognition of the national and international human rights normative framework. With this recognition, a duty-bearer not only recognizes the human rights of right holders, but also positively acknowledges and asserts its obligation under national and international human rights law. This is not to say duty-bearers can escape their obligation by non-recognition of this framework, they will still be under obligation as they are now.[46]

The basic features of this approach are as following:

- Explicit recognition of national and international human rights normative framework
- Interdependence and indivisibility among human rights and priorities
- Accountability
- Equality and non discrimination
- Protection for the vulnerable and the marginalized
- Participation and inclusion
- Human Rights impact Assessment and Benchmark

Recommendations

Affirming the lack of knowledge and proper understanding from my part, I conducted this research to establish the hypothesis that human rights and development have intersecting points and there is no dichotomy between human rights and development. In making recommendations through which the promotion and protection of human rights and development can be possible, I took help from various organizations and human rights scholars. I divide the recommendations into two parts to make them conveniently understandable through national and global duties of states and international community as such:

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45 *Mary Robinson, A voice for Human Rights, University of Pennsylvania press, 2006, page 303*
46 *Ibid*

Required action in country level

Adopting the human rights approach to development and management of globalization:[47]

Civil, cultural, economic, political and social rights – individually or as a whole provide a normative framework, mechanisms for remedies, and tools for advocacy and mobilisation that must be integrated into development work at the country level. Governments and their development partners (including UN agencies, Bretton Woods Institutions, bilateral donors and NGOs) should re-evaluate their existing development programmes and policies, especially macro-economic policies, in assessing their impact on human rights.

Strengthen administrative and judicial remedies:[48]

Administrative and judicial grievance procedures must be strengthened or made available to provide remedies and redress related to the negative impact of development. A human rights approach creates an effective framework for dealing with the so-called "victims of development," or victims of globalization and economic instability.[49]

Develop benchmarks: [50]

Goals and indicators should be designed to develop benchmarks for monitoring progress in the protection and realisation of all human rights. As an example, the Human Development Report commissioned by the UNDP presents several indicators relative to economic and social rights, as well as the Human Development Index (HDI), providing an aggregate view of progress in this area of human rights.

Strengthen democratic processes and institutions for the rule of law:[51]

A democratic political order and effective governance must be achieved and supported as a prerequisite for progress in human development and the realisation of human rights. Civil society movements and organizations play a central role in this process, exerting pressure on the government and the private sector to focus policies and programmes on human development goals and human rights achievements alike.

Promote the right to information effectively:

Central to strengthening a democratic political order and to holding governments and the private sector accountable for their policies and actions is the exercise of people's right to information. Though Bangladesh has an Information Commission, it has to function

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[47] *Summary of Oslo Symposium,02-03 October, 1998*
[48] *Ibid*
[49] *Ibid*
[50] *Ibid*
[51] *Ibid*

effectively to provide information to the people. People gather to assess the quality and efficiency of public services provided by local government in a public hearing in India. This has proved to be a powerful tool for ensuring the accountability and transparency of government services, as well as of assistance provided by NGOs.

Strengthen and support National Human Rights Commissions: [52]

Mechanisms at the national level to protect and promote human rights must be created or strengthened. The mandate of these commissions is to ask responsible organs of the state to indicate what actions have been put in place for delivering services and what progress has been made in formulating policies focused on the realisation of human rights. The work of the commissions has involved strong collaboration among the government, NGOs and community-based organizations, providing an opportunity for people to express their views and share their impressions on the merits of the policies and performance of public services. Though Bangladesh has such commission but it lacks manpower as claimed by the Commissioner of the commission.[53]

Restructuring national budget

Budget allocation should concentrate more on the rights and priorities rather than concentrating on unnecessary ideas like lowering farm subsidy and education against increasing budget for defence. Besides defence, the added savings may come from combating corruption, reforming public enterprises, reducing internal policing.[54]

Required action at global level

Strengthen and reform Economic, Social and Cultural Committee (ECOSOC):[55]

One way to develop a more effective forum for global review of the realisation of human rights, as well as a mechanism of enforcement, is to strengthen the United Nations Economic and Social Council (ECOSOC). It was recommended in Oslo Symposium that ECOSOC be reorganised into two committees. One would guide the work of development agencies and the other would be a global policy forum that would review, for example, the impact of globalization on human rights and human development.

Link the human rights conventions to the work of the UN operational agencies:[56]

The UNICEF programme model, which is based on the Convention on the Rights of the Child, was recommended to other UN agencies as an approach to be emulated in the Oslo

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[52] *Ibid*

[53] *Professor Dr. Mizanur Rahman expressed such views when he was interviewed by me, in 10 October, 2011*

[54] *UNDP: Human Development Report, 1991, overview, page 5*

[55] *See note 1*

[56] *Summary of Oslo Symposium,02-03 October, 1998*

Symposium. The various ILO conventions constitute the common denominator in terms of that organization's work on human rights instruments. UNDP should explore the procedure for adopting the Covenant on Economic, Social and Cultural Rights as a framework for programming and progress review.

Foster a closer relationship between UN development agencies and HR treaty bodies

As follow-on from the previous recommendation, it was suggested in the Oslo Symposium that attention should be given to the UN bodies responsible for monitoring the implementation of the human rights conventions and the practical actions required to link the human rights standards adopted by the international community and the actions undertaken by the operational agencies. Closer working relations between UN development agencies and the human rights committees would accelerate progress towards integrating development and human rights.

Ensure ratification of all human rights conventions by all countries

A general but important recommendation called for renewed effort to have all countries ratify the main human rights conventions. (The Convention on the Rights of the Child has been ratified by over 190 countries; the Covenant on Economic and Social Rights by only some 140 countries.) UN agencies should affirm and proclaim their commitment to human rights and work with governments to achieve at least near-universal ratification.

Develop mechanisms for accountability on the part of international organizations

The current institutional mechanisms for human rights accountability address governments only. The UN Commission on Human Rights and treaty bodies review actions of national governments within the confines of the nation state. There is a wide divergence that must be addressed. International organizations, especially the Bretton Woods Institutions (the World Bank and the International Monetary Fund) must become accountable for policies and programmes that have a negative impact on human rights, among which economic and social rights are of primary importance.

Develop mechanisms for accountability on the part of transnational corporations:

The need to extend accountability to non-state actors, especially transnational corporations, was discussed. It was recommended that more efforts are needed to establish codes of conduct and legal mechanisms to bring corporations under the rule of law of human rights. The purpose is to stimulate and create incentives for the private sector to take human rights concerns into consideration.

Develop positive incentives instead of sanctions to enforce human rlgbts

The use of sanctions in enforcing human rights, especially trade sanctions based on social clauses and defence of labour standards, can have perverse, negative impacts on poor people and poor countries. Development corporations, implementation of the ILO conventions, and capacity building for poverty eradication provide more positive and constructive means to achieve better labour standards, and not only in the export sectors.

Emphasize the obligations of donor countries

Renewed attention should be given to the legal obligations of donor countries in assisting developing countries in realising human rights. Human rights instruments oblige countries with resources to assist countries with inadequate resources in the progressive realisation of economic and social rights.

Concluding remarks

'Human progress,' wrote Martin Luther King junior, 'never rolls in on wheels on inevitability. It comes through tireless efforts and persistent work. Without this hard work, time itself becomes an ally of the forces of social stagnation.'[57] Human progress is the ultimate desire of human being living in this globe. To achieve this human progress, we should not consider there is a dichotomy between human rights and development as the trade arrangement prevails in the world operates as such. The problem requires a resolution which leads adoption of a new strategy which would foster participation, ownership and embraces the private and public sectors, the community, families and individual; and place the human person at the centre of the development paradigm.

57 *UNDP, Human Development Report, 2010, overview, page no.9*

Potential Contribution of Fact-finding Commission in Resolving Disputes over Shared Watercourses: Bangladesh Perspective

*Nusrat Jahan Urmi**

Introduction

The freshwater resources and the related environment of the world ecology are under enormous stress due to over population and rapid industrialization. Though there has never been wars over water but acute scarcity of freshwater in certain regions of the world will lead to violent conflict in the long run. The case of Indo-Bangladesh water resource crisis is no different. In this region, water resource is becoming increasingly scarce and important for economic and agricultural production. Simultaneously probability of water related conflicts is also increasing. So, it can be said that dispute over water use, diversion, pollution and quality are found virtually in all parts of the world. Finding a comprehensive solution to water sharing disputes is easier said than done. In this regard, the Ganges Water Sharing Treaty, 1996 between Bangladesh and India is a classic example. It took nearly four decades to be concluded as a long term solution of the dispute. The agreement, however, provides only a limited arrangement for the water sharing of the Ganges river and Bangladesh and India are yet to succeed in resolving the question of utilization of waters of most of the remaining common river.[1] The treaty of 1996 contains no provision for dispute settlement concerning the withdrawal of Ganges water in the upper basin. In contrast, the strength and utility of the 1997 UN Watercourse Convention is rooted in its emphasis on the observance of procedural obligations in dispute settlement like third party mechanism including mandatory Fact-finding Commission. Fact-finding Commission has received considerable attention by state parties. This paper aims at examining the effectiveness of fact-finding mechanism in resolving disputes over shared watercourses. Against this backdrop, this paper attempts to analyze the scope and prospects of Bangladesh in finding sustainable resolution of disputes concerning equitable water sharing by adopting and implementing the fact-finding provisions of the 1997 UN Watercourse Convention. It has been observed in this paper that not only the age old Ganges Water Sharing Treaty but also upcoming treaties regarding remaining common rivers need to be tailored keeping in view the considerable application of fact-finding in many parts of the world.

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* *Assistant Judge of Netrokona.*

1 *Md. Nazrul Islam, " The 1997 Watercourse Convention And Its Relevance To Bangladesh – India Water Sharing Issues ",Bangladesh Journal of Law,5:1&2(2001) at p. 1*

Analysis of the provision regarding mandatory Fact-finding Commission of the 1997 Convention to illustrate its efficacy as a mechanism of dispute resolution:

The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses is the only global treaty focused on international water resources. The main provisions of the Convention include exchange of information and data, notification of possible adverse effects, protection of ecosystems, and handling of emergency situations such as floods. Consistently, 1997 UN Watercourse Convention obliges states to settle any dispute by peaceful means and in good faith but relaxes the option of choosing dispute settlement mechanism by mutual consent.

Analysis of the Fact-finding provision

Article 33 and Annex to the Convention deal with dispute settlement mechanisms and procedures. This article lays down a number of methods for settlement of disputes, including negotiations, mediation and conciliation by a third party, or use of joint watercourse institutions, or submission of the dispute to arbitration or to the International Court of Justice .The only obligatory method set forth in the Convention is impartial fact finding. Article 33 lays down details procedure for such fact finding. It requires state parties to consider the report of the fact finding commission in good faith. Though the report has no such binding effect even then it strengthens disputing parties standpoint to raise their voice and find out a negotiable settlement. Similarly the Convention provides the parties with the option to submit their dispute for Arbitration in accordance with details rules laid down in the Annex to the Convention, or to the International Court of Justice, if the parties desire so to do. This overview indicates that this Convention is basically a framework Convention which lays down basic principles and procedures, leaving the details in the hand of the state parties to complement in agreements that take into account the characteristics of their specific watercourse."[2] In the event that a dispute remains unresolved by the above-mentioned means the Convention provides for the establishment of a "Fact-finding Commission", on being requested by any of the disputing parties. That commission's role is to investigate the dispute and produce a report setting forth it's findings and recommendations on how to achieve an equitable solution.

Firstly, Article 33 obliges state parties to take resort to several settlement mechanisms with regard to any dispute concerning 'interpretation or application' of the Convention. It provides mechanism for bilateral and third party dispute settlement, as well. "Dispute settlement procedures can be invoked gradually: first bilateral methods, thereafter optional methods of

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[2] *Salman M.A Salman "The United Nations Watercourses Convention Ten Years Later: Why Has Its Entry Into Force Proven Difficult?" International Water Resources Association, Water International, Vol 32 . Number 1 .Pg. 1-15 , March 2007 (at p. 7)*

third party settlement and lastly, if optional methods are not agreed, a mandatory fact-finding commission."[3] The provision regarding fact-finding is the only dispute settlement procedures which does not require prior agreement of every disputing parties and can be invoked unilaterally by any of them. Any contentious issue regarding use of shared watercourse can be submitted to impartial fact-finding commission by any of the parties at any time after six months from the commencement of consultations and negotiations between parties provided the parties have not sought for relief to any legal dispute resolution processes like arbitration or adjudication. Establishment of the Commission requires three members one from each disputing countries and one from neutral country who will act as chairman of the Commission. If the parties could not agree on a chairman, any party concerned may request the United Nations Secretary General to appoint the chair. The Secretary General of United Nation shall appoint a foreign national as chairman of the Commission. The said article also provides for any of the parties to the dispute to request the Secretary General to appoint a single member Commission if any of the parties fails, within four months, to nominate a member. The person to be appointed may not be a national of any of the states concerned. The commission shall determine it's own practice and procedure to prepare and adopt report with such findings and recommendations as it deems appropriate for an equitable solution of the dispute. These recommendations are not binding but the parties must consider them in good faith. Good faith in this instance means that parties must consider the recommendations with a view to reaching a negotiated settlement.[4] The expenses of the Commission shall be borne equally by all disputing parties.[5] However, Bangladesh and India, the common riparian of a very large number of international rivers, have yet to comprehend the opportunities the Convention has offered to review earlier agreement particularly the very significant 1996 Ganges Treaty and to conduct fresh negotiations for unresolved river disputes.[6]

Purpose of the Fact-finding Commission

Watercourse states with plans for development have the duty to cooperate with respect to notifying other watercourse states of their "planned measures". Planned measures include all activities or projects carried out within the borders of a particular state, making it applicable to private initiatives as well as state projects. Furthermore, the duty to notify applies not only to communication about river dams and diversions, but also to ground water extractions. In cases, where these obligations are not being properly observed by the state parties reliance on fact-finding commission is the only way to have such information. Thus the Convention

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3 *Md. Nazrul Islam, " The 1997 Watercourse Convention And Its Relevance To Bangladesh – India Water Sharing Issues",Bangladesh Journal of Law,5:1&2(2001) at p. 14*

4 *Alistair-at-el "UN Watercourses Convention User's Guide" IHP-HELP Centre for Water Law, Policy and Science(under the auspices of UNESCO)(2012) at p.242*

5 *See article 33(9) Of the 1997 UN Watercourse Convention*

6 *Md. Nazrul Islam, " The 1997 Watercourse Convention And Its Relevance To Bangladesh – India Water Sharing Issues",Bangladesh Journal of Law,5:1&2(2001) at p.2*

provides a basic mechanism for ascertaining the facts of the dispute, and leaves it for the parties to agree on the method for resolving it from a wide menu of choice. [7]The rationale of inclusion of these provisions was to avoid stalemate in the dispute settlement and to assist parties in moving forward with data and information exchange which are essential for the operation of the principle of equitable utilization and to enable the resolution of a dispute in good faith.[8]

One of the most significant recent uses of the concept fact-finding is existent in Indus Water Treaty between India and Pakistan in resolving a difference regarding the construction of Baglihar hydropower plant on Chenab river. In accordance with part–IX of Indus Treaty any difference or dispute has to be referred to a neutral expert who has extensive quasi-judicial powers including determination of available waters, withdrawal, uses, releases and procedures for providing each party an adequate hearing. The same is requested by Pakistan and an expert was being appointed accordingly. The provision of neutral expert is similar to the provision of Fact- finding Commission as enshrined in 1997 UN Watercourse Convention. Unlike Fact-finding Commission's report, the report prepared by neutral expert as per Indus Water Treaty is binding upon the disputing parties. This non-binding aspect of the Commission's report was being severely criticized in the six Committee by some delegates. These criticisms had overlooked that disagreement on facts is a common phenomenon to watercourse disputes. Later on, fact-finding has gained considerable attention as a fruitful mechanism of conflict resolution by states. States must admit that facts are of critical significance with regard to the core obligations of the Convention. As for example, how can states determine whether their use is equitable and reasonable in comparison with co-riparian states without an agreed factual basis? Or how can a state establish that it has sustained significant harm if the state that is alleged to have caused the harm denies that it has caused it or that any harm has been suffered? It is worth noting that data and information collected by a Fact-finding Commission could definitely contribute to the settlement of a dispute.

