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Foreword

Pursuant to the legal requirement of the Judicial Administration Training Institute (JATI) Act,1995, JATI Journal has been regularly published every year since 2002. Like the previous ones, this Volume is an outcome of the knowledge and skill mostly of the judges and academics.

It is worth mentioning that the judges of various tiers, besides making regular contributions to the justice delivery system, have presented in this Volume their insights on diverse legal issues.

It contains a number of articles on Mediation, Refugee Law, Sexual Violence, International Commercial Arbitration, Anti-rape Legislation, the Gambia Case on Rohingya Repatriation, Privacy and Social Media, Paperless Courts, Environmental Rights, Competition Law and also on other matters. All these articles have been examined by the peer reviewers to ensure quality and avoidance of violations of copyright as far as possible.

I sincerely appreciate the painstaking efforts of the authors, reviewers, members of the Editorial Board, officials and staff of JATI, who have made this publication possible.

It is pertinent to note that in publishing the JATI Journal, we had to follow the prescribed standard and procedure that resulted in the exclusion of a number of otherwise well written articles. I hope the relevant authors will not misunderstand our limitations.

Legal professionals, scholars and other stakeholders are cordially invited to point out any shortcomings in this Volume, whether in terms of content, text, printing error or otherwise, so that we can avoid these in future Volumes.

Our efforts will be successful if this Volume inspires the stakeholders to understand the issues discussed in the articles and benefit therefrom.

29 June 2025
Dhaka

Justice Md. Emdadul Huq
Director General
Judicial Administration Training Institute

Editorial Note

It is with great honor and pride that I present *Volume XXIV (2025)* of the **JATI Journal**, the annual academic publication of the Judicial Administration Training Institute (JATI). This edition marks a significant milestone in the Journal's history, as it is the first to be published as a **peer-reviewed** journal. This transformation reflects a notable advancement in the Journal's academic credibility and institutional prestige.

Since its establishment in 2002, the *JATI Journal* has maintained an unbroken tradition of annual publication, underscoring JATI's steadfast commitment to promoting legal scholarship, critical inquiry, and intellectual engagement among members of the judiciary and broader academic community. For this landmark volume, thirty-six manuscripts were submitted for consideration. Following a rigorous process of blind peer review and meticulous editorial evaluation, eleven articles of distinguished scholarly merit have been selected for publication.

We are deeply grateful to the contributing authors whose insightful and thought-provoking research enriches this volume. The selected articles reflect a diverse range of pressing legal issues and emerging areas of judicial interest. Judge Md. Ziaur Rahman explores the complex intersection of **privacy rights and social media**, focusing on legal implications and available remedies. Judge Mohammad Faruque examines the **institutional framework of mediation in Bangladesh**, highlighting its role in access to justice, its alignment with SDG-16, and the practical challenges and opportunities for reform. Judge Dr. Ummey Sharaban Tahura presents an in-depth analysis of **paperless courts**, emphasizing digital case management, e-filing, virtual hearings, and AI-assisted judicial processes as transformative tools for judicial efficiency.

Judge Dr. Masrur Salekin and co-authors explore the **judiciary's evolving role in advancing environmental justice**, advocating for the recognition of the right to a healthy environment as a fundamental and judicially enforceable right in Bangladesh. Judge Md. Bulbul Hossain critically analyzes the **challenges surrounding international commercial arbitration** in Bangladesh, offering insights into existing gaps and proposing practical solutions.

In a shift toward legal theory, Professor Dr. Md. Milan Hossain underscores the need to reinforce **foundational norms and methodologies of legal research**, offering guidance for emerging scholars. Associate Professor Meher Nigar

proposes significant **reforms in rape laws**, including the criminalization of marital rape and the adoption of gender-responsive procedures in investigation and prosecution. Associate Professor A.B.M. Imdadul Haque Khan offers a compelling analysis of the **Rohingya crisis**, proposing an integrated framework combining repatriation and local integration strategies.

From the domain of competition law, Judge Shuvadeep Paul examines the **anti-cartel enforcement mechanisms** in Bangladesh, identifying institutional shortcomings and suggesting robust regulatory responses. Finally, Judge Rahul Dey addresses the **psychological trauma experienced by victims in the justice system**, calling for a victim-sensitive reform agenda to better support those navigating the legal process.

I extend my heartfelt appreciation to all contributing authors for their scholarly excellence and dedication. Their work not only adds depth to the academic discourse but also contributes meaningfully to the development of legal thought and practice in Bangladesh.

I also wish to express my sincere gratitude to the Research and Publication Wing, the Editorial Board, the peer reviewers, and the dedicated staff of JATI, whose collective efforts have been pivotal to the successful publication of this volume.

As we move forward, I warmly invite scholars, practitioners, and members of the judiciary to contribute original research to future editions of the *JATI Journal*. Through sustained scholarly engagement and collaboration, we hope to continue enhancing the quality, scope, and impact of this important publication.

Mohammad Faruque
Editor
JATI Journal, Volume XXIV (2025)
Director (Research and Publications)
Judicial Administration Training Institute

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Safeguarding Privacy on Social Media: Legal Rights and Remedies

Md. Ziaur Rahman*

Abstract

Since the early 21st century, rapid advances in information technology have reached even remote villages in Bangladesh, allowing citizens to share their thoughts, emotions, and experiences through social media. Various organizations have created social media pages and groups to share information about their services with the public. It has increased people's connectivity. Advances in information technology are making life easier; however, there is a threat to people's personal privacy due to the misuse of technology. The moment a privacy incident occurs on social media, it spreads widely. Determining the identity of a cybercriminal is a challenging task, as they often attempt to conceal their identity through misinformation and false personification. When privacy is violated, the victim has to undergo heavy mental disturbances, especially if the victim is a woman; society usually blames her. Although our Constitution recognizes the right to privacy as a fundamental right, we have no separate law to protect privacy. Some issues, such as state security and freedom of speech, might conflict with the protection of privacy. Most victims are unaware of where to find legal remedies or the procedures to follow in cases of social media privacy violations. The available literature on the issues is fragmented, and there is a gap in well-organized and precise literature. This article comprehensively addresses social media privacy breaches, providing the precise information people need to know about where and how to seek specific remedies. This paper analyzes relevant legal documents and judicial responses within the country's legal framework. The approach taken in this research is qualitative and is based on both primary and secondary data. The primary data consists of documents such as the Constitution of Bangladesh, the country's laws and policies, and a collection of landmark judgments related to the cyber laws of Bangladesh. Secondary data, on the other hand, includes literature such as books, journals, articles, newspaper publications, and online blogs that help to understand better the gaps identified concerning the matter in question.

Keywords: Cyber Laws, social media, Privacy, Legal Rights, Remedies.

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1. Introduction

Remarkable advancements in information and technology have brought unimaginable dimensions to human life at the dawn of this century. However, the widespread availability of technology has its downsides. Privacy is often exposed without consent, causing harassment and complications in people's lives, even though the law mandates that everyone is entitled to keep their private information confidential unless they choose to disclose it.

Privacy means the ability to control how, when, and to whom personal information is disclosed and to keep one's thoughts, beliefs, and actions private.[1] Simply, privacy is the desire to remain free from unauthorized interference.[2] Violations of privacy include illegal entry into someone's residence, searches, or unauthorized video recordings.

Personal data refers to an individual's information that can identify them, such as name, photo, address, date of birth, parents' names, signature, national ID number, passport number, fingerprints, bank account details, driving license, and other sensitive data made easily accessible by technological advancements.[3] Breaching the privacy of personal information can cause grave harm to individuals, making its protection essential for safety.

People can share information and ideas on social media, which are online communities or networks built on technology.[4] In 2019, the government of Bangladesh put out guidelines for how social media can be used in government institutions.[5] In those directives, it is defined that social media is a way for people with computers or other digital devices that can connect to the internet to share information like text, pictures, music, videos, and more.

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1 United Nations Office on Drugs and Crime (UNODC), SHERLOC, 'Privacy: What It Is and Why It Is Important' (2024) <https://sherloc.unodc.org/cld/zh/education/tertiary/cybercrime/module-10/key-issues/privacy-what-it-is-and-why-it-is-important.html> accessed 10 December 2024.

2 Gillian Black, *Publicity Rights and Image: Exploitation and Legal Control* (Hart Publishing 2011) 61–62.

3 'Personal Data Protection Act 2023 (Proposed)' s 2(c) <https://ictd.portal.gov.bd/sites/default/files/files/ictd.portal.gov.bd> accessed 1 November 2024.

4 Maya Dollarhide, 'social media: Definition, Importance, Top Websites and Apps' (Investopedia, 1 December 2024) <https://www.investopedia.com/terms/s/social-media.asp> accessed 1 December 2024.

5 Guidelines for the Use of Social Media in Government Institutions, 2019 (Revised Edition), s 2(a).

As of January 2025, 34.3% of people in Bangladesh use social media.[6] The most popular social networks in Bangladesh are Facebook, WhatsApp, IMO, TikTok, LinkedIn, Viber, and Instagram. As the digital world expands, cybercrime is also on the rise. According to a research report by the Cyber Crime Awareness Foundation (CCAF), 59% of cybercrime victims in Bangladesh are women, and 21.65% of cybercrimes occur on social media, with ID hacking being among the most common.[7]

2. Effects of Privacy Infringement

Digital technology is making people's lives easier, while also threatening personal privacy. Information technology is controlling people's lives in such a way that tech companies can access users' information, including their activities, personal preferences, likes, and dislikes.[8] Many internet users in Bangladesh lack awareness about safe online practices. This digital illiteracy leaves them vulnerable to cyber threats, including scams, identity theft, and harassment. The protection mechanism for people's personal information on social media is not effective enough. In our social context, if any personal privacy of netizens is being exposed to social media that goes viral, it exposes a large number of people at once. In the cyber world, once privacy is exposed, restoring the victim's dignity is difficult.[9] The victim of a privacy violation has to go through financial and psychological damage. In some cases, the victim is subjected to blame (victim blaming) from her family and society.[10] It undermines the crime, conceals the perpetrator, and provides an opportunity for another crime to occur. It is frequently observed that victims have taken their own lives due to social isolation.[11] The Bangladesh National Women Lawyers' Association (BNWLA) revealed 65 reported suicide attempts by female victims subjected to privacy-

6 Simon Kemp, 'Digital 2025: Bangladesh' <https://datareportal.com/reports/digital-2025-bangladesh> accessed 30 April 2025.

7 The Daily Star, 'Social Media Use in Bangladesh Grows by 22.3% in 2024; Facebook Leads' (25 October 2024) <https://www.thedailystar.net/tech-startup/news/social-media-use-bangladesh-grows-223-2024-facebook-leads-3735526> accessed 10 December 2024.

8 Swish Goswami, 'What Does Big Tech Actually Do With Your Data?' (*Forbes Technology Council*, 16 February 2022) <https://www.forbes.com/councils/forbestechcouncil/2022/02/16/what-does-big-tech-actually-do-with-your-data/>accessed 30 Arpil 2025.

9 Md Ziaur Rahman, 'What to Do If You Are a Cyber Victim?' *Lawyers Club Bangladesh* (31 August 2022) <https://lawyersclubbangladesh.com/old/2022/08/31/%E0%A6%B8%E0%A6%BE%E0%A6%87%E0%A6% AC%E0%A6%BE%E0%A6%B0> accessed 10 December 2024.

10 The Daily Star, 'Our System Goes Against the Victim' (29 September 2021) <https://www.thedailystar.net/news/bangladesh/crime-justice/news/our-system-goes-against-the-victim-2186211> accessed 10 December 2024.

11 'Young Woman Dies by Suicide After Objectionable Video Goes Viral' *The Daily Campus* <https://thedailycampus.com/crime-and-discipline> accessed 10 December 2024.

breaching on social media from 2010 to 2014.[12] Bangladesh does not yet have a specific law to protect personal privacy. Many victims are not aware of their rights. Many people are unaware of where or how to find legal remedies.[13] Many are also unmotivated to seek legal remedies due to the length and procedural complexity of the legal process. For that, the number of victims seeking legal remedies is low. According to the Cyber Crime Awareness Foundation (CCAF), only 12% of the victims of cyber offense resort to the law.[14]

3. Rights to Privacy

The right to privacy is linked to human values, dignity and development. It is about the right to life and personal liberty. The right to privacy is recognized in almost all legal frameworks in the world. Various international instruments have been adopted recognizing the right to privacy. It has been acknowledged as a right in the constitution and different general laws of Bangladesh.

3.1 International Instruments on the Protection of Privacy

There are eight international instruments that contain provisions for privacy protection. For better understanding, these instruments can be categorized into global, regional, and political cluster based on their applicability.

3.1.1 Global

The earliest international instrument to have recognized the right to personal privacy is the **Universal Declaration of Human Rights (1948)**, which, in Article 12, states that no one shall be subjected to arbitrary interference with their privacy, family, home, or correspondence, and that everyone has the right to legal protection against such interference or attacks.[15] In 1966, the **International Covenant on Civil and Political Rights (ICCPR)** was adopted by the United Nations. Article 17 of the covenant states that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home, or correspondence, nor

[12] Kudrat-E-Khuda (Babu), 'Cyber Security and Its Reality in Bangladesh: An Analysis of Existing Legal Frameworks' 11(5): 425-431(2020) International Journal on Emerging Technologies 427.

[13] 'Most Victims Still Not Reporting Cyber Crimes: Survey' (*The Daily Star*, 30 September 2019) <https://www.thedailystar.net/city/news/most-victims-still-not-reporting-cyber-crimes-survey-1807186> accessed 10 December 2024.

[14] 'Social Media Account Hacking Tops Cybercrimes in Bangladesh: Study' *Star Business Report* (29 June 2024) <https://images-bn.thedailystar.net/news/bangladesh/news-593696> accessed 10 December 2024.

[15] Universal Declaration of Human Rights 1948.

to unlawful attacks on their honor and reputation.[16] Everyone has the right to legal protection against such interference or attacks. Under this covenant, a Human Rights Committee comprising 18 members exists, and member states are required to submit regular reports on their human rights practices for review by the committee. Later, in 1989, the **Convention on the Rights of the Child (CRC)** was adopted by the United Nations to protect children's rights. Article 16 of the convention recognizes children's right to privacy. It prohibits any arbitrary or unlawful interference with their privacy, family, home, or correspondence, as well as any attacks on their honor and reputation.[17] It ensures that children are entitled to legal protection against such interference or attacks. States are legally bound to comply with the provisions of the CRC, and a Committee on the Rights of the Child monitors the implementation of these rights. To ensure compliance with the commitments outlined in international instruments, member states are required to submit regular reports to the relevant committees. In line with its obligations under the CRC, Bangladesh, as a ratifying country, introduced the Children's Act 2013.[18] The protection of migrant workers' rights is a significant concern in the international human rights issue. A migrant worker is an individual residing and working in a country of which they are not a citizen. On this concern, Article 14 of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the United Nations, expressly affirms their right to privacy.[19] Widening the scope of privacy rights to fragile groups, the United Nations adopted the Convention on the Rights of Persons with Disabilities (UNCRPD) in 2006. Article 22 of the Convention guarantees the right to privacy for persons with disabilities, including respect for their personal, family, and home life, as well as the confidentiality of communications, medical records, and rehabilitation information. To fulfill its obligations as a ratifying state of the Convention on the Rights of Persons with Disabilities, Bangladesh enacted the Rights and Protection of Persons with Disabilities Act in 2013.

3.1.2 Regional

The **European Convention on Human Rights (1950)** was adopted as a strong regional instrument. Article 8 of this convention explicitly recognizes the right to privacy, applicable only within Europe. It affirms that everyone has the right

16 International Covenant on Civil and Political Rights 1966.

17 Convention on the Rights of the Child 1989 art 16.

18 Children Act 2013.

19 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990.

to respect for their private and family life, home, and correspondence.[20] State authorities may not interfere with this right except within the bounds of the law for reasons such as national security, public safety, or economic, well-being, prevention of disorder or crime, protection of health or morals, and the protection of others' rights and freedoms. European countries are obligated to comply with this convention, and the supervisory powers of the European Court of Human Rights monitor compliance. A privacy law is also included as an essential right in the European Union's Charter of Fundamental Rights adopted in 2000. Article 7 of the charter states that every person has the right to respect for his or her private and family life, home and communications. Additionally, it emphasizes the need to protect privacy.[21]

3.1.3 Political

The Organization of Islamic Cooperation (OIC) is a political group consisting of Muslim-majority states around the world. In 1990, member states of the OIC adopted the Cairo Declaration on Human Rights in Islam, which affirms in Article 18 that every individual has the right to privacy in their home, family, property, and personal life.[22]

The following table shows eight international documents that guarantee personal privacy until January 2025.

Table 1: International Instruments on Protecting Privacy

Name of the Instrument and Year of Adoption	Areas of Privacy Covered	Article Number	Nature of the Instrument
Universal Declaration of Human Rights - 1948	Privacy, family, home, and correspondence	Article 12	International
European Convention on Human Rights - 1950	Private and family life, home, and correspondence	Article 8	Regional
International Covenant on Civil and Political Rights - 1966	Privacy, family, home, and correspondence	Article 17	International

[20] European Convention on Human Rights 1950.

[21] Charter of Fundamental Rights of the European Union 2000.

[22] Cairo Declaration on Human Rights in Islam 1990.

Name of the Instrument and Year of Adoption	Areas of Privacy Covered	Article Number	Nature of the Instrument
Convention on the Rights of the Child - 1989	Privacy, family, home, and correspondence	Article 16	International
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families - 1990	Privacy, family, correspondence, and dignity	Article 14	International
Cairo Declaration on Human Rights - 1990	Home, family, property, and private life	Article 18	OIC Member Muslim States
Charter of Fundamental Rights of the European Union - 2000	Life and family, residence, and communication	Article 7	Regional
Convention on the Rights of Persons with Disabilities - 2006	Privacy of personal, family, residential, and correspondence, as well as dignity	Article 22	International

3.2 Domestication of International Laws in the Courts of Bangladesh

The question now is whether those international instruments or the principles laid out in them can be applied in Bangladesh. The Constitution of the People's Republic of Bangladesh pledges that the State of Bangladesh will be respectful of international law and principles.[23] Article 7 of the Constitution states that any law that is inconsistent with the Constitution shall be void. So, it is clear that if international law conflicts with the constitution of Bangladesh, then the constitution will prevail. As the guardian of the Constitution, the Supreme Court of Bangladesh holds the power of judicial review. It provides a legal framework and interpretation of how domestic law and international law interact, or which will prevail in the event of a conflict. Domestication of international law has been raised and settled in several cases disposed of by the Supreme Court of Bangladesh. In the case of *Prof. Nurul Islam and Others vs. Bangladesh and Others*,

[23] Constitution of the People's Republic of Bangladesh 1972.

the court ruled that the interpretation of national laws must conform with the basic principles of international law.[24] In the case of *Hussain Mohammad Ershad v. Bangladesh*[25] The Appellate Division of the Supreme Court of Bangladesh laid down three principles: 1. If domestic law is clear and consistent with international law, domestic law shall prevail. 2. If domestic law is clear and inconsistent with international law, domestic law will be followed until domestic law is amended in accordance with international law. 3. If domestic law is vague and international law is clear, then international law can be followed. The Appellate Division reiteratively decided in *Anika Ali v. Rezwanul Islam*[26] The helpful parts of an international agreement can be utilized when needed, provided they don't conflict with domestic law. After signing and ratifying various international instruments, Bangladesh has amended or re-enacted several laws in compliance with its legal obligations as a party state.

3.3 Domestic Legislations on the Protection of Privacy

The state, in its supreme law, the constitution, specifies certain rights for the protection of citizens and non-citizens, and guarantees to enforce them, which are recognized as fundamental rights. On the contrary, the general law specifies the rights of citizens, which are considered legal rights. Usually, legal rights align with constitutional rights; however, as a common law country, Bangladesh, gives precedence to constitutional rights in the event of any conflict between the two.[27]

3.3.1 The Constitutional Rights to Privacy in Bangladesh

In a welfare state, the constitution reflects the sovereign will of the people. The Constitution of the People's Republic of Bangladesh, the supreme law of the Republic, came into force on December 16, 1972. Article 43 of the Constitution recognizes the right to privacy as a fundamental right.[28] It is guaranteed that every citizen shall have the right to privacy of correspondence and other means of communication. The Constitution protects privacy not just in written communication but also through all means of communication. When it was written in 1972, there were no modern technologies such as we have today. Nevertheless, the framers employed the term "other means" of communication, indicating that they were looking ahead. This aligns with the

[24] [2000] 52 DLR (HCD) 413.

[25] [2001] 21 BLD (AD) 69.

[26] [2012] 17 MLR (AD) 49.

[27] Constitution of the People's Republic of Bangladesh, Art 26.

[28] ibid, Art 43(b).

originalist interpretation of the Constitution, which focuses on understanding the framers' intentions when drafting the Document. They obviously were interested in guarding privacy as means of communication evolved. Part II of the Constitution talks about 18 fundamental rights. If these rights are violated, the High Court Division of the Supreme Court of Bangladesh can apply its writ jurisdiction under Article 102 to make things right. According to the Constitution, the state cannot make any law against the fundamental rights. Any inconsistent law that violates any of these 18 fundamental rights will be void.[29]

3.3.2 The Statutory Rights to Privacy in Bangladesh

People now frequently use various online services, requiring them to provide personal information such as names, addresses, ages, national identity (NID) numbers, passport numbers, and bank account details while creating accounts. Numerous incidents of personal data breaches have already made headlines.[30] Criminal groups can exploit misused personal information to commit fraud, forgery and various digital crimes. Therefore, ensuring the privacy and security of personal data is essential. However, Bangladesh has not enacted specific legislation to prevent incidents that violate personal privacy. Although there have been discussions about drafting a Data Protection Act, it has yet to be realized. Nonetheless, if crimes violating privacy are committed using digital technology, existing laws impose penalties. A prominent example of privacy violation in Bangladesh is the publication of 'romance scandals, 'which involve secret or controversial romantic relationships causing public outrage. These acts fall under the category of pornography. In such cases, photos or videos of intimate moments between individuals are secretly captured and shared on social media. Most victims in these situations are women, as Bangladeshi society tends to blame women rather than men in cases of sexual offenses. Actions that tarnish someone's social or personal reputation, extort money or favors through intimidation, or cause mental distress are punishable under the Pornography Control Act with up to five years of rigorous imprisonment and a fine of up to 200,000 BDT.[31] On social media, anyone can easily create an account under any name. Often, fake IDs are created by misusing others' names, identities, or photos to commit fraud while concealing the criminal's identity. Using someone else's personal photos, name, or identity to create a fake ID is a crime under

[29] ibid, Art 26.

[30] Mahmudul Hasan, 'Govt Data Leaked Again' Prothom Alo (8 December 2024) <https://en.prothomalo.com/bangladesh/v4bcjdzepl> accessed 25 February 2025.

[31] Pornography Control Act 2012, s 8(1).

the Cyber Security Act, 2023, punishable by up to five years of imprisonment, a fine of up to 500,000 BDT, or both.[32] If false or offensive information is published or spread digitally to harass, insult, or defame someone, it is a crime under the Cyber Security Act, 2023, punishable by up to two years of imprisonment, a fine of up to 300,000 BDT, or both.[33] Collecting, selling, transferring, or using someone's identifiable information without legal authority is a crime under the Cyber Security Act, 2023, punishable by up to two years of imprisonment, a fine of up to 500,000 BDT, or both.[34] Publishing or disseminating defamatory information electronically falls under Section 29 of the Cyber Security Act, 2023, which can lead to fines of up to 2.5 million BDT for the offender.[35] Section 63 of the Information and Communication Technology Act, 2006, states that it is an offence to disclose any material, including communications, to another person without permission, and the person guilty of this offence shall be punished with imprisonment for a term that may extend to two years or with a fine that may extend to two lakh taka or with both.[36] The table below outlines the relevant laws, associated offenses, and corresponding penalties for breaches of personal privacy.

Table 2: Provisions for Punishment under Domestic Law Regarding Violation of Personal Privacy via digital platforms

Offense	Law and Section	Punishment
Tarnishing someone's social or personal reputation, extortion, gaining benefits, or causing mental distress through pornography	Pornography Control Act, 2012, Section 8(1)	Up to 5 years of rigorous imprisonment and a fine of up to 200,000 BDT
Using another person's name, identity, or photo to commit fraud by concealing one's identity	Cyber Security Act, 2023, Section 24	Up to 5 years imprisonment, a fine of up to 500,000 BDT, or both

32 Cyber Security Act 2023, s 24.

33 ibid, s 25.

34 ibid, s 26.

35 ibid, s 29.

36 Information and Technology Act 2006, s 63.

Offense	Law and Section	Punishment
Publishing or spreading false or offensive information on digital platforms to harass, insult, or humiliate someone	Cyber Security Act, 2023, Section 25	Up to 2 years imprisonment, a fine of up to 300,000 BDT, or both
Collecting, selling, transferring, or using someone's identifiable information without legal authority	Cyber Security Act, 2023, Section 26	Up to 2 years imprisonment, a fine of up to 500,000 BDT, or both
Publishing or disseminating defamatory information electronically	Cyber Security Act, 2023, Section 29	A fine of up to 2.5 million BDT
Publishing the secrecy of documents to others without consent	Information and Technology Act 2006, Section 63	Up to 2 years imprisonment, a fine of up to 200,000 BDT, or both

4. Intersections of Privacy with Competing Rights and State Interests

Although privacy is a fundamental right, it is not unfettered. Just as one person is entitled to personal privacy, another person is entitled to access information. Freedom of speech can also sometimes conflict with the privacy of others. In the same way, privacy can be related to the discipline and security of the state. One transcends the other. Therefore, it's crucial to understand the boundaries of confidentiality and when to exceed them.

4.1 Right to Privacy and Right to Freedom of Expression

The right to privacy and the right to expression are both guaranteed in the constitution as fundamental rights, but neither of the rights is unlimited. As per the constitution, restrictions can be imposed on the right to freedom of speech and expression to ensure state security, keep diplomatic relations, maintain public order, maintain decency and morality, stay away from contempt of court, incitement, or committing an offence.[37] Defaming someone can be an offence under the penal code, and if such abuse occurs on social media in cyberspace, it can also be an offence under Section 25/29 of the Cyber Security Act-2023. There

[37] Constitution of the People's Republic of Bangladesh, art 39(2)

is intense criticism that section 25/29 of the Cyber Security Act has imposed a serious embargo on the exercise of freedom of speech and expression in Bangladesh.[38] Following the political changeover on August 5, 2024, the interim government initiated a review of the contentious aspects of the Cyber Security Act 2023 and is currently developing the Cyber Security Ordinance 2025. This new ordinance intends to expunge nine sections from the previous act that banned criticism, falsehoods, and slander against the Liberation War and its spirit, Bangabandhu Sheikh Mujibur Rahman, as well as the national anthem and the flag.[39]

4.2 Right to Privacy and Access to Information

The right to information and the right to privacy are both important human rights. Although they might seem to conflict at times, both are essential in a democracy and help keep the government accountable. To protect the privacy, several laws, including the Women and Children Repression Prevention Act[40] and the Children's Act [41], prohibit revealing the identity of victims. Section 7 of the Right to Information Act limits the disclosure of any information that may be prejudicial to the privacy and security of persons and life. Newspapers often try to provide detailed information to their readers, and in doing so, they sometimes cross legal boundaries- for example, by publishing the identities of victims of sexual offenses. Further, the state uses the information of various accounts to formulate specific plans for the citizens. During the census, various information and data on the wealth, income, expenditure, food habits, and lifestyle of each household are collected. They are kept in the statistics office. Any A person authorized by law to obtain statistical information shall have access to the residence of any person. It shall be an offence to disclose such information without the consent of the person.[42]

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38 Ahamed Ullah, Ahmed Swapan Mahmud and Khairuzzaman Kamal, 'Cyber Security Act Will Not Stop Criminalising Freedom of Expression' *The Daily Star* (13 August 2023) <https://www.thedailystar.net/opinion/views/news/cyber-security-act-will-not-stop-criminalising-freedom-expression-3393326> accessed 25 February 2025.

39 'Cybersecurity Law: 9 Contentious Sections Shed' *The Daily Star* (7 May 2025) <https://www.thedailystar.net/news/bangladesh/news/cybersecurity-law-9-contentious-sections-shed-3888196> accessed 30 April 2025.

40 Women and Children Repression Prevention Act 2000. s 14.

41 Children Act 2013, s 28.

42 Statistics Act 2013, s 12, 13.

4.3 Right to Privacy and Legal Interception

This right to privacy is not absolute. The state can impose reasonable restrictions if necessary. Article 43 mentions four factors for imposing restrictions, namely, 1. security of the state, 2. public order, 3. public morality, and 4. public health. These are the boundaries for what legal mandates of restrictions might be applied in a reasonable case. No unreasonable restriction can be imposed.[43] For the sake of state security or maintaining law and order, the government may limit citizens' right to privacy and members of government agencies are safeguarded from prosecution.[44] However, there should be a clear standard to determine whether such government actions are reasonable. Eavesdropping, which is secretly listening to a conversation without the consent of the parties, is a punishable offense that is punishable with up to two years imprisonment and a fine of up to five crore taka.[45] To defame others for personal or political gain, the leaking of mobile call records on social media is not a rare incident in Bangladesh. Though it is the responsibility of the Bangladesh Telecommunication Regulatory Commission (BTRC) to protect the privacy of telecommunications in our country,[46] There have been no reported prosecutions under BTRC regulations related to telecom data leaks, raising concerns about gaps in enforcement.

4.4 Leading Judgments on Privacy Rights in Bangladesh

Aynunnahar Siddiqua and Others vs. Government of Bangladesh and Others is a famous case in Bangladesh, where the fact revealed that police were seeking dwellers' information from landlords. That was challenged, arguing that gathering such information was against freedom, privacy, democracy, and fundamental rights. On the contrary, the state claimed that the privacy was not undermined; police were taking information for the safety of the people in the public interest. The High Court ruled that the responsibility of the police is to ensure the safety of the citizens so that the citizens can live without any kind of fear and insecurity. Collected information should be protected, and police should not restrict citizens' privacy or movement.[47] In *the State and Others. vs. Oli and Others*. Case, phone call records were produced in the trial court. During the hearing in the High Court, it was claimed that the call records did not have a

[43] Mahmudul Islam, *Constitutional Law of Bangladesh* (Third edn, Mullick Brothers 2023) 383.

[44] Bangladesh Telecommunication Act 2001, s 97A, proviso to s71.

[45] ibid s 71.

[46] ibid s 30(f).

[47] *Aynunnahar Siddiqua and Others vs Government of Bangladesh and Others*, 37 BLD 181.

signature from the proper authority; moreover, that violated the privacy of the citizens. In that case, the high court did not accept the call records as evidence.[48] In the case of *Bangladesh v H. M Ershad*, the Apex court of Bangladesh verdict that police officials or public functionaries cannot enter into the house of any citizen and conduct any search or seize anything unless they are duly authorized under any law. If the law does not provide a way to check the arbitrary or illegal exercise of the power of search and seizure, it will be found invalid.[49]

5. Legal Remedies When Personal Privacy Is Violated

If a person falls victim to a privacy violation on social media, a cyber tribunal is the proper forum to get legal remedies under the Cyber Security Act, 2023. That Act is a special law designed to address offenses of a special nature and will take precedence over other laws in case of any conflict.[50] If the offense is pornographic, he or she will take legal recourse under the Pornography Control Act, 2012. Publishing nude photos on social media may fall under concurrent jurisdiction, being covered by Sections 25 and 29 of the Cyber Security Act, 2023, as well as Section 8 of the Pornography Control Act, 2012.

5.1 Filing of Cyber Case

The complainant may approach the local police station or file a complaint directly with the Cyber Tribunal, depending on the ionizability of the offense. In case of a complaint, the tribunal directs the police to investigate, as there is no provision to assign the investigation of a cyber offense to anyone other than the police.[51] As per Section 155 of the Criminal Procedure Code, no magistrate can grant permission if it does not have the jurisdiction to try the offense. Therefore, a magistrate cannot order an inquiry into an alleged cyber offense.[52] However, if such an order is made in good faith, it will not vitiate the proceedings.[53]

48 *The State and Others vs Oli and Others.* LEX/BDHC/0128/2019.

49 *Bangladesh v H M Ershad* 52 DLR (AD) 162.

50 Cyber Security Act 2023, s 48.

51 Cyber Security Act 2023, s 47.

52 Code of Criminal Procedure 1898 s 155(2).

53 ibid s 529(b).

5.2 Investigation of Cyber Offense

The Investigating Officer (IO) investigates, collects evidence, and submits a report to the cyber tribunal. IO must be a police officer of inspector rank or senior.[54] The investigation officer may seek expert assistance from anyone, and the person is bound to help the IO.[55] The court or government may form a joint investigation team comprising different units of law enforcement agencies.[56] Cyber offenses are of a special nature, and to deal with them, the government has promulgated the Cyber Offense (Investigation and Trial) Rule, 2022. Sometimes, privacy breaches on social media may fall under two separate offenses; one under the pornography act and another under the Cyber Act. The case docket will then be split into two parts: the pornography-related Case Docket (CD) must be sent to the magistrate to be tried in a magistrate's court under the Pornography Control Act, 2012, and the cybercrime related CD must be sent to the cyber tribunal. This approach makes the process lengthy and complicated. Victims and accused individuals have to appear in two separate courts, which is costly, time-consuming, and results in duplication. Trying both offenses in the Cyber Tribunal could improve procedural efficiency and lessen the burden on parties.

5.3 Trial of Cases in Cyber Tribunal

There is a total of 8 Cyber Tribunals in Bangladesh, one in each division. A Cyber Tribunal functions as a session court, with the District and Sessions Judge or Additional District and Sessions Judge serving as its judge.[57] There is a time limit of 180 days from the charge hearing to conduct a trial without deferred dates.[58] The court may seek expert assistance from anyone, and the person is legally bound to help the court. During the trial, the court can resort to an opinion from IT experts.[59] The public prosecutor will conduct every case on behalf of the state. As of December 2024, a total of 5936 cyber cases are pending in different cyber tribunals in Bangladesh.[60]

54 Cyber Security Act 2023, s 2(m), s 38.

55 ibid s 45.

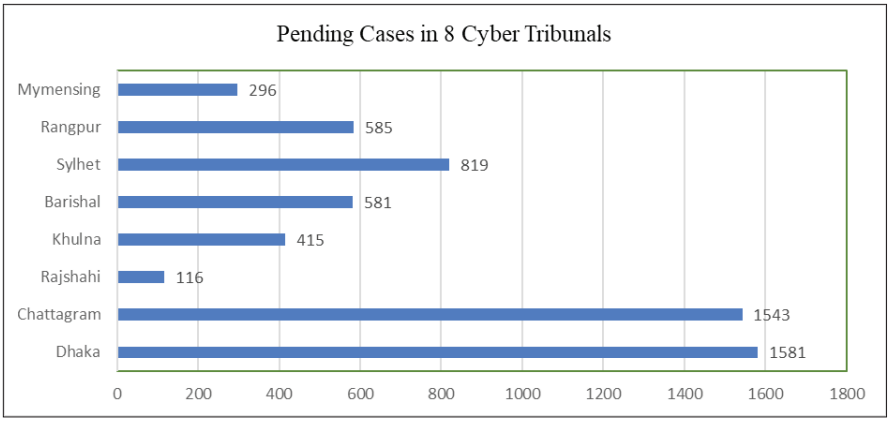
56 ibid s 38(2).

57 Information and Technology Act s 68, 69, 70.

58 Cyber Security Act 2023.

59 ibid s 50.

60 Data Collected from Supreme Court of Bangladesh.



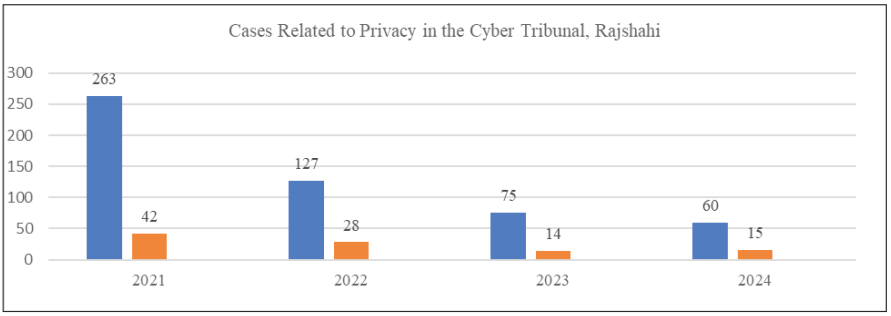
Source: Periodical Statistics 2024, Supreme Court of Bangladesh.

5.4 Punishment of the Offender

Considering the nature, extent, and impact of the offense, the judge awards punishment at their discretion. The judge has the authority to impose a sentence, a fine, or both within the limit prescribed in the section of law. Alternatively, if deemed appropriate, the judge might offer the offender an opportunity for rehabilitation by granting probation under certain conditions for a specified period.[61] Whether the punishment is physical or financial, the law also has scope to provide adequate compensation for the victim of the offense under sections 22, 23, and 24 of the Cyber Security Act.[62] The table below shows the statistics of cases related to privacy violations on social media in the Cyber Tribunal, Rajshahi.

[61] The Probation of Offenders Ordinance 1960, s 5.

[62] The Cyber Security Act 2023, s 37; Probation of Offenders Ordinance 1960, s 6; Code of Criminal Procedure, s 545.



Source: Office of the Cyber Tribunal, Rajshahi.

Upon reviewing the privacy violation cases, it was found that in most of the cases, the victim's personal photos, name, and address were published and disseminated on social media without permission, with the intent to damage their social reputation. Between 2021 and 2024, a total of 99 cases related to privacy violations were adjudicated, of which 32 resulted in the conviction of the accused, and 59 cases resulted in the acquittal; the remaining 8 cases were disposed of on probation. The number of acquittals was nearly double the number of convictions. Since the establishment of the Cyber Tribunal, Rajshahi, in 2021, the number of pending cases related to privacy violations on social media has steadily decreased.

5.5 Appeal Procedure

If any party is aggrieved by any order or judgment of the Cyber Tribunal, there is an opportunity to appeal to the Cyber Appeal Tribunal. The Cyber Appeal Tribunal will consist of three members: a High Court judge, a district and sessions judge and a cyber expert. The Cyber Appeal Tribunal can uphold, set aside, correct, or modify the verdict of the Cyber Tribunal. The verdict of the Cyber Appeal Tribunal will be final.[63] A Cyber Appeal Tribunal has not yet been set up in Bangladesh. Until the formation of the Appeal Tribunal, there was an opportunity to appeal to the High Court against any order or verdict of the Cyber Tribunal.[64]

[63] Information and Technology Act 2006, s 82.

[64] ibid s 84.

6. Challenges and Recommendations to deal with cyber offenses

Since cyber offenses occur on digital platforms, presenting unique challenges in investigation and trial, several key recommendations are outlined below to enhance the effectiveness of cybercrime investigations and prosecutions.

6.1 Challenges

With the advancement of technology, cybercrimes are also increasing. Cybercrime can occur from anywhere in the world. It is always a challenge to bring the criminal to justice, as it is a transnational crime. Justice actors, including Investigation Officers and Public Prosecutors, often lack the necessary training and skills to effectively identify cybercrimes, apprehend offenders, and support the court in prosecuting these cases; in some instances, judges also face similar limitations. Cyber Tribunals are not adequately equipped with essential modern facilities such as audio-visual systems, monitors, and computers to effectively handle technology-related offenses. The conviction rate in cyber cases is very low. Witnesses are often reluctant to appear in court and testify properly, especially when they have to travel from distant districts. They are required to come to the divisional town, incurring their travel and lodging expenses. Serving process to other districts is also time-consuming. Additionally, they might fear disclosing the truth, be intimidated to become a foe to the influential parties. It is taking an unduly long period to dispose of a cyber case. As of December 2024, a total of 5,936 cyber cases were pending in eight cyber tribunals across the country, including 262 cases that have been pending for more than five years. There have been allegations of misuse of the cyber law, and repeated repeals or amendments have also hindered the smooth progress of the judicial process.

6.2 Recommendations

Raising awareness among the netizens about how to keep their privacy is needed to prevent privacy crimes frequently. The digital literacy rate is low in Bangladesh, which needs to be accelerated. Updated features of technological advancement should be ensured in every government and non-government institution. Sufficient logistics and training are needed for the police and investigators to find out about cybercrime, identify criminals and bring them to justice. International standards must be met in the collection, examination, and presentation of digital evidence in court. Up-to-date cyber knowledge and skills should also be provided for the prosecutors and judges through intensive training at home and abroad to ensure justice. The government should

strengthen mutual cooperation with international institutions and developed countries to gain up-to-date knowledge and skills on cybercrime. Every cyber tribunal should be equipped with modern technology, including audiovisual systems, sound equipment, and monitors, to facilitate evidence recording and support a transparent trial process. For a speedy and transparent trial, digital connectivity between the Cyber Tribunal, the Digital Forensic Lab, and jails is crucial. Cybercrime is increasing rapidly. To ensure access to justice, a cyber tribunal should be established in every district. This would save time and money for litigants who would otherwise need to travel to divisional cities. It would also make it easier for witnesses in cybercrime cases to appear in court and provide testimony, thereby supporting proper justice. Currently, pornography offences are tried in the magistrates' court, but they should be tried by the Cyber Tribunal, which would help the parties avoid appearing in two separate forums. Additionally, a witness protection law should be enacted to safeguard witnesses from pressure or threats by influential parties. Witnesses should be provided with financial support for attending court. Cyber law is complex and multifaceted; the law needs to be modern, easy, straightforward, and specific, ensuring freedom of expression.

7. Conclusion

In today's digital age, where most interactions happen online, breaches of privacy on social media have become increasingly common and severe. Although legal protections exist, challenges in technology, enforcement, and coordination often limit their effectiveness. To build a safer digital environment, laws must be strengthened with prompt enforcement, public awareness on privacy must be raised, and cooperation among all stakeholders should be improved. At the same time, a careful balance between the right to privacy and freedom of expression must be maintained. As technology continues to evolve, we must adapt- using its benefits wisely while addressing its risks. The focus should be on ensuring a fair and efficient justice system, which is key to protecting privacy and upholding digital rights.

Mediation for Access to Justice and SDG-16: A Bangladesh Perspective

Mohammad Faruque*

Abstract

Mediation, a popular form of alternative dispute resolution (ADR), is a voluntary, cost and time-efficient process of negotiation between the disputing parties assisted by neutral, independent, and third parties. The independent mediator assists the parties in focusing on the real issues in conflict and exploring the best possible options to resolve their dispute and achieve justice. Access to justice, a basic human right, ensures the rule of law, good governance, and democracy. It helps people to achieve their fundamental rights and participate in governance and raise their voice against injustice. 16 Sustainable Development Goals (SDGs) were adopted to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable, and inclusive institutions at all levels. This paper aims to explore the legal regime and institutional mechanisms of mediation as an instrument to resolve disputes, its challenges and prospect, and potential linkage among mediation, access to justice and SDG 16 in Bangladesh. It is evident that mediation has a crucial role in access to justice, an important indicator of SDG 16 that helps to achieve SDGs.