Potential contribution of Fact–Finding Commission in Bangladesh perspective:

Bangladesh is a land of rivers. About 405 rivers run across the country of which 57 are transboundary rivers. Out of the 57 transboundary rivers 54 are common with India whereas only 3 rivers are common with Myanmar.[9] The life and livelihood of people of this county are critically dependant on waters of those rivers since ancient time. In order to attain sustainable development, Bangladesh needs to address its water related problems through viable policy

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7 *Salman M.A Salman "The United Nations Watercourses Convention Ten Years Later: Why Has Its Entry Into Force Proven Difficult?" International Water Resources Association , Water International, Vol 32 , Number 1 ,Pg. 1-15 , March 2007 (at p. 11)*

8 *Alistair-at-el "UN Watercourses Convention User's Guide" IHP-HELP Centre for Water Law, Policy and Science(under the auspices of UNESCO)(2012) at p.242*

9 *For details see official website of Joint River Commission, Bangladesh at www.jrcb.gov.bd/*

architecture. Due to its geo-physical factor Bangladesh has to face the brunt of both excessive and low water flows, occurring alternatively during the monsoon and the dry season. Flooding in monsoon and drought in non-monsoon period is a common natural phenomenon of Bangladesh. On the other hand, India is an upper riparian country with most of the catchment area of the Ganges –Brahmaputra- Meghna (GBM) river systems. The major rivers which flow through our country have their origin in other countries of the region placing Bangladesh in the receiving end as a lower riparian. The situation became much more complex by the fact that all the rivers that matter first flows through India before entering into Bangladesh. So, our Government needs to address the issues relating to the equitable sharing and the proper management of transboundary rivers with co-riparian countries more meticulously. Treaties must contain handy provisions for effective and sustainable resolution of disputes over shared watercourses. Against this backdrop, the Ganges Water Sharing Treaty, 1996 could be taken as exemplary to analyze its efficiency in avoiding the decade old stalemate over water sharing disputes. The treaty falls far short of finding out long lasting solution to water sharing disputes. Furthermore, it can be said that water allocation at different points of Ganges was not properly accommodated in the treaty for non-availability of exact data and information. The 1996 treaty does not provide for any minimum guaranteed flow for downstream Bangladesh if the flow at Farakka reduces substantially. Rather Article II(ii) of the Treaty states that "Every effort would be made by the upper riparian to protect flows of water at Farakka as in the 40 years average availability as mentioned above."[10] However the treaty did not elaborate and define the term "every effort". Thus if the flow at Farakka reduces due to upstream abstraction, India is not under any obligation to protect the flow.[11]

In such situation an efficient system for providing data regarding upstream water diversion becomes more imperative. But the monitoring mechanism set up in this regard at or below Farakka point was hardly equipped to answer effects of upstream water withdrawal projects. In the 1996 Ganges Water Sharing Treaty water availability had been calculated on the basis of controversial figures of average historical flow (1948-1988) without taking into consideration the most recent data on water availability from 1988-1996. Since the implementation of the treaty, the amount of water-flow at Farakka Barrage hardly ever reached the historic average flow. India had tried to explain non-availability of water as a result of less rainfall, non-melting of snows in the Himalayas and so on.[12] However, India

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10 *See text of the 1996 Ganges Water Sharing Treaty*

11 *Muhammad Mizanur Rahman " The Ganges Water Conflict", A Comparative Analysis of 1977 Agreement and 1996 Treaty [asteriskos (2006) ½:195-208] ISSN 1886-5860 [provided by the international water law project : www.waterlaw.org]*

12 *For details idea see Dr. Md. Khalequzzaman and Zahidul Islam "Success and Failure of the Ganges Water Sharing Treaty" at http://wreforum.org/khaleq/blog/ or M. Maniruzzaman Miah " Hydro –Politics of the Farakka Barrage", Gatidhara (2003)*

herself showed no interest to refute Bangladesh's argument that water availability is bound to be less because of indiscriminate upstream diversion. Commentating on the situation, it is suggested by some experts that the treaty of 1996 would have no practical value, unless some steps be taken to ensure steady or increased water supply at Farakka.[13] In this regard, dispute settlement provisions as enshrined in Ganges Water Sharing Treaty, 1996 need to be focused. Nowhere in the treaty we found existence of third–party dispute settlement including impartial Fact-finding Commission. As facts are fundamental to water related disputes, up-to-date data and factual information relating to water diversion and extraction in the upstream region are sine qua non for ensuring effective negotiation in disputing factors. Furthermore, the prospect and potentiality of the 1996 Treaty in resolving disputes regarding equitable sharing of Ganges water has been frustrated due to insufficiency of data on accurate water flow at or before Farakka point during dry season. These purpose of extracting actual data and information could have been well served by an impartial Fact-finding Commission as outlined in the 1997 UN Watercourse Convention. Water is still a hot issue in the relations between Bangladesh and India. Bangladesh is yet to enter into negotiations with regard to remaining common rivers. Indo-Bangladesh legal regime relating to water resources needs to be appropriately tailored for development of sustainable water partnership. Inclusion of fact-finding provision is essential in this region to avoid long lasting stalemate in dispute settlement.

Recommendations

Bangladesh is yet to ratify the 1997 UN Watercourse Convention. This Convention came into force on 17th August, 2014 in accordance with it's article 36 (1). Being ratified by Vietnam on 19th May, 2014, it fulfills the requirement of having 35 instruments of ratification. Now it is time for Bangladesh to be party of this norm creating Convention having reflection of cardinal environmental protection principles. Prior to it's enforcement as a treaty law the Convention had shown considerable influence on multilateral and bilateral water treaties. Furthermore, it has also been endorsed by a number of international entities as well as by the International Court of justice. It has codified established and emerging customary principles, as well. This Convention gives priority to existing bilateral treaties. At the same time it acknowledges the necessity of harmonization of prior agreements for more comprehensive solution to watercourse disputes in cases where the previous one lacks effective implementation.[14] India has voted against article 33 of the Convention especially Fact-finding Commission for being compulsive in nature. In my point of view the strength of fact-finding is rooted in it's formation and working procedure in extracting facts, data. All

13 *Md. Nazrul Islam, "Equitable Sharing of The Ganges Under The Agreements Between Bangladesh And India", The Dhaka University Studies, Part- F Vol.XII(1)(2001) at p. 77*

14 *Article 3 of the Convention 1997*

these are very much favorable for regionally weak lower riparian states. So, after becoming party to this framework Convention Bangladesh should comprehend fact-finding mechanism enshrined in it to review existing as well as future agreements over shared watercourses. Bangladesh should harmonize the Ganges Water Sharing Treaty 1996 with the UN Watercourse Convention 1997 by incorporating provision regarding Fact-finding Commission. We should be regardful of our own interest while dealing with other riparian states of shared watercourses.

Conclusion

In this global society, the impacts of instability in one country or region, and the resulting hardship and suffering, do not stay isolated. Economic systems and trade can face disruptions when political instability arises. Likewise, environmental degradation in one country cannot always be confined to political borders, giving rise to negative social and economic impacts experienced by states sharing the water resources. This paper has outlined the rationale for Fact-finding Commission in resolving disputes over shared watercourses. This paper has also underscored, among other things, the fact that water can be a catalyst for cooperation as well as cause for conflict and emphasized the pressing need for collaborative action that the Convention epitomizes. Water is the most important resource that human kind shares. It is a finite resource with no alternative. So, states must ensure maximum utilization and protection of this scarce resource among all riparian instead of engaging in disputes. Fact-finding has been hailed as an effective mechanism for sustainable resolution of water related disputes in many parts of the globe. Even then application of this mechanism or any attempt to review the Ganges treaty would require sound diplomatic relation between Bangladesh and India. As the 1996 treaty is subject to five year review cycle, negotiation for incorporating provision like fact-finding mechanism could have been started at those review times .This can be done without becoming party to the Convention keeping in view the success of Indus Water Treaty. Simultaneously the option of becoming party to the 1997 framework Convention is open for Bangladesh like all other non-parties.[15] Finally, the strength and effectiveness of fact-finding mechanism in resolving disputes over shared watercourses could never be undermined in any way. Let us start afresh.

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15 *See article 35 of the 1997 UN Watercourse Convention*

Challenges of Village Court and Its effectiveness on Criminal Justice System in Bangladesh

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*Md. Minhaz Uddin****

ABSTRACT

Laws and the legal systems are major tools that may be used to promote justice and these play a vital role in the well being of any society. But the legal system sometimes may act like a double-edged sword. Just as fair laws can dispense justice, unfair laws can lead to infringement of rights and violations of principles of justice. Similarly, even if laws are fair and impartial, but implementation of laws is carried out in unfair manner, it may act as a barrier to achieve the goal of justice. Village Courts were first established in 1976 by an ordinance and at present the Village Court Act, 2006 had replaced the old law. The purpose of the establishment of the village courts was to ensure justice locally without having to suffer the inordinate delays and exorbitant costs of the formal court processes. The perceived benefit from village courts also includes the reduction of the enormous transaction costs in terms of lawyer's fees, court expenses and bribes associated with the formal judicial system. The study reveals that the Village Court (VCs) do not seem to function properly in all areas of the country due to lack of awareness among the rural people, inexperience of the chairman, members and secretaries of UPs who are not sufficiently conversant with the system. Moreover, as a court, this institution does not appear to have received proper attention from the concerned authorities at the field level. Strengthening the village court is linked to strengthening the local government, but there is a lack of political commitment in this regard. Undoubtedly, the village court should continue to function not only to make justice available at minimum cost and trouble but to maintain peace and harmony.

Introduction

'Access to Justice' is recognized as one of the fundamental preconditions for development and good governance. The term 'access to justice' refers to opening up the formal systems and structures of the law to disadvantaged groups in society. This includes removing legal and financial barriers, but also social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions (Global Alliance against Traffic in

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Women). The Universal Declaration of Human Rights also endorses the legal rights to all. According to the Article 1 of United Nations Universal Declaration of Human Rights (1948), "All human beings are born free and equal in dignity and rights."

Local justice lies at the intersection of two of the most forceful currents in Bangladesh. One of these is the rule of law: the government's highest aspiration is to establish law - and not personality or power -as the fundamental structure in which electoral competition will once again take place. A second force that defines the present social and political moment is decentralization. The Article 27 of our constitution states "All citizens are equal before law and are entitled to equal protection of law" and for this equal protection of law, access to Justice is required.

Still traditional shalish are rampant, perpetuating the regimes of impoverishment. Some NGOs have been supporting local dispute resolution as an alternative forum of state-led and traditional forums of rural justice. These NGOs supported programmes run by knowledgeable law officers and well-prepared documents have been seeing the light of success gradually. But these NGOs legal aid activities cover hardly 1% of around 70,000 Bangladeshi villages. According to a UNDP report, two third of the disputes do not enter the formal court process. So still two-third disputes are disposed off in traditional Shalish, Village Courts, Arbitration Council or they remain unsettled. Theoretically, everyone is entitled to access to justice but unfortunately, the gap between formal entitlements and actual access can be immense. Typically, justice within the formal state system is beyond the means of most poor people in the South. Exorbitant costs, excessive delays and backlogs, and a lack of knowledge or resources are major obstacles to those who seek justice informal legal settings (Siddiqi 2003).

In early nineties the *Magistrate Courts* and *Munsif Courts* were shifted from Upazila/Thana headquarters to the districts. Average expense of a case in the court of a Thana magistrate was estimated to be a minimum of Tk. 16,511 while the maximum was Tk. 176000 (Arafunnesa1988: 27). As these figures were estimated more than two decades back, the current expense in the absence of Upazila courts would be much higher. Such expense is beyond the capacity of the village people. Therefore, large segments of the population who lack information or means to surmount the significant substantive and procedural barriers seek informal mechanisms (Shalish) to redress their grievances. About two-thirds of the disputes do not enter the formal court process; instead, they are either settled this at the local level through informal process by local leaders or a Village Court (*Gram Adalat*) or they remain unsettled (Golub: 2003).

The Gram (Village) Adalat (Court) Ordinance 1976 (Ordinance No. LXV) was promulgated in Bangladesh in 1976 to serve the rural poor from the sufferings and hazards of the formal courts. Bangladesh is one of the poor country of the world and most of its populations lives in the villages. As a result it is not easy for rural people to go to the formal courts in the district headquarters. The formal courts are generally expensive and follow lengthy procedures. As a results, it is very difficult for them to sue and continue the cases at the formal courts. This results in compelling the villagers to rely on the traditional alternative dispute resolution mechanisms such as Salish. The system Salish has been practiced for centuries. Local Leaders, either in groups or individually provide a forum for discussion and the resolution of local disputes. The strength and popularity of local leaders depend to a large context on their tact, skill, integrity, fairness and overall ability to resolve local disputes. The more capable a leader provides at selling disputes, the more solid is his power base. But these Salish is a very crude from of local judicial practice, which is very much influenced by the people who are the members of rural power structures. There are also dominated by the people of different vested interest groups including the musclemen and local elites or even by the local touts.

At present there are 4,488 Union Parishads (UPs) in Bangladesh (Statistieal Year book of Bangladesh -2004, p.27). These Union Parishad plays a vital role in the economic and socio-cultural life of rural people. As the chairman and members of the UP are elected by the local people, they have greater accountability to them the chiefs of the informal "Salish" procedure. It is unfortunate and frustrating that though Village Courts ordinance was promulgated more than three decades before, it has not yet achieved a considerable success till now.

The lack of faith in the formal justice system in Bangladesh is immense. A survey conducted by Transparency International– Bangladesh found that 79.7% of the households interviewed agreed with the assertion that it was almost impossible to get help from the law-enforcing agency (police) without money or influence. 88% expressed a similar disillusionment with respect to the judiciary and stated that they had to bribe court officials (TIB – CPI 2010).

In Bangladesh, one of the major problems of the justice sector is delayed dispensation of justice due to huge backlog of cases. Sometimes it takes 20 to 25 years for a ease to be resolved.

According to average rate of disposal of civil cases in the last five years, it would take two years and nine months to dispose of all pending cases if there are no new cases during this period. On the other hand, according to average rate of disposal of criminal cases in the last five years, it would take one year and ten months to dispose of all pending cases if there are no new cases (IGS 2010).

Though the state mandated village courts are headed and operated by personnel in local governance, have backing of the government and have the necessary structures and function arise in place, these systems are almost non-functional. Village courts are also blamed for its excessive formalities and delays. Again, the village court also is susceptible to manipulation by touts and local musclemen who sometimes guide the pace and direction of the process by intimidation.

Review of literature

A good number of researchers and scholars of Bangladesh and the west have dealt with the working of the state-led formal courts and non-state informal courts. Again some international organizations like UNDP, World Bank and DFID have developed different models in dispensing justice. Justice dispensation process is interlinked with various issues like the justice seeking behaviour of the community, power structure of the rural society, capacity, competency, strengths and weakness of the justice dispensing organs and the people involved with the whole process.

According to **Lewis (1991) and Wood (1999),** rural power structure plays a very vital role in dispensing justice or seeking justice either through formal legal systems or informal systems like Shalish or quasi-formal system like village courts. The rural power structure has changed a lot in last twenty years. Land ownership alone is no longer the main determinant of rural power.

UNDP (2005) divides access to justice into different stages; starting from the moment a grievance occurs (causing a dispute) to the moment redress is provided. Full access is ensured when the process is completed.

Hashmi(2000) describes a "*member -matbar-mulla*" triumvirate that controls village affairs, including Shalish.

> *The members of the Union Parishad (the lowest electoral unit) are elected officials, in charge of the disbursement of public goods and relief materials among the poor villagers, are the most powerful in the triumvirate. They are often connected with the ruling political party of other influential power-brokers in theneighboring towns or groups of villages. The matbars (matabbars) or village elders, who also sit on the Shalish (village court), are next in the hierarchy, having vested interests in the village economy as renters and moneylenders. They often get shares in misappropriated relief goods along with government officials and members-chairmen of the Union Parishads. The mulla, associated with the local mosques and maktabs (elementary religious schools), are sometimes quite influential as they endorse the activities of village elders albeit in the name of Islamic or Sharia law. The often sit on the Shalish and issue fat was in support of their patrons, the village elders. The rural poor, often women, are victims of these fatwas (Hashmi 2000: 137).*

Siddiqi (2003) argues that justice seeking behavior determines the preference of one justice system over others. Justice seeking behavior depends on the perceptions, availability, accessibility effectiveness and efficiency of the justice systems. A common saying captures the general perception towards the courts as well: "*He who gets trapped by the law falls into the mouth of a tiger*" It was observed that for many years, Shalish is the first preference of the people living in rural Bangladesh.

Table-1: Justice Seeking Behavior in rural Bangladesh

Type	1st preference	2nd preference	3rd preference	4th preference	Mean
Salish	46	1	-	-	4.0
Village court	1	41	2	3	2.8
Police	-	4	20	16	1.7
Court	1	-	19	24	1.5

*Source: A small-scale survey of UP villagers (UNDP Human Security Report, 2002)

Jahan (2007) opines that traditional Shalish had been considered as the most effective means to resolve disputes in the past, but in recent times, the significance, importance and effectiveness of Shalish are declining.

Aminuzzaman, S. M. (2000) speaks of the high levels of corruption in the Shalish system. Political affiliation of the person seeking justice has become an important point of consideration and the just resolution is not delivered as the Shalishkers have started to consider the consequence of their resolution on their vote bank.

Objectives and Methods

The present article has been written on the basis of an empirical study. The study mainly carried out to focus the challenges associated with the Village Court System in Bangladesh. To attain this objective, present study followed the qualitative approach and is exploratory by nature. For better understanding of the nature of the problem, several techniques were used. The techniques like in-depth interview with semi-structured questionnaire, focus group discussion and case study methods were used in this study. For the focus group discussion, people from all segments of rural community (like peasants, shopkeepers, women, ex. member/chairman, religious leader etc) were included. To analyze the relevancy/drawbacks of Village Courts, contents (like books, journals, relevant laws and rules) were reviewed.

Discussion

The adjudication systems in rural Bangladesh are broadly divided into two categories: state supported rural justice systems like village courts and arbitration council and non-state rural

justice systems like 'Shalish'. This division is based on the legal status of the forums. State supported rurai justice systems do have the specific body of laws, rules and procedures to follow.