Keywords: Mediation, Alternative Dispute Resolution (ADR), Access to justice, Sustainable Development Goals (SDGs).

Introduction

Different types of ADR are practiced under diversified legislations in Bangladesh. Based on the actors involved, ADR may be categorized under three major heads such as Court-annexed ADR i.e., ADR by civil courts, Statutory ADR conducted by various statutory bodies of the government and informal or non-statutory ADR conducted by non-government organizations (NGOs), private institutions and individuals. Mediation is one of the most popular methods of alternative dispute resolution. It is a tool for resolving conflicts which is local, consensual, informal, cost-effective, informal, voluntary, and participatory. The unique characteristic

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of mediation is that each party has the opportunity to voice their own views but that is private and confidential. It is a peaceful dispute resolution mechanism which is complementary to the existing traditional court system. Parties of the disputes have the power to participate actively and to decide outcomes and criteria for them. Despite of challenges and limitations, mediation is going to be popular day by day and creating the avenue for getting justice for the marginal, underprivileged, and mass people of Bangladesh. Different institutions such as legal aid officers, village courts, formal courts, non-government organizations, and statutory bodies are providing mediation services to the people in Bangladesh under diverse laws and regulations to resolve disputes and create the way for access to justice. Although various statutes use different and distinct terms regarding resolving disputes such as settlement conference, conciliation, mediation, basic notions of mediation are followed in resolving disputes.

Laws relating to Mediation in Bangladesh

The legal regime of mediation is governed by different institutions under different legislations in Bangladesh.

Institutions	**Relevant Laws**	**Sections**	**Method of Dispute Resolution**	**Nature of Mediation**
Money Loan Courts	Money Loan Courts Act, 2003	22-25, 38, 44A, 45	Mediation	Court based Mediation
Civil Courts	The Code of Civil Procedure,1908	89A[1] 89B, 89C, 89D & 89E	Mediation	Court based mediation
Family Court	The Family Courts Act, 2023	11, 14	Mediation	Court based mediation
Local Government Institutions	The Conciliation of Disputes (Municipal Area) Board Act, 2004	3, 4 & Schedule	Mediation conciliation	Local Government based mediation
Local Government Institutions	Village Court Act, 2006	4, 5 & Schedule	Mediation/ Arbitration	Quasi formal statutory mediation

[1] The Code of Civil Procedure (Amendment) Act 2003, s 3.

National Board of Revenue	Income Tax Ordinance, 1984	152F-152S	Mediation/ Facilitation	Statutory institutional mediation
National Board of Revenue	The Value Added Tax Act, 1991	41A-41K	Mediation/ Facilitation	Statutory institutional mediation
National Board of Revenue	The Customs Act, 1969	192A-192K	Mediation/ Facilitation	Statutory institutional mediation
National Legal Aid Services Organization	Legal Aid Rules, 2015	4-17	Mediation	Statutory institutional mediation
Conciliator	Bangladesh Labor Act, 2016	210	Conciliation/ Arbitration	Statutory institutional mediation
Conciliator/ Mediator	EPZ Trade Welfare Society and Labor Industrial Relation Act, 2019	126,128-130	Conciliation/ Arbitration	Statutory institutional mediation
Mediator/ Conciliator	Bankruptcy Act, 1997	43,44	Conciliation/ Mediation	Court Annex Mediation
	Dowry Prohibition Act, 2018	7		Court

I. Court-annexed or Court-based Mediation

Mediation which is referred by the court to the mediator for resolution of pending cases of the court is called court-based or court-annexed or court-connected mediation. It is a method of alternative dispute resolution developed in Bangladesh through various legislations from time to time due to strategic position of the court and huge backlog of cases. It is an institutionalized form of mediation under the concept of ADR where certain cases filed before the court for litigation, are referred to mediation for resolution. When mediation is connected to court cases or lawsuits, it is popularly termed court-based or court-annexed or court-referred or court-connected mediation. Court-annexed mediation occurs when the cases are pending in court. In this circumstance, the parties to the suit

may request the court to refer the suit, or the court may refer the cases to the mediator in its own motion and both the parties meet with a mediator under the direction of the court. The court monitors the referred cases and provides logistic support as well as in selection of neutral or mediator. The judge himself or third party as a mediator helps the litigants to reach an amicable agreement with the active participation of the engaged counsels of the litigants. If the mediation is successful, the case is dismissed which saves time and expenses of litigation. A settlement arising out of court-connected mediation at a pre-litigation stage is binding and enforceable between the parties as a court order.

Court-annexed mediation in Family Suits

The provision of court-annexed mediation was introduced in family suits at pre-trial and post-trial stages through Family Courts Ordinance,1985 in Bangladesh. Section 11 of this Act provides provisions for compromise or reconciliation between the parties at the pre-trial stage of the suit. On the date fixed for the pre-trial hearing, the Court shall examine the plaint, the written statement and documents filed by the parties and shall also, if it so deems fit, hear the parties. At the pre-trial hearing, the Court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties, if this is possible. Subsequently, the Family Court Ordinance,1985 was repealed and enacted new law as Family Court Act,2023[2]. New law has adopted the provision of earlier ordinance. Section 14 deals with post-trial mediation. After the close of evidence of all parties, the Family Court shall make another effort to effect a compromise or reconciliation between the parties.

A pilot project was taken in Family Courts of selected districts in 2000 and on the grand success of the project, court-based mediation was introduced to all family courts[3] and subsequently, provisions for mediation were inserted into the Code of Civil Procedure,1908, Money Loan Courts and Labor Courts. These courts are empowered to follow mediation procedures at the pre-trial and post-trial stage of the suits. After filing the written statement by the defendant, the court shall fix a date for mediation at the pre-trial stage within 30 days. At this pre-trial stage, the court determines the issues between the parties and helps the parties to reach a settlement. The family court has the authority to take steps to achieve a compromise between the parties even after closing the evidence and before pronouncing the final judgment.

[2] Family Court Act,2023 (Act No 26 of 2023)

[3] Justice Mustafa Kamal, *Judicial Settlement and Mediation in Bangladesh* https://www.hrpb.org.bd/public/images/article/justice-mustafa-kamal.pdf accessed 23 June 2024.

Court-annexed Mediation in Civil Suits

Mediation in all kinds of civil suits of the courts i.e., court-based mediation was first introduced by inserting sections 89A and 89B into the Code of Civil Procedure,1908.[4] In the beginning, it was the discretionary power of the court to avail the mediation process to resolve civil disputes. It was informal, confidential, non-binding, non-adversarial, and consensual. The Code was amended again in 2006 and inserted the provisions of mediation at the appellate stage of the suits.[5] Considering the challenges of court-based mediation in civil suits, the government amended the Code of Civil Procedure in 2012 and made the mediation process mandatory.[6] In 2006 the legislatures inserted the provisions of mediation at the appellate stage of the suit through an amendment of the Code of Civil Procedure based on the principle that an appeal is the continuation of the original suit.[7] Mandatory Pre-trial Mediation: Section 89A now obligates courts to refer civil disputes for mediation after written statements are filed, unless urgent judicial intervention is necessary. Defined Timelines: Mediation must conclude within 60 days of the date of referral, extendable by another 30 days. Court-annexed Mediation Panels: Courts must maintain a panel of trained mediators to ensure neutrality and professionalism. Settlement Enforceability: Mediated settlements have the same legal standing as a court decree. These provisions aim to reduce delays, lower litigation costs, and promote participatory justice. The amendment aligns Bangladesh's legal system with international standards such as the UNCITRAL Model Law (2018) and practices in India and Singapore.

Mediation under the Money Loan Courts Act 2003

The provisions of mediation both at trial and appellate stage of the suits were incorporated into Artha Rin Adalat Ain (Money Loan Court Act) 2003, a special law for the quick recovery of credits provided by commercial banks and financial institutions. After submission of the written statement, i.e. at the pre-trial stage of the suit, the money loan court shall send the suit for mediation to the appointed lawyers or parties, where lawyers are not appointed.[8] This court can use mediation process to resolve

[4] The Code of Civil Procedure (Amendment) Act 2003.

[5] The Code of Civil Procedure (Amendment) Act 2006, s 89C.

[6] The Code of Civil Procedure (Amendment) Act,2016, s 3(a)

[7] ibid s. 89c (1) (2)

[8] Money Loan Court Act,2003, s 22(1)

disputes not only at the revisional stage[9] but also at the executing stage[10] of the suits.

Mediation under Village Court

The Village Courts Act, 2006 of Bangladesh mentions the phrase "Village Court," however, no judge adjudicates cases under this Act. Petty civil cases for up to 75,000[11] Taka and certain types of crimes listed in the Act's schedule fall within the exclusive jurisdiction of the village court.

It lacks the authority to impose prison sentences. The village court is required to hear arguments from both sides and to take action to mediate a resolution. If the mediation is successful, the parties' terms and conditions will be included in an agreement that must be signed by both parties and their designated representative.

Village Courts Performance[12]
(July 2017- May 2021)

Dispute received	2,35,891
Application directly filed at Union Parishad	2,24,277
Cases transferred from District Courts	11,614
Pending dispute before implementation of project (30 June 2017)	2,340
Application filed by Women	69,727
Women in decision-making process	51,562
Money recovered as compensation	BDT 191.25 crore (US $ 22.63 million)

9 Ibid, s 44(ka)

10 Ibid, s 38

11 Village Court (Amendment) Act, 2013

12 Activating Village Courts in Bangladesh Phase II Project Local Government Division available at https://www.villagecourts.org/case-statistics/ accessed on 23 February, 2023

Mediation under Arbitration Act, 2001

Although the Arbitration Act,2001 provides rules and procedures to resolve disputes through arbitration, the legislator has kept scope for mediation under this act. Settlement options other than arbitration which include mediation, conciliation, or any other procedures at any time during the arbitral proceedings to encourage settlement of the disputes with the consent of the parties are allowed[13]. If the parties settle the disputes amicably and notify the tribunal, the arbitration tribunal shall pass a consent award. An arbitral award on agreed terms shall have the same status and effect as any other arbitral award made in respect of the dispute.

Mediation by Statutory Bodies

Some statutory bodies such as Income Tax Authority, Customs Authority etc. are empowered to resolve disputes speedily through mediation under different laws in Bangladesh. Deputy Commissioner of Taxes has the authority to settle disputes relating to income taxes under section 152F to 152S of the Income Tax Ordinance,1984. According to section 152N, the facilitator or median inquiry serve notice upon the parties, adjourns the proceedings when so required, call records or evidence, and make such inquiry as she/he may deem fit and necessary. Income Tax Ordinance, 1984 was repealed and a new act was enacted titled as Income Tax Act, 2023 where provisions relating to alternative dispute resolution were inserted (section 296-307). The Finance Act, 2011 incorporated similar provisions for mediation into the Value Added Tax Act, 1991 and Customs Act, 1969 for the speedy recovery of unpaid or disputed taxes and customs dues.

Mediation by Municipal (Local Government) Board

The Conciliation of Disputes (Municipal Area) Board Act,2004 provides settlement of some types of petty disputes within municipal area or city area. The Act empowers the Board to settle both petty civil and criminal matters as mentioned in the schedule of the act through conciliation.

Mediation under the Labor Laws

The provision of mediation is incorporated for the peaceful settlement of labor disputes of industries in the Bangladesh Labor Act, 2006. In this act, the term 'conciliation' is used for settlement of disputes. In case of industrial disputes between the workers and the employers, the employer or the Collective

[13] Arbitration Act, 2001, S.22

Bargaining Agent shall inform his/her or its opinion in writing to the other party.[14] The government shall take steps to appoint conciliator or mediator to settle the industrial disputes and shall determine the local jurisdiction and function of the conciliator.[15]

Statistics of Settlement of Disputes under section 210 of Bangladesh Labor Act, 2006[16]:

Number of Disputes Year 2019-20	Total settlement of disputes	Under process	Remarks
41	25	8	Number of Record closed 7 Issued certificate for failure 1

Mediation by Non-Government Organizations (NGOs)

NGOs are using community mediation, an improved version of the traditional shalish or mediation conducted by village elites, to resolve family disputes, land issues, and other local disputes. The entire process of mediation is moderated and facilitated by staff of NGOs. NGOs in Bangladesh are working at grassroots legal reform to target and empower the vulnerable and underprivileged sections of the population with a view to providing at least a reasonable solution to dispute where none was available previously. NGOs have grown dramatically in a few countries of the world as much as in Bangladesh and currently 26,000 NGOs are registered with NGO Bureau of Affairs.[17] The study on Bangladesh by World Bank puts emphasis on additional benefits of NGO-facilitated mediation. The study observed that the most notable gain from mediation services provided by NGOs is the lesser cost in resolving disputes, helping individual disputant greatly, as most of them are extremely poor and underprivileged.[18]

Many NGOs are facilitating mediation and ADR models and engaging the community people in modified and innovative versions of the traditional village

[14] Bangladesh Labor Act, 2006 S 210(1)

[15] Ibid, S 210(5)

[16] Ministry of Labor Employment (Bangladesh) S*tatistics of Settlement of Disputes*, (30 December 2020) http://dol.gov.bd/sites/default/files/files/dol.portal.gov.bd/files/1fc533fb_1b3f_4f88_a3e0_8844c680a35b/2020-12-30-13-14-43a379 accessed on 23 February 2023

[17] Asian Development Bank, *Overview of NGOs and Civil Society, Bangladesh* (2003) https://www.adb.org/sites/default/files/publication/28964/csb-ban.pdf accessed on 27 February 26, 2023

[18] Asian Development Bank, *Asian Development Bank and Policy Reform at the 25 (2001)* http://www.adb.org/documents/others/law_adb/1pr_2001.pdf accessed on 23 June 2023

dispute resolution process such as BRAC, BLAST, Madaripur Legal Aid Association (MLLA), Banchte Shekha, and Bangladesh National Women Lawyers Association etc.

Mediation by Legal Aid Officer

Providing mediation service to resolve disputes through Legal Aid Officer (LAO), a member of Bangladesh Judicial Service appointed by the government on deputation to National Legal Aid Services Organization (NLASO), is an innovation in the field of alternative dispute resolution (ADR) of Bangladesh since it is neither a court-based ADR program nor a private initiative. It's a new dimension introduced very recently in the field ADR of Bangladesh which proved to be successful in resolving disputes and helping access to justice concurrently with other dispute resolution mechanisms to some extent. Although the main function of LAO is to provide legal aid and legal advice to people who do not have sufficient means under Legal Aid Services Act,2000. Due to the demand of the indigent people for integrated justice service, government of the People's Republic of Bangladesh has amended this Act in 2013 and inserted the provisions for mediation by LAO. LAO has the power to settle any case which is referred by any court or tribunal[19] but also any case brought by the disputants voluntarily in the legal aid office. The mediation service provided by LAO is unique since it targets the most vulnerable, marginal, poor, and under-privileged people in society.

By virtue of power provided by law[20], Government of the People's Republic of Bangladesh has enacted Legal Aid (Legal Consultation & ADR) Rules, 2015 and empowered Legal Aid Officer (LAO) to provide legal advice as well as to take initiative to dispose the disputes through mediations. This rule which is made in 2015 provides the detailed legal framework necessary to institutionalize the mediation program conducted by LAO. The Government may in the manner prescribed by rules, appoint necessary number of Legal Aid Officers and determine their duties and responsibilities.[21] LAO has two option to mediate the dispute. It can mediate a dispute which is submitted by the parties in their own initiative to the legal aid office and the case referred to by the courts or tribunals within the local jurisdictions. In this way, LAO is involved with both court annexed mediation program as well as party-driven mediation program. This is unique in its nature due to its design to accommodate all kinds of mediation programs. Being a judicial officer, LAO has some distinct and comparative advantages

19 The Legal Aid Services Act 2000, s 21A (2).

20 Ibid, s 22A

21 Ibid., s 21(A)(1).

over other dispute resolution mechanisms such confidence of the parties, legal knowledge and expertise and rapport with judicial officer as a fellow colleague.

After hearing the applicants and perusing the submitted documents of the applicants, if LAO is satisfied that reasonable causes are exist, he may advise the applicants to dispose of the disputes through compromise primarily.[22] If the applicants are agreed to settle the dispute through mediation, LAO will inform the matter to the other parties and ask their consent by fixing a date.[23] If other parties provide consent, LAO shall take steps to arrange a settlement conference with the presence of both parties.[24] LAO will convene settlement conference at Legal Aid Office or in any other convenient place in a fixed date.[25] Section 9 of the Rules provides guidelines for the LAO which should be followed during the mediation of disputes.

Mediation by Legal Aid Officer[26]
(From 2009-2019)

Name of Office	Case received for Mediation	Disposal through Mediation	Number of Beneficiaries	Recovery of Compensation
DLAO 64 District	75,612	67,354	123512	101,34,48,767
Labor Help Cell (Dhaka & CTG)	3209	1823	27046	6,28,00,198
Total	**78,821**	**69,177**	**150,558**	**107,62,48,965**

II. Challenges of Mediation in Bangladesh

Mediation has not yet been proved to be successful in resolving disputes in Bangladesh due to huge challenges. More than a decade has passed since the incorporation of provisions of mediation in the Code of Civil Procedure as well as other special laws particularly law of property. The high expectation of success of mediation as an instrument in reducing the case backlog and ensuring speedy, inexpensive relief sidestepping the procedural complexity and formality in the

[22] The Legal Aid (Legal Consultation & ADR) Rules 2015, r 3(4)

[23] Ibid, s 4(1)

[24] Ibid, s 4(2)

[25] Ibid, s 5

[26] National Legal Aid Services Organization available at http://www.nlaso.gov.bd accessed on 23 January 2023

civil, money loan related suits, and family suits has not been successful. Court-annexed mediation, statutory mediation and informal mediation have been facing challenges.

Challenges of mediation in Family suits

The Family Court Act (FCA),2023, does not have provisions relating to mediation at the appellate stage like the Code of Civil Procedure. Moreover, no provision for substitution of judge like CPC in case of failure judge sponsored mediation program under the Family Court Ordinance. The objective of FCA was to establish separate, dedicated family courts to dispense with family disputed exclusively but unfortunately, no exclusive family courts were established. The court of Assistant Judge, a court of first instance, is serving as the judge of family court which is already overloaded with civil suits. Though family suits are simple in nature, they are very touchy, delicate, and personal in nature which requires an experienced and skilled judge but Court of Assistant Judge, lowest tier of district courts and unseasoned judges serve as the Judge of the Family Court. On the other hand, the minimum qualifications to be judge of Family Court is seven years in India under the Family Courts Act,1984. Under the FCA, judges of the Family Court are responsible for effecting compromise and no referral system is available in FCA to refer the dispute to a person or institution outside the court. No provision regarding counselling support service is available in FCA which is crucial for helping the parties in resolving family disputes.[27] The jurisdiction of family courts may be transferred to the Women and Children Repression Prevention Tribunal which is presided over by a District Judge.

Challenges of Mediation in Civil and Money Loan matters

The guidelines for mediators in the Code of Civil Procedure (CPC) are not comprehensive and exhaustive. No rules for the mediator for ensuring equal participation and opportunity for the parties that may create impediments regarding power imbalance. No specific provisions relating to reviewing the agreement arrived at the conclusion of mediation under the CPC. The government has incorporated the provision of mediation at the pre-trial and the appellate stage of the civil suits, but no provisions for mediation upon conclusion of the trial before pronouncement of judgement has been included into the CPC.

[27] Md Khairul Islam, 'Critical Review of the Court Based ADR in Bangladesh: Prospects and Challenges' (2015) 20(2) *Journal of Humanities and Social Sciences* 45–55 https://www.iosrjournals.org doi:10.9790/0837-201244555.

In fact, parties of the suits can understand about the merits of the suits upon conclusion of the trial before the pronouncement of the judgment. Therefore, provisions for mediation after conclusion of the trial may be more appropriate than that of mediation at the appellate stage. Section 89A of CPC requires the civil court to refer to the suit for compulsory mediation but this provision does not empower the court to enforce the attendance of the parties and their counsels. Penal provision should be inserted into section 89A for withdrawal from mediation without any reasonable and cogent grounds.

Lack of established culture of ADR

Bangladesh does not have an established culture of using mediation, a form of alternative dispute resolution for cases in litigation. The mindset of the stakeholders is not favorable for the success of mediation in resolving disputes. Many people have a preconceived mental state that mediation is not an effective mechanism to resolve disputes, it is a foreign concept, it's an waste of time and money.

Lack of skilled mediators

The success of mediation depends on the quality of the mediators to a great extent. There is shortage of skilled mediators in Bangladesh. Mediators have not yet been developed as professions. Government, in collaboration with the Bar Associations and other stakeholders should provide training and build up the capacity of mediators and develop skilled mediators. Courses on mediation should be introduced in the curriculum of law schools to motivate future lawyers and judges. Policies should be developed to provide incentives for mediation. Recently India has enacted separated and dedicated special law for mediation[28] where provision for the qualification[29] and role of mediators[30] are addressed clearly.

Non-cooperation from the lawyers

One of the main reasons for delay in disposal of suits is the dilatory tactics adopted by the lawyers. Generally, lawyers do not provide cooperation in resolving disputes through mediation due to fear of losing income. They believe mediation will eat into their share of the pie. Moreover, the current

[28] Mediation Act,2023(India), Act No 32 of 2023

[29] Ibid, s 8

[30] Ibid, s16

practice of paying lawyer's fees, i.e., day-to-day fees, is also responsible for the non-cooperation of the lawyers. So, the longer a case continues, the more the opportunity of getting fees. The payment system of fees of the mediators should be designed considering the nature of the disputes in consultation with Bar Associations in such a way that provides incentives to the lawyers for mediation.

Absence of Sanction for non-cooperation in mediation

Currently there are no provisions of sanctions in the Code of Civil Procedure and other laws for non-cooperation in mediation and so parties do not feel it mandatory to use mediation in resolving disputes.

In case of failure of mediation mechanism due to non-cooperation of both or either of the parties or their engaged counsels without reasonable grounds, there is no legal provision under the laws providing for mediation for imposing penalty in the form of fines or taking other legal action against the responsible parties that could restrain the parties from frustrating a mediation or conciliation process altogether. For instance, The UK has specific sanction procedure in this regard that force the parties to consider the mediation options before opting for litigations.

Absence of Special Law for Mediation

There is specific law for Arbitration in Bangladesh but no specific, special law for mediation. The provision for mediation is inserted in different legislations. In addition to that, a separate and comprehensive law on mediation should be enacted like an arbitration act. Considering the importance mediation, India has enacted a separate and special law for mediation. In the Code of Civil Procedure,1908 and other special laws enacted for different institutions and purpose does not have the exhaustive provisions regarding the procedure of mediation, role of mediators and mediation service providers, registration of mediated legal agreement and online mediation.

Lack of institutional infrastructure

Institutional infrastructure such as statutory bodies should be developed to provide policy support, training in establishing and promoting the culture of mediation and private organizations. It will act as a catalyst for the development of infrastructure of mediation and encourage the private sector. Very few institutional mediation centers in private sector are available in Bangladesh which are not sufficient considering the demand in the market. In India, a neighboring country of Bangladesh has more than 40,000 mediation centers which are operated by the private organizations and provide mediation service.

Mediation will reduce pressure on the court which may lead to a reduction of public expenditures relating to justice. So, the government should provide some incentives on the basis of performance for establishing mediation centers in private sectors.

The Necessity of a Dedicated Mediation Act

The experience of countries like India, which recently enacted the Mediation Act 2023, highlights the transformative potential of comprehensive legislation. A dedicated Mediation Act for Bangladesh is essential for the following reasons:

1. **Institutionalization and Standardization:** A standalone Act would provide a robust legal framework, defining mediation, outlining its principles, procedures, and ethical standards. This would standardize practices, ensuring consistency and predictability in the mediation process. It could also establish a regulatory body for mediator registration, training, and certification, similar to India's approach, fostering professionalism and accountability.[31]

2. **Enhancing Enforceability of Agreements:** A dedicated Act can explicitly address the enforceability of mediated settlement agreements, potentially granting them the same legal weight as court orders. This would provide parties with greater confidence in the mediation process and reduce the need for subsequent litigation to enforce agreements.[32]

3. **Promoting Pre-Litigation Mediation:** The current system largely mandates mediation after a suit is filed.[33] A Mediation Act could promote pre-litigation mediation, encouraging parties to resolve disputes before they escalate to formal court proceedings, thereby significantly reducing the inflow of new cases into the already overburdened judiciary. Recent discussions by the Law, Justice and Parliamentary Affairs Adviser Dr Asif Nazrul indicate a move towards making pre-litigation ADR mandatory for certain types of cases.[34]

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[31] 'Bangladesh needs a Mediation Act' The Daily Star (Dhaka, 25 January 2025) https://www.thedailystar.net/law-our-rights/news/bangladesh-needs-mediation-act-3807581 accessed 2 July 2025

[32] 'Key Provisions of the Mediation Act, 2023' Saakshya Law (22 May 2024) https://www.saakshyalaw.com/post/key-provisions-of-the-mediation-act-2023 accessed 2 July 2025

[33] Code of Civil Procedure 1908, ss 89A, 89C.

[34] 'Asif Nazrul for making ADR mandatory to reduce backlog of cases' The Financial Express (Dhaka, n.d.) https://thefinancialexpress.com.bd/national/asif-nazrul-for-making-adr-mandatory-to-reduce-backlog-of-cases accessed 2 July 2025. (Date of publication not available on source, so n.d. used).

4. **Facilitating Online Mediation:** In an increasingly digital world, a comprehensive Act can provide a legal basis for online mediation, making dispute resolution more accessible and affordable, especially for those in remote areas. This is a key feature of India's Mediation Act 2023 and could revolutionize access to justice in Bangladesh.[35]

5. **Encouraging Professionalism and Training:** A dedicated Act would pave the way for the development of a professional cadre of mediators. It could mandate specific training and qualification requirements, leading to higher quality mediation services and greater public trust in the system.[36]

6. **Reducing Case Backlog and Ensuring Access to Justice:** By providing a clear and effective alternative to litigation, a Mediation Act would significantly contribute to reducing the immense case backlog in Bangladeshi courts. This, in turn, would ensure more timely and cost-effective access to justice for all citizens, including the marginalized and vulnerable populations who often bear the brunt of judicial delays and expenses.[37]

7. **Harmonizing Existing Laws:** A comprehensive Act could streamline and unify the mediation provisions scattered across various existing laws, eliminating potential conflicts and creating a coherent legal landscape for ADR in Bangladesh.

8. **International Best Practices:** Aligning with international best practices and the growing global emphasis on ADR, a dedicated Mediation Act would bolster Bangladesh's legal system and enhance its appeal as a destination for foreign investment, where efficient dispute resolution mechanisms are highly valued.

[35] 'Mediation Act, 2023' Drishti Judiciary (27 September 2024) https://www.drishtijudiciary.com/editorial/mediation-act-2023 accessed 2 July 2025.

[36] 'Institutionalization of Mediation: Legal Framework, Benefits & Progress' PMF IAS (25 February 2025) https://www.pmfias.com/mediation/ accessed 2 July 2025.

[37] Development of Mediation and Civil Litigation Practices for Enhancement of Access to Justice Project launched in Bangladesh!' JICA (4 June 2024)

Comparative Analysis (India's Mediation Act 2023)

India's recent enactment of the Mediation Act 2023 serves as a valuable case study. This Act aims to:

Promote and facilitate mediation, especially institutional mediation, for the resolution of disputes.

- Enforce mediated settlement agreements.
- Provide a body for the registration of mediators.
- Encourage community mediation.
- Make online mediation acceptable and cost-effective.
- Regulate, certify, and promote professional mediation.
- Encourage pre-litigation mediation.
- Provide a time frame for the mediation process.[38]

Bangladesh can draw significant lessons from India's comprehensive approach, particularly in areas like mediator accreditation, enforceability of agreements, and the promotion of institutional and online mediation. The Judiciary Reforms Commission has also recommended enacting a separate and dedicated special law for mediation. It is recommended to repeal the existing legal aid services Act,2000 and to enact a new law on Mediation and Legal Aid through promulgation of ordinance.[39]

Challenges of Legal Aid Officer in providing Mediation Services

Although legal aid officer is empowered to arrange a settlement conference on the spot of suit land under rule 5 of the Legal Aid (Legal Consultation & ADR) Rules, 2015, but no vehicles or transport facilities are provided to legal aid officers to visit place of occurrence or suit land. Moreover, no security is provided to the legal aid officers during the visit time at the suit land. Lack of supporting human resources at the legal aid office is one of the impediments in the smooth and efficient functioning of the legal aid office. At present, there is only one legal aid officer in the whole district and so, it is difficult to provide legal aid services to the grassroot people. Bangladesh is going to graduate from the least developed country to lower-middle income country very soon and so more investment is required in legal aid services and the capacity of legal aid officer as well as number of legal aid officers should be increased to catch up the more people.

[38] Mediation Act 2023 (India)

[39] The Judiciary Reforms Commission Report, 2024 https://jrc.gov.bd/wp-content/uploads/2025/06/Abridged_Version_of_JRC_Report_Summary.pdf accessed on 02 July 2025

III. Role of Mediation in Accessing to Justice in Bangladesh

Mediation is enthusiastically promoted as a vehicle for providing access to justice. [40]About 60—70% of local disputes are settled through Shalish, an informal justice system in Bangladesh.[41] The traditional judicial system is unable to provide justice to the justice seeker mass people due to inherent procedural structure, lack of sufficient judges and huge backlog of cases. Access to justice is very crucial for ensuring rules of law, good governance, and enjoyment of basic human rights. But courts of Bangladesh are burdened with huge backlog of cases which are creating impediment in the access to justice. At present more than 3 million cases are pending in the courts against 1700 judges. The average growth rate of the cases is around ten percent during the last five years. Considering that growth rate, the backlog of cases will double within the next five years if no action is taken. Rising trend of backlog of cases is one of the sources of concern that challenges the very purpose of the court system.[42] Considering the delay in the disposal of cases by the courts, Gladstone, a British Public Servant said in nineteenth century that Justice delayed is justice denied. [43] In view of delay and cost of litigation, traditional court system of Bangladesh appears to be not accessible and inclusive and causing obstacles regarding access to justice and so providing access to justice to the justice seekers particularly the marginal, vulnerable and underprivileged people is a challenging issue in Bangladesh. In this regard, former Chief Justice of Bangladesh Supreme Court justly stated that the judiciary of Bangladesh has become antiquated and overburdened by its in-built inability to recognize new problems…. The current backlog and delay problem in our country has reached such a proportion that it effectively denies the rights of citizens to redress their grievance.[44] Backlog of cases in the courts is one the major cause of injustices, especially who are already been marginalized and vulnerable.[45] In Bangladesh, poor and underprivileged people do not have the means to access

[40] American Bar Association Section of Dispute Resolution, *Access to Justice Through Alternative Dispute Resolution: White Paper 2* (2002) https://www.americanbar.org/content/dam/aba/images/dispute_resolution/publications/A2J_%20white_paper.pdf accessed 1 July 2025.

[41] UNDP, *Programming for Justice: Access for All – A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (2005) https://www.undp.org/sites/g/files/zskgke326/files/migration/asia_pacific_rbap/RBAP-DG-2005-Programming-for-Justice.pdf accessed 1 July 2025.

[42] Supreme Court of Bangladesh, *Strategic Plan 2017–2022* http://www.supremecourt.gov.bd/resources/contents/Strategic_Plan.pdf accessed 3 June 2024.

[43] Bruce and Allan Zullo (eds), *Lawyer's Wit and Wisdom: Quotations on the Legal Profession, in Brief* (Running Press, Philadelphia PA 1995) 139.

[44] KM Hasan, *A Report on Mediation in the Family Courts: Bangladesh Experience* (2001) http://www.peacemakers.ca/research/Bangladesh/BangladeshBib.html accessed 24 June 2023.

[45] ASEAN, *Report on Regional Cooperation on Sustainable Development Goals, Access to Justice and Legal Aid* (26–27 May 2016) https://namati.org/resources/association-of-southeast-asian-nations-asean-regional-consultation-on-sustainable-development accessed 30 January 2023.

to formal justice system due to inflated legal costs, unnecessary delay, and a lack of education of both the legal system and potential resources.[46]

The 8th Five-Year Plan (July 2020- June 2025 of the Government of the People's Republic of Bangladesh has also emphasis on increasing the capacity of local justice services to resolve disputes at low cost, fairly and quickly- so producing better outcomes for people.[47] The right of access to justice is deterred for the underprivileged groups due to complex procedural laws, extreme expenditure, prolonged procedure, corruption and above all huge backlog of cases in the court of Bangladesh.[48] The 7th Five-Year Plan(2016-2020), a national development policy framework of the People's Republic of Bangladesh also adopted mediation as a mechanism for speedy justice delivery to the justice seeker people and its fix an annual target of disposing twenty five thousand suits under mediation by the year 2020.[49] Mauro Cappelletti and Bryant Garth noted in their international and interdisciplinary study of access to justice that access to justice, from historical point of view, is a reform movement, where they categorized three waves of law reform such as legal aid, procedural devices for class action, and promoting systematic reform of the legal system through alternative dispute resolution. [50]Mediation service, a most popular form of ADR provided by the LAO to the poor and underprivileged people is a systematic reform of the legal system of Bangladesh as to make legal system inclusive and pro-people. Mediation service provided by legal aid officers to indigent, marginal and vulnerable people is almost free of cost because the legal aid officer is paid by the government. On the other hand, mediation which is provided by private organizations or lawyers requires costs since they have to pay for mediators.

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46 Md Abdul Alim, *Shalish and the Role of BRAC's Federation: Improving the Poor's Access to Justice* (unpublished MA thesis, Graduate School of Development Studies, The Hague, December 2004).

47 General Economics Division, *Eighth Five Year Plan July 2020 – June 2025: Promoting Prosperity and Fostering Inclusiveness* (Bangladesh Planning Commission) http://plancomm.gov.bd/site/files/8ec347dc-4926-4802-a839-7569897e1a7a/8th-Five-Year-Plan accessed 1 July 2025.

48 *Community-Based Mediation as an Auxiliary to Formal Justice in Bangladesh: The Madaripur Model of Mediation (MMM)* (Namati,2003) https://namati.org/wp-content/uploads/2015/12/PRI-ADR-Community-based-mediation-as-auxiliary-to-formal-justice-in-Bangladesh.pdf accessed 7 October 2020

49 General Economics Division, *Seventh Five Year Plan FY 2016–2020* (Planning Commission, Government of Bangladesh) 159 https://bcsadminacademy.portal.gov.bd/sites/default/files/files/bcsadminacademy.portal.gov.bd/page/6a28f1e5_7ded_44a1_a531_bd13881c8e0c/7th_FYP_18_02_2016.pdf accessed 1 July 2025.

50 Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 181, 196–223

Access to justice suggests the creation of ways to resolve disputes which are within the ambit of the formal legal system by adopting multidimensional strategies including mediation, early neutral evaluation, arbitration, and many combinations of other methodologies that are structured to promote speedy resolution of disputes. The litigation process has become an end in and of itself without the litigants having a meaningful role in the last few decades. The vigorous expansion of dispute resolution mechanisms in the past thirty years has evolved, in part, due to the ability of these processes to adapt to the needs of the litigant people and not exclusively on the process and its formalities.[51]

IV. Can mediation be considered part of the justice system?

In 1995, the Commonwealth Attorney General's Department promulgated the Justice statement in 1995 where four key themes and beliefs regarding access to justice were described namely (i) a commitment to equality before the law; (ii) a belief in the desirability of preventing disputes from occurring or escalating where possible; (iii) making it possible for people to resolve disputes by simple and accessible means; and (iv) ensuring that the services already delivered in the legal system are delivered more efficiently and with a much greater awareness of and orientation to their consumers – the public.[52] All the above key themes and beliefs reinforce the importance of ADR in promoting access to justice. The Charter of United Nations also recommends ADR to solve international disputes. It is stated that the parties to any dispute relating to international peace and security shall seek a solution by following ADR such as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.[53] Moreover, United Nations General Assembly (UNGA) adopted a resolution 65/283 in June 2011 and called the member states to use mediation in the peaceful settlement of disputes, conflict prevention and resolution. The Aarhus Convention 1998 also puts emphasis on settlement of disputes through alternative dispute resolution. Article 16 prescribes settlement of disputes by way of negotiations or any other means of dispute settlement acceptable to all parties.

51 William Davis and Helga Turku, 'Access to Justice and Dispute Resolution' (2011) *Journal of Dispute Resolution* vol 2011, art 4, 50.

52 Commonwealth Attorney-General's Department, *Justice Statement* (1995) http://www.austlii.edu.au/austlii/articles/scm/jcontents.html accessed 1 July 2025.

53 United Nations, 'Article 33' https://www.un.org/en/about-us/un-charter/full-text accessed 31 January 2023.

The ability of people to defend and enforce their rights and obtain a just resolution to legally actionable issues in accordance with human rights standards, if necessary, through impartial formal or informal institutions of justice and with appropriate legal support, is broadly referred to as access to justice.[54] In many parts of the world, the adoption of alternative dispute resolution(ADR) processes was premised on creating better access to justice for citizens, particularly those with lesser mean (Woolf,1996; Access to Justice Advisory Committee,1994)

The term access to justice has many aspects, for instance, access to justice from a right-based point of view refers to the ability of people from underprivileged groups to prevent and overcome human poverty by seeking and obtaining a remedy, through formal and informal justice systems.

Access to justice institutions whether formal or informal should be affordable, accessible and process the case in a timely manner.[55] People-centered justice services encompass a vast number of processes and procedures which includes a range of alternative resolution mechanisms such as mediation, online dispute resolution, pre- and post-resolution support, in addition to more formal judicial and non-judicial proceedings.[56] There must be a different approach to access to justice today- a people centered approach to access to justice that takes consideration of the individual's choice by providing opportunity for resolving disputes through multidimensional resolutions systems. The best way forward in this multi-tier approach to ensure access to justice would be to provide stakeholders at all levels with ADR mechanism, to simultaneously benefit the state and the citizens (Craw Hall & Silvermann,2016). The right to access justice, however, is far beyond criminal matters and should empower people to seek and obtain a remedy through formal and informal institution of justice whenever a legal dispute in civil, commercial,

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54 Praia Group Handbook on Governance Statistics: Access to and Quality of Justice (forthcoming 2019).

55 *American Bar Association, Access to Justice Assessment Tool – A Guide to Analyzing Access to Justice for Civil Society Organizations (Rule of Law Initiative, Washington 2012)* https://www.americanbar.org/content/dam/aba/directories/roli/misc/aba_roli_access_to_justice_assessment_manual_2012.pdf *accessed 1 July 2025.*

56 OECD, *Equal Access to Justice for Inclusive Growth: Putting People at the Centre* (2019) https://www.oecd-ilibrary.org/sites/597f5b7f-en/1/2/5/index.html?itemId=/content/publication/597f5b7f-en&_csp_=67307576eea7cf85ba9867047256bcbf&itemIGO=oecd&itemContentType=book accessed 1 July 2023.

labor, land property or housing issues cannot be solved by other means.[57]

In many jurisdictions of the world, to resolve disagreements, the multidoor courthouse model has been introduced which accepts both traditional litigation and alternative dispute resolution methods. At the Pound conference in 1976, Professor Frank E.A. Sander of Harvard Law School was the first to propose the idea of a multidoor courthouse. Public litigation, or conflict resolution, can only be done in the traditional courthouse through a single door. Realizing that litigation is not always the best course of action for settling problems gave rise to the idea of the multidoor courthouse. The parties should be given a variety of options in addition to adjudication, such as mediation, arbitration, early neutral evaluation, summary jury trials, and mini trials.[58] So it is evident that the multidoor courthouse concept also embraces the concept of alternative dispute resolution including mediation as a means of access to justice. ADR program can enhance access to justice for vulnerable social groups of people who do not have adequate and fair access to the traditional judiciary. It can also reduce time and cost to resolve disputes and increase the satisfaction of the disputants with the results.[59] Rethinking conventional methods of providing legal and justice services and placing a priority on meeting people's needs is necessary if we are to ensure that no one is left without access to justice. Services must be "personalized" and adaptable to the user and the circumstanced programs may increase access to justice for marginal social groups who do not have adequate or fair access to the courts due to constraints. It can be cost-effective and time efficient in resolving disputes and increase the satisfaction of the disputants with outcomes.[60]

Case backlogs in the courts create major injustices, particularly for those who are already marginalized and vulnerable. This requires specifically tailored solutions focused on increasing coordination between agencies in the justice delivery processes. Specific tools targeting case backlogs may include establishment of small claims courts to rapidly deal with less serious cases, recognition and support for community-based paralegals, strengthening

[57] Manfred Nowak, *'Equal Access to Justice: A Human Rights Approach to SDG 16.3' in Helen Ahrens, Horst Fischer, Veronica Gomet and Manfred Nowak (eds), Equal Access to Justice for All and Goal 16 of the Sustainable Development Agenda: Challenges for Latin America and Europe* (LIT VERLAG GmbH & Co, Zurich 2019).

[58] Kenneth K Stuart and Cynthia A Savage, 'The Multi-Door Courthouse: How It's Working' (1997) https://www.courts.state.co.us/Administration/Section.cfm?Section=odrres accessed 1 July 2023.

[59] *Alternative Dispute Resolution Practitioners Guide*, Part III, page 6 https://www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf accessed 1 July 2024.

[60] Scott Brown, Christine Chervenak and David Fairman, *Alternative Dispute Resolution Practitioner Guide* https://www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf accessed 1 July 2023.

alternative dispute resolution mechanisms, improved technology for case management systems, electronic tracking of detainees, immediate provision of court orders at the time of decision, strong sanctions by judges and police services when cases cannot progress because of non-attendance of police witnesses. For example, in the Philippines, a case decongestion officer, technological advancements such as e-courts and automated hearing, among other initiatives.

Access to Justice and Human Rights

Access to justice is social goods which are ensured through positive intervention of the government.[61] Governments can strengthen their legitimacy, their capacity to effect social change, and their ability to promote economic growth by giving access to justice. Although the idea is widely understood and accepted in the developed world, governments in the developing world occasionally do not place a high focus on it. Most states correctly acknowledge that access to justice is a weapon for social change and economic growth in addition to being a right.[62]

Access to justice is a basic principle of the rule of law. Access to justice is an essential condition for the effective implementation of human rights, as well as for democracy and the rule of law. Access to justice involves legal protection, legal awareness, legal aid, and counsel, adjudication, enforcement, and civil society oversight. Access to justice supports sustainable peace by providing the population with a more attractive alternative to violence in resolving personal and political disputes. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination, or hold decision-makers accountable (United Nations, 2019).

Access to justice and Constitution of Bangladesh

Constitution of the People's Republic of Bangladesh, the supreme law of the land, provides importance about the access to justice. The preamble of the Constitution affirms that a fundamental aim of the state to realize through the democratic process a socialist society, free from exploitation, a society in which the rule of law, fundamental human rights and freedom, equality, and justice, political economic and social, will be secured for all citizens. The state shall endeavor to

[61] Philip Alston and Alex Boraine, 'What Is Access to Justice? The Unmet Legal Needs of the Poor' (2000) 24(6) *Fordham International Law Journal* 1 https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1785&context=ilj accessed 31 January 2023.

[62] Doncily, (n 3), 43

ensure equal opportunity for all citizens[63]. It is also guaranteed that all citizens are equal before the law and are entitled to have equal protection of law.[64] Article 44(1) provides the right to access to constitutional courts i.e., High Court to enforce the fundamental rights i.e., human rights which are enforceable by the constitutional courts mentioned in the third part of the constitution. In the case law of Mohiuddin Farooque vs. Bangladesh, the Appellate Division of Supreme Court of Bangladesh remarked that if justice is not easily and equally accessible to every citizen, there then can hardly be any rule of law. If access to justice is limited to the rich, the more advantaged and more powerful section of society, then the poor and deprived will have no stake in the rule of law.[65]

Access to Justice and International Human Rights Laws

The cornerstone of international human rights legislation and the framework for a system of universal access to justice are the Universal Declaration of Human Rights (UDHR), International Covenant on Economic, Social and Cultural Rights (ICESCR), and International Covenant on Civil and Political Rights (ICCPR). Article 8 of the UDHR, 1948 provides that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 2(1) of the Covenant indirectly addresses the right to access to justice by providing that, "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical to the maximum of its available resources with a view to achieving progressively the full realization in the present Covenant by all appropriate means including particularly the adoption of legislative measures. 5.1 billion individuals are affected by a global justice gap, 4.5 billion are denied access to social, economic, and political opportunities provided by the law, and 1.5 billion have unresolved issues with criminal, civil, or administrative justice. Therefore, 253 million individuals lack any significant legal protection and endure grave injustices.[66]

63 Constitution of the People's Republic of Bangladesh, art.19(1)

64 Ibid, art 27.

65 ***Mohiuddin Farooque v Bangladesh*** (1997) 17 BLD (AD) 1.

66 Task Force on *Justice, Justice for All*: Final Report (Center on International Cooperation, New York 2019) http://www.justice.sdg16.plus/ accessed 1 July 2024.

Civil rights and liberties are protected and advanced when citizens have access to and confidence in the justice system.[67] Rule of law loses its credibility and importance if citizens are not able to access the services of the state. International Courts such as the court of Justice of the European Communities and the European Court of Human Rights realize that governments should have an affirmative and positive obligation to provide access to justice to its citizens[68]. **The Organization for Economic Cooperation and Development (OECD) puts emphasis on the efforts of members of OECD and partner countries to promote equal and people-centered access to justice for sustainable development through inclusive growth.[69]**

V. Mediation towards Legal Empowerment

Mediation is one of the strategies to empower the people to participate in decision making i.e., participation in the resolution of disputes legitimately. It allows people to decide how they

would like to settle their disputes and try to help them reconcile. Legal empowerment plays a vital role in increasing the social access of the poor to public goods and services such as access to justice, education, health etc. and empowering them to assert their legitimate rights and interests and improve the condition of life. It can be considered as both a process as well as a goal. The process involves the enhancement of control over the lives of disadvantaged people and achieving such increased control creates the goal. The UN Commission on Legal Empowerment of the Poor (CLEP) defines legal empowerment as "a process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests as citizens and economic actors. [70]Maru defines legal empowerment through five key principles such as concrete solutions to instances of injustice, a combination of litigation and high-level

[67] Samuel J M Donnelly, 'Reflecting on the Rule of Law: Its Reciprocal Relation with Rights, Legitimacy, and Other Concepts and Institutions' (2006) 603 *The Annals of the American Academy of Political and Social Science* 37, 37–42 https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf accessed 1 July 2024.

[68] *Rule of Law Checklist* (Venice Commission) https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf accessed 1 July 2024.

[69] OECD, *OECD Policy Roundtable on Equal Access to Justice, Session 1: Actioning the Justice Development Goals* (5–6 July 2018, Riga, Latvia) https://www.oecd.org/gov/equal-access-to-justice-oecd-expert-roundtable-latvia-2018.htm accessed 30 January 2023

[70] UN Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, vol 1 (UN Commission on Legal Empowerment of the Poor and UNDP, New York 2008) 3

advocacy with more flexible, grassroots tools, a pragmatic approach to plural legal systems, empowerment and a balance between rights and responsibilities. Grass roots tools include community education, local advocacy, and mediation.[71] Golub further elaborates the above CLEP definition as legal empowerment is the use of legal rights, services, systems, and reform, by and for the disadvantaged populations and often in combination with other activities, to directly alleviate their poverty, improve their influence on government actions and services, or otherwise increase their freedom. Legal empowerment can contribute to increasing accountability through a combination of advocacy, mediation, education, organizing and litigation to make dysfunctional legal systems work for citizens[72].

Legal empowerment can contribute to increasing accountability through a combination of advocacy, mediation, education, organizing and litigation to make dysfunctional legal systems work for citizens (Maru,2010b). Legal empowerment initiatives enable citizens to actively use the law and shaping it with their needs. Ensuring access to justice and establishing the rule of law through institutional reform and the removal of legal and administrative barriers are central to legal empowerment. Laws are ineffective if citizens cannot use the justice system to realize their rights, or if the institutions enforcing the law are ineffective, corrupt, or captured by elites.[73] Mediation is used to promote rights of the people particularly the poor, women, ethnic minorities, and under-privileged people in many jurisdictions across the world. In Papua New Guinea, mediation was an important addition to legal education in an effort to promote women's rights.[74] A great variety of instruments including mediation, community education, organizing and local advocacy allows for productive and cost-effective solutions, while the sparing, strategic use of litigation and high-level advocacy backs frontline efforts with larger power of enforcement. For instance, paralegals adopted mediation as a strategy within a program focused on

[71] S Bakrania with H Haider, *Safety, Security and Justice: Topic Guide* (GSDRC, University of Birmingham, Birmingham 2016) https://gsdrc.org/wp-content/uploads/2016/07/GSDRC_SSJ.pdf accessed 1 July 2024

[72] Stephen Golub, 'Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative' (Working Paper No 41, Democracy and Rule of Law Project, Carnegie Endowment for International Peace, Washington DC 2003) 15.

[73] UN Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, vol 1 (UN Commission on Legal Empowerment of the Poor and UNDP, New York 2008) 3

[74] Naomi Johnstone, 'Bush Justice in Bougainville: Mediating Change by Challenging the Custodianship of Custom' in Erica Harper (ed), *Working with Customary Justice Systems: Post-Conflict and Fragile States* (International Development Law Organization, Rome 2011) ch 1.

protecting of natural resources in Ecuador.[75] UNDP and Developed countries are taking projects to empower the people of least developed countries to resolve disputes through mediation and other legal tools. UK invested in community legal services for empowerment from 2003 to 2009 in Bangladesh which helped poor people mostly women to resolve disputes over land, inheritance, and dowries through mediation and recovered assets valuing £1.5 million.[76] Property rights is one of the most significant pillars of legal empowerment. Family law, inheritance law and property rights, including dispute resolution, are crucial issues in extending access to justice to citizens, particularly women who are often dependent on men to inherit land and housing and to gain access to land. underprivileged groups and women are the victim of lack of property rights.[77]

VI. Access to Justice and Sustainable Development Goals

Sustainable Development Agenda,2030 was adopted at the landmark United Nations (UN) summit on 25 September 2015 in New York, is a shared master plan of action for people, planet, and prosperity.[78] Goal 16 of SDGs deals with peace, justice and strong institutions which is essential to promote just, peaceful, and inclusive societies. Justice for all is the core promise of this goal. It is evident that conflict, insecurities, weak institutions, and limited access to justice remain a great threat to achieve SDGs. Target 16.3 of SDGs asks the countries to promote the rule of law at the national and international levels for ensuring equal access to justice. SDG-16 advocates building up strong institutions to promote just, peaceful, and inclusive societies.

It puts emphasis on the linkage among rules of law, access to justice and strong institutions to promote just, peaceful, and inclusive societies. Resolving disputes through mediation may help to build peaceful societies since disputes create tension and stress among the members of society. It also enables us to ensure just societies through just solution in time. Resolving disputes through

[75] Dennis Glick, Constance McCorkle, Alan Patterson, Raymond Victurine and Joshua Dickinson, 'Sustainable Uses for Biological Resources (SUBIR) Project: Phase 1 Evaluation' (Tropical Research and Development, Gainesville, Florida 1994) http://pdf.usaid.gov/pdf_docs/PDABP379.pdf accessed 1 July 2024.

[76] *Justice Initiatives: Legal Empowerment* (Open Society Foundations, January 2014) https://www.justiceinitiative.org/uploads/112318e4-a2b5-48e4-a14d-742bb3b8bcfb/justice-initiatives-legal-empowerment-20140102.pdf accessed 1 July 2025

[77] UN Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, vol 1 (UN Commission on Legal Empowerment of the Poor and UNDP, New York 2008) 3

[78] UNGA Res 70/1, 'Transforming our world: the 2030 Agenda for Sustainable Development' (25 September 2015).

mediation may support building up inclusive societies due to their inherent attributes such as less expensive and speedy in comparison with other methods of dispute resolution. It also acts as a catalyst to achieve other SDGs. Formal Courts system, Legal Aid officers, Statutory Authorities such as Customs Authority, Income Tax Authority; Village Courts, Traditional Shalish system, Non-government Organizations, and Private organizations are the institutions in Bangladesh which are providing mediation services to resolve disputes and paving the way for access to justice. Policy shall be adopted to strengthened the capacity of these institutions to ensure access to justice and achieve the target of SDG-16. A comprehensive and exhaustive legislation regarding the Mediation is required to institutionalize the mediation through policy support.

The incorporation of access to justice in the SDGs goal of 2030 acknowledges its inherent connection to poverty reduction and inclusive growth. Access to justice is also paramount in achieving many other sustainable development goals. It may empower people to fight against injustices that contribute to eliminating poverty, ending hunger, ensuring gender equality, and upholding labor and environmental standards, among other things. Farmers require support for justice when they are evicted from their land; the poor and marginalized need pathways to fight back against employers who cheat them out of wages; victims of violence and sexual persecution need a means to raise their voices and societies need to take responsibility when corruption is allowed to flourish. Progress in peace, justice and inclusion can play a vital role in achieving the goals of the 2030 Agenda.[79] On February 7, 2019, Ministers and High-level representatives from countries and International Organizations recognized the importance of formal and informal justice systems such as mediation to improve the quality of justice journey and use justice for prevention. They recommend empowering people to understand, use and shape the law, while offering them fair, informal, and formal processes that meet their needs in terms of both process and outcome and make use of mediation and other methods to prevent disputes from escalating.[80]

[79] OECD, *OECD Policy Roundtable on Equal Access to Justice, Session 1: Actioning the Justice Development Goals* (5–6 July 2018, Riga, Latvia) https://www.oecd.org/gov/equal-access-to-justice-oecd-expert-roundtable-latvia-2018.htm accessed 30 January 2023

[80] *Declaration on Equal Access to Justice for All by 2030* (7 February 2019, The Hague) https://namati.org/wp-content/uploads/2019/02/Declaration-on-Access-to-Justice-050219.pdf accessed 22 February 2023.

One of the indicators of SDGs is to ensure responsive, inclusive, participatory, representative decision making at all levels.[81] Mediation is a dispute resolution mechanism which fulfils the requirements of this indicator. Glen Cove Expert Committee also endorsed the informal mechanism to manage dispute peacefully and fixed two targets such as enhance equity and social cohesion and ensure adequate formal and informal mechanisms are in place to manage disputes peacefully (target 3) and resolve divisions within society peacefully (targe 10). Indicator of target 3 is degree to which there are effective formal and informal mechanisms and programs in place to prevent and resolve disputes peacefully and the indicators of target 10 are that people can access, and affordable civil justice and alternative dispute resolutions are accessible, impartial, and effective.[82]

Several country studies found multiple benefits in addressing legal needs and providing access to justice to wide range of legal assistance and access to justice programs, for individuals, families, and communities. There is evidence of positive sectoral impacts in areas such as housing and the prevention of homelessness, enabling gender equality and reducing domestic violence, supporting inclusion through facilitating access to social benefits, enhancing consumers financial protection and debtor relief, facilitating access to health care and support for medico-legal problems, supporting child welfare and families, supporting positive outcomes for migrants and immigrants, reducing recidivism and enhance victim support, supporting employment and promoting equality and diversity and promoting equal access to education[83]. Goal 16 reflects increasing recognition by the global community that access to justice is an essential component in the fight against extreme poverty.[84]

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81 United Nations, *Sustainable Development Goal 16, Indicator 16.7: Ensure responsive, inclusive, participatory and representative decision-making at all levels* https://sdgs.un.org/goals/goal16 accessed 1 July 2023.

82 UNDP, UNICEF and PBSO, Report of the Expert Meeting on an Accountability Framework for Conflict, Violence, Governance and Disaster, the Post-2015 Development Agenda (Glen Cove Expert Meeting 2013) (2019) https://www.kpsrl.org/sites/default/files/publications/files/409_accountability_framework_for_conflict_violence_governance_and_disaster_and_the_post_2015_development_agenda.pdf accessed 22 February 2023)

83 OECD, *Equal Access to Justice for Inclusive Growth: Putting People at the Centre* (2019) https://www.oecd-ilibrary.org/governance/equal-access-to-justice-for-inclusive-growth_597f5b7f-en accessed 1 July 2024

84 *Recommended Access to Justice Indicators for Implementation of Goal 16 of the UN 2030 Sustainable Development Agenda in the United States: Developed for the Civil Society Consultation with White House Legal Aid Interagency Roundtable on Goal 16 Access to Justice Indicators and Data (15 September 2016, Washington DC)* http://web.law.columbia.edu/human-rights-institute and http://ncforaj.org accessed 1 July 2024.

Proposal is given to include access to civil justice as one of the indicators such as 16.3.3 to make the goal 16 more acceptable and reliable. Mediation can play crucial role in access to civil justice in Bangladesh. Access to civil justice through formal courts requires huge time and resources which is challenging in access to civil justice for poor and underprivileged people in Bangladesh, a developing country.

Conclusion

Many tools are used to create the way for access to justice in different jurisdictions in the light of socio-economic conditions, cultures, and resources. Mediation is one of the tools which plays an important role in accessing to justice and empowering the people in Bangladesh, a least developed country to make the justice system as inclusive, inexpensive, and accessible. Despite its limitations, it has proved its potential as a strategy of legal empowerment that paves the road in accessing justice, achieving SDG 16 and a more sustainable future. The institutions which provide mediation services are facing myriad challenges in resolving disputes and providing access to justice and eventually achieving sustainable development goals 16. The effective and dynamic role of the institutions is crucial to create favorable and conducive environment for access to justice and the achievement of SDGs. The law and policy relating to mediation and institutions providing mediation services should be designed in such a way that it could play the role of catalyst to make the justice system inclusive as well as integrate access to justice, legal empowerment, and SDGs. The capacity of the institutions as well as stakeholders relating to mediation should be strengthened to make them effective and accountable to the stakeholders through logistic support and legal policies by investing more resources to make the mediation more pro-people, effective and inclusive. Moreover, the legal regime and public policy concerned with mediation should be tailored comprehensively in light of the existing challenges and accommodating the demands and recommendations of the stakeholders as much as possible. Policies regarding mediation must be attentive to the cost of the process to participants. Coordination, cooperation and communication among government institutions, local government institutions, civil society, non-governmental organizations, and the private sector may be helpful to resolve disputes through mediation and creating avenues in accessing justice and achieve the goal 16 of sustainable development. International Community and stakeholders such as World Bank, Asian Development Bank, USAID, DFID, UN should support Bangladesh through projects and technical assistance to develop

policy and human resources for the improvement of culture of mediation and strengthen the capacity of the relevant institutions so that it may play its due role for access to justice and achieving sustainable development goals robustly. Policies regarding mediation must be attentive to the costs of the process to participants.

Paperless Court in Bangladesh: A Timely Demand Lessons from Singapore

Dr Ummey Sharaban Tahura*

Abstract

The judicial system of Bangladesh is plagued by excessive case backlogs, procedural inefficiencies, high litigation costs, and a lack of transparency, making access to justice difficult for many. In response to these challenges, digital transformation through paperless courts has emerged as a potential solution to enhance judicial efficiency, transparency, and accessibility. This paper explores the concept of paperless courts, focusing on how digital case management, e-filing, virtual hearings, and artificial intelligence (AI)-assisted legal processes can streamline judicial administration. Drawing from the experiences of Singapore, which has successfully implemented digital courts, this study examines how Bangladesh can adapt similar strategies to modernize its judiciary. Singapore's Integrated Case Management System (ICMS) serve as the best model demonstrating how digitalization can reduce delays and increase efficiency. The paper also evaluates the legal, infrastructural, and logistical challenges associated with transitioning to a paperless court system in Bangladesh, including concerns related to cybersecurity, data privacy, and digital accessibility. Despite these challenges, the study argues that Bangladesh's judiciary must embrace comprehensive digital reforms rather than fragmented initiatives to improve case management and judicial efficiency. By adopting a structured, well-integrated approach, Bangladesh can enhance judicial accountability, restore public trust, and ensure broader access to justice through a digitally enabled, transparent, and efficient legal system.

Keywords: Paperless Courts, Digital Judiciary, Judicial Reform, E-Courts, Case Management.

1. Introduction

An efficient and transparent judiciary is fundamental to ensuring access to justice yet, the Bangladesh Judicial System faces severe structural and procedural inefficiencies that hinder its effectiveness. The judiciary is currently burdened with excessive case backlogs, prolonged delays, high litigation costs, and a lack

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of transparency, making legal redress increasingly inaccessible[1]. Several factors contribute to this crisis, including traditional manual processed and paper-based documentation, inefficient case management, limited public access to the justice system, a shortage of judicial officers, complex procedural formalities, high legal fees, and inadequate legal aid facilities.[2] As a result, justice remains inaccessible, time-consuming, prohibitively expensive, and uncertain for a significant portion of the population.

Empirical research highlights that cases in Bangladesh take significantly longer than necessary to be resolved, with disposal rates consistently lower than case filing rates.[3] For instance, the number of pending cases rose from 3,053,870 in March 2019 to 3,684,728 by December 2020, and as of January 2025, the backlog has reached 4.5 million cases.[4] The subordinate courts of Bangladesh process a very high and varied case load i.e 90% of the total case load. This paper addresses mainly the subordinate courts of Bangladesh. This growing backlog not only delays justice but also increases financial burdens on litigants, with many cases taking five or more years to reach trial resolution.[5] Moreover, litigation expenses often exceed the disputed amount, rendering the legal system economically unfeasible for many citizens.[6] The absence of cost reimbursement mechanisms further exacerbates the issue, as even successful litigants find the legal process financially draining.[7] Without systemic reforms, these inefficiencies is continuing to erode public trust in the judiciary, making legal recourse unattainable for many.

1 Ummey Sharaban Tahura and Margaret RLL Kelly, 'Procedural Experiences from the Civil Courts of Bangladesh: Case Management as a Potential Means of Reducing Backlogs' (2015) 16(1) Australian Journal of Asian Law 16-19.

2 Ummey Sharaban Tahura, *Facilitating Access to Justice: Managing the Cost of Litigation in the Subordinate Courts of Bangladesh* (PhD thesis, Macquarie University 2021) 5.

3 Judicial Strengthening Project, 'Summary Report on Court Services Situation Analysis' (Supreme Court of Bangladesh, December 2013) 34.

4 Emran Hossain Sheikh,' Bangladesh has one judge for 95,000 people' *Dhaka Tribune* (online newspaper, Dhaka, Bangladesh, 30 August 2023) <https://www.dhakatribune.com/bangladesh/324006/bangladesh-has-one-judge-for-95-000-people> (accessed 7 March 2025)

5 Ridwanul Hoque, 'Courts and the Adjudication System in Bangladesh: In Quest of Viable Reforms' in Jiunn-rong Yeh and Wen-Chen Chang (eds) *Asian Courts in Context* (Cambridge University Press, 2014), 481.

6 Ummey Sharaban Tahura, (n 2) 5

7 Abul Barkat and Prosanta K Roy, *Political Economy of Land Litigation in Bangladesh: A Case of Colossal National Wastage* (Pathak Shamabesh, 2004) 291.

Given these challenges, the Bangladesh judiciary has been at the center of controversy regarding transparency and accountability.[8] To restore public confidence, the adoption of e-Courts could serve as a transformative solution, enhancing judicial transparency, efficiency, and accessibility. This aligns with Jeremy Bentham's principle of "open justice", which asserts that justice must not only be done but must also be seen to be done.[9] Additionally, the theories of legal certainty and justice emphasize that consistent and predictable judicial decisions are fundamental to maintaining public trust.[10] Incorporating modern technology within the judicial process can help achieve this goal by ensuring improve efficiency, enhance accessibility, ensure transparency, accountability and reducing human efforts.

Recognizing these needs, several countries, including Singapore, have successfully implemented technology in the court through e-court or paperless court systems, demonstrating their potential to improve judicial efficiency and access to justice. Transforming to digitization these countries have integrated simplification in the judicial initiatives. For example, Switzerland's Justitia 4.0 or Brazil's PJE are notable initiatives.[11] In line with global judicial modernization trends, Bangladesh has initiated efforts to transition toward a paperless court system.[12] Digitalizing judicial processes presents an opportunity to reduce inefficiencies, enhance transparency, and streamline case management. This paper examines Bangladesh's transition towards a digital judiciary, analyzing its potential benefits, implementation challenges, and the lessons that can be drawn from Singapore.

8 Rafiqul Islam, 'The Judiciary of Bangladesh: Its Independence and Accountability' in Hoong Phun Lee and Marilyn Pittard (eds) *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2018) 53

9 J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press 2017) 201

10 Heru Setiawan, I Gusti Ayu Ketut Rachmi Handayani, M Guntur Hamzah, and Hilaire Tegnan, 'Digitalization of Legal Transformation on Judicial Review in the Constitutional Court' (2024) 4(2) *Journal of Human Rights, Culture and Legal System*, 263, 265

11 Anita Gehlot, Shaik Vaseem Akram, Lovi Raj Gupta, Amit Kumar Thakur, Neeraj Priyadarshi and Bhekisipho Twala, 'Integrating Industry 4.0 Technologies for the Administration of Courts and Justice Dispensation—A Systematic Review' (2024) 11 Humanities and Social Sciences Communications 1076 https://doi.org/10.1057/s41599-024-03587-0 accessed 12 March 2025.

12 The Supreme Court of Bangladesh, *Strategic Plan* (2017–2022) 41 https://www.supremecourt.gov.bd/resources/contents/Strategic_Plan.pdf accessed 7 March 2025

2. Methodology

This study employs a doctrinal research methodology, a widely used approach in legal studies that focuses on analyzing legal principles, statutes, case laws, and scholarly writings to develop a comprehensive understanding of legal issues. This method is primarily library-based, relying on primary sources such as legislation, judicial precedents, and legal doctrines, as well as secondary sources like journal articles, reports, and commentaries.

The doctrinal approach will be applied to examine the legal framework surrounding paperless courts in Bangladesh and evaluate its potential benefits and challenges. This study will also explore the principles of judicial efficiency, transparency, and legal certainty, which underpin the digitalization of court processes.

Additionally, this paper employs a comparative legal analysis, drawing lessons and Singapore, two jurisdictions that have successfully transitioned to e-Courts. Singapore was selected as it represents a global benchmark in judicial digitalization, demonstrating how advanced technology can optimize court efficiency and transparency. In addition, World Bank also recommended Singapore Subordinate Courts as a model for both developing and developed countries.[13] By systematically analyzing legal texts, case laws, and judicial reports from these countries, the study aims to interpret and critically assess how Bangladesh can adopt best practices to enhance its judicial system. This methodology ensures a structured and objective examination of the legal and procedural aspects of digitalizing the judiciary, making it an essential tool for assessing the feasibility of a paperless court system in Bangladesh.

3. The Concept of Modern Court or e-Court or Paperless Court

Technology has become an indispensable force in the dispensation and administration of justice, reshaping the way legal systems operate worldwide.[14]The judiciary can no longer remain indifferent to technological advancements, as societies are now interconnected through digital means. The emergence of blockchain, cloud computing, big data analytics, and machine learning has revolutionized various sectors, including judicial administration, necessitating legal adaptation to technological change.[15] Courts across the globe are now

[13] Magnus, Richard, *e-Justice: The Singapore Story* (Singapore Subordinate Courts, 1999) 4

[14] Gehlot, Akram, Gupta, Thakur, Priyadarshi and Twala, (n 11)

[15] Ibid.

integrating digital solutions to address pressing challenges such as data privacy, evidence management, judicial efficiency, and speedy trial mechanisms. The widespread adoption of these technologies underscores an irreversible shift toward digital transformation in the justice sector, making paperless courts an inevitable evolution of judicial administration.

The paperless court, or e-Court, is an emerging model in judicial administration that leverages digital technologies to enhance efficiency, transparency, and accessibility in legal proceedings. The transition towards a paperless judiciary is a global movement, with many countries adopting electronic case management systems to streamline court operations and reduce dependency on physical records. A paperless court fundamentally refers to a digitized judicial system where case processing, record-keeping, and communications are managed electronically, minimizing manual paperwork and procedural inefficiencies.[16]

A core component of a paperless court is the Digital Case Management System (DCMS), which integrates e-filing, virtual hearings, automated case tracking, and digital summons services.[17] By utilizing cloud-based platforms, artificial intelligence (AI), and mobile-friendly interfaces, this system has the potential to reduce case backlogs, minimize delays, and enhance the overall efficiency of judicial operations. The automation of legal processes not only improves workflow management within courts but also ensures better accessibility for litigants, legal professionals, and judicial officers.

Under this system, plaintiffs can file cases online, draft pleadings digitally, and make court fee payments through an integrated electronic payment gateway.[18] Upon submission, the system automatically notifies respondents via digital notifications, ensuring timely communication and reducing procedural delays. Additionally, respondents can submit their written statements and supporting documents electronically, thereby eliminating the need for frequent physical visits to the court. Furthermore, modern paperless court systems incorporate Online Dispute Resolution (ODR) mechanisms, allowing litigants

16 P Wong, 'E-Litigation in Singapore: A Case Study of Digital Innovation in the Judiciary' (2017) 4(2) *Asian Journal of Law and Society* 345; S Chakraborty, 'Digital Transformation of Indian Judiciary: A Step Toward Paperless Courts' (2021) 2(2) *Journal of Law and Legal Reform* 123-34; Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2019).

17 World Bank, *Digital Courts: Transforming Justice Systems for the 21st Century* (2021); United Nations Office on Drugs and Crime (UNODC), *E-Justice: A Global Perspective* (2020).

18 European Commission for the Efficiency of Justice, *European Judicial Systems: Efficiency and Quality of Justice* (Council of Europe 2020)

to settle disputes remotely through mediation and arbitration platforms.[19] Courts are also increasingly adopting AI-driven chatbots and 24/7 legal helplines to assist users with FAQs, case procedures, and system navigation, thereby improving public accessibility to legal services.

At the edge of artificial intelligence, recent developments in paperless courts also explore AI-assisted judgment writing tools that provide structured templates, legal research support, and predictive analytics to enhance judicial efficiency and accuracy in decision-making.[20] These advancements signify a transformative shift in judicial operations, making legal proceedings more streamlined, cost-effective, and user-friendly.

The following part will elaborate how Singapore has adopted the e-courts system to enhance accessibility, ensuring transparency and reducing case backlogs.

4. Singapore: A Global Model for Smart Courts

Singapore's judiciary has undergone a remarkable transformation, evolving from a conventional legal system into one of the most technologically advanced court systems in the world.[21] Within just three decades, Singapore transitioned from a developing nation to an industrialized economy, with its legal system following the same trajectory.[22] By integrating Artificial Intelligence (AI), blockchain, virtual courtrooms, and digital case management, Singapore has positioned itself as a global leader in judicial digitalization. The introduction of technology in the courts has significantly enhanced administrative efficiency, demonstrating that judicial modernization is not merely an operational necessity but a key driver of institutional credibility.

The country's journey towards technological modernization in the courts began in 1992 under the leadership of Chief Justice Yong Pung How.[23] Singapore's courts

[19] United Nations Commission on International Trade Law (UNCITRAL), *Technical Notes on Online Dispute Resolution* (United Nations 2022)

[20] T Sourdin, *Judges, AI and Digital Transformation* (Oxford University Press 2021)

[21] Karen Blöchlinger, 'Primus Inter Pares: Is the Singapore Judiciary First Among Equals?' (2000) 9 *Pacific Rim Law & Policy Journal Association* 591, 591

[22] Judge Suriakumari Sidambaram, 'The Role of Police, Prosecution and the Judiciary in the Changing Society—The Singapore Approach' *Resource Material Series* No 55, 303

[23] The Honourable Chief Justice Yong Pung How, 'Keynote Address at the Technology Renaissance Courts Conference' (Singapore Westin Convention Centre, 24 September 1996); Drik Hartung, Florian Brunnader, Christian Veith, Philipp Plog and Tim Wolters, 'The Future of Digital Justice' (2022) Institutional Knowledge at Singapore Management University 1, 14 https://ink.library.smu.edu.sg/sol_research/4631 accessed 7 March 2025

initially adopted a pragmatic approach to technology, addressing operational challenges, case management inefficiencies, and performance monitoring. The launch of the first technology court in 1995[24] marked the beginning of a broader transformation that saw the judiciary evolve from a technology pragmatist to an innovation leader.[25] The Singaporean judiciary embraced scenario planning and legislative amendments to create a fully digitized legal framework, introducing electronic evidence and records management while redefining procedural laws to accommodate the new digital landscape.[26]

Today, Singapore's paperless court system is considered one of the most comprehensively digitalized judicial infrastructures in the world. While factors such as the country's small geographic size, efficient governance, and economic prosperity have facilitated this transformation, the real catalyst has been strategic decision-making at the highest levels of the judiciary. A top-down approach, with strong leadership from the judiciary and government, ensured that digitalization efforts were implemented systematically and effectively. Collaboration between the legal community, government agencies, and technology experts created an ecosystem where judges, lawyers, and litigants could seamlessly transition into digital court processes. This cohesive approach ensured that modernization was not simply about technology adoption but was integrated into the legal culture itself.

4.1 Strategic Technological Framework in Singapore's Judiciary

To address the persistent issue of case backlog, the Singaporean judiciary introduced a series of judicial reforms in the 1990s aimed at eliminating courtroom congestion and reducing procedural delays.[27] Research identifies Singapore's legal digitalization as structured around three core technological pillars:[28] The first category, enabler technologies, includes cloud storage, cybersecurity measures, and digital identity verification, forming the foundation of a secure and efficient paperless court system. The second category, support process solutions, covers the digitalization of daily court operations, such as

[24] Boon Heng Tan, 'E-Litigation: The Singapore Experience' *Law Gazette* (1 November 2001) https://v1.lawgazette.com.sg/2001-11/Nov01-focus2.htm accessed 25 February 2021.

[25] Magnus, (n 13) 4.

[26] Hartung, Brunnader, and others (n 23).

[27] Chee Hock Foo, Eunice Chua and Louis Ng, 'Civil Case Management in Singapore: Of Models, Measures and Justice' (2014) ASEAN Law Journal 1 https://ink.library.smu.edu.sg/sol_research/2258 accessed 12 March 2025.

[28] Hartung, Brunnader, and others (n 23) 8.

electronic case management systems, digital summons services, and automated case tracking. The third category, substantive law solutions, involves AI-driven legal assistance, including predictive analytics, automated judgment drafting, and digital dispute resolution platforms. By integrating these three components, Singapore successfully automated key judicial functions, reducing case backlog, improving efficiency, and ensuring transparency in legal proceedings.

4.2 Key Features of Singapore's Paperless Court System

4.2.1 Virtual Court Services and Digital Case Management

Singapore's transition towards a digital judiciary began with the introduction of virtual court services in traffic offence cases, where defendants could plead guilty and pay fines through multimedia kiosks linked to the Automated Traffic Offence Management System (ATOMS).[29] Over time, these systems evolved into the Integrated Case Management System (ICMS), launched in 2014, which provides a cloud-based platform that allows judges, lawyers, and litigants to file, track, and manage cases entirely online.[30] The ICMS introduced electronic hearings and document submissions, significantly reducing reliance on paper-based processes, automated workflow management to minimize administrative bottlenecks, and integration with other legal and government databases, streamlining information exchange. Additionally, the Community Justice and Tribunals System (CJTS) facilitates online dispute resolution, enabling litigants to settle disputes remotely while reducing courtroom congestion and litigation expenses.[31]

4.2.2 AI-Powered Judicial Assistance

The Singaporean judiciary has also integrated AI-powered solutions to improve efficiency. AI-driven tools assist in legal research by analyzing past case judgments to help judges and lawyers make informed legal decisions.[32] Case outcome prediction models use machine learning to assess legal precedents and estimate possible rulings.[33] AI also supports automated judgment drafting,

[29] Magnus, (n 13) 7.

[30] Supreme Court of Singapore, *Digital Transformation of Singapore Judiciary* (2022) <www.supremecourt.gov.sg> accessed 7 March 2025

[31] Sidambaram, (n 22) 303

[32] Ministry of Law, Singapore, *AI in Judicial Processes: Enhancing Access to Justice* (2023) <www.mlaw.gov.sg> accessed 7 March 2025

[33] Louisa Tang, 'Real-Time AI Transcribing System, Co-Working Space to Be Rolled Out at New State Courts Towers' *Today* (Singapore, 8 March 2019) https://www.todayonline.com/

reducing administrative workload for judges in routine cases. While these AI applications have enhanced efficiency, concerns have been raised regarding AI bias in judicial decision-making, requiring ongoing oversight and ethical considerations to ensure fair and impartial adjudication.

4.2.3 Video Conferencing and Remote Hearings

One of the most significant advancements in Singapore's judicial digitalization is the adoption of video conferencing and remote hearings. Singapore was one of the first countries to amend its Criminal Procedure Code in 1995 to allow virtual court appearances via live video links.[34] A Practice Direction was issued to ensure that an accused person's right to counsel and fair trial procedures remained intact.[35] Over time, the judiciary expanded video conferencing usage, particularly for bail applications and remote consultations with magistrates, testimonies from vulnerable witnesses and remote interpretation services, and international co-mediation sessions in commercial disputes.[36] The COVID-19 pandemic further reinforced the value of digital hearings, with over 85% of proceedings conducted virtually, accelerating the adoption of paperless court processes.[37]

4.2.4 Blockchain for Evidence Management

Beyond AI and video conferencing, Singapore has pioneered the use of blockchain technology for securely storing digital evidence and legal documentation.[38] The introduction of tamper-proof decentralized ledgers has ensured enhanced security and authenticity of evidence, created permanent and verifiable records of case proceedings, and improved the efficiency of handling contracts, intellectual property disputes, and commercial litigation. Blockchain-based records provide unparalleled transparency while preventing fraudulent alterations to legal documents, reinforcing trust in digital judicial processes.

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singapore/real-time-ai-transcribing-system-co-working-space-berolled-out-new-state-courts-towers accessed 24 February 2021.

34 Richard Magnus, 'The Confluence of Law and Policy in Leveraging Technology: Singapore Judiciary's Experience' (2004) 12 *William & Mary Bill of Rights Journal* 661, 663-5.

35 Magnus, (n 13) 8

36 Singapore Judiciary Annual Report, *Virtual Courts and Remote Hearings* (2021) <www.judiciary.gov.sg> accessed 7 March 2025

37 Magnus, (n 13) 8

38 Infocomm Media Development Authority, *Blockchain for Legal Evidence Management in Singapore Courts* (2022) <www.imda.gov.sg> accessed 7 March 2025

4.2.5 Paperless Courtrooms and e-Filing

Singapore has also successfully eliminated physical documentation in legal proceedings through its eLitigation System, developed by the Singapore Academy of Law. This platform allows lawyers and litigants to submit case files digitally, significantly reducing physical paperwork.[39] Electronic signatures and remote verification have replaced traditional manual authentication methods, expediting legal formalities.[40] Additionally, the implementation of digital payment systems for court fees and legal transactions has streamlined financial transactions within the legal framework. By 2023, over 95% of all court documents in Singapore were filed digitally, drastically reducing administrative costs and case processing delays.[41]

The success of Singapore's smart court system demonstrates that a well-structured and strategically implemented paperless judiciary can deliver tangible improvements. The automation of judicial processes has significantly reduced case backlogs and improved accessibility, as online dispute resolution mechanisms allow individuals, particularly small businesses, to resolve disputes without incurring excessive legal fees.[42] Additionally, AI-driven legal assistance and blockchain-based evidence management have increased transparency and accountability, ensuring greater public trust in the judiciary.[43] Moreover, digitalization has led to substantial cost savings by reducing administrative expenses and minimizing reliance on paper-based documentation.

However, despite its success, Singapore's transition to a fully paperless judiciary has not been without challenges. Increased reliance on digital platforms has exposed courts to potential cybersecurity risks, necessitating the continuous strengthening of data protection measures.[44] The ethical implications of AI in judicial decision-making remain an ongoing concern, as bias in AI algorithms could potentially impact fairness and impartiality in rulings. Additionally, while

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39 Singapore Academy of Law, *eLitigation and Paperless Court Initiatives* (2023) <www.sal.org.sg> accessed 7 March 2025

40 Magnus (n 13)

41 Singapore Academy of Law (n 39)

42 Janet C Checkley, Updates from the 'Fifth Phase' of ODR: The Singapore and APEC Experience (Singapore International Dispute Resolution Academy, 2024) https://cdl.smu.edu.sg/sites/cdl.smu.edu.sg/files/2024-12/ODR_Working_Paper__edited.pdf accessed 30 April 2025

43 Lim WL and Goh MH, 'Blockchain Records under Singapore Law' (March 2022) The Singapore Law Gazette 45–50

44 Jane Loo and Mark Findlay, 'Digitised Justice: The New Two Tiers?' (2022) 33 *Criminal Law Forum* 35, 35-36.

younger legal professionals have adapted quickly to digital court systems, some senior judges and lawyers require extensive training to effectively integrate technology into their practice.[45] In response to these challenges, Singapore has outlined a strategic roadmap that includes integrating quantum computing for enhanced legal security, expanding AI-driven dispute resolution mechanisms, and strengthening cybersecurity measures to protect judicial data.[46]

Singapore's experience demonstrates that a successful transition to a paperless court system requires more than just technology—it demands strong judicial leadership, legislative adaptation, and stakeholder engagement. The key lessons for Bangladesh include the importance of early investment in digital infrastructure, judicial leadership driving digital transformation, comprehensive cybersecurity frameworks, and extensive training programs for legal professionals. By adopting strategic digital policies similar to Singapore's, Bangladesh can effectively transition toward a paperless judicial system, enhancing efficiency, transparency, and access to justice.

5. The Paperless Court Journey in Bangladesh

A successful digital transformation of the justice system requires more than just technological advancements; it necessitates extensive change management, coordinated legislative reforms, and a strategic vision tailored to the specificities of a country's legal framework. In an ideal scenario, judicial governance structures evolve in response to technological innovations, ensuring that the transition to a paperless system aligns with the principles of justice, accessibility, and efficiency. However, the introduction of digital courts also demands procedural and institutional adaptations that meet the expectations of litigants, legal practitioners, and policymakers.[47] The case of Bangladesh exemplifies both the challenges and opportunities presented by judicial digitalization, as the country struggles with an overwhelming backlog of cases, a slow litigation process, and limited access to justice for the majority of its population. Another significant challenge lies in the underdeveloped state of rural digital infrastructure in Bangladesh, coupled with the widespread lack of digital literacy among the general population.

45 Tang, (n 33).

46 ANTARA News, 'Singapore Invests Close to S$300 million in National Quantum Strategy' (31 May 2024) https://en.antaranews.com/news/314874/singapore-invests-close-to-s300-million-in-national-quantum-strategy accessed 30 April 2025.

47 Hartung, Brunnader, and others (n 23), 8

5.1 The Role of Virtual Courts in Bangladesh: Past and Future

The COVID-19 pandemic brought unprecedented disruptions to Bangladesh's judiciary, exacerbating an already overburdened legal system. During the nationwide lockdown, which lasted for three months, judicial proceedings were largely suspended, further increasing case backlogs. In response to this crisis, the government introduced virtual courts in a limited capacity, primarily for bail petitions in criminal cases, given that prisons were overcrowded with undertrial detainees.

To facilitate the implementation of virtual courts, the Bangladesh government enacted the Utilization of Information Technology by the Courts Act, 2020 in June 2020.[48] This ordinance (later on enacted as an Act) enabled litigants to appear virtually via audio, video, or other digital platforms for various judicial processes, including trial proceedings, witness depositions, arguments, and the issuance of court orders and judgments. Alongside this ordinance, the Supreme Court of Bangladesh issued a series of practice directions[49] incorporating technology into court filings, bail hearings, and other urgent legal matters.

Despite these efforts, the ordinance and its accompanying directives failed to comprehensively address all procedural aspects of virtual court proceedings. Significant legal ambiguities persisted, particularly regarding the admissibility of witness depositions taken remotely, the extent to which arguments could be presented digitally, and the conditions under which judgments could be pronounced entirely through virtual platforms. These gaps in legal provisions resulted in inconsistent judicial practices, further complicating the effective implementation of virtual courts.

5.1.1 Past Digitalization Initiatives: Learning from Failures

Prior to the pandemic, Bangladesh had initiated several pilot projects aimed at addressing case backlog issues, but these projects failed to improve court efficiency. The unsuccessful implementation of the online cause list pilot project and the witness deposition system highlighted the necessity of adequately training court staff in using digital tools. A study found that these projects collapsed due to a combination of funding constraints, lack of a well-researched long-term plan, inadequate post-project maintenance, and the

[48] The *Utilisation of Information Technology by the Courts Act* 2020 (Bangladesh)

[49] Supreme Court of Bangladesh, 'Practice Directions No 214' (29 April 2021) http://ww2.supremecourt.gov.bd/resources/contents/Notice_20210429_17.pdf accessed 12 May 2021.

absence of effective policymaking.[50] The lack of a holistic and strategic approach meant that digital reforms were attempted in a piecemeal manner, rather than as part of a comprehensive digital transformation strategy.