The laws emanate from the legislature. One the other hand, the non-state rural justice systems commonly referred as traditional 'Shalish' system, which is active in rural Bangladesh from time immemorial don't have any specific laws and procedures. Sometime they follow local customs, traditions or religious dicta. Sometime they may follow neither, but may decide upon the circumstances. However, there is also a practice of clan (gusthi) based dispute settlement. In the recent years, Rural Bangladesh has also experienced the NGO-organised modern Shalish/ADR (alternative dispute resolution) systems. All these forums come under the non-state rural justice systems (Biswas. Z. I 2009). Among the four non-state and state-led rural justice systems Shalish is very informal but village court is a formal court with informal characteristics.

At the lowest level there is the Village Court in rural areas operating in accordance with the Village Court Act of 2006. Some small matters like cattle lifting, larceny of property up to Taka 25,000/- (US$ 313) value, offences of minor hurt, trespass, etc. are tried by the Village Court. This court can impose a fine only; it cannot pass a sentence of imprisonment. The village court has no jurisdiction in municipal areas. The Conciliation of Disputes (Municipal Areas) Board Act 2004 is the city-edition of the Village Court Act of 2006. Legal jurisdiction is almost the same. This court can pass an order imposing a fine only; it cannot pass a sentence of imprisonment.

Though there are various types of courts and tribunals working hard to dispense justice but around 20 lacs cases are still pending in various types of courts.

Tablel-2: Number of pending cases in Bangladesh Judiciary

Court	Civil	Criminal	Others	Total
Supreme Court(App. Division)	6922	2169	50	9141
Supreme Court(High Court Division)	77859	181926	53950	313735
District Session Judges and Tribunals	519585	328837	00	848422
Magistrate Court(Metropolitan Magistrate and Chief Judicial Magistrate)	00	770865	00	770865
Total	604366	1283797	54000	1942163
On January 1, 2011 there are 19,42,163 cases pending in Bangladesh				

*Source: Annual Report on The Judiciary, 2010, Supreme Court of Bangladesh

Village Court Ordinance was promulgated 38 years ago, but it has not been reformed so far in line with the economic and social changes.

Ex Law, Justice and parliamentary Affairs Minister Barrister Moudud Ahamed informed the Jatiya Sangsad that total of 1045895 cases are pending in the courts of the country, till April 2003, while replying to a question in this regard. Among these 3,79,893 are civil cases, 6,43,697 are criminal cases and 22,302 writ cases pending in the High Court Division. (The Daily Ittefaq, 29 June, 2006, p.1). This statement indicates the level of back logs of cases in the formal Courts compared to their disposal capacity and emphasizes on the importance of dispute settlement arrangement like village courts. The main challenges of village court are given bellow:

Socio-economic characteristics of the justice providers (UP Chairman, Members and Secretary)

The Union Parishad (UP) chairman and members are mainly responsible in dispensing justice at local level. Usually the chairman of the UP acts as chairman of the Village Court (VC). He is assisted by other elected members. As per the VC Act 2006, two members from outside the parishad are nominated by both the parties related to the case. In the following paragraphs, attempt to analyze some of the socio-economic characteristics of the UP officials who acts panel members and support staff in the village court in two UPs under study.

Tablel-3:Age of the UP officals of Jhawgara and Vabkhali union village court

Age	Vabkhali, Mymensingh(n=14)	Jhawgara, Jamalpur(n=14)	Total(n=28)
31-40	42.86%	50%	46.43%
41-50	42.86%	42.86%	42.86%

It is finding that the highest percentage of the chairman and members belong to the age group between 31-40 years (46.43%) indicates the dominance of a relatively younger age group. The traditional rural leader (matbors) in the rural areas of Bangladesh who usually settles local disputes in the form of 'Shalish' are supposed to be quite elderly people, i.e. belonging the age group of 50 and above. But in case of VC, the picture shows the dominance of younger people in leadership. From the point of making judicial decision it may has an impact on the acceptance of such decision in rural areas.

Tablel-4:Educational level of the UP officals of Jhawgara and Vabkhali union village court

Education	Vabkhali, Mymensingh(n=14)	Jhawgara, Jamalpur(n=14)	Total(n=28)
0-5	7.14%	35.71%	21.43%
6-10	64.29%	35.71%	50%
SSC	14.29%	7.14%	10.71%
HSC	14.29%	14.29%	14.29%
Graduation	-	7.14%	3.57%

In the case of education the highest percentage of the chairman and members of VC belongs to the educational level between VI-X (50%). It is interesting to note that in both cases the UP chairman who acts as chairman of the VC and UP secretary who acts as support staff of VC has HSC or above level of education. So, the level of education of the justice providers is not quite adequate which may has a connection with the legal awareness of the justice providers.

Tablel-5: Occupation of the chairman and members of the village court

Occupation	Vabkhali, Mymensingh(n=14)	Jhawgara, Jamalpur(n=14)	Total(n=28)
Agriculture	28.57%	42.86%	35.71%
Business	14.29%	14.29%	14.29%
Agriculture and Business	21.43%	14.29%	17.89%
Housewife	21.43%	21.43%	21.43%
Others	14.29%	7.14%	10.71%

The above table gives some picture of the economic characteristics of the members of VC under study. Though as single occupation agriculture scores the highest, the next highest percentage goes to agriculture and business. All the female UP members are housewives. In both of the UPs the UP chairman is a businessman and has a relatively better economic background. This situation in some extent favorable in dispensing justice locally because judgment which comes from a person who is economically better off in society may has more social acceptability.

Finally, in response to a question on how to make VC more effective in dispensing justice, one respondent (Local elite, a retired police officer) stated that necessity of appointing knowledgeable persons:

"Nothing could improve the efficiency of village courts more than appointing knowledgeable and experienced persons who have demonstrated both courage and common sense in their past lives."

Justice seekers of both the union noted that though village court takes seat in the Union Parishad building, which is within easy reach of the villagers and geographically accessible but the major problem is to find out the UP chairman and member of the UP because there is no specific office hour for them. There should be specific time for the justice seekers to resolve the local minor disputes.

Lack of legal awareness of the justice seekers and providers

According to the respondents, lack of awareness of the mass people about village court is the major limitation of village court to work actively. Outside the project area, both the justice seekers and providers have little or no knowledge about VC because of literacy rate. The literacy rate in my study area Vabokhali and Jhawgara are 68% and 37% respectively. Most of the members of village court belongs to the educational level between VI-X and this percentage is 50%. UP chairman who acts as chairman of the VC and UP secretary who acts as support stuff of VC has HSC or above level of education. During the time of the study, visibly there was no awareness programme or local initiatives at the local/national level to make people aware about village court. Also no NGO initiatives were observed there to help this institution. The scenario is completely opposite in the project area. The other concerned authorities such as the local police, UNOs who are legally designated and closely work with the UPs are also not well aware about the village court. In most of the cases the court decorum was not maintained. It was observed that, disputes related to land and property is the source of most of the conflicts in rural area. Violence against women and family dispute is also a major problem.

Complexity and Lack of clarity of the Act, Rules and Procedures

For both the justice providers and seekers the existing Village Court Act, 2006 is difficult to understand. Again, under the VC rules 1976, a Village court has to preserve and use eleven kinds of forms for use as register of cases, summons to respondent and witness, decrees and orders, receipt and register of fines and also half yearly report return which makes the whole process complicated. Most of the members of the village court are not well educated. Mostly their occupation based on agriculture that scores the highest and that is 35.71% , the next highest percentage goes to agriculture and business that is 21.43%. It is a barrier to know and apply the VC. Members Village Court are not well trained up at village court proceedings. So the total process of VC is complex to them. Narrow jurisdiction of VC allows and encourages both the justice seekers and providers to take resort to Shalish or to go to police and formal

court. Financial jurisdiction of VC is limited and most of the case approaches to the VC are beyond its jurisdiction. Though the offences like dowry and violence against women is very common in rural Bangladesh but VC has no jurisdiction to trial cases related to domestic violence or dowry.

Divert the cases from Village Court to local Police station

In many cases false information divert cases village court to police station. We all know that village court has some specific jurisdiction. One of its jurisdiction is village court does not take that cases which money value exceed Tk. 20,000. In some cases broker take this scope. They influence the victim to file case in the police station with false information that exceeds Tk. 20,000. It is a challenge for village court as well as total justice procedure.

Lack of Competencies of the UP officials

The UP Chairman, secretary and UP members have a considerable level of education which is favorable in dispensing justice. Most of the people in my study area are poor. In my study area Vabokhali 20-25% and in Jhawgara 61% or more people live under poverty line. They have limited scope of education. Most of the UP chaiman and member's education level are under SSC. My study show that only 3.57% UP officials have completed their graduation level. The UP officials have the lack of training, lack of the machinery, and more than anything else, for lack of the understanding of what it means to make a full and complete record. The record management of the village courts is woefully poor.

Village Court – An unfunded mandates on local governments

Village Court outside the project area has not received any fund from Local Government Ministry or from Upazila Parishad. It was also observed that outside the project area all VC runs without a fulltime court assistant and the UP secretary usually performs this task who thinks that it is beyond their ordinary job descriptions. The members and chairman of a Union Parishad serve in the Village Court as a part of their functions in the Union Parishad. But considering their overall responsibilities as members and chairmen of the Union Parishads, their salary or honorarium is too poor. It was also observed that, the resources and facilities in the project aided courts have positive effect on the quality of justice dispensed. The UP chairmen and members are interested to perform judicial activities which by law have vested on them but at the same time in the absence of the government sponsored project intervention or NGO initiatives they can not perform it.

Lack of monitoring and supervision of the court activities

Monitoring and supervision mechanism is very weak in both the areas. UP chairman don't send the reports and returns to the concerned authority regularly. After the separation of

judiciary from the executive in 2007, UNOs and DCs/ District Magistrate have little or no control over the judicial activities of the village court. Judicial magistrates, judges and police are also unaware about the village court and local police regularly entertains cases that fall under the jurisdiction of village court.

Absence of legal aid and support mechanism of the NGOs

It was observed that when government starts the activating village court program and BLAST stepped in as facilitator this court started functioning in the project area (Vabokhali). The scenario is complety opposite outside the project area (Jhawgara). But it was also observed that the UP of the project area (Vabokhali) is heavily dependent on NGO assistance. Though NGO assistance is essential to make people aware about their rights and privileges but too much dependency is also a vital impediment for the institutionalization and successful working of VC.

Negative attitudes and perceptions towards legal institutes

It was also observed that, victim's first preference for seeking justice is Shalish; and Shalish is still the most powerful means for dispute resolution in rural Bangladesh. If settlement of disputes fails at Shalish, the victims involve the Union Parishad or go to the police or formal courts. Again, village politics is also an important factor that impedes functioning and/or constituting of the village courts. Most of the justice seekers and providers agreed noted that due to the complex socio-economic and political realities, they sometimes do not get justice. It was also observed that the people's confidence has to be restored on the chairman and members for the functioning of VC.

Recommendations

- Separation of judicial matter of VC from the normal local government activities of the UP. UP Chairmen and members are actively engaged in development activities and active member of political parties.
- If government appoint a retired government officials(like retired police/army personnel) of the locality or a retired teacher as honorary magistrate in village court and nominate few other members for three to five years with a honorarium can make Village Court active and functional.

Conclusion

In brief, rural justice systems sometimes do not work well in the context of extreme power imbalance between parties. A more powerful or wealthy party may press the weaker into accepting an unfair result, so that the settlement may appear consensual, but in fact result from coercion. Rural justice systems are sometimes tools of equity rather than tools of law.

They seek to resolve individual disputes on a case-by-case basis, and may resolve similar cases in different ways if the surrounding conditions suggest that different results are fair or reasonable according to local norms.

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Administrative Tribunals in Bangladesh: Nature and Jurisdiction

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Introduction

The term 'administrative' refers to broad areas of governmental activities and the word 'tribunal' refers to a type of court with the authority to deal with a particular problem or disagreement. The Administrative Tribunals deal with administrative affairs. The root of Administrative Tribunals is traced from French system of Administrative Tribunals. The control of the judicial courts in France over the government and administration was lifted under Article 12 of the Law of 1790. It is even in force today. Napoleon also decided to build up solid governmental machinery. Council d'Etat was established in the French Constitution of 1799. The establishment of Council d'Etat was the beginning of the system of Administrative Tribunals[1]. The Administrative Tribunal is established by a statute and thus it has a statutory origin and status. It has some but not all of the trappings and accessories of a court. An Administrative Tribunal is entrusted with the judicial powers of the state. It performs both the judicial and quasi-judicial functions. It possesses powers of a Court such as to summons witnesses, to administer oath, to compel production of document etc. However, it is not strictly bound by rules of procedure and evidence. Administrative Tribunals are independent in nature. In the discharge of their judicial or quasi-judicial functions, Administrative Tribunals are not subject to any administrative interference. The decisions of the Administrative Tribunals are judicial rather than administrative in fact. Administrative Tribunals have to record finding of facts. Although they can apply discretion, their discretionary power is to be exercised within judicial mechanisms. The prerogative writs of certiorari and prohibition are available against the decision of Administrative Tribunal[2].

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1 *Rosenbloom, D. H. and Schwartz, R. D. (1994) Handbook of Regulation and Administrative Law. New York: Marcel Dekker.*

2 *The Administrative Tribunals have some distinctive features, which are traced out by the Franks Committee Report, 1957 of UK.*

Administrative Tribunal is a quasi-judicial body which is created by a statute and invested with judicial powers. It is a part and parcel of the Executive Branch of the state. It exercises both the executive and judicial functions. Lord Greene states that Administrative Tribunal performs 'hybrid functions'[3]. Members of Administrative Tribunal are entirely in the control of executive branch in respect of their tenure, terms and conditions of their services[4]. However, they may not be trained in law. They may be party to the dispute to be decided by it. Administrative Tribunal is not bound by all the rules of evidence and procedure unless the statute imposes such an obligation. It is not strictly bound by precedents, principles of *Res judicata* and estopple[5]. It cannot decide the *vires* i.e. the power and authority etc. of legislation[6]. It may decide the questions taking into account the departmental policy or expediency. In that sense, the decision of Administrative Tribunal may be subjective rather than objective.

Article 117 of The Constitution of the People's Republic of Bangladesh empowers the Parliament in 1972 to enact law providing for- the establishment of Administrative Tribunals to exercise jurisdiction in (a) respect of matters relating to the terms and conditions of persons in the service of the Republic; (b) the acquisition, administration, management and disposal of any property vested in or managed by the Government and service in any nationalized enterprise or statutory public authority; and (c) any law mentioned in the First Schedule to the Constitution[7]. Later the Administrative Tribunals Act, 1980 was passed by the Parliament in 1981. It has confined the jurisdiction of the Administrative Tribunals merely to deal with disputes relating to the terms and conditions of persons in the service of the Republic. It precluded the Administrative Tribunals from exercising jurisdiction in respect of matters relating to or arising out of the terms and conditions of any person in the service of any nationalized enterprise or statutory public authority; the acquisition, administration, management and disposal of any property vested in or managed by the Government; and most of the laws mentioned in the First Schedule to the Constitution[8]. It shall have exclusive jurisdiction to hear and determine applications made by any person in the service of the Republic or of any statutory public authority in respect of the terms and conditions of his service including pension rights, or in respect of any action taken in relation to him as a person in the service of the Republic or of any statutory public authority[9]. A person in the service of the Republic or of any statutory public authority may make an application to an

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3 *Takwani, C. K. (2004) Lectures on Administrative Law. Lucknow, India: Eastern Book Company.*

4 *Islam, M. (2002) Constitutional Law of Bangladesh, 2nd Edition. Dhaka: Mullick Brothers.*

5 *Takwani, C. K. op cit*

6 *L Chandra Kumar vs. Union of India, (1997) 3 SCC 291; AIR 1997 SC 1125.*

7 *Talukder, S. M. H. (2007) Jurisdiction of Administrative Tribunals in Bangladesh: An Analysis and Evaluation. Dhaka University Law Journal, Volume 18, No. 1.*

8 *Ibid*

9 *Section 4(1), the Administrative Tribunals Act, 1980*

Administrative Tribunal[10], if he is aggrieved by any order or decision in respect of the terms and conditions of his service including pension rights or by any action taken in relation to him as a person in the service of the Republic or of any statutory public authority[11].

Objective and Methodology

This paper has been written based on secondary materials i.e. related journals, books and reports. Most of the data are qualitative in nature and the qualitative descriptive method has been applied for in depth analysis of the Administrative Tribunals in Bangladesh. The aim of this paper is to provide an overview of the Administrative Tribunals in Bangladesh. In this regard, nature of Administrative Tribunals, background, jurisdiction, features and some important issues of the Administrative Tribunals in Bangladesh have been discussed briefly.

Nature of Administrative Tribunals

Administrative Tribunals are specialized governmental agencies. They are established to implement legislative policy under federal or provincial legislation. Appointment of judges of members to such agencies is usually by order-in-council. Candidates for appointment to Administrative Tribunals are ordinarily chosen for their expertise and experience in the particular sector. Administrative Tribunals function at arm's length from government[12]. They are expected to exercise their role and perform their duties in a nonpartisan manner. However, the specific relationship between Administrative Tribunals and government agencies varies. *In some circumstances, such as in the municipal, transportation, communications and energy sectors, provision may be made for appeal from tribunal decisions to the cabinet, although this is not common, and even where it exists only resorted to rarely*[13]. In order to determine conflicting rights and obligations or to confer entitlements as between competing parties, many Administrative Tribunals function through a hearing process. Administrative Tribunals are vested in wide powers to summon witnesses and records and to take evidence under oath either directly in their enabling legislation, or indirectly by Inquiries Acts of general application[14].

There are many similarities between an Administrative Tribunal and a Court. Both of the Administrative Tribunal and court are constituted by the state, invested with judicial powers and have a permanent existence[15]. They are adjudicating bodies. They exercise judicial power

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10 *Section 4(2), the Administrative Tribunals Act, 1980*

11 *Administrative Tribunal is not exercising the jurisdiction of the High Court Division as its constitutional successor. It is exercising a jurisdiction of its own in its own right (not by taking away of the High Court's preexisting jurisdiction by a constitutional amendment) as laid down in the original Constitution itself. It does not possess the power of judicial review at all. It cannot decide the constitutionality of any rule or order touching service matters.*

12 *Davis, Kenneth C. (1975) Administrative Law and Government, 2nd Edition. St. Paul, MN: West.*

13 *http://www.thecanadianencyclopedia.ca/en/article/administrative-tribunals/*

14 *http://www.thecanadianencyclopedia.ca/en/article/administrative-law/*

15 *Ibid*

and discharge judicial functions vested to them by a sovereign state. If the precise decision between tribunals and Courts is a matter of uncertainty, what is certain is that tribunals are inferior to the normal Courts[16]. However, the distinctions between these two are comprehensively laid down by C.K. Takwani (2004).

Table: Difference between Courts and Administrative Tribunals[17]

Courts	Administrative Tribunals
A Court of law is a part of the traditional judicial system in a country.	A Tribunal is a quasi-judicial body which is created by a statute and invested with judicial powers.
Judges of the ordinary Courts of law are generally independent from the control of executive branch in respect of their tenure, terms and conditions of their services.	Primarily and essentially it is a part and parcel of the Executive Branch of the state, exercising executive and judicial functions. Thus, Judges and members of the Administrative Tribunals are not generally independent from the control of executive branch in respect of their tenure, terms and conditions of their services.
In a Court of law, the presiding officer, i.e. the judge is trained in law.	The member of Administrative Tribunal may not be trained in law.
In a Court of law, the judges must be an impartial arbiter and he cannot decide a matter in which he is interested.	A member of the Administrative Tribunal may be party to the dispute to be decided by it.
A Court of law is bound by all the rules of evidence and procedure.	Administrative Tribunal is not bound by all the rules of evidence and procedure unless the statute imposes such an obligation
The court of law is bound by precedents, principles of *Res judicata* and estopple.	Administrative Tribunal is not strickly bound by precedents, principles of *Res judicata* and estopple.
A Court must decide all the questions objectively on the basis of evidence and materials produced before it	Administrative Tribunal may decide the questions taking into account the departmental policy or expediency and in that sense, the decision may be subjective rather than objective.
A Court can decide the 'vires' i.e. the power and authority etc. of legislation	Administrative Tribunal cannot decide the 'vires' i.e. the power and authority etc. of legislation

In France, there are two types of laws and two types of courts. One type of law and one type of courts are only for the administrative officers and another few laws and type of courts are for general people. The strongest form of Administrative Tribunals exists in France known as the Council of State System. In United States, there are specialized commissions such ad Inter-state Commerce Commission, Federal Trade Commission etc to adjudicate administrative disputes[18]. In a wide sense[19], Administrative Tribunal refers to all types of tribunals and is commonly used to mean an adjudicating body that disposes of disputes

[16] *In Associated Cement Companies Ltd. vs. P.N. Sharma, [AIR 1965 SC 1595] the Indian Supreme Court held that there are some basic and fundamental feature which are common to both the Courts and the tribunals.*

[17] *Takwani, C. K. op cit*

[18] *Rosenbloom, David H. (2003) Administrative Law for Public Managers. Boulder, CO: Westview.*

[19] *The United Kingdom is an example where the term 'Administrative Tribunal' is used in wide sense.*

arising in counection with the administration of legislative schemes normally of a welfare or regulatory nature. In a narrow sense[20], it is an adjudicating body that resolves litigation only relating to the terms and conditions of service of persons employed to public service or any statutory body controlled by the government[21].

The term 'Administrative Tribunal' is used in India[22], Pakistan[23] and Bangladesh[24] in restricted sense to mean only that tribunal which has been established to settle disputes relating to the terms and conditions of service of persons appointed in the public service or in any statutory body controlled by the government[25]. If any dispute arises with administrative affairs, this dispute goes to administrative Courts or Administrative Tribunal. Judges of administrative Courts and Administrative Tribunal are the man of executive branch not judiciary. If any dispute arises with administrative personnel, this dispute goes to Administrative Tribunal. Traditional judieial system is very slow. It has overburdened with cases. It takes years for the disposal of a case. It is not possible to expect speedy disposal of important administrative disputes between employers and employee, lock-out, strike etc[26]. Administrative Tribunals are speeialized quasi-judiciary body for the disposal of such important administrative disputes. They are not bound by strict rules of evidence. They can take practical view of the matter to decide the complex problem. Administrative authorities can avoid rigid judicial technicalities and formalities for the disposal of such important administrative disputes[27]. They can take a realistic approach rather than a theoretical legalistic approach. It can enhance flexibility in administrative procedure.

Background of Administrative Tribunals in Bangladesh

During the British rule in India, a government servant held the office during the pleasure of the Crown. By the insertion of section 96B in the Government of India Act, 1915, certain constitutional protections were provided for the government servants for the first time in 1919. This section was incorporated in the Government of India Act, 1935 and in the Pakistan Constitution[28].

The emergence of Administrative Tribunals is related to the concept and practice of administrative adjudication of disputes between the executive organ of the state and citizens

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20 *India, Pakistan and Bangladesh are the genuine examples where the term 'Administrative Tribunal' is used in narrow sense.*
21 *Talukder, S. M. H. (2007) Jurisdiction of Administrative Tribunals in Bangladesh: An Analysis and Evaluation. Dhaka University Law Journal, Volume 18, No. 1.*
22 *Section 14, the Administrative Tribunals Act, 1985.*
23 *Section 3, the Service Tribunals Act, 1973.*
24 *Section 4, the Administrative Tribunals Act, 1980.*
25 *Talukder, S. M. H. op cit*
26 *Rohr, J. A. (1986) To Run a Constitution: The Legitimacy of the Administrative State. Lawrence, KS: University of Kansas Press.*
27 *Cooper, P. J. (2000) Public Law and Public Administration, 3rd Edition. Itaska, IL: F.E. Peacock Publishers.*
28 *http://www.assignmentpoint.com/arts/law*

and non-government entities. Crown Proceedings Act 1947 provided the basis of British development of Administrative Tribunals. The jurisdiction of these tribunals is generally focused on specific subjects such security, registration of children's homes, local taxation etc[29].

Article 117 of The Constitution of Bangladesh provides the constitutional foundation of Administrative Tribunals in Bangladesh. Administrative Tribunals in Bangladesh owe their legal basis by Administrative Tribunals Act, 1980 (Act VII of 1981). The core purpose of the act is to set up Administrative Tribunals to exercise jurisdiction in respect of matters relating to the terms and conditions of persons in the service of the republic.

Administrative Tribunals came into force by a notification in the official gazette. The Government of the People's Republic of Bangladesh notified that the act relating to Administrative Tribunals would come into an effect on 1st February 1981. It is further laid down in the act that when the government establishes one or more Administrative Tribunals, each tribunal shall exercise its jurisdiction within specific area[30]. There are seven Administrative Tribunals in Bangladesh. These Administrative Tribunals are located in Dhaka, Bogra, Chittagong, Khulna and Barisal. In addition, there are other tribunals and specialized commissions such as the Income Tax Tribunal, Securities and Exchange Commission and Taxes Settlement Commission etc.

Constitutional Basis of Administrative Tribunals in Bangladesh

Article 117(1) of The Constitution of the People's Republic of Bangladesh empowers the Parliament to establish one or more Administrative Tribunals against whose decisions no writ will lie in view of the provision of Article 102(5). Such tribunals may be established to deal with matters relating to[31]

a) the terms and conditions of persons in the service of the Republic including matters provided for in Part IX and award of penalties or punishment;
b) the acquisition, administration, management and disposal of any property vested in or managed by the govt. by any law, including the operation and management of, and services in any nationalized enterprise or statutory public authority;
c) any law to which article 102 (3) applies.

Article 102 (3) of the Constitution of Bangladesh provides that 'notwithstanding anything contained in article 102 (1) and article 102 (2), the High Court Division shall have no power

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29 *Islam, S. (2009) Administrative Law in Bangladesh. Dhaka: Shams Publications.*
30 *Ibid*
31 *Section 117 (1) of the Constitution of People's Republic of Bangladesh.*

under this article to pass any interim or other order in relation to any law to which article 47 applies'. Article 47(1) provides that 'no law providing for any of the following matters shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridge, any of the rights guaranteed by this Part-

a) the compulsory acquisition, nationalisation or requisition of any property, or the control or management thereof whether temporarily or permanently;
b) the compulsory amalgamation of bodies carrying on commercial or other undertakings;
c) the extinction, modification, restriction or regulation of rights of directors, managers, agents and officers of any such bodies, or of the voting rights of persons owning shares or stock (in whatever form) therein;
d) the extinction, modification, restriction or regulation of rights of search for or win minerals or mineral oil;
e) the carrying on by the Government or by a corporation owned, controlled or managed by the Government, of any trade, business, industry or service to the exclusion, complete or partial, or other persons; or
f) the extinction, modification, restriction or regulation of any right to property, any right in respect of a profession, occupation, trade or business or the rights of employers or employees in any statutory public authority or in any commercial or industrial undertaking;

If Parliament in such law (including, in the case of existing law, by amendment) expressly declares that such provision is made to give effect to any of the fundamental principles of state policy set out in Part II of this Constitution'.

Article 47(2) provides that 'notwithstanding anything contained in this Constitution the laws specified in the First Schedule (including any amendment of any such law) shall continue to have full force and effect, and no provision of any such law, nor anything done or omitted to be done under the authority of such law, shall be deemed void or unlawful on the ground of inconsistency with, or repugnance to, any provision of this Constitution'. Article 47(2) provides that 'notwithstanding anything contained in this Constitution, no law nor any provision thereof providing for detention, prosecution or punishment of any person, who is a member of any armed or defence or auxiliary forces or who is a prisoner of war, for genocide, crimes against humanity or war crimes and other crimes under international law shall be deemed void or unlawful, or ever to have become void or unlawful, on the ground that such law or provision of any such law is inconsistent with, or repugnant to any of the provisions of this Constitution'.

Development of Administrative Tribunals in Bangladesh

The Parliament of Bangladesh enacted the Administrative Tribunals Act, 1980 eight years later of the enactment and enforcement of the Constitution. In fulfillment of the constitutional mandate given in Article 117, this act empowers the Government to establish one or more Administrative Tribunals to deal with matters and disputes especially pertaining to service matters of civil servants by notification in the Official Gazette[32]. The Government of Bangladesh established an Administrative Tribunal at Dhaka on 01st February, 1982, for the whole of Bangladesh by a gazette notification[33]. Thus, an Administrative Tribunal was established for the first time in the history of Bangladesh to resolve disputes concerning the terms and conditions of the service of civil servants. In fact, the Tribunal was given herculean task of resolving disputes relating to service matters of civil servants throughout the country[34].

In 1992, ten years later of the establishment of the first Tribunal, it was ultimately realized that the single Tribunal was unable to deal with the increasing number of cases expeditiously. Consequently, the second Administrative Tribunal was established at Bogra 30th May, 1992[35]. Nine years later, the Government of Bangladesh established five more Administrative Tribunals in the country on 22nd October, 2001 to ensure speedy justice[36]. Thus, the total number of Administrative Tribunals stands at seven- three at Dhaka, one at Chittagong, one at Khulna, one at Barisal and one at Bogra[37].

There are three Administrative Tribunals established at Dhaka- Administrative Tribunal No. 1, Administrative Tribunal No. 2 and Administrative Tribunal No. 3. Administrative Tribunal No. 1 (one) has been given territorial jurisdiction over six administrative districts- (1) Dhaka, (2) Narayanganj, (3) Munshiganj, (4) Manikganj, (5) Gazipur and (6) Norsingdi. Administrative Tribunal No. 2 (two) has been given territorial jurisdiction over five administrative districts- (1) Faridpur, (2) Gopalganj, (3) Madaripur, (4) Shariatpur and (5) Rajbari. Administrative Tribunal No. 3 (three) has been given territorial jurisdiction over six administrative districts- (1) Mymensingh, (2) Kishoregonj, (3) Netrokona, (4) Tangail, (5) Jamalpur and (6) Sherpur. These three Administrative Tribunals have been given territorial jurisdiction over seventeen administrative districts of Dhaka Administrative Division. Administrative Tribunal set up at Chittagong has been vested with the territorial jurisdiction

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[32] *Section 3(1) of the Administrative Tribunals Act, 1980*

[33] *The provisions of the Administrative Tribunals Act, 1980 empower the Government to establish one or more Administrative Tribunals. Initially, by SRO 58-L/82-JIV/IT-1/81, one Administrative Tribunal located at Dhaka was established for the whole of Bangladesh.*

[34] *Talukder, S. M. H. op cit*

[35] *Subsequently territorial jurisdiction of the Tribunal was restructured by SRO NO. 11 9-L/92/249/J-4/5C-5/89 dated 30th May, 1992 and another Administrative Tribunai was set up in Bogra.*

[36] *Notification S.R.O. No. 288-Law/2001, dated 22nd October, 2001.*

[37] *Talukder, S. M. H. op cit*

to resolve relevant disputes in twelve administrative districts of Chittagong Administrative Division and Sylhet Administrative Division- (1) Chittagong, (2) Cox's Bazar, (3) Noakhali, (4) Feni, (5) Laksmipur, (6) Comilla, (7) Chandpur, (8) Brahmanbaria, (9) Sylhet, (10) Moulvi-Bazar, (11) Habiganj and (12) Sunamganj. Administrative Tribunal established at Khulna has been given territorial jurisdiction over ten administrative districts of Khulna Administrative Division- (1) Khulna, (2) Bagerhat, (3) Satkhira, (4) Jessore, (5) Magura, (6) Jhenaidah, (7) Narail, (8) Kustia, (9) Chuadanga and (10) Meherpur.

Administrative Tribunal set up at Barisal has been accorded jurisdiction to deal with disputes concerning the terms and conditions of service of civil servants in six administrative districts of Barisal Administrative Division- (1) Barisal, (2) Pirojpur, (3) Jhalakhati, (4) Bhola, (5) Patuakhali and (6) Barguna. Administrative Tribunal established at Bogra has been given territorial jurisdiction over sixteen administrative districts of Rajshahi Administrative Division- (1) Bogra, (2) Joypurhat, (3) Pabna, (4) Sirajganj, (5) Dinajpur, (6) Thakurgaon, (7) Panchagar, (8) Kurigram, (9) Rangpur, (10) Lalmonirhat, (11) Gaibanda, (12) Nilphamari, (13) Rajshahi, (14) Nawabganj, (15) Naogaon and (16) Natore.

Seven Administrative Tribunals have been given territorial jurisdictions over 61 out of 64 administrative districts in Bangladesh. The remaining three administrative hilly districts, namely- Khagrachari, Rangamati and Bandarban have been placed under the jurisdietion of the Administrative Tribunal located at Chittagong in absence of clear mandate by the Government notification concerned[38]. Thus, more or less a full fledged Administrative Tribunal system has been established and developed throughout the country[39].

Power and Jurisdiction of Administrative Tribunals in Bangladesh

Administrative Tribunal consists of one member who is appointed by the government. This member is or has been a district judge. The terms and Conditions of the appointment of the member of Administrative Tribunal are to be determined by the government[40]. An Administrative Tribunal in Bangladesh has exclusive jurisdiction to bear on applications made by person in the service of the republic in respect of terms and conditions of his service including pension rights. It can also determine applications in respect of any action taken in relation to him as a person in the service of the republic[41].

A person in the service of the republic is defined in the act as a person who is or has been retired or otherwise dismissed, removed or discharged from such service. A person in the

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38 *Vide notification S.R.O. No. 288-Law/2001, dated 22 October, 2001.*
39 *Talukder, S. M. H. op cit*
40 *Section 3, the Administrative Tribunals Act, 1980.*
41 *Section 4(1), the Administrative Tribunals Act, 1980.*

defence service is excluded from such a definition[42]. However, the person making an application must be aggrieved by any action or order. In case where a higher administrative authority exists to set aside, vary or modify any action or order, the Administrative Tribunal can admit no such application until the higher authority has taken a decision on the matter[43]. There is also a time limit to move the Administrative Tribunal for redressing the grievances. This time limit is six months from the date on which any order is made or action taken by the appropriate administrative authority.