Recognizing the limitations of past fragmented attempts, the Supreme Court of Bangladesh, in collaboration with the United Nations Development Programme (UNDP), has undertaken several initiatives to incorporate technology into judicial administration.[51] One such initiative is the My Court platform, which synchronizes existing cause list management, case tracking, and judicial workflows.[52] These initiatives demonstrate a significant effort to integrate digital solutions into the judiciary, but much remains to be done to ensure a full transition to a paperless court system.

5.1.2 Proposed Solutions for Judicial Digitalization

A fully digital case management system is essential for Bangladesh's judiciary, allowing for e-filing, virtual hearings, automated case tracking, and digital summons services. By leveraging cloud-based platforms, artificial intelligence, and mobile-friendly interfaces, the judiciary could significantly reduce case backlog, procedural delays, and administrative inefficiencies. A particular emphasis must be placed on Service Process Simplification (SPS), ensuring that legal processes become more accessible, efficient, and transparent. The digital transformation of the Family Court System could serve as a pilot model for broader judicial reforms, focusing on reducing the Total Cost of Visit (TCV) for litigants and ensuring that they do not face excessive financial, time, or logistical burdens in seeking justice.

The introduction of e-filing platforms would enable plaintiffs to initiate cases online, draft pleadings digitally, and make court fee payments through an integrated online payment gateway. Upon submission, the system would automatically notify respondents via SMS, email, or mobile app notifications, ensuring timely communication. The respondents, in turn, would be able to submit written statements and supporting documents electronically, eliminating

50 Tahura, (n 2) 218; U S Tahura, 'Can Technology Be a Potential Solution for a Cost-Effective Litigation System in Bangladesh?' (2021) 42 Justice System Journal 180 https://doi.org/10.1080/0098261X.2021.1902437

51 Working as a Deputy Secretary in the Ministry of Law, Justice, and Parliamentary Affairs in Bangladesh, this researcher became aware of these projects. Currently, the Ministry of Law, Justice, and Parliamentary Affairs, in collaboration with UNDP and the Supreme Court of Bangladesh, is working to develop a paperless court as a pilot project.

52 This app is available in Google play store.

the need for repeated physical visits to the court. Moreover, virtual hearings and online dispute resolution (ODR) mechanisms could allow parties to resolve legal matters remotely, reducing litigation costs and ensuring faster adjudication.

For judges and court officials, a digital judiciary would include features such as digital case management systems, automated document filing, digital court diaries, and judgment writing modules. A centralized dashboard and reporting system would provide real-time analytics on case progress, workload management, and judicial performance tracking. Interoperability with key government platforms—including the Legal Aid System, My Court Platform, Judi Pay, Judiciary Cause list, and National Identification (NID) databases—would enhance verification processes and case legitimacy. These solutions would ensure that digital courts operate in a transparent, accountable, and citizen-centric manner.

5.1.3 The Proposed Components of digital solutions: At a glance

- Online Application: Citizens and legal professionals can initiate case proceedings through an online platform, reducing paperwork and eliminating the need for physical visits to the court.
- Personalized dashboard: A user-friendly interface providing litigants, lawyers, and judges with access to case status, notifications, hearing schedules, and document submissions in a personalized manner.
- Case tracking: A real-time case status tracking system allows users to monitor their cases' progress, receive updates, and access case history.
- Helpline & virtual assistant: A 24/7 helpline and AI-driven chatbot to assist users with FAQs, case procedures, and system navigation, ensuring better accessibility to legal services.
- Online payment: A secure online payment gateway for court fees and other charges, integrated with Judi Pay.
- Notification (SMS, Email etc.): Automated case updates, hearing reminders, and document submission alerts via SMS, email, and push notifications to ensure timely communication.
- Virtual Hearing: An integrated video conferencing platform enabling judges, lawyers, and litigants to attend hearings remotely, reducing case backlog and travel-related barriers.

- Digital Case Management: A centralized case management system allowing courts to handle all case-related activities, including filing, scheduling, documentation, and updates in a structured digital format.
- Digital Court Diary: A digital Court Diary serves as a digital platform for the online storage of court case information for judges and court officials to efficiently manage case status, cause title, party name, type of case etc. giving complete history of a case hearing.
- Digital filing: An electronic document filing system allowing court staff, lawyers, and litigants to submit case-related documents online, ensuring security, accessibility, and reduced paperwork.
- Digital Summons: A system for automated generation and digital delivery of court summons via SMS, email, and official portals, reducing delays in communication.
- Judgment writing: A structured judgment-writing tool for judges, incorporating AI-assisted legal research and document templates, improving efficiency and accuracy in drafting verdicts.
- Dashboard and reporting: A data analytics and reporting module providing real-time insights into case progress, pending matters, judicial workload, and system efficiency metrics.
- Online dispute resolution: A virtual mediation platform enabling parties to resolve disputes outside of traditional court hearings, promoting alternative dispute resolution (ADR) mechanisms.

5.2 Challenges to Digitalizing Bangladesh's Judiciary

Despite the potential benefits, transitioning to a paperless court system in Bangladesh presents significant infrastructural, logistical, and cyber security challenges. One of the primary barriers is the lack of reliable technological infrastructure, particularly in rural areas, where frequent power outages and slow internet connectivity make virtual hearings difficult to conduct. Courts often lack adequate digital storage systems, raising concerns about the security and accessibility of electronic submissions. Additionally, there is no clear legal framework governing the acceptance of e-banking receipts as proof of payment, further complicating the transition to digital transactions in the judiciary.

Another key challenge is the human resource gap. Judges, court staff, and lawyers require specialized training to efficiently use digital tools, but such training programs are not widely available. The absence of a structured technical support

system leaves many legal professionals unprepared to navigate the complexities of digital case management. Due to these factors, the judiciary remains a hybrid of manual and digital processes, creating confusion, inefficiency, and bureaucratic hurdles.

5.3 Data Privacy and Security Concerns in Digital Courts

The shift towards digital courts raises critical concerns about data privacy and cybersecurity risks. The increasing reliance on online case management systems and digital dispute resolution platforms makes judicial data vulnerable to cyberattacks. Even Singapore, a global leader in judicial digitalization, has faced challenges related to data breaches in its Integrated Case Management System (ICMS).[53] In the absence of adequate data protection measures, sensitive legal documents could be accessed by unauthorized parties, compromising the privacy of litigants.[54] The unauthorized collection and monetization of user data, particularly in the context of digital courts, could erode public confidence in the judicial system. Additionally, concerns surrounding DNA profiling databases and digital forensic records highlight the need for strict data governance frameworks to prevent the misuse of personal information.[55]

To mitigate these risks, the judiciary must implement strong authentication protocols, encrypted access to digital case files, and legal safeguards for personal data protection. Restricting access to case records before final disposal and developing secure login systems for authorized legal representatives could help address security vulnerabilities.

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53 Lydia Lam, '223 State Courts Online Case Files Accessed Without Authorisation Due to Loophole' *Channel News Asia* (Singapore, 28 November 2018) https://www.channelnewsasia.com/news/singapore/223-state-courts-online-case-files-accessedwithout-10976490 accessed 25 February 2021.

54 Loo and Findlay (n 41)36

55 Jasmine Ng, Andrew Wong and Jia Qing Yap, 'Legal Teaching Our Way to Justice' *Law Tech Asia* https://lawtech.asia/legal-tech-ing-our-way-to-justice/ accessed 24 February 2021; The Constitution of Bangladesh 1972, art 43; Paul E Tracy and Vincent Morgan, 'Big Brother and His Science Kit: DNA Database for 21st Century Crime Control' (2000) 90(2) *Journal of Criminal Law and Criminology* 670, 670-3.

6. Conclusion

The transition to a paperless court system in Bangladesh is no longer a matter of choice but a necessity. The COVID-19 pandemic demonstrated that the judiciary could adapt to technological advancements when circumstances demanded it. However, past experiences have shown that fragmented and unstructured digitalization efforts do not yield sustainable results. A comprehensive, well-planned approach, rather than isolated pilot projects, is required to ensure long-term success.

While concerns about digital exclusion, setup costs, and cybersecurity remain, the benefits of judicial modernization—enhanced transparency, faster case resolution, and increased accountability—far outweigh the challenges. Bangladesh now stands at a critical juncture where the incorporation of technology into the judiciary, through a structured and well-coordinated effort, is the only viable solution to reestablish public confidence in the justice system. A paperless court system could provide the pathway towards a more transparent, accessible, and accountable judiciary, ultimately strengthening the rule of law in Bangladesh.

Greening the Post-July Aspired Constitution through Pro-activism

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Abstract

Following the month-long 'the 2024 July Revolution' in Bangladesh, leading to the fall of a decade-long government, discussions are now taking place to reform the Constitution. While the prime focus, for obvious reasons, is given to the civil and political rights that have been grossly violated in the last 15 years, the necessity of reforming constitutional provisions of several vital economic, social and cultural (ESC) rights is being overshadowed in the preliminary discussions. Although some of the ESC rights were proposed to be extended as part of the fundamental rights, a few important ones fall behind. The most prominent among them is the environmental rights, considering the "environmental circumstances" of Bangladesh, i.e., river filling, deforestation, razing mountains, polluted air, contaminated water, etc. Although Article 18A of the Constitution of the People's Republic of Bangladesh enshrines the right to the environment, this right is judicially unenforceable, similar to other ESC rights listed in the fundamental principle of State Policy of the Bangladesh Constitution. Nevertheless, the Judiciary of Bangladesh has played a prominent role insofar as at least legally upheld environmental rights on multiple occasions. Hence, at the outset of reforming the Constitution or adopting a new one, this paper argues that the Judiciary of Bangladesh, through its activism, can play the quintessential role in bringing, if not overturning, the focus on the highly important concern of environmental rights to step towards a sustainable Bangladesh. Stating the constitution reform discussion in post-July and the necessity of environmental safeguards in Bangladesh, this study will follow a doctrinal, qualitative and analytical methodology to highlight Bangladesh's Judiciary's contribution to environmental justice to date and how it can continue its role to include the right to environment in the list of fundamental ipso facto judicially enforceable rights.

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I. Introduction

The 2024 July Revolution marked a significant turning point in the history of Bangladesh. This month-long uprising led to the fall of a decade-long government, ushering in a new era of hope and transformation. As the nation embarks on the journey of constitutional reform, the primary focus has understandably been on civil and political rights,[1] which were grossly violated during the previous regime over the last 16 years and, more recently, during the July Revolution. Although some economic, social and cultural (ESC) rights were proposed to be extended as part of the fundamental rights,[2] the necessity of reforming long-needed constitutional provisions related to environmental rights is being overshadowed amidst these crucial discussions.

Environmental challenges have been one of the major concerns of the present as well as future generations in the 21st century. With rapid population growth worldwide, environmental concerns no less than the fundamental needs of human beings. In 2022, the UN General Assembly passed a resolution recognizing "a clean, healthy and sustainable environment as a human right."[3] This resolution was supported by 161 votes in favor against only eight abstentions.[4] Despite receiving such an enormous response, the phenomenon that 'environmental rights are human rights' or 'environmental sustainability is complementary for the protection of human rights'[5] is contested and still not practically realized around the globe.[6] Because facilitating more people within the same land area requires more development, and countries around the world have achieved this development at the cost of the environment. The increasing fiscal pressure from the expectation of high development equally hampers the States from attaining Sustainable Development Goals.[7]

1 Star Digital Report, 'Constitution reform commission proposes new principles for Bangladesh' *The Daily Star* (Dhaka, 15 January 2025) <https://www.thedailystar.net/news/bangladesh/news/constitution-reform-commission-proposes-new-principles-bangladesh-3799896> accessed 17 January 2025.

2 Staff Correspondent, 'Constitution reform: Sweeping changes in constitution' *The Daily Star* (Dhaka, 16 January 2025) <https://www.thedailystar.net/news/bangladesh/politics/news/constitution-reform-sweeping-changes-constitution-3800181> accessed 17 January 2025.

3 The human right to a clean, healthy and sustainable environment, UNGA Res A/76/L.75 (28 July 2022) UN Doc A/76/L.75.

4 Azadeh Chalabi, 'A New Theoretical Model of the Right to Environment and its Practical Advantages' (2023) 23 (4) Human Rights Law Review 1, 1.

5 United Nations Development Group, 'UNDG Guidance Note on Human Rights for Resident Coordinators and UN Country Teams' (2020) <https://unsdg.un.org/resources/unsdg-guidance-note-human-rights-resident-coordinators-and-un-country-teams> accessed 16 January 2025.

6 Chalabi (n 6), 1.

7 World Bank, 'Understanding the Cost of Achieving the Sustainable Development Goals' (2020) <https://documents1.worldbank.org/curated/en/744701582827333101/pdf/Understanding-the-Cost-of-Achieving-the-Sustainable-Development-Goals.pdf> accessed 18 January 2025.

Specifically, global south countries that have a large population compared to their limited resources strive to find contemporary solutions through sustainable mechanisms. Introducing such strong policies has a lot to do with the country's existing legal frameworks, which are often misused by corruption and politics. Bangladesh itself, as country from South Asia, is no exception to these kinds of political vulnerability. However, after the July Revolution, the government had a golden opportunity through the Constitution reform discussions to strengthen at least its institutional framework to safeguard its diverse yet vulnerable environment. Since the right to the environment could not make a place in the proposal of the Constitution Reform Commission,[8] this article investigates the role of judicial activism to bring the focus on the much-anticipated environmental right.

After the introductory discussion in section I, this article explores the necessity of enforcing environmental rights from the lens of core elements of the environment in section II. Then, section III will focus on the progress made in Constitution reform in the post-July revolution period and the overwhelming emphasis on civil and political rights. Next, section IV will first examine the judiciary's role in upholding environmental justice so far and then recommend how judicial activism can bring, if not overturn, the focus on the right to the environment. Discussing the judiciary's potential to advocate for including environmental rights in the list of fundamental rights, section V will highlight potential challenges and limitations from the holistic view. Finally, based on the discussion made throughout the article, section VI will conclude that while advocating for the inclusion of environmental rights as fundamental rights, the judiciary can contribute significantly to advancing environmental protection and sustainability in society, but its effectiveness may be hindered by challenges and limitations.

II. Necessity of Enforcing Environmental Rights

Bangladesh is the largest delta in the world, with 200 laws covering environmental protection in one way or another.[9] Despite its strong commitment to environmental safeguards, over the past few decades, Bangladesh has experienced significant environmental degradation, including the loss of a

[8] Constitution reform commission proposes new principles for Bangladesh (n 1).

[9] Mohammad Golam Sarwar and others, 'International Environmental Law | Bangladesh', *Encyclopedia of Public International Law in Asia Online* (2021).

substantial amount of its rivers, forests, and biodiversity.[10] Ranking 175th out of 180 countries in the Environmental Performance Index 2024,[11] Bangladesh's struggle to practically implement the existing legal framework is exposed.

Besides, while State policy regarding the safeguarding and enhancement of the environment and biodiversity contributes to environmental protection, it is not enforceable by citizens affected by environmental degradation.[12] Meanwhile, fundamental rights that are constitutionally protected are more resilient than state policies, hold the highest status among legal standards, are less influenced by political changes, and are generally better comprehended by both the public and the citizens.[13]

'Environmental rights' can be understood as an expansion of existing human rights to include responsibilities for environmental protection.[14] This concept acts as a bridge between applying current rights for environmental aims and recognizing a new right to a healthy environment. These rights emphasize political participation and informed consent, ensuring protections against arbitrary actions that could cause environmental harm and an individual right to take legal action for environmental conservation.[15] Individuals affected by environmental issues must be directly involved to prevent harmful environmental practices. Essential elements for this include the right to prior knowledge of potentially harmful actions, with a duty for the state to inform the public; the right to participate in decision-making; and the right to seek recourse through administrative and judicial bodies.[16]

Constitutional environmental rights guarantee essential elements in this regard. National constitutions that recognize environmental rights indicate a growing awareness among states about the importance of the environment in fulfilling other human rights. Moreover, there is a shared responsibility to protect

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10 Fahim Abrar Abid, 'When 'National Interest' leads to Ecocide: The Unseen Constitutional Violation of Environmental Laws in Bangladesh' (*Oxford Human Rights Hub*, 10 October 2024) <https://ohrh.law.ox.ac.uk/when-national-interest-leads-to-ecocide-the-unseen-constitutional-violation-of-environmental-laws-in-bangladesh/> accessed 26 January 2025.

11 Yale Center for Environmental Law & Policy, '2024 Environmental Performance Index' (2024) <https://epi.yale.edu/measure/2024/EPI> accessed 26 January 2025.

12 Ernest Brandl and Hartwin Bungert, 'Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad' (1992) 16 (1) Harvard Environmental Law Review.

13 ibid.

14 Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' in Steve Vanderheiden (ed), *Environmental Rights* (Routledge 2012) 117.

15 ibid.

16 ibid.

the environment, not only for its intrinsic value but also for the benefit of future generations.[17]

This section will particularly focus into the environmental concerns in Bangladesh from the lens of the core environmental elements, i.e., air, water (river and sea), soil, biodiversity, and thus its overall effect on climate change in Bangladesh.

II. A. Air Quality

Bangladesh has encountered a massive air quality crisis. The capital, Dhaka, frequently ranks first in the world in terms of air pollution.[18] For instance, on January 5th, 2025, Dhaka's air quality was labelled as "hazardous," with an air quality index (AQI) score of 358.[19] Ambient concentrations of air pollutants such as PM2.5, PM10, CO, O3, NO2, and SO2 are present in the air of Dhaka.[20] This rising air pollution is connected to four factors such as road or soil dust, vehicular emissions, industrial emissions and biomass burning.[21] All these factors are intensified by the lack of stringent environmental regulations and enforcement.[22] This severe air pollution impacts the respiratory system, cardiovascular system, psychological well-being, skin health and increases cancer risk.[23] It also reduces the average life expectancy by 6.9 years in Bangladesh.[24] Consequently, it hampers the right to health and, eventually, the right to life of the citizens of the country. However, the implementation of relevant legislation can significantly help combat air pollution in the country through preventive initiatives. In *Dr Mohiuddin Farooque being dead his substitute Syeda Rizwana Hasan and another Vs. Government of Bangladesh represented by the Ministry of Communications and others,* the petitioner

17 Bridget Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Springer Nature Singapore 2018).

18 UNB, 'Dhaka tops the world in air pollution' *Dhaka Tribune* (Dhaka, 5 January 2025) <https://www.dhakatribune.com/bangladesh/dhaka/369985/dhaka-tops-the-world-in-air-pollution> accessed 6 January 2025.

19 ibid.

20 Md Riad Sarkar Pavel and others, 'Long-Term (2003–2019) Air Quality, Climate Variables, and Human Health Consequences in Dhaka, Bangladesh' (2021) 3 Frontiers Sustainable Cities.

21 ibid.

22 Joseph Webster, Natalie Sinha and Sarah Meadows, 'Bangladesh's air quality is among the world's worst. What can be done?' (*Atlantic Council*, 25 June 2024) <https://www.atlanticcouncil.org/blogs/energysource/bangladeshs-air-quality-is-among-the-worlds-worst-what-can-be-done/> accessed 6 January 2025.

23 Irin Hossain and others, 'Environmental Overview of Air Quality Index (AQI) in Bangladesh: Characteristics and Challenges in Present Era' (2021) 4 (7) International Journal of Research in Engineering, Science and Management.

24 Webster, Sinha and Meadows (n 23).

emphasized implementing the National Environment Policy 1992 and achieving the purposes and spirit of the Motor Vehicles Ordinance, 1983, the Environment Pollution Control Ordinance, 1977.[25] Even almost two decades later, such implementation is hardly to be executed.

II. B. Decreasing Number of Rivers

Despite receiving some of the highest annual water runoffs globally and numerous rivers meandering through its landscape, Bangladesh is in the highly vulnerable zone in terms of water security due to climate change and man-made interventions.[26] As per a recent report by the National River Conservation Commission (NRCC), only 405 rivers have survived among the 770 rivers that historically flowed through the country, and over 100 rivers have been lost from Bangladesh's landscape since its independence.[27] Despite acknowledging rivers as living entities, the assurances and pledges of the Government to safeguard the river are restricted to rhetoric as the rivers are gradually drying up, and river encroachment and pollution continue unabated.[28]

Owing to industrial discharge and mismanaged waste, such as plastics and untreated sewage, *inter alia* major rivers in Bangladesh have experienced a severe decline in water quality.[29] The changes in river patterns, influenced by factors

[25] *Dr Mohiuddin Farooque being dead his substitute Syeda Rizwana Hasan and another Vs. Government of Bangladesh represented by the Ministry of Communications and others* (Writ Petition No. 300 of 1995, with Writ Petition No. 1694 of 2000).

[26] Alamgir Kabir and others, 'A safe operating space for the major rivers in the Bangladesh Delta' (2024) 19 (11) Environmental Research Letters 2.

[27] Pavel Partha, 'Dying rivers in independent Bangladesh' *NEWAGE* (Dhaka, 26 March 2024) <https://www.newagebd.net/article/228793/dying-rivers-in-independent-bangladesh#:~:text=Historically%2C%20our%20lives%20revolved%20around,have%20been%20lost%20since%20independence> accessed 27 January 2025.

[28] Iftekhar Mahmud, '158 rivers dry up in 57 years' *Prothom Alo English* (Dhaka, 15 March 2020) <https://en.prothomalo.com/environment/158-rivers-dry-up-in-57-years> accessed 27 January 2025.

[29] Mehrin A. Mahbub and Diana Chung, 'Addressing Environmental Pollution is Critical for Bangladesh's Growth and Development' (*World Bank Group*, 28 March 2024) <https://www.worldbank.org/en/news/press-release/2024/03/28/addressing-environmental-pollution-is-critical-for-bangladesh-s-growth-and-development#:~:text=The%20Bangladesh%20Country%20Environmental%20Analysis,billion%20days%20of%20illness%20annually> accessed 27 January 2025.

like the construction of the Farakka Barrage[30] have also significantly affected the rivers in Bangladesh, and over time, the length of navigable parts of the rivers has shrunk as well.[31] The Buriganga River is among the most polluted rivers globally.[32] Also, higher concentrations of Heavy Metals (HMs) were noticed in these rivers.[33] Particularly, in three divisions, i.e. Dhaka, Rajshahi, and Chattogram, most HM concentrations in water were found above the threshold limits set by the World Health Organization, the United States Environmental Protection Agency, and the Department of Environment have also been exceeded as among the 10 HMs, six metals (As, Pb, Cd, Cr, Fe, and Mn) surpassed these limits.[34] Despite the enormous responsibility of the NRCC to protect these rivers, it was not able to uphold its responsibility adequately.[35]

II. C. Sea-level Rise

Since Bangladesh is a coastal country with smooth terrain that includes both wide and narrow ridges and depressions, it is highly vulnerable to rising sea levels.[36] Bangladesh would be one of the first victims of submergence in the rapidly warming weather.[37] Government studies have found that Bangladesh is facing a sea-level rise faster than the global average of 3.42mm per year, and this accelerated rise is expected to have a more severe impact on food

30 Shahriar Bin Shahid, M. Royhan Gani and Nahid D. Gani, '32 years of changes in river paths and coastal landscape in Bangladesh, Bengal Basin' (2024) 9 Journal of Sedimentary Environment 1035, 1049.

31 S Nazrul Islam, 'The sorry state of rivers in Bangladesh' *The Daily Star* (Dhaka, 27 September 2022) <https://www.thedailystar.net/opinion/views/news/the-sorry-state-rivers-bangladesh-3129401> accessed 27 January 2025.

32 '250 untreated sewage connections polluting Buriganga' *The Business Standard* (Dhaka, 30 October 2024) <https://www.tbsnews.net/bangladesh/250-untreated-sewage-connections-polluting-buriganga-979751> accessed 27 January 2025.

33 Hazrat Bilal and others, 'Surface water quality, public health, and ecological risks in Bangladesh—a systematic review and meta-analysis over the last two decades' (2023) 20 Springer Nature 91710, 91711.

34 Debasish Pandit and others, 'A comprehensive scenario of heavy metals pollution in the rivers of Bangladesh during the last two decades' (2024) Environmental Science and Pollution Research, 2.

35 Naimul Alam Alvi, 'NRCC has been kept weak on purpose' *The Daily Star* (Dhaka, 17 December 2023) <https://www.thedailystar.net/opinion/views/news/nrcc-has-been-kept-weak-purpose-3496281> accessed 27 January 2025.

36 Ainun Nishat and Nandan Mukherjee, 'Sea Level Rise and Its Impacts in Coastal Areas of Bangladesh' in Rajib Shaw, Fuad Mallick, and Aminul Islam, *Climate Change Adaptation Actions in Bangladesh* (Springer, Tokyo 2013) 45.

37 'Sea levels in Bangladesh could rise twice as much as predicted' *The Business Standard* (Dhaka, 07 January 2020) <https://www.tbsnews.net/environment/sea-level-estimated-rise-twice-much-predicted> accessed 27 January 2025.

production and livelihoods than previously anticipated.[38] The disappearance of a substantial portion of the freshwater zone due to sea level rise near the estuary will have profound ecological impacts on the country, potentially driving some endangered species to extinction.[39] The expected negative impacts are anticipated to be severe, including waterlogging, increased salinity, crop damage, high temperatures, and excessive rainfall.[40] Over the next few decades, if the vulnerable Sundarbans and densely populated coastal areas were to become submerged, millions could be displaced.[41]

Furthermore, the increased salinity in the coastal areas due to sea level rise could have a harmful effect on the ecology, agriculture, groundwater, people's lives, and infrastructure in the coastal regions.[42] Traditional ways of life are becoming unviable due to rising sea levels, as crop varieties struggle to survive in salty conditions and alternative career options are limited.[43] Due to climate change and sea-level rise, Bangladesh is likely to be affected by more intense cyclonic events in the foreseeable future.[44] Officials at Bangladesh Water Development Board (BWDB) have reported that, in recent years, several hundred acres of arable land, along with numerous houses, markets, mosques, educational institutions, roads, cyclone shelters, and 14 kilometers of embankments, have been submerged by seawater; consequently, Bangladesh faces significant risks.[45]

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38 Mohammad Al-Masum Molla, 'Sea-level rise in Bangladesh: Faster than global average' *The Daily Star* (Dhaka, 19 May 2024) <https://www.thedailystar.net/environment/climate-change/news/sea-level-rise-bangladesh-faster-global-average-3613116> accessed 27 January 2025.

39 Nishat and Mukherjee (n 36), 48-49.

40 Molla (n 39).

41 Antara Halder, 'Rising sea levels and the lessons to learn' *The Daily Star* (Dhaka, 27 August 2023) <https://www.thedailystar.net/opinion/views/news/rising-sea-levels-and-the-lessons-learn-3404096> accessed 27 January 2025.

42 Partha Shankar Saha, 'Sea level rising, coast under threat' *Prothom Alo English* (Dhaka, 24 May 2024) <https://en.prothomalo.com/environment/climate-change/bvlseylihs> accessed 27 January 2025.

43 William Park, 'The country disappearing under rising tides' BBC (Dhaka, 2 September 2019) <https://www.bbc.com/future/article/20190829-bangladesh-the-country-disappearing-under-rising-tides> accessed 27 January 2025.

44 Mohammed Fazlul Karim and Nobuo Mimura, 'Impacts of climate change and sea-level rise on cyclonic storm surge floods in Bangladesh' (2008) 18 (3) Global Environmental Change 490, 490..

45 'Sea level rise hits Bangladesh islanders hard' (*UNDP*, 22 February 2019) <https://www.undp.org/bangladesh/news/sea-level-rise-hits-bangladesh-islanders-hard> accessed 27 January 2025.

II. D. Effect on Biodiversity

Along with over-exploitation, deforestation, agricultural habitat conversion, pollution, and invasive species, climate change is another noteworthy driver of biodiversity loss in Bangladesh.[46] Due to climate change, a wide range of mammals, birds, amphibians, reptiles, crustaceans, and above all, the Royal Bengal Tiger will face extinction in Bangladesh. [47]The natural forests of Bangladesh are dwindling at an alarming pace due to high population density, uneven land distribution, and excessive exploitation of forest resources, and this critical fragmentation has rendered these forests unlikely to sustain rich biodiversity or support viable populations of natural and native species.[48] Despite different cases, including *Mohammad Kamrul Ahsan (Sumon) and others v Government of Bangladesh,* [49] *Ain-O-Salish Kendro (ASK) v Bangladesh*,[50] *Rana Surong v Government of Bangladesh and Ors,*[51] preservation and safeguarding biodiversity were addressed by the Court; however, the biodiversity of Bangladesh is degrading continuously.

Additionally, the biodiversity of the mangrove forests has deteriorated due to the relentless destruction of diverse mangrove ecosystems,[52] because the rising sea levels are directly impacting the Sundarbans, exacerbated by a declining flow of fresh water and increasing silt and saltwater intrusion into rivers, resulting in biodiversity in Sundarbans experiencing significant losses.[53] Furthermore, Dhaka also faces severe biodiversity threats due to rapid economic development, a growing population, land grabbing, congested housing, tree felling, and vehicle emissions, resulting in extreme pollution and diminished

[46] 'Climate Change and Health in Bangladesh' International Union for Conservation of Nature (IUCN) 2.

[47] ibid.

[48] Md Mizanur Rahman, 'Habitat Loss and Biodiversity Loss Go Hand in Hand in Bangladesh: Causes and Consequences' (2023) SSRN Electronic Journal, 3.

[49] *Mohammad Kamrul Ahsan (Sumon) and others v Government of Bangladesh, represented by the Secretary, Ministry of Environment and Forests, Bangladesh Secretariat, Dhaka and others* (Writ Petition No 1166 of 2012).

[50] *Ain-O-Salish Kendro (ASK) v Bangladesh* (2014) LEX/BDHC/0066/2014.

[51] *Rana Surong v Government of Bangladesh and Ors* (2020) 72 DLR (AD) 153.

[52] M. S. Hossain, M. J. Uddin and A. N. M. Fakhruddin, 'Impacts of shrimp farming on the coastal environment of Bangladesh and approach for management' (2013) 12 Springer Nature 313, 316.

[53] Pinky Akter, 'Environmental pollution adversely affects biodiversity in the Sundarbans' Prothom Alo English (Dhaka, 29 July 2022) <https://en.prothomalo.com/environment/97e65za0dx> accessed 27 January 2025.

quality of life.[54] Therefore, every aspect of Bangladesh's biodiversity is impacted to varying degrees.

II. E. Growing number of Diseases due to Poor Environment

Being a developing country, Bangladesh experiences a direct connection between climate change and the risks associated with water and health-related diseases.[55] According to the Bangladesh Country Environmental Analysis (CEA), air pollution, unsafe water, poor sanitation and hygiene, and lead exposure are responsible for over 272,000 premature deaths and 5.2 billion days of illness each year.[56] Bangladesh consistently ranks among the worst countries for air pollution, leading to high mortality rates from respiratory infections, lung cancer, and cardiovascular diseases. In the Dhaka region alone, an estimated 24,000 people died prematurely due to air pollution between 2005 and 2018.[57] Further, in 2019, these environmental issues cost the equivalent of 17.6 per cent of Bangladesh's GDP, and household and outdoor air pollution have the most detrimental impact on health, causing nearly 55 per cent of premature deaths and alone accounting for 8.32 per cent of the GDP.[58]

Moreover, household emissions from cooking with solid fuels are a major source of air pollution disproportionately affecting women and children, and environmental pollution has a severe impact on children, with lead poisoning causing irreversible damage to their brain development, resulting in an estimated annual loss of nearly 20 million IQ points.[59] Human health in tropical developing countries like Bangladesh will be affected by climate change, and high summer temperatures could result in enhanced deaths due to heat stress.[60] Poor sanitation, lack of safe water supply, arsenic contamination in groundwater, drainage congestion and standing water lead to cholera, diarrheal and other

54 Selina Mohsin, 'Ecological havoc in Dhaka' *The Daily Star* (Dhaka, 1 March 2018) <https://www.thedailystar.net/opinion/environment/ecological-havoc-dhaka-1541521> accessed 27 January 2025.

55 Monira Parvin Moon, 'The silent threat: Unveiling climate change's water and health challenges in Bangladesh' (2024) 22 (11) J Water Health 2094, 2094.

56 Mahbub and Chung (n 31).

57 'Health of millions in Bangladesh at risk due to climate change: LSE report' *The Business Standard* (Dhaka, 18 October 2023) <https://www.tbsnews.net/bangladesh/health/health-millions-bangladesh-risk-due-climate-change-lse-report-721606> accessed 27 January 2025.

58 Mahbub and Chung (n 30).

59 ibid.

60 Climate Change and Health in Bangladesh (n 47).

waterborne diseases causing deaths.[61] The health impacts of drought encompass fatalities, malnutrition including undernutrition, protein-energy malnutrition, or micronutrient deficiencies, infectious diseases, and respiratory ailments.[62] Therefore, due to the poor environment of Bangladesh, the number of diseases is growing as well.

Despite the efforts being made towards environmental protection, Bangladesh is currently grappling with serious challenges related to environmental degradation. For example, declining air quality and river pollution, rising sea levels, loss of biodiversity, and an increase in health issues related to environmental conditions. These issues underscore the pressing need for a comprehensive approach to safeguarding the environment. Considering the critical nature of these challenges, it is essential to consider the inclusion of environmental rights within the Constitution.

III. Post-July Constitution Reform Discussion

While it is true that the country is inherently climate-vulnerable due to its geographical location at the Bay of Bengal, one of the core reasons behind the poor environmental state and its despicable ranking in the environmental index is the legal loopholes.[63] The major one, being the right to the environment enshrined in the Constitution, which is judicially unenforceable.[64] Hence, the post-July Constitution Reform approach is a golden opportunity for Bangladesh to concretely uphold the right to a healthy environment in the new or reformed Constitution. This chapter will discuss the progress made so far in the Constitution Reform process and the overwhelming focus on civil and political rights.

III. A. Progress of the Constitution Reform Commission

The July Revolution of 2024, which led to the fall of a decade-long government in Bangladesh, has set the stage for significant constitutional reforms. The new government has promised to priorities human rights, freedom of speech,

61 'Pollution the killer' *The Daily Star* (Dhaka, 17 September 2018) <https://www.thedailystar.net/environment/environment-pollution-in-dhaka-bangladesh-18000-died-world-bank-report-1634566> accessed 27 January 2025.

62 Bettina Menne and Roberto Bertollini, 'The Health Impacts of Desertification and Drought' in UNCCD Down to Earth Newsletter' (2000) 14 United Nations Convention to Combat Desertification (UNCCD) 4, 4-6.

63 Abid (n 11).

64 The Constitution of the People's Republic of Bangladesh 1972, Art 8(2).

and political participation for all citizens. These changes are expected to bring about a more inclusive and democratic society in Bangladesh. The discussions surrounding these reforms are driven by a collective desire to address the systemic issues that plagued the previous regime and to establish a more democratic and inclusive governance framework. The people of Bangladesh are hopeful that these reforms will lead to a more transparent and accountable government that truly represents the interests of all citizens. However, although 'noble,' the focus seems to be neglecting the needs of the pre-July era. It is crucial for the new government also to consider the challenges faced by the country before the revolution to show that these changes are not being systematically done, particularly against the previous regime. Addressing the issues beyond the July Revolution in the Constitution reform discussion, Bangladesh can work towards a more comprehensive and sustainable transformation.

To facilitate the Constitution Reform process, the 'Constitution Reform Commission' (the Commission), chaired by Professor Ali Riaz, was formed in September 2024 along with five other reform commissions.[65] Other members of the Commission are Professor Sumaiya Khair, Barrister Imran Siddiqui, Professor Muhammad Ikramul Haq, Advocate Dr Sharif Bhuiyan, Barrister Moin Alam Firozi, writer Firoz Ahmed, and writer and human rights activist Mo Mustain Billah.[66] The Commission was assigned to review the existing provisions of the Constitution and propose amendments to establish a truly democratic country. Since the existing Constitution has been severely abused by the previous regime, [67]the commission's mandate was to safeguard the Constitutional provisions and avoid such abuse in the future. The Constitution Reform Commission has conducted numerous meetings with various stakeholders, including legal experts, civil society organizations, and political leaders. These consultations have helped the Commission gather diverse perspectives and insights on the necessary changes needed to strengthen the country's democratic institutions. In addition, public engagement has been a crucial aspect of this reform process, with the Constitution Reform Commission launching an official website to gather feedback and suggestions

65 Staff Correspondent, 'Govt forms six commissions to reform six sectors: Yunus' *Prothom Alo* (Dhaka, 11 September 2024) <https://en.prothomalo.com/bangladesh/68csnenzkx> accessed 24 January 2025.

66 <https://crc.legislativediv.gov.bd/site/view/officer_list_all> accessed 31 January 2025.

67 'Bangladesh: Events of 2024' (*Human Rights Watch*) <https://www.hrw.org/world-report/2025/country-chapters/bangladesh > accessed 22 January 2025.

from citizens.[68] The launched website allowed individuals and organizations interested in constitutional amendments to present their suggestions, opinions, and proposals.[69] Moreover, the website serves not only to enhance public engagement but also to offer essential resources, including background information about the Commission, recent notices, stakeholder proposals, official reports, contact details, and pertinent links.[70] These efforts have culminated in the submission of a comprehensive report to the Chief Advisor of the Interim Government, Dr Muhammad Yunus, on 15 January 2024, outlining the proposed changes to the existing Constitution.[71]

III. B. Overwhelming focus on Civil and Political Rights

While the Constitution Reform Commission's proposals address a wide range of issues, the primary focus has been on civil and political rights. This emphasis is understandable, considering the gross violations of these rights during the previous regime and especially in the July Revolution. The constitutional provisions emphasize the state's duty to guarantee citizens' rights to free expression and assembly, highlighting that these rights are fundamental to a democratic society.[72] Nevertheless, the State's conduct during the protests contravened these obligations.[73] According to the official gazette, at least 834 people were martyred in the July uprising,[74] although many argued the original number would be many more. The list includes the deaths of over 100 children[75]

68 Tribune Desk, 'Constitution Reform Commission launches official website' *Dhaka Tribune* (Dhaka, 5 November 2024) <https://www.dhakatribune.com/bangladesh/government-affairs/364275/constitution-reform-commission-launches-official> accessed 12 January 2025.

69 ibid.

70 <http://crc.legislativediv.gov.bd> accessed 25 January 2025.

71 Ashleigh Feger, 'Riaz-led commission submits report to the Bangladesh Government' *Illinois State University News* (Illinois, 22 January 2025) <https://news.illinoisstate.edu/2025/01/riaz-led-commission-submits-report-to-the-bangladesh-government/> accessed 23 January 2025).

72 Fahim Abrar Abid and others, 'Annual Human Rights Report 2024: Election, July Revolution, and Minorities in Bangladesh' (*Global Human Rights Defence*, January 2025) <https://ghrd.org/document/annual-human-rights-report-2024-election-july-revolution-and-minorities-in-bangladesh/>.

73 ibid.

74 Tribune Desk, 'Gazette published listing 834 July uprising martyrs' *Dhaka Tribune* (Dhaka, 16 January 2025) <https://www.dhakatribune.com/bangladesh/government-affairs/370972/gazette-listing-834-july-uprising-martyrs> accessed 18 January 2025.

75 Staff Correspondent, '121 children killed during July uprising' *The Daily Star* (Dhaka, 20 November 2024) <https://www.thedailystar.net/news/bangladesh/news/121-children-killed-during-july-uprising-3756816> accessed 12 January 2025.

and more than 19000 people were injured.[76] These injuries and deaths are not only the outcome of on-field clashes but also from inhuman torture and enforced disappearances. Hence, the proposed amendments aim to strengthen the protection of civil liberties, ensure free and fair elections, and promote transparency and accountability in governance.[77] The Constitution Reform Commission has recommended several key changes to the Constitution to enhance civil and political rights. These include the introduction of term limits for the president and prime minister, the establishment of an interim government to oversee elections, and the creation of a bicameral legislature.[78] Additionally, the Commission has proposed lowering the age limit for members of parliament from 25 to 21 years and reserving 100 seats in the lower house for women.[79] As can be shown from the summary reform proposal by the Constitution Reform Commission, the primary focus on civil and political rights has inadvertently overshadowed the necessity of reforming constitutional provisions related to economic, social and cultural rights enshrined in part II of the Constitution. These rights are currently categorized as 'Fundamental Principle of State Policy', and they are merely guiding principles for the State.[80] According to Article 8(2) of the Constitution, these rights are not judicially enforceable.[81]

However, one of the most notable proposals given by the Constitution Reform Commission is the expansion of fundamental rights to include essential needs such as food, clothing, shelter, and education, which was previously under the Fundamental Principle of State Policy.[82] From a bird's eye view, these additions reflect a broader understanding of civil rights, ensuring that basic human needs are recognized and protected under the law. While by making these rights enforceable in a court of law, the Commission aims to provide a stronger legal framework for safeguarding citizens' welfare, the emphasis on civil and political rights has somewhat overshadowed other necessary

76 Sajjad Hossain, 'July-August Movement: 631 lives lost, 19,200 injured' *The Daily Star* (Dhaka, 9 September 2024) <https://www.thedailystar.net/news/bangladesh/news/july-august-movement-631-lives-lost-19200-injured-3697901> accessed 12 January 2025.

77 Constitution reform: Sweeping changes in constitution (n 2).

78 <https://crc.legislativediv.gov.bd/sites/default/files/files/crc.legislativediv.gov.bd/notices/ba646bbb_a3f7_4719_8ea3_58d948772c3e/2025-01-19-05-25-816d9dcd21fd5e7054707ed4a647add2.pdf> accessed 25 January 2025.

79 ibid.

80 Constitution (n 65), Part II.

81 ibid, art 8(2).

82 (n 78).

economic, social, and cultural rights. While the inclusion of basic needs like food and shelter is a positive step, the proposals do not extensively address broader economic and social issues such as employment, social security, and cultural preservation. This seems to support the fact that economic, social, and cultural rights have received less priority in the Constitution of Bangladesh[83] and are now on the Commission's agenda. And among others, the right to a healthy environment remains judicially unenforceable. As Bangladesh grapples with severe environmental challenges, the new or reformed constitution must address the issue comprehensively.

In summary, the post-July Constitution Reform Commission has prioritized civil and political rights through comprehensive reforms. By expanding fundamental rights and proposing significant political changes, the Commission seeks to create a more inclusive, democratic, and just society for the citizens of Bangladesh. However, the relatively limited focus on economic, social, and cultural rights suggests that these areas need further attention to ensure a holistic approach to modern-day human rights[84] that most certainly includes the right to the environment.

IV. Judicial Activism: A Way Forward for Achieving Environmental Rights

Environmental rights enshrined in the constitution hold significance only if courts are prepared to enforce them according to their provisions.[85] Judicial activism is considered a vital tool for safeguarding human rights and upholding the rule of law in Bangladesh.[86] Judicial activism occurs when courts go beyond resolving disputes and attempt to create social policies that impact many citizens and interests.[87] The modification of standing rules to enhance access to environmental justice, coupled with the innovative strategies implemented

83 Jobair Alam and Ali Mashraf, 'Fifty Years of Human Rights Enforcement in Legal and Political Systems in Bangladesh: Past Controversies and Future Challenges' (2023) 24 Human Rights Review 121, 122-123.

84 Ibid, 123.

85 John C Dernbach, 'The Value of Constitutional Environmental Rights and Public Trusts' (2024) 41 (2) Pace Environmental Law Review 153, 160.

86 Awal Hossain Mollah, 'Judicial Activism and Human Rights in Bangladesh: A Critique' (2014) 56 (6) International Journal of Law and Management 475.

87 Masrur Salekin, 'Judicial pro-activism and collaborative constitutionalism: Ensuring environmental justice in India, Ireland, and Bangladesh' (PhD Thesis, University of Galway 2022) 9.

by the Bangladesh courts in the realm of environmental protection, has been recognized as a significant measure for safeguarding the environment.[88] This chapter will first highlight the role played by the judiciary so far in promoting environmental rights and thus prove itself to be an essential actor in light of the Constitution reform discussion during the post-July revolution. Then, it will briefly propose how judicial activism can bring the focus of contemporary debate *inter alia* on the Constitution reform process to achieve environmental rights in the new or amended Constitution.

IV. A. Judiciary's Contribution to Upholding Environmental Rights

The Supreme Court of Bangladesh has interpreted the right to life enshrined in Article 32 of the Constitution, including ESC rights.[89] It also involved environmental protection. *Dr. M. Farooque v Bangladesh*[90] has extended the scope of this provision to cover environmental protection.[91] Similarly, in *Dr Mohiuddin Farooque v Bangladesh and Others*,[92] regarding air and noise pollution, the Supreme Court supported the petitioner's argument that the constitutional 'right to life' includes the right to a safe and healthy environment.

In *Bangladesh Environmental Lawyers Association (BELA) v Government of Bangladesh,*[93] the Court ruled for the ban on mechanized extraction of stones imposed by the Department of Environment based on precedent from India,[94] which held that:

"*We are not oblivious of the fact that natural resources have got to be tapped for the purposes of social development, but one cannot forget at the same time that tapping of resources has to be done with requisite attention and care so that ecology and environment may not be affected in any serious way there may not be any depletion of water resources and long-term planning must be undertaken*

[88] Md. Al amin and Zakir Abu Mohd Syed, 'Application of Judicial Activism in Protecting the Environment: An Analysis' (2016) 21 (1) Journal of Humanities and Social Science 35, 40.

[89] Muhammad Ekramul Haque, 'Justiciability of Economic, Social and Cultural Rights Under International Human Rights Law' (2021) Dhaka University Law Journal 39.

[90] *Dr M Farooque v Bangladesh* (1997) 49 DLR (AD) 1.

[91] Md Golam Sarwar, 'International Environmental Law' in Mohammad Shahabuddin (ed), *Bangladesh and International Law* (Routledge 2021) 153.

[92] *Dr Mohiuddin Farooque v Bangladesh and Others* (Writ Petition No. 891 of 1994).

[93] *Bangladesh Environmental Lawyers Association (BELA) v Government of Bangladesh* (Writ Petition No. 4958 of 2009).

[94] *Rural Litigation and Entitlement Kendra and Others v. State of Uttar Pradesh and Others* (1987) AIR (SC) 359.

to keep up the national wealth. It has always to be remembered that these are permanent assets of mankind and are not intended to be exhausted in one generation."

The Court has mandated the government to implement measures to protect and restore the rivers. For instance, in *Omar Sadat v Bangladesh,*[95] where the encroachment of Gulshan-Mohakhali Lake was identified and criticized by the Court. Furthermore, activism by the Court was also demonstrated in *Nishat Jute Mills Limited*, [96] to protect the Turag River from encroachment. The Court declared the river Turag as a 'living entity', which applies to all rivers in the country. Moreover, in *Ain O Salish Kendra (ASK) v. Bangladesh,*[97] the Court directed not to efface, subtract, vary, modify, or otherwise change the forest (core), forest, lake/canals, urban green, parks, playgrounds/play lots, green-belt as well as similar other environment-oriented spaces of RAJUK project in Gazipur district.

In *Human Rights and Peace for Bangladesh and Ors v Bangladesh and Ors*,[98] concerning the Thermal Power Plant of Chittagong, the Court held that "*It is the paramount duty of all authorities of the state to ensure and protect the life of citizens and environment.*"

Under the Environment Court Act of 2010, every district is required to establish an environmental court if needed. This Act empowers the Magistrate Court to handle complaints and complete proceedings within 180 days. A key feature of this Act is its ability to expedite environmental lawsuits and proceedings, which can lead to the effective protection of Bangladesh's environment if implemented correctly.

IV. B. Judicial Activism as a Solution

Considering the judiciary's role so far in environmental protection, the judiciary has the potential to uphold environmental rights to the extent possible. Only then can environmental rights be brought into the focus of the Constitution. Judicial independence is crucial to do so. Based on the landmark Masdar

95 *Omar Sadat and Ors v Bangladesh and Ors* (2010) LEX/BDHC/0518/2010.

96 *Nishat Jute Mills Limited represented by Abul Kalam Azad v Human Rights and Peace for Bangladesh (HRPB) and others* (2020) (Civil Petition no. 3039 of 2019).

97 *Ain O Salish Kendro (ASK) v Bangladesh* (Writ Petition No. 8098 of 2013 and Writ Petition No. 1166 of 2012).

98 *Human Rights and Peace for Bangladesh and Ors v Bangladesh and Ors* (Writ Petition No. 8282 of 2010).

Hossain Case,[99] the present judiciary focuses on the path to an independent judiciary following the July Revolution. The Honorable Chief Justice Dr. Syed Refat Ahmed highlighted the significance of establishing 'the Supreme Court Secretariat', and the Supreme Court has submitted a proposal to the Ministry of Law, Justice and Parliamentary Affairs to set up the same.[100] The Chief Justice has also prioritized the independent functioning of the entire judiciary per Article 116A of the Constitution. Besides, he has underscored the need to promptly adopt the UN Basic Principles on the Independence of the Judiciary[101] as the standard guideline for judicial practice. Taking into consideration such initiatives for the development of the judiciary with judicial independence, judicial activism for environmental rights using *suo motu* jurisdiction by the Judiciary in Bangladesh.

It is noteworthy that while there are few instances of the Higher Judiciary applying *Suo motu* jurisdiction, the Special Magistrates appointed as per Section 5 of the Environment Courts Act 2010 (ECA 2010) actively exercise *Suo motu* jurisdiction to take cognizance of environmental offences. The Special Magistrates have issued orders for the Department of Environment (DoE) to take action against damage caused by brick kilns, dismantle illegal dams to restore natural water flow and safeguard rivers from contamination.[102] Although this provides relief from the bureaucratic requirement of initiating environmental cases through the DoE, there are concerns since ECA 2010 does not grant the Special Magistrates the authority to utilize *suo motu* jurisdiction.[103]

Even though public interest litigation (PIL) can hold the government responsible for its inability to safeguard the environment,[104] it is evident that there is a deficiency in accessibility for the underprivileged due to its exclusive nature. It detracts from the emphasis on social justice and the economic

99 *Secretary, Ministry of Finance v Masdar Hossain* (1999) 52 DLR (AD) 82.

100 Ashutosh Sarkar, 'Set up separate secretariat for judiciary' *The Daily Star* (Dhaka, 28 October 2024) <https://www.thedailystar.net/news/bangladesh/news/set-separate-secretariat-judiciary-3738241> accessed 15 January 2025.

101 UN General Assembly, 'Basic Principles on the Independence of the Judiciary' (Resolution 40/32, 29 November 1985).

102 Masrur Salekin, 'Restricted Access to Environmental Justice' *The Business Standard* (Dhaka, 27 January 2022) <https://www.tbsnews.net/supplement/restricted-access-environmental-justice-363046> accessed 10 January 2025.

103 Salekin (n 87), 99.

104 Altafur Rahman, 'Public Accountability through Public Interest Litigation' (1999) 3 (2) Bangladesh Journal of Law 161, 164.

empowerment of the poor and marginalized.[105] Since PIL cannot operate on its own, it is essential to have a collaborative effort among different actors.[106] Following that, effective judicial activism is necessary for environmental rights in contemporary discourse. However, it must be ensured that sufficient focus is given to sustainability. A constitutional right to a healthy environment can enable access to justice and may serve as a significant and potentially transformative measure in reaching ecological sustainability.[107]

To sum up, the judiciary can effectively contribute to promoting environmental rights in Bangladesh. By engaging in judicial activism and maintaining the rule of law, the judiciary can illuminate environmental concerns and create the conditions for a more sustainable and healthier Bangladesh.

V. Challenges

While the judiciary has great potential to uphold environmental rights and thus shed light on environmental concerns in the context of constitutional reformation, this vital organ of the government is challenged by multifaceted issues. In fact, the judiciary can not address all concerns of environmental rights being neglected. Instead, it needs to be looked at from a holistic perspective, which can be achieved through the engagement of common people seeking justice as well as other organs of the government.

V. A. Complex Procedure and Lack of Knowledge

Firstly, the judiciary can only operate through its judicial activism if and only if cases are filed in the Courts. Due to the complex Court procedure[108] and lack of knowledge about environmental law in general [109], one of the major challenges in upholding environmental rights is the reluctance of affected individuals to pursue legal remedies. Article 39 of the Constitution protects the right to free

105 Naim Ahmed, *Public Interest Litigation in Bangladesh: Constitutional Issues and Remedies* (BLAST 1999) 25.

106 Salekin (n 87), 100.

107 David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2011)

108 Supreme Court of Bangladesh and the United Nations Development Programme, 'Timely Justice for All in Bangladesh: Court Processes, Problems and Solutions" (*UNDP*, 2015) <https://www.undp.org/sites/g/files/zskgke326/files/migration/bd/Timely-Justice-for-all-in-Bangladesh.pdf> accessed 22 January 2025.

109 Syeda Rizwana Hossain, 'Application and Reforms Needs in the Environmental Laws in Bangladesh' (2005) 9 (1) Bangladesh Journal of Law 85, 98.

speech, and according to the preamble of the Right to Information Act 2009, the freedom of expression includes the right to access information.[110] Despite the existence of these legal provisions, government officials often neglected the law.[111] As a result, the aggrieved individuals do not feel encouraged to enter into legal proceedings. Therefore, the judiciary technically remains silent if environmental rights are not frequently 'sought' before the Court.

V. B. Lack of Coordination

The second challenge complements the first challenge holistically–the lack of coordination between policymakers, academia, and the judiciary. For example, policymakers often priorities economic growth over environmental protection, leading to policies that favor industrialization and urbanization at the expense of the environment.[112] However, for Bangladesh, addressing environmental risks is both a development and an economic priority.[113] Nevertheless, there has been hardly any implementation of this in practical life. One practical solution could have been the large-scale introduction of green technology to strike a balance between the environment and development. However, the country's insufficient technological advancement does not favor potential judicial activism for addressing judicial activism. Although it is true that as a developing country, more emphasis is placed on economic development over environmental protection in Bangladesh, policymakers need to consult the findings of academic researchers as well as the practical scenarios of the courts. Otherwise, such development at the expense of environmental degradation will not create a healthy and sustainable environment for future generations.[114] Since the voices of the judges have rarely been echoed in the table of the policymakers while dealing with

[110] Supti Hosssain, 'Right to Access Information' *The Daily Star* (Dhaka, 10 November 2020) <https://www.thedailystar.net/law-our-rights/news/right-access-information-1992469> accessed 31 January 2024.

[111] ATM Afzal, 'Country Representation: Bangladesh' (The Regional Symposium on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development, Colombo, July 1997).

[112] Hasan Muhammad Abdullah and others, 'Development at the cost of unsustainable degradation of wetlands: Unraveling the dynamics (historic and future) of wetlands in the megacity Dhaka' (2024) 4 World Development Sustainability 100131; Providence Amaechi, '12 Prominent Environmental Issues in Bangladesh' (*EnvironmentGo*, 15 October 2023) <https://environmentgo.com/environmental-issues-in-bangladesh/> accessed 19 January 2025.

[113] Press Release, 'Addressing Environmental Pollution is Critical for Bangladesh's Growth and Development' (*World Bank Group*, 28 March 2024) <https://www.worldbank.org/en/news/press-release/2024/03/28/addressing-environmental-pollution-is-critical-for-bangladesh-s-growth-and-development> accessed 22 January 2025.

[114] ibid.

existing challenges, it is most likely that the situation will be repeated when a positive change is aspired by the judiciary.

Similarly, to introduce an effective environment-safeguarding mechanism, the judiciary needs strong cooperation with the Ministry of Environment, Forest and Climate Change, and the Department of Environment. According to the Environment Conservation Act 2010, claims for compensation will only be taken into account by the Environment Court if they include a written report from the Department of Environment (DoE) Inspector and further authorized by the Director-General or authorized officials of the Department of Environment.[115] A Special Magistrate cannot recognize an offence without a written report from an Inspector of the Department of Environment.[116] The DoE, acting as a "gatekeeper," has significantly hampered environmental justice. During a DoE interview, Pring and Pring were told that many environmental complaints would not be examined and no report would be produced to justify legal action.[117] The Act allows the Special Magistrate or the Environment Court to review a complaint if it is established that the inspector has failed to act appropriately within sixty days following the aggrieved person's request or if there are justifiable grounds to address the complaints, ensuring that the relevant Inspector or the Director-General of the DoE has been given a reasonable opportunity to present their position. [118] Nonetheless, this authority has not been exercised by either the Special Magistrate or the Environment Court.[119] These provisions have undeniably limited and acted as a barrier to improving access to environmental justice as well as the Court's potential to deliver environmental justice.

V. C. Weak Infrastructure

This connects to the third key challenge for judicial activism, which is focusing on environmental justice, which is a weak institutional infrastructure of the environmental protection regime. Although Bangladesh was one of the first countries to establish separate environmental courts, it has failed to strengthen the infrastructure surrounding environmental justice. The government needed to establish an Environment Court in all the 64 districts of Bangladesh according

115 Environment Courts Act 2010 (Act No. LVI of 2010), s 7.

116 ibid, s 6 (3).

117 George Pring and Catherine Pring, Greening Justice: Creating and Improving Environmental Courts and Tribunals (The Access Initiative 200

118 Environment Courts Act 2010 (n 115), ss 6 (3), 7 (4).

119 Salekin (n 102)

to the Environment Courts Act 2000. However, only two environmental Courts and an environment appellate Court have been established over the 29 years since the Act's enactment. Moreover, the Environment Court's jurisdiction is limited to the Environment Conservation Act 1995 and 'other laws' to be included by gazette notifications.[120] Within the term 'other laws', only the Brick Manufacturing and Brick Kiln Establishment (Control) Act 2013 is currently categorized. As a result, the Environmental Courts do have jurisdiction over any other laws concerning environmental protection.[121] It is worth mentioning that Bangladesh has around 200 laws addressing different environmental concerns.[122] This limited jurisdiction is creating a significant obstacle for victims of environmental pollution who are seeking justice.[123] The number of pending cases pending before the three Environment Courts being 388 only,[124] shows the ineffectiveness of the Bangladesh Environment Courts. [125] The case filing rate in the Environment Court is significantly lower than global statistics because of the limited access for people to environmental justice.[126]

The infrastructural issue is not only with the Court but also within the Department of Environment. Only two laboratories in Dhaka and Chittagong, along with 45 DoE offices, are insufficient to deliver the services.[127] While the DoE prefers mobile court instead of the formal court system and filed

120 Jubaida Sakin, 'Prospects and Limitations of Environmental Law and Policy: An Analysis' (*Dhaka Law Review*, 18 May 2024) <https://www.dhakalawreview.org/blog/2024/05/prospects-and-limitations-of-environmental-law-and-policy-an-analysis-6495> accessed 10 January 2025.

121 Khalid Md Bahauddin, 'Environmental System Management and Governance Needs in Developing Countries' (2014) 34 (2) Environment, Systems and Decisions 342, 344; World Bank, 'Enhancing Opportunities for Clean and Resilient Growth in Urban Bangladesh: Country Environmental Analysis 2018' (2018) Washington, DC: The World Bank Group, 31 <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/585301536851966118/enhancing-opportunities-for-clean-and-resilient-growth-in-urban-bangladesh-country-environmental-analysis-201> accessed 2 June 2024.

122 Sarwar and others (n 9).

123 Md Sefat Ullah, 'Greening Justice in Bangladesh: A Road to Successful Environmental Court' (2017) 3(2) Green University Review of Social Sciences 101.

124 Asaduzzaman and Ahmed Dipto, 'Environment laws and court exists, but no cases' Prothom Alo (Dhaka, 13 March 2021) <https://en.prothomalo.com/environment/environment-laws-and-courts-exist-but-no-cases> accessed 28 January 2025.

125 Gitanjali Nain Gill, *Environmental Justice in India: The National Green Tribunal* (1st edn, Routledge 2017) 28.

126 Imtiaz Ahmed Sajal, 'Common People's Access to the Environment Courts of Bangladesh: An Appraisal' (*Bangladesh Law Digest*, 16 July 2015) <http://bdlawdigest.org/environment-court-act-2010.html> accessed on 8 June 2024.

127 Bahreen Khan, 'Efficacy & Implementation Gaps in the 'Core Environmental Laws' of Bangladesh: An Overview' (2022) 33 (1) Dhaka University Law Journal 73.

over 8000 cases between 2015 and 2020, most polluters were fined and released on appeal, which did not benefit the environment.[128]

VI. Conclusion

The July Revolution of 2024 opened a new chapter in Bangladesh's history. Although it was an outcome of a student-people uprising, it has provided an opportunity to reform the Constitution to address long-standing issues of governance and rights amidst the constitutional and political vacuum of Bangladesh.[129] Nonetheless, considerable emphasis has been placed on civil and political rights, and the importance of economic, social, and cultural rights, particularly environmental rights, cannot be entirely overlooked or diminished. Bangladesh's critical environmental issues require urgent and comprehensive intervention. The judiciary in Bangladesh has shown its capacity to effectuate change in promoting environmental rights via judicial activism. Strengthening environmental courts' structures, stimulating public interest litigation, and adhering to international standards are ways in which the judiciary can bring much-needed focus to the subject of environmental issues. There are, however, formidable challenges on issues such as lack of cooperation among policymakers, the judiciary, and academia. These challenges demand serious initiatives to strengthen institutional capacity collaboration, increase public awareness, and strike a balance between economic and environmental concerns. To conclude, the judiciary is able to focus on long-neglected environmental concerns; however, it lies on the other branches of the state to give due emphasis on the matter to step towards a sustainable Bangladesh.

[128] Asaduzzaman and Dipto (n 124).

[129] Fatima Zahra Ahsan Raisa and Suriya Tarannum Susan, 'Bangladesh Through the Prism of Doctrine: Examining the legitimacy of Bangladesh's Interiem Rule' (*Verfassungsblog*, 11 September 2024) <https://verfassungsblog.de/bangladesh-through-the-prism-of-doctrine/> accessed 29 January 2025.

International commercial arbitration in Bangladesh: Insights from Singapore and India

Md Bulbul Hossan*

Abstract

The purpose of this article is to highlight some of the challenges and problems associated with the country's application of international commercial arbitration and finding the solutions. The issues across borders related to international trade and commerce keeps increasing because of the growth of global trade. International business arbitration has become the preferred means of settling cross-border disputes between parties due to the formal court system's lengthy and complex proceedings. Arbitration has long been recognized by the international business community as the standard approach for settling disputes in international trade. In 2001, Bangladesh updated its arbitration law to compete with its international trading counterparts. Notwithstanding some outstanding accomplishments, the country still has difficulties addressing conflicts pertaining to business activities. While analyzing some significant features of arbitration procedures in Bangladesh and contrasting them with other regional counterparts, such as India and Singapore, this study intends to demonstrate the efficiency of international arbitration law and its applications. The efficacy will also be examined, along with certain steps that should be rendered to navigate around the constraints. The research methodology employed is grounded in theoretical sources and empirical data, such as academic publications, legal provisions pertaining to arbitration, and case law referencing the Arbitration Act 2001, with a few other jurisdictions' also being examined.

I. INTRODUCTION

The economic growth of Bangladesh is rising due to the expansion of international trade and business. Consequently, the scope of cross-border disputes pertaining to international trade and commerce continues to grow. Given the time-consuming and intricate nature of the formal court system, alternative methods like international commercial arbitration can be favorable for settling business related disputes in a more sensible approach and attracting

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foreign investment in this country.[1] International commercial arbitration has gained global recognition and become the preferred method for resolving cross-border disputes between commercial entities.[2]

Bangladesh has taken steps to compete with its global trading partners by enacting the Arbitration Act in 2001 and repealing the Arbitration Act of 1940.[3] Considering some shortcomings, the previous act was impractical. Hence, the Supreme Court of India stated the proceedings under the Act have become highly technical accompanied by unending prolixity, at every step providing a legal trap to the unwary.[4] With this latest law, Bangladesh has kept up with global developments in the sphere of international commercial arbitration, which aligns with the New York Convention[5] and UNCITRAL Model Law.[6] The Act of 2001 has modernized the legal framework for international commercial arbitration in Bangladesh, making it an appealing destination for resolving disputes in the realms of international trade, commerce, and investment.[7] Despite being based on the Model Law, the Act of 2001 differs from it in a number of significant ways. The potential of Bangladesh as a desirable venue for international arbitration is frequently impacted by these discrepancies from the Model Law. For instance, High Court Division (HCD) is designated to oversee the operations of an arbitration tribunal with its seat in Bangladesh in compliance with the Model Law's recommendation. The current Act expands the scope of judicial intervention, whereas the Model Law aims to reduce judicial control over the arbitral tribunal.

This article aims to analyze the efficacy of International Arbitration in Bangladesh in attracting international investors that encounter business conflicts, in comparison to the arbitration mechanisms, specifically with India and Singapore. The rationale for comparing the two jurisdictions is in the proximity of India and the similarities in terms of geographical location, business environment,

1 Tamar Meshel, 'Commercial Peacemaking - The New Role of the International Commercial Arbitration Legal Order' (2015) 16(2) Cardozo Journal of Conflict Resolution 395, 395.

2 ibid.

3 The Arbitration Act [1940].

4 The Gurunanak Foundation case, (AIR 1981 SC 2075), per Justice D.A. Desai

5 *Convention on the Recognition and Enforcement of Foreign Arbitral Award*s, opened for signature 10 June 1958, 3 UNTS 330 (entered into force 7 June 1959).

6 UNCITRAL Model Law on International Commercial Arbitration GA Res 40/72, UN Doc A/RES/40/72, adopted 21 June 1985.

7 A F M Maniruzzaman, 'Bangladesh Embraces the UNCITRAL Model Law On Arbitration — But Not Quite!', (2004) 19(3) MEALEY'S International Arbitration Report 1, 1.

legal disputes, and cultural aspects. However, arbitration in Singapore serves as the exemplary model in this region and is a prominent arbitration hub in Asia.[8] In addition, the legislative framework of Singapore strongly supports arbitration and the implementation of arbitrations decisions, world-class infrastructure for arbitration, as well as reputable arbitration institutions and prominent chambers.[9] The second part of the paper provides a brief overview of International commercial arbitration and demonstrate the historical background of Arbitration in Bangladesh. The third part examines the common characteristics of International commercial arbitration, drawing comparisons. The fourth part focuses on the recognition and enforcement of awards, the fifth part demonstrates the shortcomings and the final part discusses some specific suggestions of the arbitration mechanism in Bangladesh.

II. INTERNATIONAL COMMERCIAL ARBITRATION AN OUTLINE AND ITS HISTORICAL BACKGROUND OF ARBITRATION IN BANGLADESH

The Arbitration Act defined the internationality of Arbitration if the "International Commercial Arbitration" refers to an arbitration process that deals with disputes arising from Commercial agreements, in which at least one of the parties involved is an individual who is a national of or habitually resident in, any country other than Bangladesh; or a body corporate which is incorporated in any country other than Bangladesh; or a company or an association or a body of individuals whose central management and control is exercised in any country other than Bangladesh, or the Government of a foreign country.[10] This however indicates that commercial disputes involving Bangladeshi nationals cannot be arbitrated internationally under Bangladeshi law, despite the fact that their place of business is in a foreign state.

Regarding the jurisdiction of international commercial arbitration in India, the provision concerning internationality is nearly comparable to section 2(c) of the Bangladesh Arbitration Act.[11] The Supreme Court in the case of *TDM Infrastructure Pvt. Ltd. V. UE Development India Pvt. Ltd.* decided that despite TDM Infrastructure Pvt. Ltd. having a foreign control, it was negotiated that, "a

8 Ben Steinbruck, 'International Arbitration in Singapore' in Stephen Balthasar (ed), International commercial Arbitration (Munich: Beck, Hart, Nomos, 2015) 1, 541.

9 ibid.

10 Arbitration Act [2001] s 2(c).

11 The Arbitration and Conciliation Act 1996 (India) s 2(1)(f).

company incorporated in India can only have Indian nationality for the purpose of the Act.[12] Therefore, if a corporation possesses dual nationality, one derived via foreign control and the other obtained by registration in India, it will not be considered a foreign corporation under the Act.[13]

Bangladesh inherited the Indian arbitration law. The Bengal Regulations of 1772 introduced the first modern Arbitration statute during the era of British law.[14] Moreover, the revised civil procedure legislation introduced in 1908 included regulations pertaining to Arbitration, while the act was considered to the advancement of domestic arbitration, it also necessitated significant involvement from the courts in practice.[15] In 1940, a new arbitration law was enacted in India to merge both systems, that legislation permitted and established the opportunity for significant court involvement in the arbitration process.[16]

India modernized the Arbitration legislation in 1996 to address its restrictions, whereas Bangladesh continued with the prevailing act until 2001. In 2001, the state implemented a new legislation by emulating the legal framework of India and the UNCITRAL model law.

III. COMMON FEATURES AND JURISDICTION OF THE ARBITRAL TRIBUNAL

Arbitration is widely appreciated for its procedural flexibility, which distinguishes it from the intricate traditional judicial system. This enables the involved parties to participate in a streamlined, private, and equitable procedure that culminates in a definitive, obligatory, and enforceable decision. This section will focus on the typical characteristics of arbitration in Bangladesh, including its jurisdiction, significant principles and choice of law with a comparative perspective. This part will also examine the relationship between arbitration and ordinary courts through critical and comparative examination.

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12 *TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd,* [2008] (14) SCC 271 para 15.<https://indiankanoon.org/doc/1845272/>

13 Anahita Gaind, 'International Commercial Arbitration' (2017) 4(1) RGNUL Financial and Mercantile Law Review (RFMLR) 1, 11.

14 Steinbruck (n 9) 448.

15 ibid 449.

16 Sai Ramani Garimella, 'Issues of Jurisdiction, Choice of Law and Enforcement in International Commercial Arbitration: An Indian Perspective' in Sai Ramani Garimella and Stellina Jolly (eds), *Private International Law: South Asian States Practice* (Springer, Singapore 2017) 1, 327.

A. Arbitration Agreement

Arbitration agreement is the paramount for settling commercial dispute through arbitration. The presence of a legally binding arbitration agreement or a phrase in the contract that mandates arbitration in Bangladesh requires that any disputes be settled through arbitration; resorting to arbitration be necessary regarding the breach of a contract.[17] It is straightforward that if an arbitration agreement exists, the dispute can be arbitrated according to the arbitration law of Bangladesh and India but the question arises whether the agreement to arbitrate can be created after the dispute arose or whether it had to be in the original agreement. Section 17 of Arbitration Act in Bangladesh provides that unless otherwise agreed by the parties, the arbitral tribunal may rule on its own power on any questions including whether there is existence of a valid arbitration agreement.[18] In Enercon (India) case the court held that a widely worded arbitration agreement would include all disputes arising in respect of the main contract with regard to its validity, interpretation, construction, performance, enforcement or its alleged breach.[19] In addition, section 34(2) of the Arbitration and Conciliation Act provides that if the tribunal decides on its issues which do not fall within the scope of arbitration agreement, the award can be challenged and set aside.[20]

This however indicates that an arbitration agreement must be in existence for settling by arbitration. On the contrary, nowhere in the act mentioned that arbitration agreement cannot be created after the dispute arise. Furthermore, section 18 says an arbitration agreement which forms part of another agreement shall be deemed to constitute a separate agreement.[21] Therefore, based on the preceding discussion, it may be inferred that an arbitration agreement, being a distinct agreement, can be formed after the dispute arises if the parties agree.

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17 Maimul Ahsan Khan, 'Issues of Jurisdiction, Choice of Law and Enforcement in International Commercial Arbitration: A Bangladesh Perspective', in Sai Ramani Garimella and Stellina Jolly (eds), Private International Law: South Asian States Practice (Springer, Singapore 2017) 285, 288-289 <https://link.springer.com/book/10.1007/978-981-10-3458-9#:~:text=About%20this%20book&text=The%20research%20presented%20addresses%20the,family%20law%20and%20commercial%20law.>.

18 Arbitration Act (n 10) s 17.

19 *Enercon (India) Ltd & Others v. Enercon GMBH & Another* [2014] 2 S. C. R. 825 para 50 (Supreme Court of India).

20 The Arbitration and Conciliation Act (n 11) s 34(2) (a) (iv).

21 Khan (n 18) 290.

B. Separability or Severability

The principle of separability, often referred to as severability in certain legal systems, guarantees that the arbitration clause or agreement is seen as a separate and independent agreement, apart from the primary contract which enables the arbitral tribunal to decide on the agreement that serves as the foundation for its existence.[22]

Moreover, the practical importance of the doctrine is that if the contractual relationship terminated due to any inconvenient situation, the parties could settle the dispute through the separable clause. Thus, to avoid future complexities for the parties the Bangladesh Arbitration Act has adopted the principle of severability of agreement which states that an arbitration agreement which forms part of another agreement shall be deemed to constitute a separate agreement.

Section 16(1) (a) of Indian Act specifies an arbitration clause which forms part of a contract shall be considered as a separate agreement apart from the other conditions of the contract.[23] In Enercon case, the Supreme Court of India emphases the separability principle that "the concept of separability of the arbitration clause/agreement from the underlying contract is a necessity to ensure that the intention of the parties to resolve the disputes by arbitration does not evaporate into thin air with every challenge to the legality, validity, finality or breach of the underlying contract."[24] The Model Law unambiguously addresses the matters of separability and validity of contracts and arbitration agreements.[25] Conversely, the model law does not address the issue of the legitimacy of the contract formation or if it is considered as null and void ab initio, and how this affects the validity of the arbitration clause. On the other hand, the stance of Singapore is obvious, as Selvaraj pointed out that the principle of separability is widely accepted by the regulations of numerous arbitration institutions and is also forms part of Singapore law.[26] The international Arbitration Act of Singapore explicitly states that in instances in which there are disputes over the arbitration clause or agreement, the arbitral tribunal has the authority to make decision on its own jurisdiction, which includes the question of existence or legality of the arbitration agreement.[27]

[22] Arbitration Act (n 11) s 18.

[23] The Arbitration and Conciliation Act (n 11) s 16 (1) (a).

[24] *Enercon (India)* (n 19) para 80.

[25] UNCITRAL Model Law on International Commercial Arbitration (n 6) art 16(1).

[26] Steinbruck (n 9) 548.

[27] International Arbitration Act [1994] First Schedule, s 16(1).

Considering the circumstances regarding the question of the validity of the arbitration agreement, it is difficult to ascertain the appropriate method to address the situation. In *Premium Nafta Products Limited and others v. Fili Shipping Company Limited and others*, the House of Lords has clearly elucidated the unique nature of the arbitration agreement separate from the primary contract that the arbitration agreement must be considered as an independent agreement.[28]

Even though the Bangladesh Arbitration Act in 2001 provides that the arbitration agreement should be considered separately from the main contract, it doesn't say how the arbitration agreement ought to be resolved when the contract is null and void from the beginning, or which court or tribunal should decide that. This ambiguity opens the door by any party to file a case in a regular court, which slows down the process. Indeed, Singapore law is more straightforward when it comes to this issue, the arbitral tribunal will deal with it.

C. The Doctrine of Compétence-Compétence

The term "competence-competence" denotes the jurisdictional authority of an arbitral tribunal. The idea of Compétence-Compétence is an essential aspect of international arbitration and, similar to the doctrine of separability, aligns with the parties' implicit or explicit intention to resolve any issues arising from their connection through impartial arbitration.[29] The Arbitration Law of Bangladesh has incorporated the idea of Compétence-Compétence in relation to the jurisdiction of the arbitral tribunal, to effectively address the current issues in international trade and business, as well as future events.[30]

In contrast to the Model Law[31] and the Indian Act of 1996,[32] which include the same rules regarding Compétence-Compétence and grant the arbitral tribunal unrestricted freedom in this area, whereas, the Arbitration Act of Bangladesh limits this freedom by stating that it applies "unless otherwise agreed by the parties."[33] In *Wellington Associates v Kirit Mehta*, the Supreme Court of India

[28] *Premium Nafta Products Limited and others v. Fili Shipping Company Limited and others* [2007] UKHL 40 para 17.

[29] *Rashida Rana and Michelle Sanson, International Commercial Arbitration* (Thomson Reuters 2011) 1, 151.

[30] Arbitration Act (n 11) s 17.

[31] UNCITRAL Model Law on International Commercial Arbitration (n 6) art 16(1)

[32] The Arbitration and Conciliation Act (n 11) s 16(1).

[33] Arbitration Act (n 11) s 17.

determined that Section 16 grants the authority to the tribunal to make decisions regarding the "existence" of the arbitration clause. However, this does not eliminate the jurisdiction of the Chief Justice of India or their designate to decide on the "existence" of the arbitration agreement, because Section 16 does not state that only the Arbitral Tribunal can determine such a question.[34]

In Singapore on the contrary, the arbitral tribunal's decisions regarding the jurisdiction of the tribunal are binding upon the parties since an arbitral tribunal only derives jurisdiction from the party's agreement to arbitrate.[35] If the arbitral tribunal decides either as an early stage or at any point during the arbitration procedures, that it has jurisdiction or lacks jurisdiction, any party has the right to file an appeal with the high court division.[36] Thus, it transpires that Singapore legislation is more explicit and provides detailed information regarding the jurisdiction of the tribunal and the question of competence. It grants the parties the authority to appeal against the decision. Conversely, the Supreme Court of India believes that both the court and the tribunal can rule on the legitimacy of the issue at hand. In contrast, the law in Bangladesh does not address the issue in question but it respects the intention of the parties.

D. Correlation between National Courts and Arbitration Tribunal

The effectiveness and efficiency of an arbitration institution depend on the principle of non-intervention by national courts or any other higher authorities. The great paradox of arbitration lies in its pursuit of collaboration with the exact governmental entities from which it aims to free itself that necessitates relationship between the Courts and the arbitral process.[37]

However, non-interference does not imply that the arbitral tribunal can act arbitrarily. Arbitration is conducted to achieve justice, and it necessitates a harmonious relationship to ensure the fair and efficient administration of justice.

In addition, article 5 of the Model Law significantly limits the instances in which the Court can intervene in matters related to arbitration.[38] The Singapore Courts have confirmed that they will only intervene in cases where such intervention

[34] *Wellington Associates v Kirit Mehta* [2000] 4 SCC 272.

[35] Steinbruck (n 9) 553.

[36] International Arbitration Act (n 28) s 10.

[37] Williams, David AR., 'Defining the Role of the Court in Modern International Commercial Arbitration' (2014) 10(2) Asian Int'l Arbtn Jour. 137, 137.

[38] UNCITRAL Model Law on International Commercial Arbitration (n 7) art 5.

is explicitly authorized by the Model Law itself. An instance that exemplifies the advantageous implementation of Article 5 in Singapore can be observed in the case of *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush*.[39] In another case, the Singapore court observed that 'courts should supervise with a light touch but assist with a strong hand'.[40]

In Bangladesh, the connection between the court and the arbitration tribunal is related to the question of jurisdiction of the tribunal. If there are any objections to the jurisdictional question of the tribunal, the parties have the option to seek a resolution from the High Court Division.[41] The High Court Division may grant and render its decisions on jurisdictions only upon a well-reasoned application from the parties.[42] The Arbitration law of Bangladesh aims to establish a harmonious relationship between the parties involved.[43] In describing the non-intervention principle, the Supreme Court of Bangladesh held that the Act, 2001 is a special law and it has been enacted with the sole purpose of resolving the dispute between the parties, if it is allowed to be challenged in a civil suit, then the arbitration proceeding shall become a mockery and the whole purpose of the arbitration scheme as envisaged in the Act, 2001 shall fail.[44]

Another significant issue emerges when identifying the authoritative and supervisory role of an arbitration panel and national courts. Arbitrators in international commercial disputes typically possess extensive knowledge and competence in the relevant subject matter, surpassing that of judges in national courts. However, irrespective of their qualifications and expertise, arbitrators lack the authority to exert control over third parties or possess coercive powers due to the foundation of their power being rooted in the arbitration agreement.[45]

Therefore, it is not anticipated that national courts will intervene in matters related to arbitration. However, there may be instances where cooperation from national courts becomes necessary for the ends of justice. This intervention has the potential to undermine the

[39] *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush and Another* [2004] SGHC 26 para 16.

[40] COT v. COU and others [2023] SGCA 31 (Supreme Court of Singapore).

[41] Arbitration Act (n 10) s 20(1)

[42] ibid s 20(2).

[43] Khan (n 18) 293.

[44] *Md. Nurul Abser Vs Alhaj Golam Rabbani & ors* 6 SCOB [2016] AD para 19 (Supreme Court of Bangladesh)<https://www.supremecourt.gov.bd/resources/bulletin/6_SCOB_AD_2.pdf>

[45] Rana and Sanson (n 30) 243.

effectiveness of the tribunal. In such a situation, the Singapore court takes a more realistic stance by establishing a clear limit within the framework of the Model Law.

E. Choice of Law and Party Autonomy

The challenge of determining the applicable jurisdiction in international business transactions is a significant concern for the parties involved. Similarly, party autonomy is a basic principle in international arbitration, which allows the parties to freely select the laws or rules that will govern disputes related to their rights and duties.[46] In *Sonatrach Petroleum Corp. v Ferrel International Ltd* the court opined that

> "Where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract."[47]

Moreover, choosing a law for an arbitration agreement, it is not feasible to establish fixes rules and regulations, other laws may become applicable during the arbitration process depending on the circumstances. The Arbitration Act 2001 respect the party autonomy regarding the choice of law by specifying that the arbitral tribunal will resolve the conflict based on the legal rules chosen by the parties to apply to the substance of the dispute.[48] Additionally, the tribunal will make its decision in accordance with the terms of the contract, while considering any relevant customs or practices for the sake of justice.[49]

Conversely, Singapore courts have considered the nominated place of arbitration as the best evidence of an implied choice of law.[50] In fine, international arbitration allows the parties involved to freely select the laws that will ultimately be applied to resolve their dispute. If the selected laws are not comprehensive, the Bangladesh Arbitration legislation grants the tribunal

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46 Doug JONES, 'Choosing the Law or Rules to Govern the Substantive Rights of the Parties' (2014) 26 Singapore Academy of Law Journal 911, 911.

47 *Sonatrach Petroleum Corporation (BVI) v Ferrell International Ltd* [2001]WC2A2LL<https://www.newyorkconvention.org/11165/web/files/document/1/6/16926.pdf>.

48 Arbitration Act (n 11) s 36(1).

49 ibid s 36(3).

50 *Hainan Machinery Import and Export Corporation v. Donald & McArthy Pte Ltd* [1995] SGSC 232 para 41.

the authority to select a law or apply the pertinent legal principles respecting the situation. In contrast, the Singapore court in relevant circumstances acts on behalf of the law governing the place of arbitration.

F. Interim measures of courts or tribunals

An interim measure is a directive by a court or other competent authority that compels or prohibits a party from engaging in a certain action to maintain the existing Situations between the initiation of a claim and its eventual resolution. During any phase of the arbitration proceedings, a party may encounter a situation where it needs to protect himself or the subject matter of the dispute against actions performed or planned by another party involved in the dispute.[51]

The Arbitration Act 2001 provides more comprehensive and precise guidelines for the implementation of temporary measures by the arbitration tribunal in terms of preciseness and clarity.[52] It is to be noted that although the present legislation specifies the provision of enforceability of interim orders, but it should be done with the assistance of court, the tribunal has no authority to do so.

Another significant constraint of the Bangladesh Act pertains to interim measures issued by an arbitral tribunal located outside of Bangladesh. Specifically, if the interim measure takes the form of an order rather than an award, section 3(1) deems it unenforceable. This provision clarifies that the legislation applies exclusively to arbitrations conducted within Bangladesh.[53] Enforcement of interim measures from a foreign-seated arbitral tribunal through section 21 is not feasible. However, enforcing an interim measure in the form of an award from a foreign tribunal may not be complicated as a foreign award will trigger the application of sections 45, 46 and 47 of the Act.[54] This, however, suggests that an interim order in the form of an award can be enforced in Bangladesh, otherwise, it cannot be implemented.

Additionally, the Arbitration Act, 2001 does not address the authority of arbitral tribunals to issue interim measures such as freezing injunctions and measures against third parties.[55]

51 Rana and Sanson (n 30) 234.

52 Arbitration Act (n 11) s 21.

53 ibid s 3(1).

54 ibid s 45-47.