To exercise jurisdiction in respect of matters relating to or arising out of the terms and conditions of persons in the services of the Republic or of any statutory public authority, the Administrative Tribunals were established in Bangladesh. The Schedule to the Administrative Tribunals Act, 1980 (Act No. VII of 1981) includes the following bodies as the statutory public authority-

a) Sonali Bank Limited, Agrani Bank Limited and Janata Bank Limited incorporated under the Companies Act, 1994 (Act No. 18 of 1994);
b) Bangladesh Bank established under the Bangladesh Bank Order, 1972 (P.O. No. 127 of 1972);
c) Bangladesh Development Bank Limited incorporated under the Bangladesh Companies Act, 1994 (Act No. 18 of 1994);
d) Bangladesh House Building Finance Corporation established under the Bangladesh House Building Finance Corporation Order, 1973 (P.O. No. 7 of 1973);
e) Bangladesh Krishi Bank established under the Bangladesh Krishi Bank Order, 1973 (P.O. No. 27 of 1973);
f) Investment Corporation of Bangladesh established under the Investment Corporation of Bangladesh Ordinance, 1976 (Ord. No. XL of 1976);
g) Grameen Bank established under the Grameen Bank Ordinance, 1983 (XLVI of 1983);
h) Civil Aviation Authority established under the Civil Aviation Authority Ordinance, 1985 (Ordinance No. XXXVIII of 1985);
i) Karmashangsthan Bank established under Karmashangsthan Bank Ain, 1998 (VII of 1998);
j) Rajshahi Krishi Unnayan Bank established under the Rajshahi Krishi Unnayan Bank Ordinance, 1986 (Ordinance No. LVIII of 1986); and
k) Probashi Kallyan Bank established under the Probashi Kallyan Bank Act, 2010 (Act No. 55 of 2010)[44].

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[42] *Section 4(3), the Administrative Tribunals Act, 1980.*
[43] *Section 4(2), the Administrative Tribunals Act, 1980.*
[44] *Administrative Tribunals (Amendment) Act, 2011 (Act No VI of 2011)*

In Bangladesh, Administrative Tribunals are creation of the Constitution. The judicial officers or the members of the Administrative Tribunal shall be amenable to the jurisdiction of the Administrative Tribunal for deciding any dispute arising out of the terms and conditions of their service.

There is also an Administrative Appellate Tribunal in Bangladesh which consists of one chairman and two other members to be appointed by the government. The qualifications and experience for appointment of chairman and members are also provided in the act[45]. The chairman of Administrative appellate Tribunal has to be a person who is, or has been, or is qualified to be a Judge of the Supreme Court or has been an officer in the service of the republic not below the rank of an Additional Secretary to the government. As for the two members, one has to be a person who is or has been an officer in the service of the republic not below the rank of a Joint Secretary. The other member will have to be a person who is or has been a District Judge. The government determines the terms and conditions of appointment[46].

The Administrative Appellate Tribunal is required a gazette notification to be established. Such notification of establishing the appellate tribunal in Bangladesh was issued on 22nd August 1983[47]. The jurisdiction of the appellate tribunal extends to hearing and determining appeals from any order or decision of an Administrative Tribunal[48]. Any person aggrieved by an order or decision of an Administrative Tribunal may, within three months from the date of making of the order or decision, prefer an appeal. An appeal may be admitted after the period of three months specified in that sub-section but not later than six months, if the appellant satisfies the Administrative Appellate Tribunal that he had sufficient cause for not preferring the appeal within three months[49]. The Appellate Tribunal may confirm, set aside, vary or modify any order or decision of the Administrative Tribunal[50]. The distinction between the jurisdiction of Administrative Tribunals in Bangladesh and the writ jurisdiction of the High Court Division of Supreme Court is not very clear. In Many cases grievances arising out of terms and conditions of persons in the service of the republic are moved in the High Court Division. This is done on grounds of violation of specific constitutional rights. The Supreme Court shall not entertain any proceedings or make any matter falling within the jurisdiction of

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45 *Islam, S. op cit*
46 *Section 5, the Administrative Tribunals Act, 1980.*
47 *Islam, S. op cit*
48 *Section 6(1), the Administrative Tribunals Act, 1980.*
49 *Section 6(2) and 6(3), the Administrative Tribunals Act, 1980.*
50 *Section 6(4), the Administrative Tribunals Act, 1980.*

an Administrative Tribunal[51]. However, High Court Division sometimes entertains writ petition on the ground that the remedy provided by the Administrative Tribunal is not efficacious[52].

Judicial powers of the Administrative Tribunals have been laid down in sections 10-12 of the Administrative Tribunals Act, 1980. Section 10 of this act provides that no proceedings, orders, or decision of a Tribunal shall be liable to be challenged, reviewed, quashed, or called in question in any court. Section 11 provides that the provisions of this Act shall have effect notwithstanding anything contained in any other law for the time being in force. Section 12 gives the Government the power to make rules for carrying out the purposes of this Act. In exercise of the powers under the section 12, the Government has in fact made the Administrative Tribunals Rules, 1982[53].

An Administrative Tribunal in Bangladesh, as any authority or body exercising judicial functions, shall have the powers and authority to punish those who interfere with or intend to obstruct the administration of justice in any manner[54]. It shall have power to punish any person, who without lawful excuse obstructs it in the performance of its functions, with simple imprisonment, which may extend to one month, or with fine, which may extend to five hundred taka, or with both[55]. The Administrative Appellate Tribunal shall have power to punish for contempt of its authority or that of any Administrative Tribunal, as if it were the High Court Division of the Supreme Court[56]. Thus, it is the Administrative Appellate Tribunal that has been provided with the power to punish for the contempt of its authority as well as that of the Administrative Tribunal. However, the Administrative Tribunal in Bangladesh has not been given the power to punish for contempt of its authority[57]. Since, the Administrative Tribunals Act, 1980, as amended in 1988 does not contain any procedure to be followed in case of contempt proceedings and no form of punishment has been provided for by the Act, it appears that the Administrative Appellate Tribunal in Bangladesh should

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51 *Islam, S. op cit*

52 *'Court' as defined in Article 152 includes Supreme Court and hence the High Court Division cannot entertain any writ petition in respect of any matter falling within the jurisdiction of an administrative tribunal. No proceedings, order or decision of a tribunal shall be liable to be challenged, reviewed, quashed and called in question in any Court. The decision of the appellate tribunal like that of the tribunal is immune from any review under Article 102 of the Constitution because Article 117 of Constitution also applies to the appellate tribunal. The combined effect of article 102 (5) and article 117 (2) is that no writ petition is maintainable against the decision of administrative tribunal. The Constitution is silent about the administrative appellate tribunal. Again, when what is challenged is not the service rule, but administrative interpretation of a service rule, writ petition is not maintainable.*

53 *Notification No. SRO 92-L/82-JIV/IT-3/81 dated 12-3-1982, which has been published in the Bangladesh Gazette Extraordinary on 12-3-1982*

54 *Talukder, S. M. H. op cit*

55 *Section 6(4), the Administrative Tribunals Act, 1980.*

56 *Section 10 (A-1), the Administrative Tribunals Act, 1980.*

57 *Administrative Tribunal in India, which has been empowered under Section 17 of the Administrative Tribunals Act, 1985, to exercise the same power in respect of contempt as that of the High Court.*

follow the relevant provisions of the Contempt of Courts Act, 1926, in dealing with such a contempt case[58].

Administrative Tribunal Act, 1980 is a self-contained composite legislation. As in *Saifur Rahman vs Secretary, Ministry of Agriculture*[59], the Supreme Court held that Administrative Tribunal Act, 1980 does not need the additional umbrella of writ jurisdiction under Article 102 of the Constitution for the implementation of its decisions and orders. This act is a subsequent act to the Industrial Relations Ordinance, 1969 and Government Servants' (Discipline and Appeal) Rules, 1985[60]. Consequently, the provisions of this act shall have exclusive jurisdiction to determine the petitioner's application in respect of terms and conditions of his service.

Conclusion

The Administrative Tribunal and the Administrative Appellate Tribunal in Bangladesh have been established with limited jurisdictions and limited power. The Tribunal needlessly granting relief acts in excess of its jurisdiction. Orders passed by the Administrative Tribunals are declaratory in nature and there is no direction for reinstatement of the petitioner. In *Matiur Rahman vs. Bangladesh*, 50 DLR 357, Supreme Court held that if a Branch of the Department of the government not following the lawful order of the hierarchy of the Government authority, definitely the person who is aggrieved can come before court and pray for direction or declaration to implement, fulfill or obey the lawful order of the Government, which the Administrative Tribunal is not competent to do.

Based on the Article 117 of the Constitution of Bangladesh and Administrative Tribunals Act, 1980, the Administrative Tribunal in Bangladesh enjoys complete jurisdiction with regard to service matters and oust the jurisdiction of the High Court Division in such matters. The jurisdictions of the Administrative Tribunals in Bangladesh are confined to judicial review of departmental decisions mainly based on the principles of natural justice. According to the Article 102 (5) and Article 117 (2) of the Constitution of Bangladesh, no writ is allowable against the decision of the Administrative Tribunal. While resolving service disputes, the Administrative Tribunals in Bangladesh are entitled to construe and apply the provisions of the Constitution of Bangladesh, especially Articles 133, 134 and 135. The proceedings before the Administrative Tribunals are still free from quash by any court in Bangladesh including the Supreme Court. In *Abul Bashar vs. Bangladesh and Others,* 1BLC (AD) 77, Bangladesh Supreme Court held that a public servant can invoke writ jurisdiction directly for striking down any statute or rules framed thereunder for the enforcement of his

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[58] *Talukder, S. M. H. op cit*

[59] *41 DLR 538*

[60] *Mozibul Huq vs Chairman, 1st Labour Court and others, 55 DLR (AD) 91*

fundamental rights, but if he can obtain full relief from the Administrative Tribunal without striking down the statutes or rules then the writ petition would be incompetent.

There is no direction in the Constitution that the Tribunal or the Appellate Tribunal is substitute or co-equal to the High Court Division of Bangladesh Supreme Court. After establishing the tribunals, it is left to the legislature to make necessary provisions in this regard for the carrying out of the functions of the Tribunals. Under the existing laws, the Administrative Tribunal in Bangladesh has no power to grand stay or injunction as an ad-interim measure. As aim of seeking relief becomes frustrated, reducing the jurisdiction of the Administrative Tribunals is nugatory. Because of the ineffective alternative remedy, the person aggrieved seeking immediate relief takes the disputes into the writ jurisdiction of the High Court Division of the Bangladesh Supreme Court in many cases.

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National and International Concern of Legal Aid: A Significant Study

*Syed Sarfaraj Hamid**

Introduction

Seven hundred years old clarion call of Magna Carta- "To no one will we sell, to no one will we refuse or delay the right to justice" very pertinently embodies the principle of Legal Aid. However, it was only when the colonial hangover of the Indian legal system was pointed by the Committee for Legal Aid and was stated that the shadow of law created by the British to suit their convenience, has resulted in an insensitive system especially towards the socio-economic problems of the masses.

The rise of welfare state in the twentieth century has brought forward with it the concept of Legal Aid for those who cannot afford the cost of litigation.[1] Bangladesh is a developing democratic country of the world. But no amount of the constitutional protection of these high ideals can help a poor citizen of a country like ours to protect his rights and liberties unless there is some one to stand by his side to provide Legal Aid.[2] However Legal Aid mechanism of Bangladesh is doing well to ensure justice and rule of law in the society. Legal Aid is an instrument to achieve protection in law is also embedded in the Constitution of Bangladesh.[3] This study has great importance to know how Legal Aid mechanism works either nationally or internationally. Legal Aid has a close relationship with the welfare state, and the provision of Legal Aid by a state is influenced by attitudes towards welfare. Legal Aid is a welfare provision by the state to people who could otherwise not afford counsel from the legal system.[4]

Legal Aid Activities

Historically Legal Aid has its roots in the right to counsel and right to a fair trial movement of the 19th century continental European countries. "Poor man's laws" waived court fees for the poor and provided for the appointment of duty solicitors for those who could not afford to pay for a solicitor. Initially the expectation was that duty solicitors would act on a *pro bono* basis. In the early 20th century, many European countries had no formal approach to Legal

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1 *Ibid.*

2 *Md. Abdul Halim, The Legal System of Bangladesh, 4th ed. (Dhaka: CCB Foundation, 2009), p. 271.*

3 *http//www.paracalls.com/article/legal-aid-in-bangladesh/53, [Last Accessed on 11.12.13].*

4 *Tobias Schrank, "Legal Aid in Times of Economic Turmoil: Current Challenges in England and Germany" Oxford University Comparative Law Forum (http://ouclf.iuscomp.org/articles/schrank.shtml, last accessed on 20 November 2013).*

Aid, and the poor relied on the charity of lawyers. Most countries went on to establish laws that provided for the payment of a moderate fee to duty solicitors. To curb demand, Legal Aid was restricted to lawyer costs in judicial proceedings requiring a lawyer. Countries with a civil law legal system and common law legal systems take different approaches to the right to counsel in civil and criminal proceedings. Civil law countries are more likely to emphasize the right to counsel in civil law proceedings, and therefore provide Legal Aid where a lawyer is required. Common law countries emphasize the right to counsel and provide Legal Aid primarily in relation to criminal law proceedings.[5]

In response to rapid industrialization in the late 19th century Europe, trade union and workers parties emerged that challenged the social policies of governments. They gained passage of laws to provide workers with legal rights in the event of illness or accidents, in an attempt to prevent industrial action by industrial workers. Workers unions in turn started to provide workers with legal advice on their new economic, social and cultural rights. Demand for these services was high and in an attempt to provide workers with non-partisan advice, many governments started to provide Legal Aid by the early 20th century.[6] In the 20th century, Legal Aid has developed together with progressive principles; it has often been supported by those members of the legal profession who felt that it was their responsibility to care for those on low income. Legal Aid is driven by what lawyers can offer to meet the "legal needs" of those they have identified as poor, marginalized or discriminated against. According to Francis Regan, Legal Aid provision is supply driven, not demand driven, leading to wide gaps between provisions that meet perceived needs and actual demand. Legal service initiatives, such as neighborhood mediation and legal services, frequently have to close due to lack of demand, while others are overwhelmed with clients.[7]

Legal Aid in Bangladesh

The most democratic concept is that, in the eye of law all are equal and all are entitled to get justice but a person can't get the helps of law although he has legal right because of poverty or economic degradation. In this situation the democratic concepts are valueless. The persons who are pauper or poor and the person who cannot established his legal right because of decay money that person get legal help it is called Legal Aid. According to the new Encyclopedia Britannica prescribes that, the professional legal assistance given, either free or a nominal sum, to indigent persons in need of such help. The Legal Aid provides personally

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5 *Ibid, p. 114.*

6 *Ibid.*

7 *Francis Regan, The Transformation of Legal Aid: Comparative and Historical Studies, Oxford University Press (1999), pp. 113-114.*

or Legal Aid provide from the society for social justice. The Legal Aid provides in different country in different ways and in different times.[8]

In a democratic country it is a prerequisite that all citizens get economic and social justice. Many people of Bangladesh deprived of access to justice due to their poverty. Due to lack of security and protection for women victim & witness women feels threat to file cases, in some cases after filing cases women do not continue the cases due to threat of opposition, sometimes do the compromise with the perpetrator. To provide Legal Aid to the affected women, poor people and other vulnerable groups' government Legal Aid fund was introduced in 2000. It was an initiative to provide assistance to indigent litigants in the legal matters both inside and outside the courts and providing access to Legal Aid throughout the country.[9] An effort for providing Legal Aid to the indigent litigants was first taken up by the government by a notification on 18th January 1994. Under the notification a Legal Aid committee was formed in every district with the District and Sessions Judge as its chairman.[10] Later ensuring access to justice of the poor people government enacted Legal Aid Services Act 2000, (LASA).[11]

The provisions for Legal Aid providing are recognized globally in both Civil and Criminal cases. The Supreme Court of India said that, all the crimes which are relating states economy, public policy, child and women force prostitution and employ in forced labor, those criminal of that offences will not get Legal Aid cost by the government.[12] In *Khatri vs. State of Bihar* cases the Court held that, where the accused is involved in economic offences, or offences against law, prohibiting prostitution or child abuse or the like, there social justice may required that free Legal Aid service may not be provided by the State.[13]

Importance of Legal Aid in Bangladesh

Bangladesh is a developing country. The largest numbers of the people involved in suits and cases are poor and illiterate, they neither have the means nor the courage to ask for justice. Even when they gather their courage to take recourse to Court of law as last resort, they cannot proceed for financial reasons. In such circumstances, if Legal Aid means extending legal assistance to the poor litigants and to persons without means then the importance of

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8 *Md. Akhtaruzzaman, Concept and Lawson Alternative Dispute Resolution and Legal Aid, ed: 2nd 2008, Published by Razia Khatun, p. 244.*

9 *Ruma Sultana, Legal Aid and access to justice, The Daily Star, 24 September 2011.*

10 *Legal Aid is the provision of assistance to people otherwise unable to afford legal representation and access to the court system-illustrate and explain, The Lawyers and Jurists, 16 October 2012.*

11 *Ibid.*

12 *Md. Akhtaruzzaman, Concept and Laws on Alternative Dispute Resolution and Legal Aid, Ed: 2nd, 2008, p. 273.*

13 *AIR (1981) S.C. 1068.*

awarding Legal Aid in Bangladesh for enabling the poor to have access to legal service cannot be ever emphasized.[14]

The modern justice system through judicial adjudication is very costly and that cost has been the most difficult factor for the average people to get justice in both developed and developing countries.[15] In a suit where one party is poor and the other party is opulent, here equality, rule of law, and fair trail, ensured in our constitution and other constitutions and documents of the world can not be maintained because the affluent party is able to appoint an expert advocate who can easily take the fruits of the suit in favor of his clients which the opposite advocate fails to do.

In the case of *Bandhua Mukti Morcha vs. Union of India*[16], the former Chief Justice of India *P.N. Bhagwati* observed, where one of the parties to a litigation belongs to a poor and deprived section of the community and does not possess adequate socials and material resources, he is bound to be at a disadvantage as against a strong and powerful opponent. Therefore, as long as poor exist in the society, Legal Aid will be necessary to uphold human rights and equality. Thus, the provision of Legal Aid is essential for the safe walk of democracies, on the track of rule of law and the equal protection of laws.[17]

Provisions for Legal Aid under National Instruments

The Concept of Legal Aid has been found in some of the legal instrument in our country such as The Constitution of the Peoples Republics of Bangladesh, The Code of Civil Procedure, 1908; the Code of Criminal Procedure, 1898; The Legal Aid Act, 2000 and the Legal Aid Rules, 2001.

Tbe Constitution of the People's Republic of Bangladesh

In line with the international commitment to the principle of equality of justice as enriched in Article 7 of the Universal Declaration of Human Rights, 1948 it has been pledged in the preamble of the Constitution of the Peoples Republic of Bangladesh that one of the fundamental aims of the state is to realize a society in which equality of justice would be secured all citizens.

There is a stipulation that it shall be fundamental responsibility of the state to emancipate backward section of the people from all forms of exploitation. Article 27 of the Constitution of the People's Republic of Bangladesh, 1972 states the fundamental rights as follows "all

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14 *Mauli Azad, Guide Book on Civil Litigation, ed: May 2005, pp. 34-35.*
15 *http://www.lawyersnjurists.com/articles-reports-journals/law-and-ethics/free-access-justice-poor-legal-aid-bangladesh-perspective.*
16 *AIR (1984) 802, SCR (1984) (2) 67*
17 *Supra note 16.*

citizens are equal before law and are entitled to equal protection of law" – "Equal before Law" implies the absence of any special privilege to any individual in his or her favors. The expression "equal protection of Law" is defendant and based on equal before law as one cannot achieved without the other. Protection of law that the citizen and the residents of Bangladesh have the inalienable right to be treated in accordance with law is guaranteed and speedy and fair trials are ensured.[18]

The Code of Civil Procedure, 1908

The provision of Legal Aid is found in the Code of Civil Procedure, 1908 for those who file pauper suits. As regards civil matters, order 33 of CPC deals with "Pauper Suit".[19] The Conscious Law Dictionary says that a pauper, is a poor person especially one so indigent as to depend on charity for maintenance or one supported by some public provision; one so poor that he must be supported at public expense. The word "Pauper" and "poor" have nearly the same meaning and they both embrace several classes. But Explanation rule I of order 33 of CPC provides that a person is a "Pauper" who is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or where no such fee is prescribed, when he is not entitled to property worth five thousand taka other than his necessary wearing-appearing and the subject matter of the suit.[20]

The Code of Criminal Procedure, 1898

The need for Legal Aid is felt more in criminal matters as the life; property and personai liberty of a person are inseparably connected there. As regards criminal matters, section 340 of Criminal Procedure, 1908 states that an accused should be defended by a lawyer and he must pay the fees and nothing more. Commenting on section 340(1) of the Code Civil Procedure, 1908 the Supreme Court of India observed that the right conferred by section 340(1) does not extend to right in an accused person to provided with a lawyer if he wants to engage one and it engage one himself or get his relation engage one for him. The only duty cost on the Magistrate is to afford him. The only duty cost on the Magistrate is to afford him the necessary opportunity.[21]

The Village Courts Act, 2006

The Village Courts are established to dispose of trifling criminal and civil cases at the Union level under this Act. These courts are quasi formal courts the procedure of which is largely informal though the courts are backed by law. The court consists of the Union Parishad (UP)

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18 *The Constitution of the People's Republic of Bangladesh.*
19 *The Code of Civil Procedure, 1908.*
20 *Abdul Halim and N.E. Siddiki, The Legal System of Bangladesh. Ed: July 2008, University Publications, p.338.*
21 *The Code of Criminal Procedure, 1898.*

Chairman who acts as Chairman of the Court and each of the party is to nominate two members among which one must be a member of UP. It can only award compensation upto Taka 25,000 in criminal cases. It cannot inflict any punishment in a criminal case while it can order payment of money upto Taka 25,000 or delivery of property or possession to the actual owner thereof. The pecuniary jurisdiction of village courts is maximum Taka 25,000. The appeal lies only in case of a decision by a majority of 3:2 votes.

The Legal Aid Services Act, 2000

The economic condition of the common people forming 90% of the total population of our country baffles description. They are not only poverty stricken but deprived of the minimum basic needs of life.[22] Above fifty percent people are unable to maintain their livelihood.[23] Modern life and civilization seem to have been a beckoning of the horizon to them. The demon of illiteracy and wants has still kept them subjugated and ignorant of the basis of human rights and amenities. Their fate revolves round the glove of darkness without any better change.

Therefore, our poor litigant people, most of whom pass more than half of the year through acute starving condition, cannot afford to reach the door of any law chamber.[24] Moreover, in our country for the disposal of a civil suit several years required, but poor litigants after fighting one or two years, lose their everything and rail to move the suit, so the court pronounce decree in favor of the strong party.[25]

Thus the poor people cannot drive any benefit of their services in many cases and as a result, they silently bear the agonies and burns of injustice done to them in various spheres of life without any legal relief. This is nothing but a legation to them of one of their fundamental rights of equality before law and the equal protection of law.[26] It is, therefore, Legal Aid is essential for these people to protect their fundamental rights which are preserved in the constitution under Article 11.[27]

In Bangladesh the Ministry of Law Justice and Parliamentary Affairs passed a resolution in 1994 to provide Legal Aid to poor litigants, and a particular amount of money was allocated to the District Judge. However, another resolution was passed in March 1996 repealing the

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22 *Md. Abdul Halim, The Legal System of Bangladesh, February 2004, p. 270.*

23 *http://www.airticlebase.com/law-airticles/access-to-justice-through-legal-aaid-1431939.1939 (last accessed on: 06.12.2013).*

24 *Supra note 23, p. 270.*

25 *http://www.airticlebase.com/law-airticles/access-to-justice-through-legal-aaid-1431939.1939 (last accessed on: 06.12.2013).*

26 *Supra note 23, p. 424.*

27 *http://www.airticlebase.com/law-airticles/access-to-justice-through-legal-aaid-1431939.1939 (last accessed on: 06.12.2013).*

Resolution of 1994. The necessity of legislation to require Legal Aid was failed immensely. Several meeting of the Law Ministry paved the way to draft the legislation by 1998. Finally, the Legal Aid Services Act, 2000 was passed by Parliament in January 2000 and was effective begging April 28, 2000. It is also noted that amendment came in the year of 2014 for its more effectiveness.

The Legal Aid Services Rules, 2014

The Legal Aid Rules, 2001 was repealed by establishing the Legal Aid Services Rules, 2014. The Legal Aid Services Rules, 2014 has made clearer that who are entitled to seek for legal aid.

The Status of Legal Aid in Bangladesh

It is stated earlier that the Constitution of the People's Republic of Bangladesh, 1972 recognized the concepts 'equality before law', 'equal protection of law', 'rule of law' etc. In these concepts, the issue 'Legal Aid' is underpinned. The Constitution of the People's Republic of Bangladesh is the Supreme Law. In Article 19 of our Constitution said that, The State should endeavor to ensure of opportunity to all citizens. On the other the Article 27 said that all are equal before law and entitled to equal protection of law. Again in Article 31 prescribes that, everyone has a right to get protection of law and it is recognized as a moral rights. Every citizen has rights to get ends of justice of any states. But if any person is poor that time he can't take the shelter of Court then the purpose of ends of justice will fail.[28]

The concept of Legal Aid was started from ancient time. In our country the lawyer personally provide Legal Aid still now. The lawyers do not take any system to provide Legal Aid together. Although different organization regionally provide Legal Aid but it does not effect in the all side of country. In Bangladesh, most of the people are poor and illiterate. They are not aware about their rights. However, the poor people do not apply to the higher authority because of brave when they do not get basic rights. Then the general people go to the Court lastly. But the court proceeding of Bangladesh take a long time the fell confusion and can't pay all the cost. In this situation the mechanism of Government and Non Governmental Organization are not enough. The Government direct to the every Bar Council of Bangladesh to execute the Legal Aid program beside the government.[29]

The most of the people of our country live under the line of poverty. They are not aware about their right to execute because different economic, political and social reason. If we see the socio-economic condition that time we can say there are necessary of Legal Aid

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[28] *Md. Akhtaruzzaman, Concept of Laws on Alternative Dispute resolution and Legal Aid, Edition- Second Edition 2008, Published by Razia khatun, pp. 253-254.*

[29] *Ibid.*

efficiently. Although some Non Governmental Organization such as *Ain o Salish Kendra* and Bangladesh Legal Aid Services Trust including more NGO provide Legal Aid to people but it is not enough according to the people. It is the high time to execute Legal Aid program properly. The Government should arrange some initiatives to program to aware the people about Legal Aid.[30]

Legal Aid System in Bangladesh

In an underdeveloped country, majority of the population are poor and illiterate which makes Legal Aid a necessity to uphold human rights and equality. The Government took formal initiative for enacting Legal Aid laws only in 1994. However, in 1996, the resolution of 1994 was repealed because it was found that only handful of litigants actually received Legal Aid from these governmental initiatives. It was in 2000, when the Government in assurance of financial cooperation by the Canadian International Agency (CIDA) made an imitative to provide Legal Aid to indigent litigants. The Government passed the *Aingoto Sohoyota Prodan Ain* 2000 (Act No. VI of 2000) which provides legal mechanism and access to Legal Aid throughout the country. The main aim of enacting the Act is to provide Legal Aid to the people who are unable to get the justice due to financial crisis or due to different socio-economic reasons.[31]

The NGOs has played a crucial role in providing Legal Aid support to the aggrieved in Bangladesh. Among these NGOs, *Ain o Salish Kendra* (ASK), Bangladesh Legal Aid and Services Trust (BLAST), *Madaripur* Legal Aid Association (MLAA) and Bangladesh National Women Lawyers Association (BNWLA) are playing leading role in providing Legal Aid. Despite of the access to Legal Aid in Bangladesh, the *Aingoto Sohoyota Prodan Ain* 2000 has some flaws.[32]

"The free Legal Aid to the poor and the needy is an essential element of any reasonable, fair and just" procedure. It may, therefore now be taken as settled law that free Legal Aid at state cost is a fundamental right of a person accused of an offence which involves jeopardy to his life of personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article-21. The Supreme Court held that the legal assistance to poor and indigent accused, who is arrested and put in jeopardy if 39A, but also Article 14 and 21 of the Indian Constitution. Article 14 of the Constitution mandates that the

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30 *Ibid.*

31 *http://www.lawyersnjurists.com/resource/articles-and-assignment/%E2%80%9Cit-is-difficult-to-judge-the-source-0f-reforms-in-legal-aidprovision-as-we-lack-aggrement-on-the-aims-and-objectives-of-the-legal-aid-system%E2%80%9D-discuss/, [Last Accessed on: 12.12.13]*

32 *Ibid.*

state shall not deny any person equality before the law or the equal protection of law within the territory of India.[33]

The concept of Legal Aid represents the very spirit of equality and equity enshrined in the modern notions of constitutional law, as so in the Constitution of the People's Republic of Bangladesh. The doctrine of equal treatment of law and fair judicial trial have found expression as one of foundations of the modern legal edifice of fundamental human rights both national and international. The notion of Legal Aid is thus neither a charitable sentiment nor an idle philosophical dream of a utopian project. It is rather an integral and element part of the principles of administration of justice and the Rule of Law.[34]

Procedure for getting Legal Aid

There are a prescribed form and need to collect it by which a person may apply for Legal Aid, such as follows: A poor person may collect the form from the Legal Aid Committee office which situated in District Judge Court; From all Civil and Criminal Courts; From DC Office, Police Super Office and all UNO Office; From District bar Association Office. From G.P. and P.P. Office; From Jail Super Office and all Police Stations; From City Corporation and all Municipals and *Union Parishad Karjalay* Office etc.[35] However, a person will not capable for getting Legal Aid for some reasons. Such as follows: If a party do not disclose of his all assets, failure will lead to dismissal of the application; He is not a pauper person; The Court determines that he is not a pauper person; The applicant person transferred his property fraudulently for taking permission for pauper suit before two month filing application; Where there is no cause of action about dispute.[36]

Provisions for Legal Aid under International Instruments

It is vividly expressed in the Universal Declaration of Human Rights, 1948 that all are equal before the law and is entitled without any discrimination to equal protection of the law.[37] Besides this, various international documents have also been framed for protection of these rights which imply the concept of Legal Aid.[38]

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[33] *Dr. Zakir Hossain, Legal Aid is not a Charity, but a Right, CLEP Bulletin, Edition-April-September 2004, Director of Judicial Administration and Training Institution, Bangladesh, pp. 3-5.*

[34] *Supra note 34.*

[35] *Supra* note 23, p. 289.

[36] *Md. Akhtaruzzaman, Concept of Laws on Alternative Dispute resolution and Legal Aid, Ed: Second, 2008, Published by Razia khatun, Page-262.*

[37] *Universal Declaration of Human Rights, 1948, Art. 7.*

[38] *http://www.airticlebase.com/law-airticles/access-to-justice-through-legal-aaid-1431939.1939 (last accessed on: 06.12.2013).*

Universal Declaration of Human Rights, 1948

Under the provision of the Universal Declaration of Human Rights, 1948 everyone has the rights to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by constitution or by law and everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the declaration of his rights and obligation and any Criminal Charge against him.[39]

International Covenant on Civil and Political Rights, 1966

According to the provisions of the International Covenant on Civil and Political Rights, 1966, all persons shall be equal before the courts and tribunals and in the determining of any criminal charge against him, everyone shall be entitled to be tried in his presence, and to defend himself in person or through legal assistance of his own-choosing; to be informed, if he does not have legal assistance of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if does not have sufficient means to pay for it.[40]

African Charter on Human and People Rights, 1981

It is also provided in the African Charter on Human and People Rights, 1981 that every individual shall be equal before the law and entitled to equal protection of the law.[41]

Arab Charter on Human Rights, 1994

Everyone is equal before the judiciary, and the right to judicial resources is guaranteed for every person in the territory of state as to the provisions of the Arab Charter on Human Rights, 1994.[42]

Commonwealth of Independent States Convention on Human Rights and Fundamental Freedom, 1995

All persons shall be equal before the judicial system. In the determination of any charge against him, everyone shall be entitled to a fair and public hearing within a reasonable time by an independent and impartial court .The decision of the court or the sentence shall be pounced publicly, but all or part of the trial may take place in camera for reason of public order or state secrecy or where the interest of juveniles or the protection of the private life of the parties so requires according to the provision of the Commonwealth of Independent State Convention on Human Rights and Fundamental Freedoms, 1995.[43]

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39 *Universal Declaration of Human Rights, 1948, Arts. 8 & 10.*
40 *International Covenant on Civil and Political Rights, 1966, Art.14.*
41 *African Charter on Human and People Rights, 1981, Art. 14.*
42 *Arab Charter on Human Rights, 1994, Art 9.*
43 *Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, 1995, Arts. 6(1) & 21(1).*

States Obligations under International Law to provide Legal Aid

There exists a range of international norms and standards that are relevant to the question of a state's responsibility to provide Legal Aid, which began to be articulated by the international community after 1945 with the establishment of United Nations International Covenant of Civil and Political Rights (ICCPR) that set out specific obligations of states to provide state-funded counsel for indigent persons. Article 14 (3) (d) of the ICCPR requires that an accused offender is entitled 'to have legal assistance assigned to him, in any case if he does not have sufficient means to pay for it'. The European Convention for the protection of Human Rights and Fundamental Freedoms (the European Convention, also include similar provision. The United Nations Body of Principles for the Protection of All persons under Any form of Detention or Imprisonment provides that a detained person shall be entitled to have legal counsel assigned to him or her by a judicial or other authority in all cases where the interests of justice so required and without payment by him or her if he/she does not have sufficient funds to pay. The United Nations Standard Minimum Rules for the Treatment of Prisoners provide for untried prisoners to be allowed to apply for Legal Aid where such aid is available. As a criminal prosecution may result in deprivation of personal liberty, the Indian Supreme Court held that an accused, who due to poverty, indigence or an incommunicado situation, cannot afford legal service is entitled to free Legal Aid at the cost of the State as part of fair and reasonable procedure under article 21 of the Indian Constitution.[44]

Flaws in the Legal Aid Law

Government has good intention to provide Legal Aid throughout the whole country, yet there are some defects in the Legal Aid Law for which the implementation of the Legal Aid scheme cannot be properly possible.

As per Section 16 of the Legal Aid Act, 2000, all applications for getting Legal Aid must be submitted to the National Board of Legal Aid or in appropriate cases to the District Committee. The procedure for applying for Legal Aid by the poor is not practical.[45] The present law compels indigent litigants to travel to the District to get Legal Aid which is very disadvantageous for them.[46]

As per Rule 3(2) of the Legal Aid Rules, 2001, for Legal Aid for any matter in the Supreme Court, application is to be made to the Chairman of the National Legal Aid Organization, i.e. the Law Minister. Making an application to the Law Minister seems to be a big hurdle for an indigent client. It has not been clarified in the Rules how and to whom an indigent client will

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44 *Supra note 34, pp. 2-3.*

45 *Nusrat Ameen, 'The Legal Aid Act, 2000: Implementation of Government Legal Aid Versus NGO Legal Aid' Journal of The Faculty of Law, Vol. XV, no.2 (Dec. 2004), p. 71*

46 *Supra note 23, p. 326.*

approach for Legal Aid in the Supreme Court matter. Few lawyers or judges in the Supreme Court know anything about this system.