55 Khan (n 17) 294.

However, the High Court of Bangladesh has issued a stay order in the HRC case, in favour of arbitration taking place outside of Bangladesh, concluding that the lack of the term 'only' in Section 3(1) of the Arbitration Act of 2001 does not imply that the section cannot be applied when the arbitration takes place outside of Bangladesh.[56] Therefore, the Court has the authority to grant temporary relief even in arbitrations that are conducted outside of Bangladesh.[57] Conversely, another bench of the High Court Division in the STX Corporation took a dissenting stance by interpreting the Arbitration Act 2001 in a strict manner stating that temporary measures granted by the courts in Bangladesh cannot be enforced if the arbitration is not taking place in Bangladesh.[58] In contrast, Indian courts have also adopted varying approaches regarding interim measures while resolving arbitration-related issues. For example, in *Olex Focas Pvt. Ltd. & Anr. vs Skoda Export Company Ltd*, it was held that courts possess the authority to provide temporary relief for arbitration that is based in a foreign jurisdiction.[59]

Moreover, part I of the 1996 Act exclusively regulates arbitrations that take place in India. This includes arbitrations that are classified as international business arbitrations according to section 2(1)(f), if the location is within the territory of India. The interim measures outlined in Section 9 of the Act pertain to domestic arbitral proceedings or arbitrations that conducted within India. There is confusion on whether Indian courts have jurisdiction to grant interim measures in international commercial arbitrations conducted outside India. This ambiguity has been clarified in *Bhatia International vs Bulk Trading S. A. & Another*, where the Supreme Court held that for international commercial arbitrations conducted outside of India, the regulations outlined in Part I would be applicable, unless the parties explicitly or implicitly agree to exclude any or all its provisions.[60]

Therefore, the lack of specific guidelines for implementing interim measures, the entire arbitration process ineffective, as various courts and authorities adopt different perspectives and approaches when addressing identical issues. The rules regarding temporary measures issued by the Arbitral Tribunal in all three regimes, namely the Arbitration Act of Bangladesh, India, and the Model Law, are ineffectual because these measures cannot be enforced on their own as a decree or order

[56] *HRC Shipping Ltd. v M.V. X press Manaslu and Others* [2007] 12 MLR 265.

[57] ibid.

[58] *STX Corporation Ltd. v Meghna Group of Industries Ltd. and Ors.* [2012] 32BLD 400.

[59] *Olex Focas Pvt. Ltd. & Anr. vs Skoda Export Company Ltd* [2000] IAD Delhi 527, AIR 2000 Delhi 161 para 62-63 <https://indiankanoon.org/doc/521759/>.

[60] *Bhatia International vs Bulk Trading S. A. & Another* [2002] 4 S.C.C. 105

of a court.[61] While this section examines the mechanisms and numerous phases, including the laws and practical execution of tribunal and court procedures, the subsequent section will illustrate the enforcement of the award.

IV. ENFORCEMENT AND RECOGNITION OF ARBITRAL AWARDS

The effectiveness and satisfaction of the parties involved depend on the enforcement of award. Similarly, multiple variables influence the enforcement, such as the national laws of the country where the arbitration takes place, the terms and conditions of the contract, international obligations, and the approach of the relevant courts or authorities concerned. If the losing party in an arbitral proceeding refuses to satisfy an arbitral award, then the question of enforcement arises. However, the enforcement of arbitral awards in Bangladesh either in the case of domestic or foreign award must be enforced according to the Code of Civil Procedure, as if it were a decree of court.[62] The following parts will illustrate and meticulously evaluate the methods of enforcing award in the previously mentioned jurisdictions.

A. International Arbitration and Domestic Courts

The interference of national courts in arbitration procedures is undesirable, as it can hinder the entire process. Article 5 of Model Law limits the involvement of national courts stating that in matters controlled by this legislation, no court shall interfere unless explicitly allowed by this law.[63] Sometimes, court involvement may be necessary to reach a more conclusive resolution in arbitration. The national court in this perspective is considered an executive partner that enhances the efficiency of an arbitral proceeding.[64] In this regard, national courts are necessary as a support mechanism for resolving disputes, that play a significant role in various stages of an arbitral process, as arbitration is governed by national laws.[65] In Saipem v. Bangladesh,[66] it was claimed that

[61] Md. Jahurul Islam and Md. Rezaul, Haque 'Position of Bangladesh in International Commercial Arbitration: An Analysis' (2022) 4 (4) British Journal of Arts and Humanities 107,112.

[62] Arbitration Act (n 11) s 44-45 (1).

[63] UNCITRAL Model Law on International Commercial Arbitration (n 7) art 5.

[64] Sameer Sattar, 'National Courts and International Arbitration: A Double-edged Sword?' 2010) 27(1) Journal of International Arbitration 51, 52.

[65] Sameer Sattar, 'Enforcement of Foreign Arbitral Awards in Bangladesh: The Law, Its Implementation and Challenges' in Sai Ramani Garimella and Stellina Jolly (eds), Private International Law: South Asian States Practice (*Springer* 2017) 303, 305.

[66] Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Award on June 30, 2009.

by issuing an anti-arbitration injunction against an ICC tribunal with its seat in Bangladesh, Bangladesh had violated its international obligations by disregarding Article II of the New York Convention. In response to it, Bangladesh stated that the country had not yet passed an Act of parliament pursuant to its requirement under the Convention. Consequently, the court was under no duty to accept an arbitration agreement. In the Saipem case, the ICSID tribunal determined that Bangladesh had unlawfully intervened through its courts to take away Saipem's right to use ICC Arbitration Rules to arbitrate the issue in Bangladesh.[67] Another remarkable case Chevron Bangladesh Ltd v. People's Republic of Bangladesh,[68] Chevron filed a dispute to ICSID in 2006 claiming that Petro Bangla had been taking irrational deductions from Chevron's petrol sales profits over the years. Petro Bangla turned to local courts after Chevron filed the complaint, delaying going to the ICSID until late 2008. Chevron has argued that the four percent wheeling charge only applies if it supplies petrol to third parties via Petro Bangla's Pipeline. ICSID ruled in favor of Bangladesh after hearing both sides' arguments. It was decided that Petro Bangla has the right to continue Chevron for the wheeling charges.[69]

Domestic courts located at the place of arbitration and in the country where the award is being enforced may be required to address issues pertaining to the legality of an arbitration agreement, the formation of an arbitral tribunal, disputes over jurisdiction, the provision of temporary measures to support arbitration conducted in a foreign jurisdiction, and the annulment of awards.[70]

B. National Courts and Enforcement of Arbitral Awards

The involvement of national courts in the international arbitration process is essential and multifaceted.[71] Arbitration tribunals lack the power to enforce arbitral awards that require involvement of national courts. In *Mitsubishi Motors Corp v Soler Chrysler-Plymouth,* the Supreme Court of USA held that national courts should have minimal interference for the enforcement of foreign arbitral

67 ibid para 204

68 Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People's Republic of Bangladesh, ICSID Case No. ARB/06/10.

69 Ibid.

70 Vera Korzun and Thomas H. Lee, 'An Empirical Survey of International Commercial Arbitration Cases in the US District Court for the Southern District of New York, 1970-2014' (2015) 39(2) Fordham International Law Journal 307, 337-339.

71 ibid

awards.[72] Arbitrators possess powers that are generally sufficient for settling disputes, although they are not as extensive as the powers granted to a court of law.[73]

In a landmark case the Tribunal determined in the Award that it had the authority to decide Niko's Payment Claim against Petro Bangla, that the GPSA was legitimate and binding and had not been obtained through corruption, that Petro Bangla was required to pay Niko for the gas that was delivered, with interest, and laid out terms of payment, and that all other claims pertaining to the Payment Claim were dismissed.[74]

Furthermore, the granting and implementation of recognition and enforcement may be declined if the applicant can substantiate compelling reasons. Article 36 of the United Nations Commission on International Trade Law Model Law specifies the specific reasons for which these awards may be denied recognition and enforcement.[75] The New York Convention clearly addresses the issue of when and how an arbitral award could potentially be rejected.[76] However, the reasons for refusal have been enumerated in section 46 of the Arbitration Act of Bangladesh,[77] which is nearly identical to the New York Convention and the Indian Act.[78]

The annulment of an arbitral award is not consistent, as it might vary depending on the unique circumstances. However, the significant grounds for refusal of awards are discussed in the following paragraphs.

1. Invalidation of Arbitral Agreement and Incapacity of parties

The lack of capacity of the parties is a legitimate reason for rejecting the enforcement of arbitral award. For a contract to be legally binding, the parties involved must have the legal capacity to enter into the agreement, and the agreement itself must be legitimate and enforceable. English court in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs*, observed

[72] *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth* [1985] 473 US 614, 638.

[73] *Nigel Blackaby et al, An Overview of International Arbitration* (5th edn, OUP 2009)

[74] Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh Petroleum Exploration and Production Company Limited (Bapex), ICSID Case No. ARB/10/18

[75] UNCITRAL Model Law on International Commercial Arbitration (n 7) art 36.

[76] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (n 3) art V.

[77] Arbitartion Act (n 11) s 46.

[78] The Arbitration and Conciliation Act (n 12) s 34.

that there was no arbitration agreement to resolve the dispute between the parties; consequently, the arbitrators did not have the authority to issue an award, therefore, arbitral award was set aside.[79]

In Bangladesh, the enforcement of an arbitral award may be rejected if a party to the arbitration agreement was under some incapacity; or the arbitration agreement is not valid under the law to which the parties have subjected to it.[80] The same provision applies in Singapore with respect to incapacity of parties or while the agreement itself is invalid.[81] Conversely, in Indian jurisdiction, the application of incapacity of parties and the question of validity of agreement is very limited. The Supreme Court of India in Svenska Handelsbanken vs Indian Charge Chrome Ltd opined that the plaintiff's engagement in contracts with various parties does not have the power to undermine or invalidate the rights of the other party involved in those contracts, especially when the right to international arbitration has been established by Parliament as an absolute right, over which the court has no authority to exercise any discretion.[82] Therefore, the legal framework in Bangladesh and India regarding the grounds of incapacity and invalidity of arbitration agreements is based on the Model Law and New York Convention. However, the application of this principle may differ depending on the specific case and jurisdiction.

2. Notification of the Arbitration Procedures

The fundamental tenet of ensuring justice is to duly notify the opposite parties. To enforce an arbitral award, it is mandatory provision to provide appropriate notification. Courts have the authority to reject the execution of arbitral award if the party being asked to enforce the award can demonstrate that they were not informed about the appointment of an arbitrator or were unable to present their case.[83]

The arbitration law in Bangladesh acknowledges that the party against whom the award is invoked was not given adequate notification on the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present their case due to valid reasons.[84]

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79 *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 para 150-159.

80 Arbitration Act (n 11) s 46 (1)(a).

81 International Arbitration Act (n 28) s 34(2).

82 *Svenska Handelsbanken vs Indian Charge Chrome Ltd* [1994] SCC (2) 155 para 43.

83 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (n 3) art V(1)(b).

84 Arbitration Act (n 11) s 46(1)(a)(iii).

The High Court of Singapore by referring the principle '*audi alteram partem*' expressed that the parties must be given adequate notice and opportunity to be heard. The court further added that each party must be given a fair hearing and a fair opportunity to present its case. [85]

3. The discrepancy in the Arbitration Procedure or Composition of the Tribunal

Improper composition of the arbitral authority is a valid ground for the refusal of the enforcement of an award. In the composition of the arbitral tribunal or the arbitral procedure did not conform to the terms agreed upon by the parties or, in the absence of such agreement, the enforcement of the award could be refused in Bangladesh,[86] which is similar to NYC.[87] The decision of the Italian Supreme Court in this matter, may be pertinent, while a dispute emerged between Hubei, a Chinese company, and Tema, an Italian company, who initiated separate arbitration in Beijing and Stockholm respectively, but Tema refrained from participating in the Beijing proceeding.[88] The Stockholm award was upheld by the Italian court, while the Beijing award was not enforced on the reason that the proceedings in Beijing failed to conform to the agreement between the parties, which only permitted one arbitration, either in Stockholm or Beijing, contingent on which party initiated the arbitration first.[89] Conversely, the composition of the arbitral tribunal and the commitment to abide by the appropriate legislation, arbitral rules, or procedure are strictly complied in Singapore.[90]

Improper composition of the arbitral authority is a legitimate reason for refusing to enforce an arbitral ruling in Bangladesh. However, the Singapore court and law are more stringent in that if a party fails to take advantage of an opportunity within the specified timeframe, they will not be granted a remedy.

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85 *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 para 30.

86 Arbitration Act (n 11) s 46(1)(a)(v).

87 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (n 5) art v(1)(d).

88 *Tema Frugoli SpA, in liquidation v Hubei Space Quarry Industry Co Ltd Corte de Cassazione* (Supreme Court), 2001; (2007) XXXII, Yearbook of Commercial Arbitration 390-396 (Italy no 170), cited in Rashida Rana and Michelle Sanson, 'International Commercial Arbitration' (2011) *Thomson Reuters* 1, 306.

89 ibid.

90 Steinbruck (n 9) 564.

4. The award not yet binding

The award must be legally in existence at the time of application for enforcement. According to NYC refusal to enforce an arbitral award might occur if the award is not yet legally binding on the parties, or if it has been nullified or suspended temporarily by a competent authority in the country where the award was issued or under the applicable law,[91] the same provision adopted in Bangladesh act.[92] In *Creighton v the Government of Qatar,* US District court refused to enforce the award that the award has been suspended for the purposes of Article V(l)(e) of the New York Convention.[93]

If the award has been set aside, it cannot be enforced in Singapore for domestic awards, however the situation is less definite for international awards. [94]International Arbitration Act, Singapore provides that the award has not yet become binding on the parties to the arbitral award or has been set aside or suspended by a competent authority.[95] The ICSID Tribunal concluded that courts of Bangladesh abused their rights when exercising supervisory jurisdiction over the ICC arbitration process by stating that "the expropriation of the right to arbitrate the dispute in Bangladesh corresponds to the value of the award rendered without the undue intervention of the court of Bangladesh."[96] Therefore, refusal to enforce on the ground of not binding, suspension or setting it aside is a broad concept and imposed discretion of the court of enforcement in Bangladesh. Conversely, the legislation in Singapore limited the courts' ability to exercise their own discretion.

5. Arbitrability and decline of enforcement

National courts have the authority to reject the enforcement of an arbitral award if the nature of the dispute is not compatible with resolving through arbitration according to the laws of the country where enforcement is claimed.[97] If the subject matter of the dispute cannot be resolved through arbitration according to the current laws in Bangladesh, the court has the authority

91 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (n 5) art V(1)(e).

92 Arbitration Act (n 11) s 46(1)(a)(vi).

93 *Creighton v the Government of Qatar US District Court, District court of Columbia,* 1995; (1996) XXI Yearbook Commercial Arbitration 751 (US No 197); cited in cited in Rashida Rana and Michelle Sanson, 'International Commercial Arbitration' (2011) *Thomson Reuters 1*, 308.

94 Steinbruck (n 9) 566.

95 International Arbitration Act (n 27) s 31(2)(f).

96 Saipem S.p.A (n 67).

97 Convention on the Recognition and Enforcement of Foreign Arbitral Awards art (n 5) V(2)(a)

to decline enforcement,[98] the same provision also applies to Indian jurisdiction.[99]

However, the scope of the principle of non-arbitrability is very scarce and court use this very cautiously. For instance, the applicant initiated arbitration procedures in Beijing to request the enforcement of the agreement while the respondent argued that the arrangement was effectively a disguised transfer of land, which stands against the law.[100] The court determined that the proposed order did not entail a transfer of land, and the respondents were obliged to transfer the shares held in Legend Hongkong to the applicant subject to the payment of the consideration due, whereas the court did not accept the matter was incapable of settlement by arbitration.[101]

6. Public Policy

The recognition and enforcement of the foreign arbitral award can be rejected if it undermines the national policy of Bangladesh.[102] New York Convention provides that the competent authority may refuse the recognition or enforcement of the award if such an act would be contrary to the public policy of that country,[103] the Indian Arbitration Law adopted the identical provision regarding public policy ground.[104] While the public policy exception is frequently invoked to challenge enforcement, there is no universally accepted notion or definition of public policy. The Arbitration Act stipulates that an award can be invalidated if it contradicts the public policy of Bangladesh.[105] However, the act does not offer any elucidation regarding the definition of the word public policy. This is one of the shortcomings of the Act in Bangladesh. On the contrary, India has made an amendment and incorporated an arbitral award may be set aside on patent illegality appearing on the face of the award.[106]

98 Arbitration (n 11) s 46 (1)(b)(i).

99 The Arbitration and Conciliation Act (n 12) s 34(2)(v)(b)(i).

100 *Xiamen Xinjingdi Group Co Ltd. v. Eton Properties Ltd. and Eton Properties (Holdings) Ltd* [2008] HCCT 54/2007 - 24 juin 2008 para 136-140.

101 ibid

102 Arbitration Act (n 11) s 46 (1)(b)(ii).

103 Convention on the Recognition and Enforcement of Foreign Arbitral Awards art (n 5) art V(2)(b).

104 The Arbitration and Conciliation Act (n 12) s 34(2)(v)(b)(ii).

105 Arbitration Act (n 11) s 43(1) (b)(iii).

106 The Arbitration and Conciliation Act (n 12) s 34(2A).

Through legislation, the concept of refusal for enforcement of foreign awards" is generally consistent. However, the various courts' implementation of this exemption and their explanations may provide valuable insights into the differing perspectives. Although the concept of public policy is still uncertain, in many legal systems, arbitral tribunals interpret the term narrowly, considering a pro-enforcement stance as a manifestation of public policy.[107] For example in *Renusagar v General Electric*, the Supreme Court of India opined, the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.[108] In *Shri Lal Mahal Ltd vs Progetto Grano Spa*, the court held the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning by adding that the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest.[109]

In a separate instance, the supreme court of India applied the concept of public policy in a more expansive manner, if a case lacks a head of public policy, the court must declare any behavior that goes against public policy to be in opposition to public conscience, public good, and public interest.[110]

On the other hand, the Supreme Court of Bangladesh demonstrates a highly favorable stance in enforcing foreign arbitral awards. In *Tata Power Company Ltd. v M/S Dynamic Const.*[111] the Appellate Division held that

> "the arbitral award is generally not open to review by Courts for any error in finding on facts and applying law for the simple reason that it would defeat the very purpose of the arbitration proceedings"."

The court further distinguished public policy and the notion contrary to law more explicitly that if the decision made by the learned arbitrator would have an adverse effect on the future of international agreements involving foreign corporations investing in Bangladesh, then the decision could be deemed to

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107 Sattar (n 66) 313.

108 *Renusagar v General Electric* [1994] AIR 860 (SC) para 66.

109 *Shri Lal Mahal Ltd vs Progetto Grano Spa* Civil Appeal No. 5085 of 2013 para 31 <https://indiankanoon.org/doc/15591279/>.

110 ONGC v Saw Pipes [2003] 5 SCC 705.

111 *Tata Power Company Ltd. v M/S Dynamic Const.* [2015] 2 SCOB 15 (AD) para 20 <http://www.supremecourt.gov.bd/resources/bulletin/2.5_SCOB_AD.pdf>.

be in contradiction with public policy.[112] In another case, the Supreme Court clarified public policy as an award would be contrary to public policy if it were 'patent illegal[113]

The Singapore court, in contrast, adopts a stance against ambiguity and vagueness when interpreting the concept of public policy. In *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd*, the court held that the assertions of breach of public policy cannot be vague and generalized. [114]

In Singapore, the Court has shown hesitancy in using public policy as a basis for rejecting the recognition of foreign arbitral awards.[115] For instance in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA,* the court of Appeal held that it should only be applicable in cases where the enforcement of an arbitral award would be morally outrageous or obviously harmful to the public interest or would be completely offensive to a reasonable and well-informed member of the public.[116]

Upon careful examination of the legislative and judicial references, it may be concluded that there is no universally applicable set of rules and regulations pertaining to the matter of public policy and the refusal of foreign arbitral awards. In Indian jurisdiction, the judges tend to be explicit and have a distinct perspective when it comes to public policy matters. However, while the Bangladesh highest court has not made so many decisions on this matter, it is not frequently in favor of the exemption. The strategy of Singapore is more rational as frequent rejection of arbitral awards based on public policy or mere speculation may erode trust in the entire process. The following part will demonstrate the constraints of international arbitration in Bangladesh.

V. LIMITATIONS AND CHALLENGES OF ARBITRATION IN BANGLADESH

To promote international trade, it is inevitable to ensure arbitration favorable legislation and judicial practice. The objective of the new Bangladesh arbitration is to foster an appreciative business climate within the country. Despite being

112 ibid para 27.

113 *Saudi Arabian Airlines Corporation represented by its Country Manager, Dhaka Office v M/S Saudi Bangladesh Services Company, Ltd*, Civil Appeal no 173 of 2011, 1.

114 *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] SGHC 62 para 44< https://www.elitigation.sg/gd/s/2010_SGHC_62>.

115 Erman Radjagukguk, 'Implementation of the 1958 New York Convention in Several Asian Countries: The Refusal of Foreign Arbitral Awards Enforcement of the Grounds of Public Policy' (2011) 1(1) Indonesia Law Review 1, 11.

116 *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41 para 59.

derived from the Model Law and the Indian legislation, the arbitration mechanism faces significant obstacles such as backlog, delays, lack of experience, and infrastructure issues which will be demonstrated below.

A. Delays for the Enforcement of awards

Systemic delay is an impediment to the satisfaction derived from any judgement or order. Consequently, the postponement or delay of enforcement has caused frustration and discouraged foreign parties from making additional investments. The principal objective of the Arbitration Act 2001 is to accelerate the process of arbitration. Despite some notable efforts to create a favorable environment for arbitration in Bangladesh, as discussed earlier, the arbitration process and the enforcement of foreign awards in the country are excessively time-consuming. This undermines the primary goal of choosing arbitration as the preferred method for resolving international business disputes.[117] In *Smith Co-Generation (BD) Pvt. Ltd. v PDB*,[118] the petitioner received three ICC awards in their favour due to breaches of contract by the Bangladesh Power Development Board but the PDB filed an application against the petitioner's execution suit in the District Court, challenging the legality of the arbitral proceedings that took ten years for the petitioner's award to be finally upheld.[119]

The enforcement of an award is typically considered the administrative responsibility of the relevant authority. This process is anticipated to be completed expeditiously and without any additional complications. Conversely, if the task is long and requires a lot of effort, it may cause frustration for the business entity.

B. Statutory Limitations

The term "commercial is not defined by the present legislation. Section 2(c) of the Act merely states that 'considered as commercial under the law in force in Bangladesh'. However, there is no definition of "commercial" under any laws in Bangladesh. Whereas a broad definition of "commercial" has been provided by Model Law.

[117] Sattar (n 66) 319.

[118] *Smith Co-Generation (BD) Pvt. Ltd. v PDB*, ICC Case No. 10372/OL/ESR/MS.

[119] ibid.

Interim measures issued by a tribunal situated outside of Bangladesh are not enforceable in Bangladesh. Furthermore, Bangladesh has not yet adopted the amendments of Model Law in 2006 pertaining to interim measures and preliminary orders.

In addition, the existing Arbitration Law in Bangladesh does not provide a time limit for the resolution of arbitral awards. This lack of clarity increases the chances for national courts to hesitate in enforcing or dismissing such applications. On the other hand, Arbitration Act India inserted a provision with an amendment that the award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.[120] Moreover, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast-track procedure.[121]

There is ambiguity in the Arbitration Act of Bangladesh about arbitrability, which leaves an award ambiguous and leaves it open to revocation. It may discourage individuals who employ international arbitration from selecting Bangladesh as their arbitration destination. Furthermore, the Bangladesh Act fails to specify the basis for rejecting an award that is against public policy, so creating an opportunity for unauthorized court interference. In addition, while the arbitration legislation addresses certain types of disputes, the Bangladesh arbitration law does not include any provisions that restrict the jurisdiction of the national court. Specifically, if someone challenges the legality of arbitration procedures with an intention to delay the execution procedure, the legislation does not restrict them from pursuing litigation. Hossain, a judge from Bangladesh, in his article mentioned that in the execution stage, judgment-debtors take advantage of technicalities and adopt dilatory tactics and make application of tricks with intent to delay the execution.[122] The entire judicial process in civil suit has been brought to disrepute by the manner and method of executing proceedings that protract over decades.[123] Despite the article reflected for the traditional trial procedure, the same scenario applicable in case of International Commercial arbitration.

120 The Arbitration and Conciliation Act (n 12) s 29A.

121 ibid s 29B.

122 Muhammad Sazzad Hossain and Mohammad Imam Hossain, 'Causes of Delay in the Administration of Civil Justice: A Look for Way Out in Bangladesh Perspective' (2012) 6 (2) ASA University Review 101, 107.

123 ibid.

Nevertheless, the Arbitration Act, requires amending in accordance with the recent demand relating to timeframe of execution, removing ambiguity of certain significant provisions including public policy, ensuring check and balance between national court and arbitration tribunal, and non-interference by the court or challenges of the arbitral awards on validity grounds like India.

C. Limitations relating to infrastructure and expertise

The judiciary of Bangladesh is currently overwhelmed with number of cases. Furthermore, there are no dedicated judicial bodies or tribunals that adjudicate arbitration cases, neither at the trial courts level nor at the supreme court level. Therefore, when it comes to resolving arbitration matters, the courts consider them like ordinary cases without concentrating any emphasis on the matter related to arbitration. Moreover, the judges, practitioners, and other court officials lack the necessary ability and expertise in arbitration matters, which also hinders

the achievement of an arbitration-friendly environment. Without embracing the essence of such a procedure undermines the establishment of a favorable arbitration mechanism and consequently hampers a country's potential as an attractive investment destination.[124]

VI. FINDINGS AND SUGGESTIONS

For international arbitration to flourish in Bangladesh, some amenities that are often found in the ideal destinations for international arbitration should be incorporated. In addition, the following suggestions could be implemented to alleviate the limitations, attract in investors, and guarantee an efficient arbitration process.

1. The Model law's suggested temporary measures ought to be incorporated into the Act 2001. To grant temporary measures, the Act should incorporate the requirements mentioned in Article 17A of the Model Law.
2. The term "commercial" should be defined broadly, and the Act's use in global business contexts should be considered. The act should be amended by adding that the Act applies to the arbitration of disputes originating from any economic connections, whether domestic or foreign.

[124] Sattar (n 66) 322

3. The amount of time needed to administer the arbitration procedure and enforce the award should be reduced. To accomplish this, a distinct arbitration court with specialized personnel might be set up.
4. There should be provision of the act that the award should be made within a specified time and incorporating the provision, like Indian fast track system for the execution of award, it becomes more feasible to expedite the resolution of the arbitration process.
5. To effectively address the issues characterized earlier, there is no substitute for training the relevant workforce, improving the infrastructure, and advocating for the pro-arbitration system.

VII. CONCLUSION

To foster international trade and investment in Bangladesh, it is imperative to have an Arbitration friendly statute as well as the positive attitudes from concerned authorities that is advantageous towards arbitration. As investment increases, the cross-border conflict regarding international trade will also significantly rise in accordance with the growing requirement for an effective dispute resolution system.

The International Commercial Dispute resolution sector has undergone modernization over a span of twenty years through the implementation of the new Arbitration Act in 2001. This statute has incorporated the fundamental characteristics of the Model Law, New York Convention, and Indian Arbitration laws. With significant advancements in all aspects of dispute resolution, this region's legislation and infrastructure strongly encourage arbitration when compared to other countries. Although there has been remarkable achievement, there are still notable gaps that must be addressed to attain the goals. For example, amendments of existing laws including establishing a specific timeframe for enforcing an arbitration decision implementing a fast-track procedure like the Indian arbitration statute, providing clear guidelines for interim measures by the arbitration tribunal and the relevant court, and reducing interference from other authorities. Furthermore, it is necessary to provide training for judges, practitioners, and relevant ministerial personnel to enhance their skills. Additionally, efforts should be made to establish the necessary infrastructure to ensure efficient and timely processes.

Moreover, national courts should exercise caution when intervening in the jurisdiction of an arbitral tribunal. Specifically, the court shall only collaborate to enhance the efficiency of the tribunal and matters related to execution. Likewise, the court ought not to set aside the foreign award based only on a minor inconsistency or conjecture. In such a situation, the Bangladeshi authorities can adopt the approach of Singapore while implementing the rejection procedure, ensuring that it is stringent and restrictive. However, if this country fails to embrace these processes, the intended objective of the new arbitration statute of 2001 will be rendered ineffective.

Basic Norms of Legal Research: An Introduction

Dr. Md. Milan Hossain*

Abstract

Without knowing the basic norms of research or legal research, no good academic research is possible to be conducted by new researchers; therefore, they (new researchers) are generally falling in the puzzled of getting the right path to create new knowledge, contribution or at least ensure further development in their works due to the absence of clear understanding about research gap, research problem identification, research proposal, design, literature review, research objectives, research questions, hypothesis, research methodology, kinds of legal research, referencing, citation, quotation, sources of data etc. Therefore, the paper argues for an attempt to focus on the basic norms of research (legal) in theory and practice so that new researchers get a good introduction upon legal research.

Key Words: Research, Legal Research, Basic Norms of Legal Research, New Research.[1]

Introduction

Research is essential for acquiring higher education and scientific knowledge in any discipline. It is a creative process and complex activity but it is possible if a researcher has adequate patience and intention to carry on research. In the present world, research, which involves deep thinking on various subjects or issues of burning questions, takes the place of competition from various corners of society to find out various social phenomena and their solutions.

Traditionally, legal research has been conducted/carried out by scholars, lawyers, and academics in order to acquire the title of scholarship.[2] At present,

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1 In writing the paper, the author depended his book titled "Legal Research and Writings" Sufi Prokashoni, Dhaka, 2000.

2 Peter Clinch, 'Teaching legal research' *UK Centre for Legal Education,* (2006), p. 13, at

students pursuing master's and honors degrees are carrying out research to fulfill their academic requirements.[3]

To conduct research, the researcher must fully concentrate on their thinking using systematic research methods. Here, systematic means refers to the methodology of research. Therefore, he should be familiar with basic research norms and methodologies, enabling individuals to conduct research efficiently by analyzing primary and secondary data. Without clear and specific knowledge, along with a practical approach to the basic norms of legal research, a good research paper cannot be conducted, and new knowledge or further knowledge may not be generated. Under these circumstances, the paper aims to provide a comprehensive discussion on the fundamental principles of legal research, offering new researchers a clear guideline for conducting legal research and fulfilling its intended purposes.

Research

Research may be conducted on social problems, business inquiries, economic problems, political problems, medical issues, scientific and technological fields, geological fields, environmental issues, as well as legal issues, etc. It may be doctrinal, non-doctrinal, qualitative, quantitative, analytical, historical, comparative, interdisciplinary, sociological, quasi-disciplinary, mono-disciplinary, etc.

The word Research consists of the combination of two words 're' and 'search' which means to search again and again. The word came from the French word ***research***. Research is a scientific and systematic investigation and inquiry of any social questions or problems. The term research means to search more and more into any subject. In a word, research means to search, find out or examine again and again in order to prove hypotheses. According to Albert Szent Gyorgyi "*Research is to see what everybody else has seen, and to think what nobody else has thought*." As per the scholar's definition, research refers to the innovation of new theory, principles, knowledge, concepts, information, etc., discovered from hidden truth by way of systematic investigation, inquiry, or examination, or search again and again by means of scrutinizing primary and secondary data. It is an intellectual invention including literature, data, information material and facts for the achievement of knowledge.

[3] *Ibid.*

The ultimate aim of research is to find out the hidden truth that has not yet been revealed. The purpose of research is to acquire knowledge or information scientifically and systematically. It also finds the solution to any social, technical, scientific, economic, political, cultural, and governmental problems.

Significance of Research

As time passes, the world is becoming increasingly globalized, much like a village, where the wonders of modern science are providing new technologies that support economic, business, educational, and medical sectors. For example, e-governance, e-commerce, software, multimedia, device, robot, vehicle, satellite, etc. can be drawn as the result of research. Research is a scientific, systematic, and diligent process of inquiry aimed at discovering, interpreting, or revising facts, events, behavior, theories, and philosophies, as well as their practical applications.[4] Besides these, there are several important aspects of research, thus;

- It discovers a new theory
- It enriches knowledge and information and data.
- It helps to face new challenges in economic, social, cultural, religious, fair justice, and education.
- It finds out the linkage of social indiscipline.
- It provides a true and new concept to solve new challenges
- It makes the law dynamic and able to cope with the changing social ethos.
- Besides these, ongoing scientific and technological developments create new complexities, making research essential.

Legal Research

Legal Research denotes scientific investigation and inquiry regarding any questions of legal matters where the investigation provides new theory as well as knowledge in order to ascertain the presumption or hypothesis. 'Legal research', taking cues from the meaning of 'research' as outlined in the preceding section, may be defined as 'systematic investigation towards increasing the sum of knowledge of law'. It aims to uncover the true nature of legal problems. Basically, it critically analyzes the laws and regulations, as well as judicial precedents, in

[4] Singh, Rattan, Legal Research Methodology, 2nd Edition, LexisNexis, India, 2013, pp. 6-7.

pursuance of the constitution, focusing on the loopholes in the laws that are mainly liable for social indiscipline. In order to conduct legal research, a lawful mind has to be set up by the conductor/s and must have adequate knowledge upon the topic of research.

Francis Johns said- "Doctrinal or theoretical legal research can be defined in simple terms as research which asks what the law is in a particular area and all other [non-doctrinal] legal research can be generally grouped within three categories: problem, policy and law reform based on research. It is accepted that these categories are not mutually exclusive and are identified in terms of an assessment of what a piece of research is largely about."[5]

The legal research aims to identify any loopholes or drawbacks within the legal discipline and provide solutions to the problems therein. It aims to provide new knowledge on any burning question of legal matters. In the present world, research is conducted to upgrade the education qualification along with high thought. It is also done to focus on the present scenario of the effectiveness of legal liabilities. It also fills the gap in studies by making further contributions to previous work, thereby challenging new problems and reforming the existing system. In the field of law, legal research is carried out to examine the laws and regulations, whether national or international, in order to find out lacunae or deficiencies in the laws and to suggest appropriate measures to abolish/remove them.[6]

In the field of law, legal research is carried out to examine the laws and regulations, whether national or international, in order to find out lacunae or deficiencies in the laws and to suggest appropriate measures to abolish/remove them.[7] Where there is no law for addressing contemporary legal challenges e.g. AI regulation, climate change litigation and transnational terrorism for which social indiscipline occurs, in this case legal research plays a vital role giving suggestions or recommendations to form legislation with a view to minimizing and controlling the situation or problem. Besides these, where there is a law for that area but it is not working correctly due to one reason or another, then legal research aims to find out the reason for not working the legislation correctly and then recommend a new theory as well as philosophy.[8]

5 Ian Dobinson and Francis Johns 'Qualitative Legal Research' in Michael Mc Conville And Wing Hong Chui, eds, *Research Methods for Law* (2007 Edinburgh University Press, Edinburgh) pp. 18-19

6 Dr. H.N., Legal Research Methodology, *Allahabad Law agency*, 10th Edition, 2015, p. 3.

7 *Ibid*

8 *Ibid*.

Basic Terms in Legal Research

Research Problem Identification

As a researcher, the first task is to identify a research problem that needs to be solved for the betterment of society, as all problems are derived from society, but the research problem should be rational, practical, and not fictitious.[9] It is also apt to state that in the case of academic research, researchers have limited option to select research problem or research topic due to considering certain parameters i.e., novelty of topic, suitability of topic, convenience in data collection or on option of supervisor whereas in project research, researchers are to undertake for conducting research on the research problem designed by funding agencies.[10] On the other hand, an independent individual researcher or academician is free to select a research problem or topic; generally/they can select a research problem from his/her interested research area of interest, considering all parameters, as the selection of a research problem is a scientific process involving certain steps on the part of the researcher to be performed.[11] If there is no problem on particular research area, or previous researchers have already researched on the particular research area or solved the matters, there is no need of further research upon the matters; research problem identification means formulation of a research problem including the nature of the research, aims of the research, reasons of the research, context of the research and fixation of research area. Generally, a researcher may select a research problem from their own interests, practical experiences encountered in their daily life in society, from previous researchers' works, or from their supervisors or university teachers.[12]

Research Proposal

A Research Proposal is a concise summary of the entire research project. It represents a core statement of the whole research. It shows why the research concerning any particular issue is needed to carry on and what the necessities of conducting or carrying on the research are. Research proposal includes title, abstract, table of contents, introduction, statement of the research,

[9] Dr. Manish Singh, Law Research Methodology Research Problem-e-PG Pathshala, available at: http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/09._research_methodology/05._research_problem/et/7568_et_05_et.pdf, (accessed 29 March, 2020).

[10] *Ibid.*

[11] *Ibid.*

[12] Tejinder Pal and Karun Kumar, 'Selection and Formulation of Legal Research Problem: First Step Towards Destination' in Rattan Singh (eds), *Legal research Methodology*, (LexisNexis, 2013).

literature review, research design, research questions, research objectives, scope, limitations, conceptualization, methodology, data analysis, etc.[13] Mainly, the research proposal focuses on the research questions, outlining arguments for what is proposed to be done and how the proposed research will be done.[14] According to a group of scholars, a research proposal consists of three chapters or parts, where it covers the introduction under chapter 1, the literature review under chapter 2, and the methodology under chapter 3.[15] But the completed research paper must also include research findings (chapter 4) and a conclusion, as well as recommendations (chapter 5). [16]

Research Design

Research design is an integral part in carrying out research. It refers to the planning, process and entire formulation in collecting data and information in order to find out the findings of a research and fulfill the research objectives as well as research questions.[17] Research design is the general blueprint or plan for examining and verifying a specific hypothesis and obtaining results. [18]According to De Vaus and Trochim "The research design refers to the overall strategy that you choose to integrate the different components of the study in a coherent and logical way, thereby, ensuring you will effectively address the research problem; it constitutes the blueprint for the collection, measurement, and analysis of data. Note that your research problem determines the type

[13] Department of English, Writing the Research Proposal Guidelines, University of the Free State, 2018, p. 5, Retrieved from https://www.ufs.ac.za/docs/librariesprovider20/default-document-library/writing-a-phd-research-proposal_2018.pdf?sfvrsn=40dda721_0; Anon, Research Design, p. 41, Retrieved from https://www.sagepub.com/sites/default/files/upm-binaries/28285_02_Boeije_Ch_02.pdf

[14] D. R. Rowland, The Learning Hub, Student Services, *The University of Queensland*, p. 3, Retrieved from https://uq.edu.au/student-services/pdf/learning/research-proposal-sample-v2.pdf

[15] Dr. Mark A. Baron, Guidelines for Writing Research Proposals and Dissertations, University of South Dakota, p. 1, retrieved from https://www.regent.edu/acad/schedu/pdfs/residency/su09/dissertation_guidelines.pdf

[16] *Ibid.*

[17] Kinnear & Taylor, 1996, *Marketing Research: An Applied Approach,* 5 Edition, McGraw-Hill, 1996.; Anon, Research Design, p. 136, retrieved from http://shodhganga.inflibnet.ac.in/bitstream/10603/72439/11/11_chapter-3.pdf

[18] Anon, Research Design: Background, *Presidential Commission for the Study of Bioethical Issues,* 2016, pp. 7, 12, retrieved from https://bioethicsarchive.georgetown.edu/pcsbi/sites/default/files/4%20Research%20Design%20Background%209.30.16.pdf; Anon, 12 Major Types of Research Designs, p.4. Adopted from University of Southern California Libraries (2016). *Organizing Your Social Sciences Research Paper: Types of Research Designs. http://libguides.usc.edu/content.php?pid=83009&sid=818072*

of design you should use, not the other way around!"[19] This type of research design is termed descriptive design, and it is used chiefly in legal research.[20] Besides these, there are various kinds of research designs, such as action research design, Case study design, causal design, cohort design, cross-sectional design, experimental design, exploratory design, historical design, longitudinal design, meta-analysis design, and observational design.[21] The design of a study delineates the study nature (descriptive [22], correlational[23], semi-experimental[24], experimental[25], review, meta-analytic) and sub-type (e.g., descriptive-longitudinal case study), research question, hypotheses, independent and dependent variables, experimental design, and, if applicable, data collection methods and a statistical analysis plan.[26] It enables the researchers to answer the primary questions as unambiguously as possible. [27]

Here, research objectives and research questions are the core stages of research design. To conduct research, the researcher must first define the research objectives and questions, thereby establishing a clear direction to achieve the desired findings and insights through research. But it is true that in Bangladesh, especially in most cases, academicians conduct research primarily to fulfill their academic criteria and increase their research publications. On the other hand, most of the publishers publish inappropriate papers due to financial backing and personal interaction. It is a common scenario here. However, research design is a systematic way of reaching the desired findings of the researcher. It involves investigating problems and facts to address research objectives and questions, collecting data and information to fulfill these objectives,

[19] De Vaus, D. A. Research Design in Social Research. London: SAGE, 2001; Trochim, William M.K. Research Methods Knowledge Base. 2006. [cited in University of Southern California Libraries (2016). *Organizing Your Social Sciences Research Paper: Types of Research Designs. Retrieved from, USC Libraries, Retrieved from http://libguides.usc.edu/content.php?pid=83009&sid=818072*

[20] *Ibid.*

[21] University of Southern California Libraries (2016). *Organizing Your Social Sciences Research Paper: Types of Research Designs. Retrieved from http://libguides.usc.edu/content.php?pid=83009&sid=818072*

[22] It includes case-study, naturalistic observation and survey where it narrates with illustration.

[23] Correlational design study about the same of descriptive study but it has a few differences that is it includes the case-control study where it also emphasizes upon the observational study.

[24] This type of research design outlines the scheme or plan in conducting research where the scheme or plan basically depends upon field experiment and quasi-experiment.

[25] It depends upon experiment with random assignment.

[26] Adopted from Sage Publication, http://www.sagepub.in/upm-data/28285_02_Boeije_Ch_02.pdf. and from http://www.tezu.ernet.in/~utpal/course_mat/research_design.pdf

[27] Anon, what is research design, p. 8. Retrieved from https://www.nyu.edu/classes/bkg/methods/005847ch1.pdf

and analyzing the data gathered from field-based surveys or library-based investigations. Actually, it denotes the planning of conducting research and that can be traced out by asking some questions like this- how the research will be conducted systematically; how the data will be collected; how the data will be analyzed; how the research objectives and research questions will be answered; how to find out the findings. A researcher can follow doctrinal (analytical) research design though it is the most traditional form of legal research where statutes-legal rules, principles, doctrines, precedents, and commentaries are focused. By following such sort of design, if one wants to conduct research upon "The Doctrine of Basic Structure in Bangladesh Constitutional Law: An Analytical Study", he may examine the constitutional provisions, judicial pronouncements (*Anwar Hossain Chowdhury v Bangladesh, Kesavananda Bharati* v *State of Kerala*) and jurists comments to make an evaluation and application of the doctrine of basic structure; this design is purely doctrinal emphasizing qualitative content analysis having no application of empirical data. On the contrary, if a researcher wants to investigate the effectiveness of the legal aid service in rural area in Bangladesh, he needs to apply empirical (non-doctrinal) research design; for doing this he can collect data through survey questionnaire involving sample techniques, data coding and statistical analysis.

Steps of Research Design

There is no specific criteria and formation of research design. But in conducting research, generally researcher has to follow following steps:

- **i.** Tracing out the Fact and Problems existed in disciplines
- **ii.** Selection a research title[28]
- **iii.** An introduction to the research title[29]
- **iv.** Literature Review[30]
- **v.** Identifying the issues that need to be testified or examined
- **vi.** Formulating research objectives[31]

[28] Anon, 5 Components-Research Proposals, *Rosario English Area*, p. 1, retrieved from http://repository.urosario.edu.co/bitstream/handle/10336/13898/5%20components%20-%20Research%20Proposals.pdf?sequence=1

[29] *Ibid.*

[30] *Ibid,* p. 2.

[31] Traylor, Wolf, Managing a Nonprofit Organization, Prentic Hall, New York, 1990, p. 133. [cited in Anon, Research Design, Deakin University, p. 1. Retrieved from https://www.deakin.edu.au/__data/assets/pdf_file/0010/683911/research-design.pdf

vii. Framing research questions or hypotheses

viii. Conducting preliminary research[32]

ix. Selecting research methodology[33]

x. Searching the laws and regulations with a view to testing or examining the issues identified.

xi. Evaluating the laws and regulations in light of facts and issues.

xii. Collecting data and information through field work survey or library-based survey (using primary and secondary sources)

xiii. Choosing tools and techniques for analyzing data

xiv. Analyzing the collected data and information taken from field work surveys or library bases surveys in light of research problems.

xv. Finding out the result of the analyzed data for proving the hypothesis or for answering the research question.

xvi. Tracing out the overall findings and results from such evaluation.

xvii. Exploring the recommendation and solution in order to solve the existing problem (if possible)

Literature Review

Literature review means the study of existing relevant works of previous researchers with a view to critically analyzing or reviewing so that the researcher's knowledge is being enriched and he can draw rational research on the topic; he has to study all prominent researchers' and authors' works home and abroad. By studying the works of other a researcher can learn how a research should conduct or how others have conducted a research or what extent they have developed upon research topic or whether the previous researchers have given any direction or ways for further research; even a researcher can understand by making literature review of other works whether any research has directly or indirectly been done upon his/her topic; if any research is done, he has to justify that in spite of being several or many researches, his or her research is important to create or contribute new knowledge. In case of conducting literature review, a researcher has to study relevant prominent researchers works so that he/she can enrich relevant knowledge; suppose, if a Bangladeshi researcher is interested to conduct a research upon any constitutional issues, he/she can review the concerned issue from Mahmudul Islam's Constitutional Law of Bangladesh,

[32] Ibid.

[33] *Ibid.*

Justice Mustafa Kamal's Bangladesh Constitution: Trends and Issue, A. K. M. Shamsul Huda's The Constitution of Bangladesh, Dilara Choudhury's Constitutional Development in Bangladesh: Stresses and Strains, Jasim Ali Choudowry's Constitutional Law of Bangladesh or A. V. Dicey's Introduction to the Study of the Law of the Constitution, O'Hood Phillips's Constitutional and Administrative Law, Ivor Jennings's Law of the Constitution, etc.; he/she can also review published and unpublished research works, published journal papers having open access globally. One can utilize artificial intelligence (AI)-powered tools for searching relevant research works and quick review. Tools such as Elicit[34], Connected Papers [35] and Semantic Scholar[36] can identify the relevant scholarly works and summarize the complex academic works.

Objectives of the Research

The goals a researcher intends to achieve at the end of research are called research objectives, which help conduct research. Research objectives are connected with research hypotheses and research questions. Where there is no hypothesis in a study, research objectives are used as a statement of the purpose of the study. Generally, in socio-legal research the object of the study is to find out the reasons why the legal institution is not fulfilling the purpose. In a research paper entitled "Backlog of Cases-Civil & Criminal Justice: A Comparative Study-Bangladesh Perspective" the researcher determined the objectives as under:

- To make a comparative study on the backlog of cases in the lower judiciary before and after the separation of the judiciary
- To examine the state of civil and criminal justice in the post-separation period
- To find out the means of reducing the backlog of cases and ensuring civil and criminal justice.

[34] Elicit, AI-Powered Research Assistant, https://elicit.org accessed 6 May 2025

[35] Connected Papers, Discover and Understand Academic Papers, https://www.connectpapers.com accessed 8 May 2025

[36] Semantic Scholar, AI Research Tool https://www.semanticsscholar.org accessed 6 May 2025

Again, in a research paper entitled "Laws regarding the Prevention of Dowry in Bangladesh: A Study" a researcher may fix the following as objectives:

- To examine the laws regarding the prevention of dowry in Bangladesh;
- To find out the drawbacks of the laws regarding the prevention of dowry in Bangladesh; and
- To give a proposition for the prevention of dowry in Bangladesh.

If another research is focused here titled "The Laws regarding Prevention of Cyber Crimes in Bangladesh and India: A Comparative Study", the following may be set as research objectives:

1 To examine the laws regarding prevention of cyber-crimes in Bangladesh and find out the drawbacks in them.

2. To analyze the laws regarding prevention of cyber-crimes in India and identify ways or issues in which they are updated.

3. To make a proposition for making our laws more effective regarding prevention of cyber-crimes.

Research Questions

Research questions are the questions determined at the beginning of the study to answer in the study, and therefore, research methodology and methods are used to conduct research.[37] By formulating research questions, the researcher of a study fixes the matters that are to be investigated; research questions refer to the problems or issues which is yet to be resolved.[38] Therefore, the research questions of a study are to be certain and specific; they may be formulated through the words: 'what', 'when', 'how', and 'why', etc. In a research paper titled "Backlog of Cases-Civil & Criminal Justice: A Comparative Study-Bangladesh Perspective", the following are determined as research questions:

1. What is the state of civil justice and criminal justice in the post-separation period?
2. What are the existing problems or challenges behind the backlog of cases?

[37] *Austin, Caroline, 2017. Research Question.* [viewed 5th June, 2018]. Available at: https://www.quora.com/What-is-the-difference-between-a-research-question-and-a-resea...

[38] Dr. Abdullah Al Faruque, Essentials of Legal Research, *Palal Prokashoni,* 2nd edn. (July 2010)24-25

3. What are the impacts of backlogs upon civil and criminal justice?
4. **What are the means of reducing the backlog of cases and ensuring civil and criminal justice?**

Again, in a research paper titled "Laws regarding the Prevention of Dowry in Bangladesh: A Study" a researcher may fix the follows as research questions:

- Whether the laws regarding the prevention of dowry in Bangladesh are fitted to prevent dowry here?
- What are the drawbacks of the laws regarding the prevention of dowry in Bangladesh? and
- What are recommendations for the prevention of dowry in Bangladesh?

In another research, "The Laws regarding Prevention of Cyber Crimes in Bangladesh and India: A Comparative Study", the following may be set as research questions:

1. Are the laws regarding the prevention of cybercrimes in Bangladesh self-contained and updated?
2. What is the progress of Indian laws regarding the prevention of cybercrimes?
3. What is proposition for making more effective the laws regarding prevention of cyber-crimes in Bangladesh from Indian lessons?

Hypothesis

A hypothesis is an assumption regarding the research's probable decisions upon the relations of the research variables drawn at the beginning of the research, which requires being proved or disproved by analysis of the collected data upon the research. According to Kerlinger and Krathwohl, a hypothesis represents a declarative statement of the relations between two or more variables.[39] And according to Armstrong (1974) 'The practice of using hypotheses was derived from using the scientific method in social science inquiry.[40] Generally, social science research, empirical research, or socio-legal research needs to contain hypotheses; in the case of doctrinal research or traditional legal research, research questions are designed in place of research hypotheses. In a socio-legal

[39] F. N. Kerlinger. *Behavioral research: A conceptual approach*. New York: Holt, Rinehart, & Winston (1979).; D. R Krathwohl, *How to prepare research proposal: Guidelines for funding and dissertations in the social and behavioral sciences?* Syracuse, NY: Syracuse University Press (1988).

[40] Armstrong, R. L. (1974). Hypotheses: Why? When? How? *Phi Delta Kappan*, 54, 213-214.

research paper entitled "Judiciary and Citizens' Rights: Bangladesh Perspective (2008-2016),"[41] the researcher fixed the following hypothesis:

a. The Judiciary of Bangladesh could not show better performance in the period (2008-2016).

b. The Judiciary could not protect and enforce citizens' rights in the period (2008-2016) properly.

Theoretical Framework

In conducting research, one can apply existing relevant theories and build a theoretical framework. Suppose in case of conducting research upon judiciary and its role, one can apply the theory of 'separation of power', 'check and balance', 'rule of law' and 'principle of natural justice', or 'judicial review' principles for building up a theoretical framework in the study and thus he can proceed or conduct research by applying such theories and conclude the research. In research, titled "Independent Judiciary and Citizens Rights in Bangladesh: A Study" the theories separation of power and check and balance will be key ones for analyzing and make an evaluation on the role of judiciary; whether the judiciary can function independently without any interruption from executive, legislature, or from any others; or if judiciary arbitrary works, denies citizens' rights, is there any due mechanism to control them?

Furthermore, one can apply such theories to create new principles that can be applied later to make the judiciary more responsible and effective, or to establish the rule of law. Actually, a theoretical framework in research is nothing but consists of concepts, together with their definitions and existing relevant theories which are used in the study. The theoretical framework is the structure that can hold or support a theory of a research study.[42] It may be based upon the analysis of one or more core concepts like law, right, equity, justice, fairness, and so on. In research one or more theory will be center of the study: in research of constitutional issue, the principles of separation of power, due process of law, judicial review, or writ may be involved; in case of criminal law study, presumption of innocence, theories of punishment and principle of fault may be used; and in research of particular legislation, theory of natural law may apply.[43]

[41] Non-published PhD Thesis of the Researcher

[42] Sacred Heart University Library, Organizing Academic Research: Theoretical Framework, Retrieved from https://library.sacredheart.edu/c.php?g=29803&p=185919, (accessed on 24 March 2020).

[43] Dr. Abdullah Al Faruque, Essentials of Legal Research, *Palal Prokashoni*, 2nd edn. (July 2010)30-31

Research Methodology

Research methodology is a way to systematically solve the research problem.[44] It refers to 'method' plus 'ology' where 'method' refers to the way of study and 'ology' denotes a discipline of study or a branch of knowledge. So, 'methodology' is considered to be a study of methods or 'methodology' is a scientific and systematic way or technique or path that helps the researcher to conduct/carry on research.[45] According to Williman, research methods are a range of tools used for different types of enquiry.[46] Research methodology denotes the theory and principles or doctrine of how an investigation into a particular discipline should proceed.[47] It is clear how the researchers conducted their study and what methods they employed. It refers to tools and techniques as applied to carry out the research, including data collection, methods, and sources of data, citation style, and ethical considerations. In contrast, research design (stated in the earlier section) includes the research objective, research question, type of research, variables, and the overall approach. There are basic differences in conducting research applying research methodology and design between the Common Law and Civil Law systems:

Table 1: Legal Research Approaches between Common Law and Civil Law System

Aspect	Common Law System	Civil Law System
Primary Sources	Statutes, Case Laws	Codified Laws, Constitutions
Role of Precedent	Binding (Stare Decisis)	Persuasive, not binding
Legal Reasoning Style	Inductive, analogical	Deductive, code-based
Judicial Role	Law interpreters, creators	Law appliers
Research Tools	Case digests, Westlaw, LexisNexis	Code commentaries, doctrinal text

In a research paper of the researcher titled "Backlog of Cases-Civil & Criminal Justice: A Comparative Study-Bangladesh Perspective[48]", mixed methodology-

[44] Anon, *Research Methodology*, Slide 4, Retrieved from https://www.slideshare.net/yaqinov/methodology-vs-method

[45] Professor Fidelis Ifeanyi Ugwuowo, *Fundamentals of research methodology and data collection,* 2016, p. 3, Retrieved from https://www.researchgate.net/publication/303381524

[46] Nicholas Walliman, *Research Methods: the Basic*, 1st Edition, Taylor & Francis e-Library, New York, 2011, p. 1, Retrieved from https://edisciplinas.usp.br/pluginfile.php/2317618/mod_resource/content/1/BLOCO%202_Research%20Methods%20The%20Basics.pdf; Anon, Research Methodology, p. 42. Retrieved from http://studentsrepo.um.edu.my/5013/5/chapter_3_final.pdf

[47] University of Pretoria, Research Design and Methodology, p. 68, Retrieved from https://repository.up.ac.za/bitstream/handle/2263/24016/04chapter4.pdf?sequence=5

[48] Published in Int. J. Human Rights and Constitutional Studies, Vol. 6, No. 3 (2019)214-226

analytical and comparative approach was used; quantitative data collected from the registrar's office of the Supreme Court of Bangladesh, and data also collected by applying the observation method; secondary data are also collected from various sources like books, journal articles, online based articles etc. The collected data was presented using MS Word.

Originality of the Research

The important thing in case of conducting a research must create new knowledge or at least contributes a further development by adding some new knowledge to the existing knowledge.; he has to maintain originality; his work must be new even whether it is rubbish or intellectual one; he /she can make the work as original in the four means: (i) micro legal approach/question, (ii) macro-legal questions/approach, (iii) scientific legal research approach and (iv) research in non-legal topics approach.[49]

In case of a micro legal approach, a specific legal problem, i.e., a specific provision of a statute or code, or a specific case or line of cases, is analyzed and a new solution or a new way is introduced or proposed, and thus originality is maintained. Again, comparative law can make a micro-legal approach original as the laws of two or more legal systems are compared, the question often suggests itself why these legal systems are different and whether there is a need for harmonization or convergence; as such law is about making a comparison and, possibly, also a policy recommendation for one or more of the countries involved. Thus, comparative law can lead to original ideas in research.[50]

A macro-legal analysis is concerned with general concepts, problems, and principles of the law; mainly focuses on 'law', 'justice', and 'rights' which are the main topics of legal philosophy and legal theory, but does not include a specific legal problem, i.e., a specific provision of a statute or code, or a specific case or line of cases, which is generally done in the case of a micro-legal approach.[51] In such an approach, one can study legal methods, including methods of interpretation, legal research, and legal education. Again, under this approach, the relationship between law and politics can stimulate original thoughts. An analysis of "law and reality" also creates originality in research.[52]

[49] Mathimas M. Siems, Legal Originality, Oxford Journal of Legal Studies, 28 (2008)147-164, available athttps://scholar.google.com/scholar?q=author:%22Siems%20Mathias%20M.%22

[50] *Ibid*

[51] *Ibid.*

[52] *Ibid.*

Interdisciplinary study e.g., law and economics - a research to understand what effect particular legal rules having on overall social welfare, or experimental legal research, or the testing of legal theories in a quantitative way e.g., law and finance namely a research for identifying the quantifiable effect between legal rules and their enforcement and financial development, or preferring an alternative methodology, namely the use of case studies, through a qualitative methodology creates originality in a research by scientific legal research[53].

The "non-legal approach" is a recent popular trend in commercial law that one researcher can conduct research on "corporate governance" and analyze many factors – the law being just one of them – which determine how a company is governed. Again, one can also research "The Strength of Capital Markets and Dispersed Shareholder Ownership-Necessary Steps," focusing upon effective regulators, prosecutors, and courts, financial disclosure, reputational intermediaries, company and insider liability, market transparency, culture, and other informal institutions.[54] And thus originality may be maintained in research by a "non-legal approach".

It is apt to state that in maintaining originality in research, the work will not be copied from others; if it is taken from others directly or indirectly, the work of others must be recognized by mentioning the source in a particular form reference style e.g., Harvard Reference Style[55] or Oxford Reference Style[56] or any other acceptable citation style (like Chicago Reference style, New York Style, APA Citation Style etc.); if a research work is done without citation and recognizing

[53] *Ibid.*

[54] *Ibid.*

[55] Under this style a brief citation to a source is given within the text, placed at the end of sentence including author last name and publication year e.g. (Islam, 2012) and a full citation given in the Reference section of the work e.g. (Islam, Mahmudul, 2012. *Constitutional Law of Bangladesh*. 3rd ed. Dhaka: Mullick Brother). This system mostly originates from the Blue Book prepared by Harvard Law Review Association including many rules for the references of primary and secondary sources (for the legal research, statutes, precedents, customs, conventions, treaties etc. are deemed as primary source of data whereas books, journal articles, newspaper, magazine articles, published government documents or instruments etc. are treated as secondary sources of the data.

[56] In case of oxford reference style, footnote or endnote is used in giving reference of the information what are directly or indirectly taken from the acts of other. Footnote is appeared at the foot/ bottom of a page; endnote is used at the end of the chapter or document. This reference style generates from the University of Oxford which is often also known as documentary note style consisting two elements (i) footnote citation and (ii) reference list at the end of the document. Under this style a citation of a book includes the name of author/ editor (s), title of the work, edition (if any), name of publisher, place of publication, year of publication, page number etc. As for example: Islam, Mahmudul, *Constitutional Law of Bangladesh*, 3rd Edition, Mullick Brother, Dhaka, 2012, p.157.

the works of others pretending his/her own work, it will be plagiarism which is a theft of other creative and intellectual works; it is very much unprofessional, academic dishonesty and unethical approach of a researcher. In order to maintain originality, a researcher also has to maintain quotation, citation, paraphrasing properly, etc.

Research Synopsis

Research Synopsis is a short outline of a research proposal or research thesis[57] including the background/ context of the study, statement of the research, objectives of the research, research questions, literature review, rationale of the research, limitation of the study, methodology of the research, data analysis, cauterizations, conclusion of the study and bibliography and in addition to these, in case of research thesis (Masters, MPhil Thesis, or PhD Dissertation) also include short briefing of different chapters of the study and findings etc. By a research synopsis, a researcher tries to give a summary statement regarding all basic materials of the study with a view to giving a clear message to his/her supervisor and all other experts of a research proposal defense session or thesis/ dissertation paper defense session so that they can smoothly and conveniently evaluate the paper in short time and give proper suggestions for drawing a good research paper. Therefore, a research synopsis must be very specific, clear and unambiguous. A research synopsis for a final research paper (Masters, MPhil Thesis, or PhD Dissertation) should be 3000-4000 words excluding appendices or annexures.[58] The format of a research synopsis varies from institution to institution, even from discipline to discipline[59].

Kinds of Legal Research

Legal research is broadly divided into two categories[60] i.e. Doctrinal Research and Non-Doctrinal Research where doctrinal research refers to the qualitative research, traditional research or library-based research and non-doctrinal research refers to the Socio-Legal or Empirical Research, including quantitative research, which is also called field survey research i.e. Doctrinal Research and

[57] C.B. Eze, How to Write Research Synopsis (Online) (12 February 2018), available at: https://nairaproject.com/blog/how-to-write-a-research-paper-synopsis.html, (accessed 22 March, 2020).

[58] Helle O. Larsen, Research Synopsis Writing (Online),availableat: http://intra.tesaf.unipd.it/pettenella/Corsi/ReaserchMethodology/ResearchSynopsisWriting.pdf, (accessed 22 March, 2020)

[59] C.B. Eze, How to Write Research Synopsis (Online) (12 February 2018), available at: https://nairaproject.com/blog/how-to-write-a-research-paper-synopsis.html, (accessed 22 March, 2020).

[60] Dr. H.N. Tiwari, '*Legal Research Methodology*' (2nd edn, Allabad Law Agency, 2013)11.

Non-Doctrinal Research where doctrinal research refers to the qualitative research, traditional research or library-based research and non-doctrinal research refers to the **Socio-Legal or Empirical Research, including** quantitative research, which is also called field survey research:

Doctrinal Research (Traditional or Library-based Research)

The word 'doctrine' has derived from Latin, which means instruction, knowledge, or learning."[61] Doctrinal Research refers to the qualitative research, also known as library-based research.[62] Since the research is not based on a first-hand data survey, it prioritizes national laws and their standards, as well as effectiveness. Doctrinal research basically interprets the laws and regulations[63], legal doctrine, as well as judicial precedents, with illustration in pursuance of existing facts and situations, or manners and behaviors of human beings, with the help of theoretical and philosophical investigation, which provides new doctrines, principles, knowledge, information, and solutions to challenges in laws.[64] Doctrinal research relies on judicial precedents and judgments in interpreting laws.[65] Some scholars define doctrinal research as 'black-latter'[66] research and as pure theoretical research. Actually, laws and regulations are made by the parliament of a state to ensure the rights of the citizens and to protect the interests of the people. In this respect, if the laws fail to fulfill their purpose, citizens are ultimately deprived of their rights and interests that are not desirable for a civilized nation. So, legal minds take initiative to find out the reasons for the non-fulfillment of the aim or preamble of the Act, where scholars critically examine the laws or Acts with scientific investigation, along with an illustration of hidden facts. In this regard, the researcher draws on the books of prominent writers, journal articles,

61 Vijay M Gawas, 'Doctrinal legal research method a guiding principle in reforming the law and legal system towards the research development' *International Journal of Law*, Vol. 3 (5), 2017, p. 128, www.lawjournals.org

62 T. Hutchinson, *Researching and Writing in Law* (2nd edn) (Pyrmont, NSW: Lawbook Co., 2006) 7. [cited in Mike McConville & Wing Hong Chui '*Research Methods for Law*' Edinburgh University Press, Edinburgh, 2007, p. 47]

63 Paul Chynoweth, *Advanced Research Methods in the Built Environment*: Legal Research, United Kingdom, Blackwell Publishing Ltd, 2008, P. 29.

64 Sanne Taekema & Wibren van der Burg, 'Introduction: The Incorporation Problem in Interdisciplinary Legal Research' *Erasmus Law Review*, 2015, p. 39.

65 Mike McConville & Wing Hong Chui '*Research Methods for Law*' Edinburgh University Press, Edinburgh,2007, pp. 3-4

66 *Ibid.*

research papers, and extensive online information as secondary sources"[67] In this respect, researchers rely on some reliable journal sites, i.e., Westlaw International, JSTOR, Social Science Research Network, Hein Online, Global Legal Information Network, LexisNexis Online, etc.[68] Generally, law students carry on doctrinal research or qualitative research. In this respect, Lloyd E. Ohlin expresses his opinion that:

> Law students are most interested in discussions relating to the solution of social problems and the grounds for choosing among public policy alternatives. They tend to be impatient with the theorizing interests of social scientists, the complications of research design and the detailed development of proof for different hypothetical propositions.[69]

Non-Doctrinal Research (Socio - Legal or Empirical Research)

Non-doctrinal research encompasses empirical or quantitative research, also known as fieldwork research, which is conducted based on data collected through surveys in specific areas. This research aims to identify problems with laws and regulations that are not being implemented as intended. In this regard, after determining the problems, it also recommends solutions to tackle these issues, based on survey data collected through a sampling method. Here, first-hand survey data is the primary source, and second-hand survey data refers to the secondary sources. Besides these, writers' opinions, research papers, journal articles, and other information taken from the internet are considered as secondary sources. It is notable that in conducting this research, substantial financial support is essential because of collecting data, the surveyor has to travel several places and also has to interview people one-on-one by means of a questionnaire in order to gather true facts and opinions of the general people. It basically interprets the laws and regulations with the evaluation of people's experience upon any legal questions. So, it is very expensive and takes a long time to conclude the research.

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67 *Ibid.*

68 Dr. Ranbir Singh and Dr. Ghanshyam Singh, Digital Library-Legal Education and Research, ***National Law University***, Delhi, 2010, p. 9.

69 L. E. Ohlin, 'Partnership with Social Sciences' (1970-1971) 23 *Journal of Legal Education* 206. [cited in Mike McConville & Wing Hong Chui '*Research Methods for Law'* Edinburgh University Press, Edinburgh, 2007, p. 46]

Referencing in Research

Referencing is one of the most important aspects in any academic research,[70] which is stated as a method of acknowledgement of an information or data and idea of a scholar used in a research work.[71] It acknowledges the sources of such information, data, and ideas that are used in a work.[72] It is used to strengthen any arguments. When someone quotes something from books or any other sources, like journal articles, acts, rules, regulations, treaties, comments, cases, etc., then the researcher or writer needs to authenticate the sources by means of systematic citation. It stands for intellectual honesty and for credibility for one's work. Citation emphasizes the importance of any arguments or information used in a paper. The importance depends upon the classification or criteria of sources of data whereas primary sources preside over secondary sources. A citation helps the reader to make an assessment about the importance of sources.[73]

Objectives of Citation

- To acknowledge the sources of information that are used in a research paper.[74]
- To strengthen arguments or statements of the research.
- To refrain from being charged with plagiarism and academic dishonesty.
- To give an opportunity to the reader to read more concerning the cited information.[75]
- To helps the reader to know the original sources of data or information used in a paper so that reader feels good to read the article.[76]
- To validate a research work and to improve its readability.[77]

[70] John Dudovskiy, Referencing, 2019, (online), available at https://research-methodology.net/research-methodology/referencing/, (accessed 31st March 2020).

[71] M.H.Alvi, *A Manual for Referencing Stylesin Research*, (2016)14.Retrievedfrom https://www.researchgate.net/publication/308786787_A_Manual_for_Referencing_Styles_in_Research

[72] Grimsby Institute Group. (2015). *Definitive Guide to Harvard Referencing and Bibliographies, 6,* 2. Retrieved from https://grimsby.ac.uk/documents/quality/skills/DefinitiveGuideToHarvardReferencingAndBibliographies.pdf

[73] Dr. Abdullah Al Faruque, *Essentials of Legal Research*, Dhaka: Palal Prokashoni, (2017). p.61.

[74] University of Otago,. *What is Referencing and Why is it important?* (2017), 2, 3. Retrieved from https://www.otago.ac.nz/hedc/otago615365.pdf

[75] Faruque (n 73)

[76] Queens' University Belfast. (n. d.). Retrieved from https://www.qub.ac.uk/cite2write/harvard.pdf

[77] McD, David Taylor. (2002). The Appropriate Use of References in a Scientific Research Paper. *Journal of Emergency Medicine*, 14, 167. Retrieved from https://pdfs.semanticscholar.org/9db3/8b5f3cd180797529fb9e6da329f904d6faa3.pdf

Moods of Citation

a. Direct quotation

It connotes no change of sentence that is referred to in a work. It means research can use a statement or sentences concerning any issue that is previously expressed by any writer, researcher or distinguished person. Direct quotation refers to the usage of the same statement that is quoted by someone.[78] It is a direct quote in research.[79] In this case, the researchers need to use inverted commas at the start and end of a sentence. Here, the most crucial notation is that the researcher does not change even a single word.

b. Summary

While whole texts/words of a work are described in a summary, it is known as a summary citation.[80] It is used chiefly in conducting a literature review. In this practice, The researcher first reads the whole text and then summarizes a core finding in his own words. In this respect, there is no need to use inverted commas. For instance, if a writer reads the whole text of the book of legal research methodology written by Dr. H. N. Tewari, then he needs to describe only the core findings of the whole work in one or two pages, or it may be explained in the required words.

c. Paraphrase

It is another effective means of using others' words to avoid plagiarism. Basically, paraphrasing refers to the citation where the writer uses the same expression as others, but the expression shall be in the writer's own words. In paraphrasing, the writer cannot change others' expressions. It means the use of others' work in one's own words without changing the root meaning of that work.[81]

Example

"Plagiarism simply means using other people's works or ideas without authors' name or without quotation marks" (Faruk 2010) – It is direct quotation.

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78 Steven D. Krause, The Process of Research Writing: Quoting, Paraphrasing, and Avoiding Plagiarism. *Spring 2007*, 5. Retrieved from http://www.stevendkrause.com/tprw

79 *Ibid.*

80 Grace Hauenstein Library Aquinas College, Differences in Quoting, Paraphrasing and Summarizing (2004). In Robert A. Harris, The Plagiarism Handbook. *Pyrczak Publication* (2001). Retrieved from https://www.aquinas.edu/sites/default/files/ParaphrasingQuotingSummarizing.pdf

81 David McD Taylor, The Appropriate Use of References in a Scientific Research Paper, *Journal of Emergency Medicine, 14,* (2002). 168. Retrieved from https://pdfs.semanticscholar.org/9db3/8b5f3cd180797529fb9e6da329f904d6faa3.pdf

Plagiarism refers to the use of others' works or thoughts in one's own name without mentioning/referring to the original writer's name or without using quotation marks (Faruk 2010). Faruk (2010) defines reference as a formal means of acknowledging information, data, or an idea. He also emphasized that references are crucial in research work, particularly for literature reviews and in strengthening his arguments. It refers to intellectual honesty. He further added that it is a process of citing primary and secondary sources (p. 61). – paraphrasing.

Plagiarism and Ethical Considerations

Plagiarism is an offence or intellectual theft arising from copying the ideas and knowledge of others without giving their source and recognition. It is a well-known and growing issue in the academic world,[82] known as malpractice and academic dishonesty, also referred to as intellectual deceit.[83] As stated by the European Code of Conduct for Research Integrity, "Plagiarism is the appropriation of other people's material without giving proper credit.[84]" As defined by US Federal Policy on Research Misconduct, "Plagiarism is the appropriation of another person's ideas, processes, results, or words without giving appropriate credit.[85]" Plainly speaking, to steal and pass off the ideas, concepts, and words of others and pretend that it is my work. It may also happen in case of partial or complete translation of written text without giving acknowledgment of the source.[86]

In a modern legal research particularly socio-legal research, empirical research, interdisciplinary research, a researcher has to maintain ethical concerns; he/she has to conduct survey and interview and collect data from different categories of respondents; in doing this he/she has to inform the all categories of respondents his/her survey purposes in written and verbally so that they voluntarily participated and give their consents; a researcher also ensures the protection of personal data what he/she collected from respondents.[87].

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82 Gent Helgesson and Stefan Eriksson, 'Plagiarism in Research', Medicine Health Care and Philosophy (July 2014), available at: https://www.researchgate.net/publication/263743965_Plagiarism_in_research, (accessed 23 March, 2020).

83 Dr. Abdullah Al Faruque, Essentials of Legal Research, *Palal Prokashoni*, 2nd edn. (July 2010)62

84 Adopted from Sage Publication, http://www.sagepub.in/upm-data/28285_02_Boeije_Ch_02.pdf. and from http://www.tezu.ernet.in/~utpal/course_mat/research_design.pdf

85 *Ibid.*

86 Anon, what is research design, p. 8. Retrieved from https://www.nyu.edu/classes/bkg/methods/005847ch1.pdf

87 OpenAI, ChatGPT (2025) https://chat.openai.com accessed 9 May, 2025

Research Data

Research data mandates such knowledge, information, and statistics that are used for the purpose of conducting research, especially to strengthen the statement as well as the arguments of the researcher. To facilitate a better understanding, the research data can be categorized into two types: Primary Data and Secondary Data, with primary data preceding secondary data. Secondary data can be defined as data that is collected by others, not by the researcher themselves, specifically for the research question at hand.[88] Research data can be obtained using a wide variety of methodologies.

[89]In this regard, the Queensland University of Technology's Management of research data policy states[90]: "Research data means data in the form of facts, observations, images, computer program results, recordings, measurements or experiences on which an argument, theory, test or hypothesis, or another research output is based. Data may be numerical, descriptive, visual or tactile. It may be raw, cleaned or processed, and may be held in any format or media. "According to 'the University of Melbourne policy on the Management of Research Data and Records',[91] research data connotes to facts, observations or experiences on which an argument, theory or test is based. Data may be numerical, descriptive or visual. Data may be raw or analyzed, experimental or observational. Data includes: laboratory notebooks; field notebooks; primary research data (including research data in hardcopy or in computer readable form); questionnaires; audiotapes; videotapes; models; photographs; films; test responses. Research collections may include slides; artefacts; specimens; samples. Provenance information about the data might also be included: the how, when, where it was collected and with what (for example, instrument). The software code used to generate, annotate or analyses the data may also be included.

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88 Stewart, D. W. (1984). *Secondary Research: Information Sources and Methods* (Sage, Beverly Hills).; Frankfort Nachmias and D. Nachmias. (1992). *Research Methods in the Social Sciences*, Fourth Edition (Edward Arnold, London). [Cited in Christopher J. Cowton. (1998). The use of secondary data in business ethics research. Journal of Business Ethics. *Journal of Business Ethics,* vol. 17, p. 424. available at doi: 10.1023/A:1005730825103]

89 Library Guides Macalester, available at https://libguides.macalester.edu/c.php?g=527786&p=3608583

90 Queensland University of Technology Management, available at http://www.mopp.qut.edu.au/D/D_02_08.jsp

91 The University of Melbourne, retrieved from https://policy.unimelb.edu.au/MPF1242

As per The Monash University Research Data Policy, research data includes the data, records, files, or other evidence, irrespective of their content or form (e.g., in print, digital, physical, or other forms), that comprise research observations, findings, or outcomes, including primary materials and analyzed data."[92]

Griffith University states that research data includes factual records, which may take the form of numbers, symbols, text, images or sounds, used as primary sources for research, and that are commonly accepted in the research community as necessary to validate research findings.[93]

According to the University of Edinburgh, research data is a record of raw material collected, observed, or created in digital form, intended for analysis to produce original research results According to the University of Edinburgh, research data is a record of raw material collected, observed, or created in digital form, intended for analysis to produce original research results.[94] Data should be collected and described in light of the research object, or research questions, or the object itself.[95] Research data can be qualitative or quantitative, and originates in print, digital and physical formats.[96] In all cases, research data needs to be cared for so that the results of research can be validated and built upon.[97]

Sources of Data

Sources of data refer to the origin of data. It refers to the source from which the data is collected. In conducting research, researchers need to collect data from various sources, and the collected data, which is referred to in a research paper, has to be recognized by means of referring to the source. Otherwise, it will be determined as plagiarism. Sources of data can be divided into two categories that are primary sources of data and secondary sources of data. Data or information taken from statutes, Acts or Codes published under the authority

92 The Monash University, retrieved from https://www.ands.org.au/__data/assets/pdf_file/0006/731823/Whatis-research-data.pdf

93 Australian National Data Service. (2017). *What is research data*. p. 2. Retrieved from https://www.ands.org.au/__data/assets/pdf_file/0006/731823/Whatis-research-data.pdf.

94 University of Edinburgh, retrieved from http://www.ed.ac.uk/schools-departments/information-services/services/research-support/datalibrary/data-repository/definitions

95 University of Bath, retrieved from http://wiki.bath.ac.uk/display/ERIMterminology/ERIM%20Terminology%20V4

96 A. Burnham. (2012). Research Data. *University of Leicester*. Available at https://www2.le.ac.uk/services/research-data/documents/UoL_ReserchDataDefinitions_20120904.pdf

97 *Ibid.*

of the Parliament or by the State legislatures are known as primary sources of data.[98] On the other hand, commentators, digests, books, encyclopedias, and treatises, notes, journal articles, research papers, etc., are considered as secondary sources of data.[99] But, it is different in doctrinal and non-doctrinal research. Following chart pacifies the classification of sources of data.

Table-2: Sources of Data in Doctrinal and Non-Doctrinal Research

Doctrinal/ Qualitative		**Non-Doctrinal/ Quantitative**	
Primary Sources	Secondary Sources	Primary Sources	Secondary Sources
Statutes, Act, or Codes, Rule, Regulation, Case Law or Judicial precedents.	Book, Treaties Research Paper, Journal Article, Newspaper Article, Websites, Blog, Commentators, Digests, Encyclopedias, Video.	First hand Survey Report. Interview Observation	Second hand survey report, Book, Treatises, Research Paper, Journal Article, Newspaper Article, Commentators, Digests, Encyclopedias, Notes, Blog, Video.

Data Collection in Non-Doctrinal Research

In non-doctrinal research, researchers need to conduct a ***field survey*** where it connotes the process of data collections from root level, or from general people through questionnaire, interview or observation. The word survey means "to look" or "to oversee".[100] So, a survey means the observation of something. According to Mark Abrahams – A social survey is a process by which quantitative facts are collected about social aspects as a community's composition and activities." A survey is an observation of any concerning issue that plays a crucial role in collecting data and information on that issue.

But in order to conduct a survey study, first of all, researchers specify a problem upon which the survey will be conducted. Then, secondly, the researcher should give priority to the aims and objectives of the survey. It means why the survey will be conducted and for what purposes the researcher would like to

98 Tewari, Dr. H. N. (2015). *Legal Research Methodology*. Faridabad: Allahabad Law Agency. p. 50.

99 *Ibid, p. 49.*

100 Kapoor, op.cit., p. 129.

conduct a survey must be clarified and specified. Because, it is well known that without a goal, any survey is like a boat without a rudder. So, the aim of a survey is a very crucial element in reaching expected findings. Thirdly, researchers require determining the scope of survey. It means upon which particular issue of problems actually the survey will be carried on. For example, "Violation of Human Rights in Bangladesh Special Reference to Right to Life" may be selected as the research problem, where violation of the right to life may be defined as the scope of the research problem. Therefore, a survey needs to be done on human rights, right to life and its enforcement and violation facts in a particular area/s, upon a reasonable number of respondents/ people of the society

In non-doctrinal research, a first-hand survey report is known as a primary source of data.[101] On the contrary, a second-hand survey report is known as a secondary source of data. The second had survey report refers to the report which is previously done by others or the information that has already been gathered and is available.[102] In Non–Doctrinal Research, primary data is collected through methods such as field survey questionnaires, interviews, and observations.

Methods of Survey

Questionnaire and Sampling Method: v answers. It is a printed list of questions.[103] It means the surveyor presents a questionnaire before respondents to answer the questions presented before them with a view to recording the data and information. And this process of survey is known as a questionnaire survey. This process is not done upon only one or two persons but more than 100 or alike because there is no fixed number of questionnaire surveys. In order to conduct this survey, the researchers have to select a specific area and a group of the population by sampling method. Then the survey will be accurate. Sampling method refers selection a small group from a larger group of people.[104] as it is physically and financially not possible for the researcher to contact each and every person coming under the purview of a social problem. The whole group from where the sample or small group is selected is technically known as universe or population and the group actually selected for a study is known

[101] C. R. Kothari, *Research Methodology-Method and Techniques*. New Delhi: New Age International (p) Limited. 2004 P. 95 < http://www.modares.ac.ir/uploads/Agr.Oth.Lib.17.pdf> accessed 30 October 2020.

[102] *Ibid,* p. 111.

[103] H.N. Tiwari, *Legal Research Methodology*, 2edn, Allahabad Law Agency, 2013, p. 191.

[104] Faruque, op.cit., p. 117.

as sample and the process of drawing small groups or elements from the larger population or universe is called the sampling method.[105] The population might be, for example, all courts, tribunals and benches in the Bangladesh judicial/justice system. A sample is a selection from such population i.e. selection from the given list of all courts, tribunals and benches in the Bangladesh judicial/justice system; it may be selecting a few benches or courts on the basis of jurisdiction, levels, area/region, etc. which might represent the whole population. Sampling method may broadly be classified into random (probable) and non-random (non-random) method. In the probable sampling, each unit of the population may be selected as sample whereas in case of non-probable sampling method, each unit has no probability to be drawn as sample for the study.[106]

If anyone likes to conduct a survey upon implementation of labor law, then the survey should be carried out at the EPZ or industrial area, and the questionnaire survey should be conducted upon a small group of workers in garments and factories in that area; such a small group of workers may be selected randomly. However, to conduct research on human rights violations of workers, one must select a targeted group of workers in that area whose rights have been violated. And a researcher can do it by non-random sampling techniques. Actually the nature of survey depends upon the research objectives, research questions and methodology.

The questionnaire survey is conducted for the sake of investigating social problems, indiscipline, conditions and structure within a definite geographical area so that the current status of that geographical area can be come out through data collection. Questionnaire survey collects data from a sample of the large, diverse, varied and scattered population from different places.[107] In this method, researcher directly collects data from peoples' thought, thinking, philosophy, feelings, motivation, plans, beliefs, and personal, educational as well as financial background.[108] It helps the researcher to trace out the current characteristics, behavior, or attitude of the total population of any particular location.

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105 Md. Abdul Mannan & Shamsunnahar Khanam Merry, Social Research & Statistics Introduction, Absor Publication: Dhaka 2002, p. 119.

106 Ibid

107 Faruque, op.cit., p. 110.

108 *Ibid.*

This question's pattern may be categorized into two ways: Closed-ended or open-ended.[109] Closed-ended questions connotes a list of pre-fixed answers where the respondent only has to choose an answer that is closest to their own belief. It is just like multiple choice. Still, it is considered the best way of data collection through a questionnaire. On the other hand, an open-ended process refers to the questions for which no answers are pre-fixed; they are open to the respondents, and they will be answered by respondents as they think.

Conclusion

At present, most of the research is being conducted by teachers, judges, students, and lawyers to improve teaching, administrative, writing skills, and ability, which play a vital role in improving academic qualifications.[110] Specifically, students of law have recently carried out legal research to fulfill academic criteria.[111] Before the 20th century, legal research denoted doctrinal research only, but after the 20th century, the trends of empirical research emerged. research or socio-legal research took place. In a research project, students may be engaged to assist the scholar if they are deemed competent, to help draw the research conclusion. In conducting good academic mono-legal research, joint research, or project research, sound knowledge of the basic norms of legal research and legal research methodology is essential. This article has attempted to draw an overview of the introduction of legal research, in which all the basic norms of legal research are focused and analyzed to show the ways to new researchers so that they may be rightly engaged in legal research and get interested in conducting research smoothly and contribute to and create new knowledge in the legal research era

109 *Ibid*, p. 111.

110 Dr. H.N. Tewari,, Legal Research Methodology, Allahabad Law agency, 10th Edition, 2015. (taken from preface page)

111 Ernest M. Jone, 'Some Current Trends In Legal Research' Journal Of legal Education, Vol. 15, (1962-63) P. 24.

Climate Change-induced migrants under Refugee Law: Protection Gaps and Solutions

Md Sarafuzzaman Ansary*

Abstract

Due to direct and indirect impact of climate change, world nations are witnessing a growing number of people who are being displaced from their abodes and are becoming climate change-induced migrants. This phenomenon presents significant legal and humanitarian challenges, particularly when such displacement extends beyond national borders. This paper seeks to critically investigate whether these displaced people are recognized by the existing architecture of international law, with an emphasis on international refugee law. During the investigation, the paper finds that the circumstances that provoke their displacements are included neither in the definition of refugee given in the international refugee law, nor in the definition of stateless person given in the law on statelessness. As a result, they are not regarded as refugees or stateless under these frameworks. It also finds that the lack of agreed international right to safe environment deprives this group of people from human rights protection. Moreover, they are not entitled to get protection under the international environmental law framework as this regime does not create any obligation towards migrants who migrate as a result of environmental degradation. So, these branches of international law, which are most relevant with migrants, do not per se recognise or offer protection to climate change-induced migrants. Climate change migration is an obvious phenomenon, and the paper argues that only a dedicated framework can be a sustainable and effective solution to face it.