There is no uniform printed form for application for Legal Aid. The available form is very cumbersome and difficult for the indigent litigants to fill up.[47] The law only allows the fees to be paid to the appointed lawyer. There is no specific rule about other expenses such as court fees, commission fees, adjournment cost. TA/DA for witness if necessary, and other miscellaneous expenses like photocopying or releasing documents etc, It is impossible for a client whose monthly income is below taka 250 to afford these if he does not get any help from the Government as part of Legal Aid.[48]

The duties and responsibilities of the coordinators are not defined and his responsibility to report to the District Judge is not made mandatory in the Legal Aid Act, 2000. There is no provision for any advance payment to Legal Aid lawyers. In case of filing new cases under the Legal Aid scheme, appointed lawyers very often seek prior allocation of fund for payment of court fees and meeting incidental expenses. This is an outstanding factor, which requires proper decision. Before filing a suit, the indigent client has to collect many documents which has a cost-consideration involved and which is beyond his means.[49]

Condition of five years practice for the empanelment of an advocate as provided in the Act[50] is debarring many young lawyers having attitude to help indigent people and thereby to serve the community. Also is the fact that lawyers with five years standing keep themselves busy with their own briefs. As per the provisions of the Legal Aid Act, the client has to choose advoeates from the panel of three advocates formed by the committee. By this, the client is actually debarred to engage advocate of his own ehoice.

Present Structural Flaws

There are some obstacles derived from the defects in the Legal Aid Law to implement the Legal Aid scheme in practice. By focusing on these obstacles, the real situation in providing Legal Aid in Bangladesh practically could be realized and then it will be easy to find out the solutions so as to overcome the situation.

There is no media propaganda about the Legal Aid and so people are unaware of the government initiative.[51] The lack of awareness about the Legal Aid scheme and its purposes

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47 *http://www.lawyersnjurists.com/articles-reports-journals/law-and-ethics/free-access-justice-poor-legal-aid-bangladesh-perspective/ [last accessed on: 13.12.13].*

48 *Ibid.*

49 *Ibid.*

50 *The Legal Aid Act, 2000, s. 15.*

51 *Supra note 47, p. 72.*

among the indigent litigants and also among the lawyers and judges in general, is the main obstacle to achieve the objectives of the scheme of Legal Aid.[52]

The distance between the Bench and Bar makes it complicated to work together. The nature of the work of District Judge isolates him from the Bar and other officials. Therefore, calling a meeting becomes embarrassing for him as he may be exposed to uneasy situation.[53] Being in the position of the District Judge, it is not possible for him to monitor the lawyers and see whether they are discharging their duties properly. Therefore, whether a lawyer is taking money from the client (who is mostly illiterate and ignorant) and also drawing money from the fund is difficult to monitor.[54]

Initiatives

The present structural defects are impediment in ensuring the effective service. The word of caution being very clear that the traditional legal service program, which is essentially court of litigation, oriented cannot meet the specific needs and the peculiar problems of the poor demand a unique approach to this socio-economic philosophy. The notion of Legal Aid conceived wisely by the pioneers of legal world certainly needed vigorous execution by meticulous planning.

The first and foremost task is to inform people of the existence of the GOB Legal Aid programs through wide media coverage and local bodies. Any judgment regarding Legal Aid by the higher courts should be circulated to the members of the lower judiciary, who matter more in delivery of Legal Aid benefits. The need for Legal Aid and the role of judiciary in dispensing it should be reiterated in the training courses and seminars attended by the lawyers and judicial officers.[55]

Legal Aid scheme of GOB should be widened so as to include payment of court and lawyers' fees, expenses of witnesses charges incurred in connection with legal proceedings, supply of certified copies of judgment and orders, preparation of appeal papers including printing and translation of documents in a legal proceeding. It must lead to reform in the legal and judicial system, so that it may be capable of meeting the mass demand for justice.[56] Judicial reform is mandatory for effective implementation of Legal Aid and expanding access to justice and to ensure quick disposal of cases.[57]

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52 *Supra note 3, p. 325.*
53 *Supra* note 49.
54 *Ibid.*
55 *Supra* note 47, p. 76.
56 *Supra* note 49.
57 *Supra* note 47, pp. 77-78.

The NGO can play a pro-active role in implementing the Legal Aid program by conducting a survey to assess and identify the specific areas of human rights violation, making the government answerable to the detrimental situation of the poor who cannot access the law, bringing into notice the gap between the inadequacies of law and praetice of the government Legal Aid and persuading the government to take remedial measures, putting pressure on government by public interested litigation where government fails to respond to the need of the poor for Legal Aid.

The NGO may also play role in making the poor aware of their rights which the law of the land guarantees, encouraging the poor to use the law as an instrument of redress, promoting social dialogues and literacy program of redress, assisting government program by providing expertise on concerned issues.[58]

Conclusion

Without the capacity to provide individual representation on as wide a scale as possible, other efforts including legal literacy, court reform, and systemic changes in the law will not achieve the goal of giving poor people greater control of their lives. From the overall discussion presented in this thesis, it is clear that Legal Aid is not a charity or bounty, but is the prime object of the state and right of the citizens. The problems of human law and justice, guided by the constitutional goals to the solution of disparities, agonies, despairs, and handicaps of the weaker, yet larger brackets of Bangladesh's humanity is the prime object of the dogma of "equal justice for all".

Again, the constitution not being a mystic parchment but a Pragmatic package of mandates we have to decode its articles in the context of Bangladeshi life's tearful realities and it is here when the judiciary has to take center stage. The apex court has held access to justice as a human right, thus imparting life and meaning to law. Thus, Legal Aid strives to ensure that the constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the downtrodden and weaker sections of the society.[59]

In conclusion it may be well deserved to state that in order to make the Legal Aid Services Act, 2000 successful, many structural changes are necessary. In addition to that the machinery of the government engaged in the execution of free Legal Aid movement in the State must be geared from bottom to top to the goal of this mission. The state must sense the poplar needs and respond to the implementing policy according to such needs. Thus, the Legal Aid program, if implemented will go a long way towards wiping the tears from the eyes of the teeming millions of our countrymen, by advancing social justice and providing them equal access to the law and justice institutions of the country. Then the Legal Aid mechanism of Bangladesh will be a successful one for people and the State to ensure justice.

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[58] *Supra* note 47, p. 83.
[59] *Supra note 47, p. 81.*

Marital Rape and its Legal Consequences in Bangladesh

*Md. Shibly Islam**

Introduction

When someone thinks of rape, the first thing that pops into their mind is to think of someone who is a stranger, a malicious person. Usually no one thinks of rape in the context of marriage. Even women themselves find it difficult to believe that a husband can rape his wife. After all, how can a man be accused of rape if he is availing his conjugal right? It is indicative that a woman has no right to her own body and her will is subject to that of her husband. Though marital rape is the most common and repugnant form of masochism in the society. It is well hidden behind the iron curtain of marriage. While the legal definition varies, marital rape can be defined as any unwanted intercourse or penetration (vaginal, anal, or oral) obtained by force, threat of force, or when the wife is unable to consent. Despite the prevalence of marital rape, because of marital exemption this problem has received relatively little attention from social scientists, practitioners, the criminal justice system and larger society as a whole.[1] The concept of marital exemption is actually a social view, which states that a husband cannot be charged with the rape of his wife. The U.S. and English law subscribe until the 20th century to the system Covertures, which was a doctrine whereby, upon marriage, a woman's legal rights and obligations were subsumed by those of her husband. An unmarried woman had the right to own property and make contracts in her own name but a married woman does not have that right.[2] Coverture was enshrined in the common law of England for several centuries and throughout most of the 19th century influencing some other common-law jurisdictions. Marriage was understood as an institution where a husband had control over his wife's life, control over her sexuality was only a part of the greater control that he had in all other areas concerning her. A husband's control over his wife's body could also be seen in the way adultery between a wife and another man was constructed; for example in 1707 English Lord Chief Justice John Holt described the act of a man having sexual relations with another man's wife as "the highest invasion of property".[3] From this, it is evident that wife is regarded as a property of the husband and for this reason, in many cultures there was a conflation between the crimes of rape and adultery since both were seen as a violation of the rights of the husband. Rape as a crime was construeted as a

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[1] *Dr. Bhavish Gupta & Dr. Meenu Gupt, Marital Rape: "Current Legal Framework in India and the Need for Change" 2013 vol. 1 of Galgotias Journal of Legal Studies at p 17, ISSN. 2321-1997.*

[2] *Marital rape, From wikipedia, the free encyclopedia, ,http://en.wikipedia.org/wiki/Marital_rape>accessed on 13th April, 2014.*

[3] *Samuel H Pillsbury, Judging Evil: Rethinking the Law of Murder and Manslaughter. (2000-07-01). ISBN 9780814766804. http://www.quickiwiki.com/en/Marital_rape. accessed on 13th February 2014.*

property crime against a father or husband not as a crime against the woman's right to self-determination. Bangladesh as Common law successor state adopted the similar outlook.

As it is discussed though once marital rape is widely ignored by law but not repudiated by international conventions and increasingly criminalized in some countries but still marital rape has not been criminalized for long in many countries and Bangladesh is not out of it. Here in Bangladesh traditional views on marriage states that a woman must be (sexually) submissive to her husband. It is easily understandable that women in Bangladesh who are raped by their husbands are likely to experience multiple assaults and often suffer severe long-term physical and emotional consequences as maximum number of women are financially dependent on the husband. So, it is clearly a serious form of violence against women and worthy of public attention.

Moreover, marital rape is actually more traumatic than rape because rape is done by a stranger while marital rape is done by the husband and the wife lives with her assailant and she may live in constant terror of another assault whether she is awake or asleep.[4] It is high time that the concept of "rape is rape irrespective of the relationship between the victim and the perpetrator" is recognized by the law and put strictly to force.

Concept of Marital rape

The word 'rape' has been derived from the term 'rapio', which means to seize'. Rape is therefore, forcible seizure, or the ravishment of a woman without her consent, by force, fear or fraud. It involves coercive, nonconsensual sexual intercourse with a woman. Rape can be viewed as an act of violence against a woman, an outrage by all means. It is the ultimate violation of the self of a woman .The Supreme Court of India has aptly described it as 'deathless shame and the gravest crime against human dignity.[5]

On the other hand, marital rape is sexual intercourse forced by a spouse on the other spouse, against that person's will. It also can be defined as any unwanted intercourse or penetration (vaginal, anal or oral) obtained by force, threat of force, or when the wife is unable to consent.

According to Oxford dictionary, Marital rape is sexual intercourse forced on a woman by her husband, knowingly against her will.

A state statute (California) defined 'spousal rape' as rape of a person who is the spouse of the perpetrator is an act of sexual intercourse accomplished under any of the following circumstances:

4 *Marital Rape (1999) p 7 of 10 v VAW net is a project of the National Resource Center on Domestic Violence 800-537-2238.*

5 *Bodhisattwa Gautam v. Subhra Chakraborty AIR, 1996 SC 922.*

(1) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear with or without immediate and unlawful bodily injury on the person or another.

(2) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known, by the accused.

(3) Where a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this paragraph, "unconscious of the nature of the act" means incapable of resisting because the victim meets one of the following conditions:

(A) Was unconscious or asleep.

(B) Was not aware, knowing, perceiving or cognizant that the act occurred.

(C) Was not aware, knowing perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.

(4) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.

(5) Where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official. As used in this paragraph, 'public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.[6]

To summaries it can be said that marital rape means any unwanted sexual acts by a spouse that is committed without the other person's consent. Such illegal sexual activity is done by using force, threat of force, intimidation, or when a person is unable to consent. The sexual acts include intercourse, anal or oral sex, forced sexual behavior and other sexual activities that are considered by the victim as degrading, humiliating, painful, and unwanted.

Marital rape in Bangladesh

We have a very strong set of penal laws against rape in Bangladesh. In our Penal Code, the definition of rape is very wide. A man is said to commit "rape" when he has sexual intercourse with a woman under circumstances falling under any of the five following descriptions: First, against the will of the woman. Second, without her consent .Third, with her consent obtained by putting her in fear of death, or of pain. Fourth, with her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. And fifth, with or without her consent, when she is under fourteen years of age. In explanation, it

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[6] *Cal Pen Code 262.*

is said that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

There is an exception in the Penal Code and that is sexual intercourse by a man with his own wife is considered rape when the wife is under thirteen years of age. So, if the wife is under thirteen years of age only then marital rape is recognized otherwise it clearly excludes marital rape.

In section 9 of "Nari o Sishu Nirjaton Daman Ain, 2000", it is said whoever commits rape against with a women or child shall be punished with rigorous imprisonment for life with fine. But in explanation it is said whoever has sexual intercourse with his lawfully married wife not being fourteen years of age — against her will or with her consent obtained — or by putting her in fear or by fraud or with a women not being above fourteen years of age with or without her consent, he shall be said to commit rape.

However, as in common law husbands were exempted from prosecution for raping their wives. Over the past quarter century this law has been modified somewhat but not entirely. A majority of states still retain some form of common law regime; they criminalize narrower range offences if committed within marriage. Unfortunately we are among those states. Marital rape is non-consensual sex in which the perpetrator is the victims spouse. As such, it is a form of partner rape, of domestic violence, and of sexual abuse. Once widely ignored by law. spousal rape is now repudiated by international conventions and increasingly criminalized but still, in many countries, spousal rape either remains legal, or is illegal but widely tolerated and accepted as a spouses prerogative.

In 2006, it was estimated that marital rape could be prosecuted in at least 104 countries (in four of these countries, marital rape could be prosecuted only when the spouses were judicially separated), and since 2006 several other countries have outlawed spousal rape. In many countries it is not clear if marital rape may or may not be prosecuted under ordinary rape laws. Several countries in Eastern Europe and Scandinavia made spousal rape illegal before 1970, but other countries in Western Europe and the English-speaking Western World outlawed it much later, mostly in the 1980s and 1990s. Most developing countries outlawed it in the 1990s and 2000s.[7]

As most of the people of our country are Muslim, this might have been the cause for the lawmakers for not including marital rape as a crime in the penal law legislation. Even the courts are also reluctant to make the interpretation as they find it confusing whether the shariah narrates it as crime.

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7 *Witte, John; Robert M. Kingdon (2005), Sex, marriage, and family life in John Calvin's Geneva, Grand Rapids, Mich: W.B. Eerdmans Pub. Co. pp. 120-22, ISBN 978-0-8028-4803-1 http://www.quickiwiki.com/en/Marital_rapeaccessed on 11 january 2013.*

Reeently in India a man has been discharged by a Delhi court of charges of raping his wife on the ground that having sexual relation with his spouse, even forcibly, does not amount to 'marital rape.' District Judge JR Aryan let off accused Hazi Ahmed Saeed, agreeing with his counsel's submission that the Indian Penal Code does not recognize any concept of "marital rape". The court remanded the case back to a magisterial court as rest of the alleged offences, including those of causing hurt. criminal intimidation and theft, for which the accused was charge-sheeted.[8]

So the question strikes, does Islamic law or shariah approves marital rape? As for "marital rape". Islam teaches both husband and wife the understanding of having to minimize the times when they are reluctant to respond to their spouses' sexual demand. Unless there are really serious reasons concerning, for example, health or mental difficulties, they should not refuse such a demand. This is not because any side is a "property" of the other or because Islam approves what is called 'marital rape'. On the contrary, this is because Islam prohibits adultery and marital infidelity.

This, in fact, is prohibited for both parties. Therefore, Islam urges both parties to be always welcoming to meet the other party's needs. Both parties are also obliged to make sure that this affair has ended with full satisfaction for ones' partner. Islamic teaching also made it obligatory for husbands to offer sex to their wives. But we have to understand this is due to the fact that the woman might be shy or embarrassed to ask it for herself. In addition, a ruler should not send soldiers in an army - even if it is wartime - for more than four months, just for this reason! Also, Ibn Magah reported that the Prophet (PBUH) has commanded husbands not to start a sexual intercourse, unless they start by 'flirting, talking to and kissing the wife' till she is 'in the mood' and is capable of sharing the pleasure of these moments. Not only that the' Prophet (PBUH) warned husbands against what he called: "falling onto women like animals." Thus we can say Islam has no bar to enact laws against marital rape, as it clearly discourages marital rape.[9]

Causes of Marital rape in Bangladesh

There are many causes of marital rape in Bangladesh. Amongst them the principal causes of marital rape are-

Religious Cause

In Bangladesh most of the people live in rural areas and the majority of them are Muslim. Literacy rate is very low. Though bulk of the people are very religious but they don't have enough chance to get proper religious education. As a result they do have several types of

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[8] *Hindustan Times Friday, 23 May 2014, ,http://www.hindustantimes.com/india-news/newdelhi/forcible-sex-with-fife-doesn-t-constitute-rape-court/article1-968113.aspx>accessed on march 2, 2013.*

[9] *Md Shibly Islam, The Daily Independent Bangladesh, 17 February 2013, p 6.*

religious superstition which never goes with the true meaning and object of Islam. There is a religious believe in Bangladesh that the wife has a sacred duty to please his husband anytime he wants.

Illiteracy

Illiteracy is a curse for every nation. As most of the people in Bangladesh do not know how to read or write it is very difficult for them to realize the concept of women right.

Poverty

Bangladesh is one of the world's most densely populated countries with 150 million people, 26 percent of whom live below the national poverty line of US $2 per day.[10] In addition, child malnutrition rate is also high, in condition that is tied to the low social status of women in Bangladeshi society. The scope of quality entertainment is very low in Bangladesh as there is not any minimum infrastructure. So one of the popular form of entertainment is considered to have sexual intercourse with the wife. In that case if the wife does not give the consent marital rape frequently occurs.

Absence of penal law against marital rape

In Bangladesh a lot of laws have been passed to protect the women from violence and rape. Among them Nari O Sishu Nirjaton Daman Ain is the most popular. But unfortunately nowhere in this law or in any other law marital rape is addressed or made penal offence .Only raping wife under 14 years of age is crime over here.

Lack of women Empowerment

Empowerment is the process of giving power of authority to the powerless. Empowerment of women is a process through which women in general and poor women in particular get the opportunity to join the workforce and contribute to family income and interfere on the decision making of the family as well as get the opportunity to raise their voice against the injustice and exploitation. In past Bangladeshi women were segregated from out of home productive work. They were kept within the four walls. The hearth became the place for them. So cooking, cleaning, washing, giving birth and rearing children became their jobs. Men became the wage earners and all other activities became their responsibilities .Though nowadays we have come a long way as today women are playing important role in all spheres of life. Many of them have come out of the kitchens. They are working hand in hand with men in all spheres of work i.e. from garments workers to pilots, doctors, engineers, teachers, administrators etc. But still most of the women live in the rural areas and if they are

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[10] *"After Much Heartbreak, Some Good News at Last for Bangladesh", Time Retrieved 22 July 2013. http://world.time.com/2013/07/18/after-much-heartbreak-some-good-news-at-last-for-bangladesh/accessed on april 9, 2013*

empowered only then they would have the capacity to raise the voice against the marital rape otherwise they don't have any scope but to accept all the oppression against them.

In the context of forced and early/child marriage

Forced marriage and early marriage are prevalent in this part of the world, especially in South Asia and in Bangladesh it is very common. A forced marriage is a marriage where one or both participants are married without their freely given consent;[11]

So, a child marriage is a marriage where one or both parties are younger. These types of marriages are associated with a higher rate of domestic violence, including marital rape.

In Bangladesh traditionally women are very shy and they do not express their feelings publicly. If they do not have visible physical injuries from the assault and/ or rape, friends and family may think you are okay. Many people do not understand the extent of trauma that is suffered by rape and sexual assault victims, even if the offender is a loved one. Moreover as a victim of spousal or relationship sexual assault and/or rape, victim will probably have to deal with additional effects and experience that are very different from the experience had by victims of stranger sexual assault and/or rape.

Some of these effects are

- Having to deal with ongoing contact with the abuser;
- Being in love with/having romantic feelings for the abuser:
- Further sexual assault and/or rape by the abuser as well as the possibility of different types of violence (for example, women being sexually assaulted and/or raped by their partners are also more likely to be even murdered by them).
- There are also further emotional effects that you may have to face based on the abuse you had to endure from your spouse. Because women who are raped by their partners are raped by someone they loved and trusted.
- Be diagnosed with depression or anxiety than those who are victims of abuse by someone other than a spouse or partner;
- Have trouble forming trusting relationships;
- Have a poor body image which may lead to an eating disorder;
- Have more negative ideas about themselves and blame themselves for what happened.

Exemption of Marital Rape and Its origin and rationality:

The idea that is responsible for leaving scope for the wife to accuse her husband of rape has the potential to destroy the institution of marriage. There are many provisions under the law for cruelty against women, it was, therefore, felt that if marital rape is brought under the law,

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[11] *BBC, Ethics guide http://www.bbc.co.uk/ethics/forcedmarriage/introduction_1.shtmlaccessed on 28th April 2014.*

the entire family system will be under great stress and it will end up perhaps be doing more injustice.

The concept of a marital exemption, is, a legal framework, or, perhaps even more importantly, a social view, stating that a husband cannot be charged with the rape of his wife, must be understood in the historical context of marriage, rape, and of women's position in society. Through much of history, and still in some countries today, women were considered legal minors belonging at first to their fathers, and then to their husbands. As such, women had very few rights of their own, and the relationship between husband and wife, in terms of authority and balance of power, was mirroring that between father and daughter.

Apparently marital rape is not something that is yet discussed publicly in Bangladesh. If anything, a woman is not supposed to contemplate sexual autonomy once she is married. This harkens back to the patriarchal society that governs much of Bangladesh, where 'virginity', 'chastity' and 'purity' are concepts that are crucial to a family's 'honor.' Not only Bangladesh throughout the history of most societies, it has been acceptable for men to force their wives to have sex against their will. The traditional definition of rape in most countries was sexual intercourse with a female not his wife without her consent'. This provided the husband with an exemption from prosecution for raping their wives or a license to rape.

The foundation of this is an exemption that can be traced back to statements made by Sir Matthew Hale, Chief Justice in 17th Century England. Lord Hale wrote that:

'the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual consent and contract, the wife hath given up herself this kind unto her husband which she cannot retract.'[12]

It is very shocking to note that Lord Hale did not offer any argument, case law or legal basis to support his assertion. He asserted that, upon marriage, the wife automatically hands over her legal person to the husband and consents to all sexual acts, which cannot be retracted at any later date for no reason whatsoever. He introduced within the marriage, a notion of 'implied consent' that started at the time of the marriage and continued for the entire course of the marriage, and such consent was deemed irrevocable by Lord Hale. This established that once married, a woman does not have the right to refuse sex with her husband. Due to construction of sex as a woman's duty within a marriage, there is always a presumption of her consent.[13] Even a female slave has an admitted right, and is considered under a moral obligation, to refuse her master the last familiarity. Not so the wife.[14]

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12 *Matthew Hale, 1 History of the Pleas of the Crown, (1736, London Professional Books, 1972), p 629.*

13 *Dr. Bhavish Gupta & Dr. Meenu Gupt, Marital Rape: "Current Legal Framework in India and the Need for Change" 2013 vol. 1 of Galgotias Journal of Legal Studies at p 17, ISSN. 2321-1997.*

14 *J.S Mill,. The Subjection of Womened. S.M. Okin, Indianapolis, Hacket, 1988, p 33.*

As long back as in 1869, **John Stuart Mill** observed that marital rape is never welcome to women for it represents a surrender of dignity so absolute in nature, that it lowers the stature of the wife beneath that of a slave. The basic premise for this assumption lies in the fiction that the wife is considered to have given her irrevocable consent to sexual intercourse to the husband at the time of the marriage and hence the husband cannot be held guilty of rape, which he may commit upon his wife. The tenets of the marital rape exemption were based on the notion of irrevocable implied consent. As per this notion, once a woman is married to a man, there is believed to be implied consent to sexual intercourse, which is irrevocable in nature. The other traditional justifications for the marital exemption were the common law doctrines that a woman was the property of her husband and that the legal existence of the woman was incorporated and consolidated into that of a husband.[15]

Consequences of marital rape in Bangladesh

The problems those are faced by marital rape survivors are enormous. Some of the problems are discussed below-

- **Longer recovery from trauma**. Contrary to popular belief, the trauma actually may last longer for the marital rape victim than for the stranger rape victim. Reasons include lack of recognition and ability to share the pain, and the profound sense of a betrayal of trust.
- **Higher likelihood of repeated assaults**. The women who are marital rape victims are more likely to experience repeated assaults than other rape victims; in fact, among battered women, sexual assault may be a routine part of the pattern of the abuse. As in Bangladesh because of agricultural economy and patriarchal influence women are raped and battered by their partners experience the violence in various ways e.g., some are battered during the sexual violence or the rape may follow a physically violent episode where the husband wants to 'make up' and forces his wife to have sex against her will.
- **The married perpetrator is more likely to use "anal and oral rape to humiliate, punish and take 'full' ownership of their partner.** At the same time there could be the negative effect on children on the household. Such children may witness the sexual violence or otherwise be affected by it.
- **Pressure to stay with perpetrator.** A victim with children who lacks outside employment specially in a economy like Bangladesh may be financially dependent on the spouse and feel there is no way to leave the situation, and the victim basically face additional pressure from family members or friends to remain with the perpetrator because otherwise they think she will be dependent on the relatives.
- **Difficulty in identifying what happened as a crime**. A victim may find it difficult for cultural reasons, to define the other spouse's conduct as rape or identify someone she married and loves as a 'rapist.'

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[15] *"To Have and to Hold-The Marital Rape Exemption and the Fourteenth Amendment", 99 HARV. L. REV. 1255, 1256 (1986) P442.*

Prosecuting spousal or Marital rape

The criminalization of marital rape does not necessarily mean that these laws are enforced in practice, with lack of public awareness, as well as reluctance or outright refusal of authorities to prosecute being common in many countries. For instance, in Ireland, where marital rape was made illegal in 1990 and by 2006 there had been only one person convicted of marital rape in a case which involved a man who raped his wife shortly after she had given birth and when she was still bleeding.[16]

So it can be perceived that in many countries, most often, in practice, there will be no prosecution except in extreme cases that involve a very high level of violence.

In the United Kingdom, such a category of rape was only recognized by a 1991 House of Lords decision known simply as R v R (1991 All ER 481). While most parties agreed with the House of Lords' motive in making the decision, there were many who were of the opinion that the decision involved post facto criminalization. Since the House of Lords were imprisoning spouses for doing what was once, according to the law, their right.

In order for any law to be successfully enforced, the acts which it prohibits must be perceived by society as abusive. That's also the problem in case of Bangladesh as the literacy rate is very low Would they perceive? So, even if lawmakers in Bangladesh enact adequate laws against marital rape, in practice, these laws will be ignored if the act of marital rape is not socially considered a crime.

Suggestions

There is an immediate need to enact laws for prevention of marital rape or to amend Nari O Sishu Nirjaton Daman Ain 2000 and insert section regarding marital rape and the definition of marital rape should be expanded as there are many ways in which marital rape can happen but that law at least should list some of the facts or expand the definition such as-

It the spouse has sex with the wife when he is On Drugs. Several women wake up to their spouse having sex with them when they are under the influence of drugs. As Prescription drugs or even liquor can cause a woman to not be able to make choices or fight the person off of her since she is under the influence of drugs.

When the husband commits Sodomy without the consent of wife, it is rape since sodomy is the most painful. The husband has no right to commit sodomy just because of the fact that he is doing it to his own wife. A wife has a right to say no regarding to what happens to her own body.

If women's spouse doesn't stop the sexual intercourse when she says no, it should be considered rape. Wife shouldn't have to say no more than once. Any man that keeps going after the wife say no once than it should be rape no matter what the situation is.

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16 *Man jailed again for marital rape<http://www.irishhealth.com/article.html?di=8909.accessed on Monday, January 30, 2014.*

If the husband uses religion against the wife. Some husbands attempt to use religious lines against wife in order to force sex upon her. Husbands can still be charged with rape when they use religion to force themselves upon wives. Some husband say that they have a right to wife's body by using the name of religion in order to justify what they do. Religion is something that sometimes husbands turn around on the wife in order to make her feel like it isn't really rape that happened. So the husband should have no right to use any religious line on you to strip wife of all of her rights as a human being.

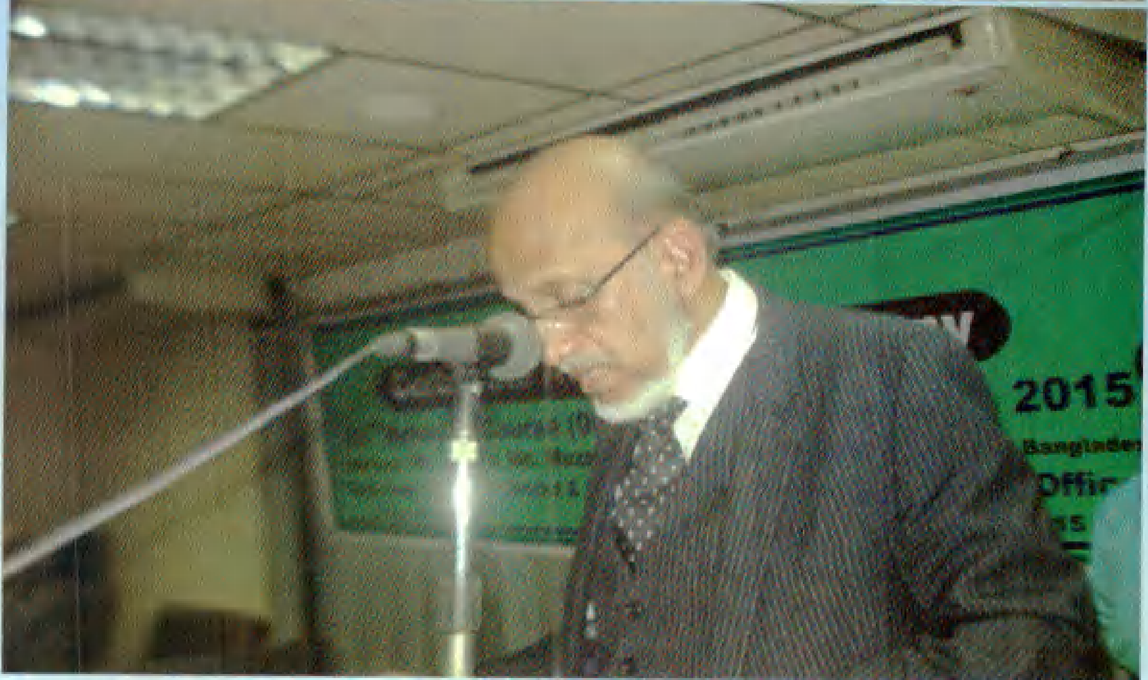
If the husband threatens the wife with force if she fights him. Many husbands tell their wife that it can happen in the easy way or the difficult way if the wife refuses. It is a way of force someone to submit to something that they don't want to do in the first place. It is no different than when a man beats his wife until she does something that he wants no matter what the situation is.

At the same time law should also provide damage with penal provision so that victim could have the courage to stand against the perpetrator. Secondly the government has to raise awareness among the public about the marital rape. Legal aid groups and government legal aid agencies should come forward to provide legal assistance to victims.

Conclusion

Despite the fact that marital rape has not been criminalized in Bangladesh, there is no doubt marital rape is clearly a serious form of violence against women and worthy of public attention. It indicates that women who are raped by their husbands are likely to experience multiple assaults and often suffer severe long-term physical and emotional consequences. Marital rape may be even more traumatic than rape by a stranger because a wife lives with her assailant and she may live in constant terror of another assault, given the serious effects. There is clearly a need for those who come into contact with marital rape survivors to provide assistance and challenge the prevailing myth that rape by one's spouse is inconsequential. Rape crisis counselors and advocates for battered women are in particularly important leadership positions should play a pivotal role to address the problem of marital rape in society and to assist survivors from this form of violence. In the future, researchers should continue to try to determine the prevalence of this problem in the society.

More research on the effects of marital rape, particularly for pregnant women and the children who witness the sexual violence is necessary. Additionally, researchers should investigate the motives for why men rape their wives and address prevention.



Mr. Justice Md. Muzammel Hossain, Hon'ble Chief Justice of Bangladesh is delivering his erudite speech as Chief Guest at the Certificate Awarding Ceremony.

Mr. Anisul Huq MP, Hon'ble Minister for Law, Justice & Parliamentary Affairs at the Addressing Ceremony with Mr. Abu Saleh Sk. Md. Zahirul Haque, Hon'ble Secretary, Law and Justice Division, Ministry of Law, Justice & Parliamentary Affairs.

Mr. Justice Khondker Musa Khaled, Dirctor General of JATI is delivering his speech at the Certificate Awarding Ceremony.

Participants in a session at classroom with the Resource Person Professor Dr. Mizanur Rahman, Chariman, National Human Rights Commission, Bangladesh.

Mr. Abu Saleh Sk. Md. Zahirul Haque, Hon'ble Secretary, Law and Justice Division, Ministry of Law, Justice & Parliamentary Affairs is delivering his speech to the trainee Judges on a Study Tour Programme in the Ministry of Law, Justice & Parliamentary Affairs.

Visiting Programme in the CID Office, Dhaka.

Participants of the 123rd Refresher Course for the Special Judges/Equivalent Judicial Officers are seen With the Faculty Members of JATI.

JUDICIAL ADMINISTRATION TRAINING INSTITUTE

In order to keep pace with socio-economic development both in national and international spheres, the judiciary needs to be dynamic, sound and capable to meet the requirement of time. For achieving these objectives, imparting training to the judges and other connected with the administration of justice is considered necessary. Keeping this view in mind, the Parliament enacted the Judicial Administration Training Institute Act, 1995 (Act No. XV of 1995) to train the members of judicial service and certain other professionals connected with the judicial system. In pursuance of section 11 of the said Act, a person who is or has been or is qualified to be a Judge of the Supreme Court shall be the Director General who shall be the fulltime Chief Executive Officer of the Institute and responsible for the implementation of the decisions of the Management Board constituted under that Act and he shall discharge other functions of the Institute as per instruction of the aforesaid Management Board headed by the Hon'ble Chief Justice of Bangladesh. In March 1, 1997 the Institute was formally inaugurated by the Hon'ble Prime Minister of Bangladesh.