I. INTRODUCTION

An old Chinese proverb says, "Of thirty ways to escape danger, running away is the best".[1] This strategy of survival indicates that when a person is in danger, it is better for him to avoid the situation which has created the danger. This proverb replicates the phenomenon of becoming refugees who run away from dangers. Refugees, according to international refugee law, flee from well-founded fear of persecution for reasons of race, religion, nationality, affiliation

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1 Essam El-Hinnawi, 'Environmental Refugees' 1985 UNEP Doc UNEP (02)/E52 (1985).

with particular social groups or political opinions.[2] There are other people who flee from their habitual abodes for saving own lives from environmental disasters that are direct results or triggered by climate change. Climate change is now an unquestionable phenomenon, and increasing numbers of people are being displaced by natural hazards that are linked to climate change.[3] The most significant impact of climate change can be on human migration, and it is predicted that 150 million people may have to leave their abodes by 2050 as a result of climate related phenomena.[4] However, these people don't fall under the refugee criteria fixed by the Refugee Convention because they are not in a well-founded fear of being persecuted for the abovementioned reasons. Then where should we look into for their status and protection? This essay gives an effort to find out the answer. The part II discusses about climate change, its effect on environment, and on human migration. Part III analyses the gaps for which these people are not eligible for protection in existing refugee law and other international law regimes. Despite those limitations, these regimes are capable of offering protection to some extent which will be covered in part IV. Finally, the essay will end with proposing some initiatives that can be taken by international communities to facilitate these people.

II. NEXUS BETWEEN CLIMATE CHANGE AND MIGRATION

Climate change plays a role in environmental degradation, and environment has a fundamental relationship with human migration since the very beginning of civilization. [5] In other words, climate change deteriorates environment by increasing and intensifying disasters which can displace people from their habitats and induce them to migrate to some other places. In this part, the essay will try to elaborate the connection between climate change and human migration. In doing so, it will shed light on how climate change transpires through environmental disasters. Moreover, it will discuss about who can be regarded as climate change migrants, how migration can be induced by

2 Convention relating to the Status of Refugees, (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 (Refugee Convention) art 1(A)(2)

3 Walter Kälin, 'The Climate Change-Displacement Nexus', (2008) The Brookings <https://www.brookings.edu/articles/the-climate-change-displacement-nexus/> accessed 08 January 2025

4 UNHCR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights', (15 January 2009) UN Doc A/HRC/10/61 para 55

5 International Organization for Migration 'Climate Change, Environmental Degradation and Migration' (March 2011)<https://www.iom.int/sites/g/files/tmzbdl486/files/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/climate-change-2011/background_paper.pdf> accessed 08 January 2025

climate change and about different types of displacements caused by climate change.

A. *Climate Change and Environmental Disasters*

The UN Framework Convention on Climate Change defines climate change as the change of climate that alters the composition of global atmosphere occurring as a direct or indirect result of human activities.[6] The same convention defines adverse effects of climate change as the alteration of environment or habitat that occurs as a result of climate change and is harmful for ecosystem or socio-economic system or for human welfare.[7] It is clear from these two definitions that climate change is the alteration of natural atmosphere that affects the environment of natural habitats. It should be clarified that climate change cannot be visualized directly, rather, it can be evident from the increase in number and strength of natural disasters. So, for understanding climate change, we need to look into the disasters that are linked to it. These disasters can be either slow onset that happen for a long period of time or can be sudden.[8] Slow onset disasters include deforestation, land degradation, soil erosion, salinity in soil, desertification etc. which lessen the agricultural quality of certain areas.[9] On the other hand, sudden environmental disasters include the natural disasters such as cyclone, hurricane, volcanic eruptions, earthquakes, floods etc.[10] However, the long-term environmental degradations often worsen the sudden disasters and thus these two are also connected to each other.[11]

B. *Climate Change Migrants*

Climate change is evident and the disasters that have a connection to it, are displacing a growing number of people, on which politicians and scholars have agreed. [12] These disasters sometimes directly displace people, and sometimes

6 United Nations Framework Convention on Climate Change (adopted 20 June 1992, entered into force 21 March 1994) 1771 UNTS 107 art 1(2)

7 ibid art 1(1)

8 Lauren Nishimura, 'Climate Change Migrants: Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies' (2015) 27(1) International Journal of Refugee Law 107, 112

9 Gregory S. McCue, 'Environmental Refugees: Applying International Environmental Law to Involuntary Migration' (1993) 6(1) Georgetown International Environmental Law Review 151, 158

10 ibid 160.

11 ibid.

12 Kälin (n 4)

encourage people to migrate, or prompt authorities to relocate people.[13]Providing an exclusive definition of climate change migrants is a complex task, because numerous social and economic factors are connected to this type of displacements.[14] Sometimes, climate change raises the stress on the existing economic vulnerability, and sometimes it worsens the existing political or social conflicts and in the long run, induces displacements.[15] Essam El-Hinnawi, in his pioneering report for the United Nations Environment Program, named this type of people as 'environmental refugees' and defined them as the group of people who have involuntarily left their natural abodes, for a short-period of time or permanently, as a result of environmental disruptions.[16] He categorized these migrants into three types.[17] The first type comprises of those people who left their homes for a certain period of time as a result of temporary environmental hazards such as earthquake and cyclone and will come back to their homes after the hazards are over. [18] The second type includes those people who have resettled elsewhere forever due to the permanent degradation of their habitats' environment.[19] The third category encompasses the people who migrated elsewhere, temporarily or permanently, because the natural resources of their habitats have become insufficient to meet their basic necessities.[20]

So, environmental degradation sometimes directly forces people to leave their usual habitats and sometimes it worsens pre-existing tough socio-economic circumstances and induce people to move elsewhere. Considering all the factors discussed, it can be said that climate change migrants are those people whose migration is a result of climate change-induced environmental degradation only, or is a result of combined effect of this degradation and other factors.

C. *How Climate Change Induces Migration*

The adverse effects of climate change are making it harder for many people to stay at their ordinary abodes and an increasing number of people are migrating

13 Jane McAdam, 'Displacement in the Context of Climate Change and Disasters' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 833, 833

14 Nishimura (n 9) 112

15 ibid

16 McCue (n 10) 157

17 El-Hinnawi (n 2)

18 ibid

19 ibid 5

20 ibid

to other places.[21] Though climate change is not the exclusive reason for people movement, it is a factor that multiplies the deterioration of social, economic and environmental situations.[22] The natural disasters intensify the contemporary discrimination and make people more exposed to their existing social and economic incapability.[23] This interaction of climate change with other pre-existing situations plays a deciding roll behind migration.[24] Climate change can create several distinct scenarios that can trigger migration. Those are hydro-meteorological disasters, evacuation activities by governments from those areas that are dangerous for human, environmental deterioration, sea levels rising and declination of resources that are vital for living.[25] The examples of first type of scenario are flooding, hurricanes, typhoons, cyclones, mudslides etc that have an immense effect on economy and most of the people affected by these disasters remain within the border of their country, and this type of displacement is for a short period of time.[26] This type of displacement is short-term, because the disasters playing roll behind the displacement end shortly and the displaced people can come back to their original abodes just after the disasters are over. Most of the displaced people remain at other places within the boundary of their own country, because in most cases this type of calamities do not occur country-wide, and it is possible to find shelters within the border. However, they only enter neighboring country, if it is the only escape route, or if the neighboring country can afford better shelter.[27] The second type of displacements occur when any government relocates people from a certain part of the country that is at risk of disasters that can make the part dangerous for human habitation, and this type of relocated people also remain in another part of the same country, but permanently.[28] This type of displacement differs from the first type in a sense that it is implemented by the concerned authority, and it is done before the disasters occur. The third type of migrations take place when people move to other regions beforehand predicting that their places of abode would become inhabitable in future as a result of some slowly ongoing disasters like draught, repeating floods or salination of agricultural land etc.[29] This type of displacement is voluntary in nature, because people move to another place

21 Kälin (n 4)

22 Jane McAdam, 'Conceptualizing Climate Change-Related Movement', *Climate Change, Forced Migration, and International Law* (Oxford Academic, 24 May 2012) 24

23 Kälin (n 4)

24 McAdam (n 23) 21

25 Kälin (n 4)

26 ibid

27 ibid

28 ibid

29 ibid

for better economic opportunities, however, if the environmental degradation worsens, this may amount to be a forced displacement.[30] The fourth type of displacements occur when the territories of small island states reduce due to the rising of sea levels and the states cannot provide enough place for their populations, and when the situation become extreme, these people relocate to other countries. [31] The last category of migrations take place when people become displaced by armed conflicts that are fueled by declining essential resources like water, or by increasing aridity of lands.[32]

So, the migrations can be categorized in different considerations. In terms of their destinations, the migrants either can be internally displaced persons, if they stay within the territory of own country, or can be cross-border displaced persons, if they move to other countries. Moreover, considering the temporal criterion of displacement, the migration can be either temporary or permanent.[33] Furthermore, in terms of the degree of environmental degradation in the place of origin, they can either be voluntary migrants or forced migrants. For clarification, if the environmental degradation of the place of origin is of such a degree that does not force people to move, rather encourage them to move for better opportunities, then they are voluntary migrants. On the other hand, if the degradation is so extreme that the people have no other choice but to move, then this displacement can be called forced migration. [34]

III. PROTECTION GAPS UNDER EXISTING FRAMEWORKS

The preceding analysis transpires the phenomena of becoming climate change migrants. This group of displaced people exist in factual world. Do they exist in the realm of international law frameworks? This part tries to answer the question by analyzing different international law regimes.

A. *International Refugee Law*

The people who are displaced from their abodes as a result of climate change impacts, are sometimes called 'climate change refugees' which is useful in political perspective, however, this term is incorrect legally and conceptually.[35]

30 ibid

31 ibid

32 ibid

33 McAdam (n 23) 20

34 Kälin (n 4)

35 Jane McAdam, 'The Relevance of International Refugee Law', *Climate Change, Forced Migration, and International Law* (Oxford Academic, 2012) 39

Moreover, in some territories like Bangladesh, Tuvalu and Kiribati, 'refugee' is considered as an unsignifying word and used to mean those people who are helpless and running away from their own authorities.[36] These societies argue that their authorities are not liable for the climate change induced migration, rather the industrially developed countries are to be liable for this. [37]So, the major questions that arise in this context are whether the climate change migrants can be considered as refugee and if so, to what extent the international refugee law can be applied to these people. This section will try to find out the answers, and as the first step of this task, the definition of refugee given in The Convention Relating to the Status of Refugees must be analyzed. According to the convention, the term 'refugee' applies to the person who is outside his country of nationality and is unable or unwilling to return to that country for a well-founded fear of being persecuted for reasons of his race, religion, nationality, affiliation to any social group or political opinion.[38] It is very difficult to include the climate change migrants within the definition of the convention because of several obstacles.[39] The convention definition delimits the refugee status to the person who is outside his own country.[40] This is the first obstacle for including climate change migrants within the meaning of refugee, because many of these migrations occur within the state boundary. [41] It has already been discussed in the preceding part that the people who are displaced temporarily as a result of short term disasters like cyclone, flood, earthquake or people who have been evacuated from a potential dangerous area by their authorities, mostly remain within their own country and become internally displaced persons. This kind of displaced people are excluded from the refugee status according to the primary criterion of the convention definition.

The next obstacle to include climate change migrants within the convention definition is portraying 'climate change' as 'persecution'.[42] Because the person's inability or unwillingness to return to his abode for a well-founded fear of persecution is the distinctive feature of a refugee under the convention.[43] Moreover, the refugee convention aims to provide protection to those at-

[36] ibid 40-41

[37] ibid 41

[38] Refugee Convention (n 2) art 1(A)2

[39] McAdam (n 36) 42

[40] James C Hathaway and Michelle Foster, 'Alienage', *The Law of Refugee Status* (Cambridge University Press, 2014) 17

[41] McAdam (n 36) 43

[42] ibid

[43] James C Hathaway and Michelle Foster, 'Well-founded fear', *The Law of Refugee Status* (Cambridge University Press, 2014) 91

risk persons who do not get protection from their respective governments.[44] For stretching the convention protection to climate change refugees, it can be argued that, as authoritative decisions of governments play a role behind the environmental disasters, the displaced people seeking refuge from those disasters are seeking refuge from their governments also.[45] However, in spite of being harmful and fatal, environmental disasters do not amount to persecution, because they are not related to the five convention grounds.[46] That means, environmental disasters affect people randomly, and do not choose people on the basis of their race, religion, nationality, affiliation to any social group or political opinion. That is why, the harms caused by the environmental calamities do not amount to persecution mentioned in the refugee convention.

The next obstacle against enhancing the umbrella of refugee convention towards climate change migrants is identifying the persecutor. Because the essence of the convention is that 'being persecuted' involves human agency.[47] In contrast, the environmental disasters are out of human control. Although it is often proposed that persecutors are the industrially rich countries whose greenhouse gas emissions have caused the environmental degradation and made the people displaced, the climate change migrants are likely to seek shelters in these countries.[48] In other words, if the industrially rich countries are regarded as persecutors, and the climate change migrants get shelters in those countries, it will mean that the persecuted people are sent to the hands of the persecutors. This proposition goes against the theme of refugee paradigm.[49] Besides, as the greenhouse gas or carbon emitter countries do not possess any intention to harm the people of other countries for their race, religion, nationality, affiliation to any social group or political opinion, the harm cannot be considered as a persecution under the refugee convention.[50] So, it can be said that as far as the displacement relates

44 James C Hathaway and Michelle Foster, 'Failure of state protection', *The Law of Refugee Status* (Cambridge University Press, 2014) 288

45 Jessica B. Cooper, 'Environmental Refugees: Meeting the Requirements of the Refugee Definition' (1998) 6(2) New York University Environmental Law Journal 480, 502

46 McAdam (n 36) 43-44

47 AF (*Kiribati*) [2013] NZIPT 800413, 54 (New Zealand Immigration and Protection Tribunal)

48 McAdam (n 36) 45

49 Jane McAdam, 'Displacement in the Context of Climate Change and Disasters', in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 833, 837

50 *RRTA Case 0907346* (2009) RRTA 1168, 51 (Refugee Review Tribunal of Australia)

to climate change, it lacks a persecutor which is a required element for being refugee under the refugee convention.

So far, no refugee claim arising out of climate change impacts is successful.[51] In 2013, an application for refugee status on the ground that the environment of the applicant's abode in Kiribati has degraded as a result of climate change was rejected by Immigration and Protection Tribunal New Zealand.[52] The same tribunal in 2014 rejected another application for refugee status that was based on the ground that the applicants' lives were in danger due to the impact of climate change in their country of origin.[53] Also, The New Zealand Court of Appeal refused to consider Mr. Teitiota as a refugee, who identified the international community who are responsible for climate change as the persecutor.[54]

In light of the above discussion, it seems that the climate change migrants are not capable of getting protection under the Refugee Convention. The possibility of their protection under this convention is further shrunk because, many States authorities opine that if these migrants are included within the protection of refugee convention, it will increase the flow of refugees, which will negatively affect the present refugee protections.[55] The fear of these states parties is not baseless, because the volume of request for protection on environmental ground is increasing faster than other types of requests, and it is predicted that the traditional refugees will soon be outnumbered by the climate change migrants.[56]

As the gap of protection in the Refugee Convention is evident, the paper now turns to analyses whether OAU Convention Governing the Specific Aspects of Refugee Problems in Africa can be referred as an example of being capable to offer protection to the climate change migrants in this region. According to this instrument, the term 'refugee' applies, among others, to the person who is forced to leave his place of abode because of events that have seriously disturbed public order in his country of origin or nationality.[57]

51 McAdam (n 50) 837

52 AF (*Kiribati*) (n 48)

53 *AC (Tuvalu)* [2014] NZIPT 800517 (New Zealand Immigration and Protection Tribunal)

54 *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173 (New Zealand Court of Appeal)

55 Angela Williams, 'Turning the Tide: Recognizing Climate Change Refugees in International Law' (2008) 30(4) Law & Policy 502, 509

56 Cooper (n 46) 485

57 Convention Governing the Specific Aspects of Refugee Problems in Africa (entered into force June 20, 1974) 1001 UNTS 45 art 1

This convention accepts the definition of the Refugee offered by the Refugee Convention of 1951 and then adds some other type of persons in its own definition.[58] For this reason, there is much query about whether this convention provide protection for environmental migrants also.[59] Some interpret the phrase 'events seriously disturbing public order' used in the definition as including ecological changes such as famine and draught.[60] However, there is a counter argument that the definition of OAU convention indicates only man-made events, and it does not make the international community responsible for natural disasters.[61] It is also argued that displacement induced by climate change was not considered by the drafters.[62] As there is a dilemma about the coverage of the OAU convention, we need to look at the State parties' interpretation which is important to determine whether the treaty has a wider acceptance. It is notable in this regard that the States parties of the convention do not accept the concept that the OAU convention includes environmental disasters while receiving migrants from neighboring countries.[63] So, it is apparent that, like 1951 Refugee Convention, the OAU convention does not per se offer protection to the climate change migrants.

B. *Human Rights Law*

Although it is widely accepted that climate change negatively affects the enjoyment of human rights, it is uncertain that these effects can be considered as human rights violations in a legal sense.[64] This protection gap for climate change migrants exists, because there is neither a particular international right to safe environment, nor a mandatory human rights agreement that can address the issue of climate change migration.[65] The Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment provides protection against returning a person to a country where he is in danger of

58 M. R. Rwelamira, 'Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa' (1989) 1(4) International Journal of Refugee Law 557, 558

59 McAdam (n 36) 48

60 Rwelamira (n 59) 588

61 Alice Edwards, 'Refugee Status Determination in Africa' (2006) 14(2) African Journal of International and Comparative Law 204, 226

62 Walter Kälin, 'Conceptualising Climate-induced Displacement', in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, 2010) 81, 88

63 Edwards (n 62) 227

64 'Report of the Office of the United Nations High Commissioner for Human Rights' (n 4) paras 69-70

65 Nishimura (n 9) 117

torture.[66] Although this provision offers a protection for refugees, it is dubious that it will offer a protection to the people affected by environmental factors[67]. Being unable to acknowledge the basic reasons of environmental migration, the international human rights regime is not appropriate for environment induced displaced people. [68] Yet, the subsequent part (part IV) of this paper will try to find out if there is any narrow or indirect scope of protection for climate change migrants under this regime.

C. *Law on Statelessness*

Due to the rise of sea levels, many small island states are sinking and in some extreme cases these states may disappear entirely, and the people would migrate to other countries permanently.[69] However, it is unclear whether these people can be considered stateless persons under international law regime.[70] The essay will now investigate the international law relating to statelessness and will try to find out whether the climate change migrants who are displaced from sinking states fall under this regime. According to the Convention Relating to the Status of Stateless Persons, when someone is denied nationality by any State under the operation of its law, he is a stateless person.[71] This convention mandates the contracting States not to expel a stateless person who is lawfully in their territory.[72] This convention *prima facie* seems to be useful for offering protection to the people whose state territories are disappearing due to the rise of sea level. However, these people do not become stateless if any portion of their country along with its government exists.[73] So, people displaced from the countries that have lost lands under water due to climate change, do not fall under this convention protection, because their governments are still in existence with other parts of their countries. What will happen if the whole territory of a country goes under the sea? Even in this case, these people will not become stateless under this convention, because it deals with people who

66 Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, (adopted 4 February 1984, entered into force 26 June 1987) 1465 UNTS 85 art 3

67 Williams (n 56) 514

68 ibid

69 Kälin (n 4)

70 ibid

71 Convention Relating to the Status of Stateless Persons, (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 art 1

72 ibid art 31

73 Jane McAdam, 'Disappearing States', Statelessness, and Relocation', *Climate Change, Forced Migration, and International Law* (Oxford Academic, 24 May 2012) 119, 130

are without any nationality, not with those people who are without a state.[74] In other words, the convention protects those people who are denied nationality under the operation of law of the country. It does not protect those people who are in fact deprived of the territory. Moreover, international law is strongly presumptive against the extinction of a State, and even the entire territory is lost, the government may retain its symbolic presence on the former lands and can function in exile.[75] Besides, loss of territory less likely to indicate the disappearance of a State.[76] So, it can be said that climate change migrants are not eligible to get protection under the law of statelessness.

D. *Environmental Law*

As the subject matter of this paper is human migration that results from environmental degradation, it should investigate the International Environmental Law framework to find out whether this framework stipulates any protection for this group of people. International Environmental Law was first recognized as a distinct branch of international law in the 1972 United Nations Conference on Human Environment, which adopted the Stockholm Declaration.[77] This declaration mandates the States parties to ensure that their activities do not cause damage to the environment.[78] This instrument forms a responsibility for preventing environmental degradation and it does not provide any obligation related to migrations that result from such degradation.[79]

Similarly, another instrument that could afford protection or status to this group is the United Nations Framework Convention on Climate Change. However, the aim of this convention is to prevent adverse effect on climate by stabilizing greenhouse gas concentration.[80] Similar to the 1972 Stockholm Declaration, this convention also focuses on the preventive measures that address climate change. The main concern of the instrument is inter-state relations and does not denote the duties of States towards individuals.[81]

74 Kälin (n 61) 101

75 ibid 102

76 McAdam (n 50) 844

77 McCue (n 10) 179

78 Declaration of the United Nations Conference on the Human Environment, (16 June 1972) UN Doc A/CONF.48/14/Rev.1 principle 21

79 McCue (n 10) 179

80 United Nations Framework Convention on Climate Change (n 6) art 2

81 Bonnie Docherty and Tyler Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33(2) Harvard Environmental Law Review 349, 358

Moreover, for being preventive in nature, it does not deal with climate change refugees.[82] So, it can be assumed that International Environmental Law regime as well does not offer any protection for this group of people.

IV. POSSIBLE PROTECTIONS UNDER EXISTING FRAMEWORKS

The earlier segment has made an effort to detect the loopholes in the present international law regime through which the climate change migrants are falling. The present segment of the essay attempts to find out the probable interpretations of the regime by which those loopholes can be compressed. It will also consider some other form of protection along with some real-world examples that are already being offered to this group of people.

A. *Linking Displacement with Refugee Law Regime*

Based on the discussions in part III, it was remarked that the protection of climate change migrants seems to be impossible under international refugee law regime. However, despite the particular definition of refugee given by international law, it cannot be concluded that people who do not fall under this definition are unqualified to get protection.[83] As environmental calamities may lead to broader scenario of displacement such as armed conflicts, the protection of this type of displaced people should not be automatically rejected by refugee law.[84] Moreover, the failure of international refugee regime to include climate change migrants in general does not mean that the protection for some of them should be rejected. [85] Also, regarding the requirement of human agency in deciding the status of refugee, the Immigration and Protection Tribunal New Zealand observed that this requirement does not always block the passage of protection of the Refugee Convention.[86]

The refugee convention may be applicable to those people who, during the impacts of disaster, are persecuted, or are tortured on the ground of their gender, or are discriminated in terms of receiving relief, or whose persecution is amplified as a result of the disaster.[87] Moreover, if the disasters occur in a state that does not respect human rights of the affected people, the humanitarian

82 ibid

83 McAdam (n 36) 42

84 McAdam (n 14) 836

85 Nishimura (n 9) 113

86 AF (*Kiribati*) (n 48) 55

87 McAdam (n 14) 836

relief may be politicized by depriving the marginalized groups.[88] In other words, in all the countries, there are some people who are minimal in number regarding their race, religion etc. who are not capable of keeping a significant impact in the transition of political power. When these countries are affected by environmental disasters, there is a possibility that the political governments will discriminate these minority people and emphasize on providing relief to the people who are major in number. It may happen as a strategy of attracting the majority peoples' votes or as a result of contrast political opinion of those minority groups.

Sometimes, the governments may create hindrance in rehabilitation programmers needed for the disaster affected people by denying acceptance of foreign relief after the disasters. This denial of international humanitarian assistance, if done arbitrarily, may be regarded as an action of the government that can lead the affected people to the protection pathway.[89] This type of incident took place in Myanmar. After the cyclone 'Nargis' hit the southern part of the country in 2008 that killed at least 140,000 and affected 2.4 million people, the then government prevented foreign disaster relief workers and even relief supplies from entering the affected area.[90]

Moreover, the governments authorities may also target those persons who have participated in disaster relief works.[91] This type of persecution may seem ridiculous but happened in real world. During the incident described in the above paragraph was responded by civil society and NGO activists with rehabilitation necessities, they faced coercion and harassment by government officials.[92]

It indicates an adverse political view of the authorities towards those who facilitated the relief activity, and the indication is enough to attract protection under Refugee Convention.[93]

88 AF (*Kiribati*) (n 48) 58

89 AC (*Tuvalu*) (n 54) 87

90 'I Want to Help My Own People: State Control and Civil Society in Burma after Cyclone Nargis', (*Human Rights Watch*, 28 April 2010) <https://www.hrw.org/report/2010/04/28/i-want-help-my-own-people/state-control-and-civil-society-burma-after-cyclone > accessed 9 January 2025

91 McAdam (n 14) 836

92 Human Rights Watch (n 91)

93 *Refugee Appeal No 76374* (2009) NZRSAA 83, para 45 (New Zealand Refugee Status Appeals Authority)

Furthermore, many countries have weak legal framework for disaster management which lead to increased gender-based violence in temporary shelters.[94] Natural disasters can destroy peoples' home and can force them to live in temporary shelters where they become vulnerable to crimes of various natures such as rape, theft, robbery, extortion and so on. Instability that follows disaster makes people vulnerable to trafficking because of being displaced from homes, separated from families and unable to earn.[95] Their worsened economic condition often makes them desperate to move to other countries for better economic opportunities. This desperateness of those affected people brings opportunity for the human traffickers. Sometimes these criminals and traffickers are influential persons in the country of origin and the government may be reluctant to act against them. In this regard, the Immigration and Protection Tribunal New Zealand observed that pathways into the protection regime may exist in such situation.[96]

Environmental degradation, through social and political process, may create a security issues and trigger vicious clash and thus can cause displacement, and an example of this is the use of environmental degradation as a mean of oppression on the Iraqi Marsh Arabs.[97] The then Iraqi government, following a movement against it by the Iraqi Marsh Arabs, conducted systematic drainage, constructed dams, canals and dikes to prevent water flow in the region from Tigris and Euphrates rivers that caused one of the world's greatest environmental disasters.[98] It can be sum up in light of the above discussion that the 1951 convention does not offer protection to the people who are displaced as a sole result of climate change. However, if the climate change impacts are followed by other incidents that create well-founded fear of persecution, then these people can be covered by the convention. The same proposition applies to the OAU convention. The displaced people of this region may be covered by this convention, if the government hinders the rehabilitation after environmental

94 Elizabeth Ferris, 'Disaster and Displacement: What We Know, What We Don't Know', (*Brookings*, 9 June 2014) < https://www.brookings.edu/articles/disasters-and-displacement-what-we-know-what-we-dont-know/> accessed 9 January 2025

95 'Human Trafficking in the Wake of a Disaster', (*Centers for Disease Control and Prevention*, 26 August 2020) < https://www.cdc.gov/disasters/human_trafficking_info_for_shelters.html > accessed 9 January 2025

96 AC (*Tuvalu*) (n 54) 83

97 AF (*Kiribati*) (n 48) 59

98 'The Iraqi Government Assault on the Marsh Arabs' (*Human Rights Watch*, 25 January 2003) < https://www.hrw.org/sites/default/files/media_2021/08/202108mena_iraq_marsharabs.pdf > accessed 9 January 2025

disasters with an intention to victimize the affected people on one of the five convention grounds.[99]

Examples of Granting Protection Under the Refugee Law Regime

i) After an earthquake struck Haiti in 2010, some Haitian people were given refugee status under the Refugee Convention in Panama and Peru on the basis of well-founded fears of persecution that were related to the disaster and considering the reluctancy of the government to address such fear.[100]

ii) The Refugee Status Appeals Authority New Zealand granted refugee status to a disaster-relief activist because of the adverse political view of her country of origin's government towards the disaster-relief activities she participated in.[101]

B. *Under Complementary Protection Pathways*

Human rights regime offers significant protections to those people whose rights are affected by climate change, regardless of whether the said effects can be interpreted as human right violations.[102] The recognition of these protections is now growing.[103] This type of protection, known as 'complementary protection', is beyond the 1951 Refugee Convention, and the European Union, Canada, the United States, New Zealand, Hong Kong, Mexico and Australia have legal structure to offer it under international law obligations.[104]

Different types of human rights, that may be affected directly or indirectly by climate change, are recognized in various international instruments. For example, the International Covenant on Civil and Political Rights recognizes the

99 Kälin (n 63) 88

100 David James Cantor, 'Law, Policy and Practice Concerning the Humanitarian Protection of Aliens on a Temporary Basis in the Context of Disasters' (*United Nations Network on Migration*, 1 January 2016) <https://migrationnetwork.un.org/resources/law-policy-and-practice-concerning-humanitarian-protection-aliens-temporary-basis-context > 17, accessed 9 January 2025

101 *Refugee Appeal No 76374* (n 92) 83

102 'Report of the Office of the United Nations High Commissioner for Human Rights' (n 4) para 71

103 *AF (Kiribati)* (n 48) 60

104 Jane McAdam, 'Climate Change Displacement and International Law: Complementary Protection Standards' (*United Nations High Commissioner for Refugees,* May 2011) <https://www.unhcr.org/media/no-19-climate-change-displacement-and-international-law-complementary-protection-standards > 17, accessed 9 January 2025

inherent right to life of every human which cannot be curtailed arbitrarily.[105] The International Covenant on Economic, Social and Cultural Rights ensures the right to adequate standard of living that includes right to adequate food, housing, clothing and highest possible standard of health.[106] Climate change can affect human rights in many ways. For instance, extreme environmental disasters can affect the right to life, the food scarcity that follows the disasters affects the right to adequate food, the disaster destroys the health infrastructure that affects the attainable standard of health, and sea-level rise and floods affect the right to housing.[107] When these rights are affected, the State's human rights obligation to protect them arises.[108] According to the Immigration and Protection Tribunal New Zealand, the Article 7 of ICCPR provides a framework that can offer protection to the persons who are affected by environmental degradation.[109] It also creates an obligation not to send the people back to the country in which there exist life-threatening circumstances created by the impacts of climate change.[110]

It can be said that although international human rights regime does not directly recognize the climate change migrants, it is possible to offer protection under the principle of non-refoulement. They may also be sheltered under the regional and national legal systems that offer complementary protection.

There are other forms of complementary protection pathways, such as temporary protection, which are already practiced by many countries and regions.[111] In the USA, a foreign person from a designated country can be granted temporarily protected status for a certain period and he is not removed for that period.[112] This protection is available to a person if his country is designated by the Attorney General after considering that the country is affected by an earthquake, flood, draught, epidemic or other environmental disasters and that there is a substantial but temporary degradation of living condition.[113] However, people who are already in the USA during the disaster are only eligible

105 International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art

106 International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, arts 11-12

107 McAdam (n 105) 16

108 McAdam (n 14) 839

109 AF (Kiribati) (n 48) 61

110 McAdam (n 14) 839

111 McAdam (n 105) 36

112 *Aliens and Nationality Act,* 8 USC § 1254a(a)(1) (2018)

113 ibid § 1254a(b)(1)

for this protection if their governments request assistance under this provision.[114]This temporary provision can be applied to grant protection to the people who are fleeing from climate change disasters.[115]

In Europe, temporary protection is available under the EU Temporary Protection Directive. It offers protection to the people who had to leave their country and are unable to return because of the situations prevailing there.[116] As the directive does not give an exhaustive definition of situation for which the person is unable to return, this directive can be applied to offer protection to the climate change migrants.[117]

In Finland, the Aliens Act has provision to grant temporary protection to a person who is unable to return his home country due to an environmental disaster. [118]

Asylum is another type of protection that can be offered to the climate change migrants. In Europe, individuals can be granted protection under the EU Qualification Directive which does not expressly include climate-change impacted people.[119] However, if this instrument is applied against inhuman or degrading treatment, this group of people can be accommodated also.[120] In Sweden, the Aliens Act offers protection to a foreign person who is unable to return his country of nationality because of an environmental disaster.[121] Similarly, if widely interpreted, the Swiss asylum law that offers temporary protection can cover climate-change migrants.[122] Moreover, Argentine immigration legislation has provision to grant residence to a person who is unable to return his country due to an environmental disaster. Although these legislations may not cover the climate-change migrants, it can accommodate people fleeing from sudden onset environmental disasters.[123]

114 McAdam (n 105) 37

115 ibid

116 Council Directive 2001/55/EC on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences thereof [2001] OJ L212/12, art 2(c)

117 McAdam (n 105) 39

118 Aliens Act (301/2004; amendments up to 1163/2019 included) (Finland), s 109(1)

119 McAdam (n 105) 39

120 ibid.

121 *Aliens Act* (Sweden) No 2005:716, ch 4 s 2 para 3

122 Kälin (n 63) 100

123 McAdam (n 105) 39

C. *Under Guiding Principles on Internal Displacement*

These Guiding Principles address those people who are displaced from their homes for natural disasters or some other reasons and have not crossed the international borders. They provide some practical guidance to Governments, other authorities as well as Non-government Organizations for working with internally displaced persons. The principle 1 of this instrument entitles the internally displaced persons to enjoy same rights and freedoms as are enjoyed by other persons in their country.[124] The capability of international community to help climate-related displaced persons will be enhanced if the climate change affected States implement these guiding principles in domestic level.[125] So, the people who migrate to another area within their countries' borders as a result of climate change related disasters, can be granted protection under this instrument. However, this instrument's protection is not available for the cross-border climate-change migrants.

V. PROPOSING SUSTAINABLE SOLUTIONS

It is time to diverge from the existing approach and to think about a new analysis for dealing with climate change-related displacement problem.[126] However, this new approach must be overarching rather than providing some probable alternatives.[127] The following options are the possible approaches that can address the climate change displacement.

1. The problem of climate change migration is new and substantial enough to demand its own regime rather than being addressed by other legal regimes whose purposes were not to deal with it.[128] This statement is evident from the discussion of the previous parts. As discussed, the climate change induced migrants do not fit into the definition of refugee given in Refugee Convention. The regime of Internal Displacement does not cover the cross-border movements induced by climate change. Their protection under International Human Rights regime is uncertain as the disasters linked with climate change cannot be considered as violation of human rights. Similarly, the law on statelessness does not offer shelter to these migrants as they are

[124] UNHCR, 'Guiding Principles on Internal Displacement', (11 February 1998) UN Doc. E/CN.4/1998/53/Add.2 principle 1

[125] McAdam (n 105) 55

[126] Williams (n 56) 514

[127] McAdam (n 105) 54

[128] Docherty and Giannini (n 82) 350

not denied citizenship by their countries of origin. Even the Environmental Law regime, which seems to be closely related with the present issue due to the subject matter, deals with the minimization of environmental degradation and does little for the aftermaths. That is why a dedicated convention, which can consider the existing law as well as can give a creative solution to any future problem, would be the best option to address this type of displacement.[129] This new convention, while defining climate change-induced migrants, should consider legal aspect as well as be sensitive to the humanitarian crisis.[130] It should define the migrants in such a way that the definition should not become obsolete in any unforeseeable future situation. In other words, the definition should be capable of addressing displacement caused by present factors as well as any factor that may arise in future. Moreover, it should include all sub-categories of climate change migrants e.g., people displaced by direct and indirect impacts of climate change. The definition should have six elements and those are forced migrations, temporary or permanent relocation, cross-border movement, disruption related to climate change, sudden or slow-onset environmental disruption and a standard for human contribution to the disruption.[131]

Only providing a holistic and dynamic definition would not be enough. The new convention should incorporate a practical framework that can ensure adequate humanitarian assistance and human rights to the migrants, can distribute the responsibilities among international communities and can administer the instrument effectively.[132]

2. Making a new and dedicated convention is a lengthy process and it also requires global agreement. Until that happens, other solutions can be considered, such as formulating an international guiding framework. This framework will be based on the existing principles of refugee and human rights laws and will clarify the existing scopes as well as probable scopes that can be applied for protecting the climate change migrants.[133] In other words, this framework will not create new rules, rather it will interpret the existing rules and provide suggestions regarding how those rules can be applied in the context of climate change displacement.

[129] ibid

[130] ibid 361

[131] ibid 372

[132] ibid 373

[133] McAdam (n 105) 57

3. Another initiative that can be carried out at present through bilateral and regional agreements is managed international migration which is a safe process for allowing climate changed affected people to get elsewhere from the affected area.[134] This can be implemented by accepting the climate change affected people with work and education opportunities. It is true that the skill migration will not provide opportunities for poor people.[135] Because usually they are the underprivileged communities and don't afford to become skilled and educated enough to qualify for the labor or education migration. However, this scheme can benefit them by giving an opportunity to migrate to the safer places of the country from where the skilled and educated people have migrated to other countries.[136]

4. Lastly, climate change migrations can be addressed by mass relocation of people from affected country to another country. However, if this scheme is to be implemented as a permanent solution, the concern of social, political, cultural, economic rights of the relocated people should also be considered.[137] This scheme can be helpful for those who are extremely vulnerable, and it is advantageous because the whole community can stay together after the mass relocation. [138]

In terms of effectiveness, a dedicated convention would be the best solution for legally recognizing climate change migrants and for offering them a sustainable protection. Other options can be considered as short-term measures until the convention comes into reality.

[134] ibid

[135] ibid 58

[136] ibid

[137] ibid

[138] ibid 60

VI. CONCLUSION

Climate change, through the increasing frequency and intensity of natural disasters, is reshaping environments, harming ecosystems, and threatening human welfare. It forces people of affected regions to migrate elsewhere either to escape deteriorating situations or to save their own lives. This article has demonstrated that the climate change-induced migration is no longer a theoretical concern but a growing reality that demands urgent international attention. However, current branches of international law fall short of providing adequate recognition and protection for these displaced people. International refugee law, which seems to be the most relevant branch of international law in this regard, does not include climate change-induced displacements in its definition. Protection under human rights regime is also uncertain as there is no international instrument that considers this type of displacement as a violation of human right While some countries have set precedents by offering protection through broad interpretations of existing laws, many others have not. The existing protection pathways do not certainly cover all climate change-induced displacements and hence they should not be regarded as the only ways. Given the scale and urgency of climate-induced displacement—now rivaling traditional refugee crises—this paper argues for the creation of a dedicated legal framework through a new international convention. It also outlines key features that such a convention should include. In the meantime, interim measures must be adopted by the international community to respond to this escalating challenge.

Revisiting Anti-Rape Laws in Bangladesh: A Normative Analysis

Meher Nigar*

1. Introduction

Rape is the most extreme form of sexual violence which destroys a women's life. Rape can be defined as an act that involves sexual intercourse or sexual penetration against an individual, by using force, coercion, abuse of authority, and which lacks valid consent or against a person who is not competent to give valid consent by reason of unconsciousness, intellectual disability, or not attaining the age of majority.[1] In Bangladesh, incidence of rape remains an everyday newspaper topic and it is a rapidly increasing sexual crime that occurred against women. According to Ain-O-Shalish Kendra(ASK), a leading organization in human rights advocacy, recently published a report showing that in Bangladesh, during the period from January 2020 to September 2024, there is total of 4787 rape cases.[2] Moreover, the organization recorded four years' data on rape occurrence in Bangladesh, which states that in every 9 hours there is one rape; that means, in Bangladesh, at least two women have been raped each day during this period.[3] This report is self-explanatory to give a real scenario of rape incidents against women in Bangladesh.

Bangladesh has made a relentless effort to address the issue of violence against women. In Bangladesh, there are a significant number of legislations and regulations that promote women's rights and protect women from violence. It has achieved significant achievement in the area of gender parity.[4] At the same time, this achievement co-exists with high prevalence of violence against women, of which rape is the most heinous form and is becoming more common day by day. This situation indicates that though there has been major

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1 *Black's Law Dictionary*, 11th edn (Thomson Reuters, 2019).

2 Nilima Jahan, 'At least one woman raped nearly every 9hrs' *The Daily Star* (Dhaka, 25 November 2024) Law & Our Rights.

3 ibid.

4 *The Daily Prothom Alo* (Dhaka, 22 June 2023) 1.

progress at least at legislation level, in establishing the rights of women to live free from violence, significant gaps still remain in the normative structure and implementation of these laws. This situation critically requires a profound review to examine how the issue of rape has been addressed in the laws of Bangladesh. To this end, this write-up aims to revisit the present anti-rape laws, the legal gaps persist there in and identify key normative challenges, and finally concludes with some potential reforms to ensure justice, protection, and prevention.

2. Understanding 'Rape' in socio-legal context

Rape can be defined as having sex with someone who is unwilling to do so and sexual activities carried on forcibly by using violence or threatening behavior.[5] According to Merriam-Webster, rape is defined as "unlawful sexual activity and usually sexual intercourse carried out forcibly or under threat of injury against a person's will or with a person who is beneath a certain age or incapable of valid consent."[6] So, rape may occur between same-sex or a male child or even a trans-gender people can be a victim of rape. However, despite the divergent views on rape suggesting same-sex rape or even a male can be a victim of rape, this article perceives the common understanding of rape where the male only as sole perpetrator and the female as sole victim.

In Bangladesh 'Rape' is defined as having sexual intercourse of a man with a woman against her will or without her consent.[7] Rape defined under the present laws in Bangladesh covers that form of rape only which is constituted by penile-vagina interaction. This age-old definition of rape supports only heterosexual forced sex where only male is the perpetrator and rape occurred only against women.[8] Moreover, under this provision, marital rape is not recognized if the wife is thirteen years of age.

Rape can be understood as manifestation of power that a man can exercise against women. In particular, in a patriarchal society like Bangladesh, rape is often perceived as power projection by male over women which is rooted in the stereotyped gender role of dominating masculinity in converse to

5 'Rape' (*Cambridge Dictionary*, nd) <https://dictionary.cambridge.org/dictionary/english/rape> accessed 15 January 2025.

6 'Rape' (*Merriam-Webster*, nd) <https://www.merriam-webster.com/dictionary/rape> accessed 15 January 2025.

7 The Penal Code (PC) 1860, s 375; Women and Child Repression Prevention Act (WCRPA) 2000, s 9.

8 Shuva Das, "Rape in Bangladesh: an Epidemic Turn of Sexual Violence", (2021), Harvard International Review < https://hir.harvard.edu/rape-in-bangladesh-an-epidemic-turn-of-sexual-violence/> accessed 27 December 2024.

behaviors where women remain submissive, supporting her to an undervalued, subordinated position.[9] These views can be contextualized in Bangladesh perspective. Bangladesh practices patriarchy which institutionalizes subordinate status of women and often laws are based on stereotypical assumption about appropriate female and male sexuality, gender identity and gender roles. [10] Hence, the conceptualization of 'rape' is a male dominated definition which indicates that women are sexually possessed as they are of weaker sex and rape committed only by male, the dominant community in the society.

The provision relating to rape was inserted by British colonial rulers when they enacted the Penal Code in 1860, and it illustrates the nineteenth century mindset of English lawmakers.[11] The laws, largely inherited from colonial-era legislations like the Penal Code of 1860, that reflect outdated patriarchal values and fail to address contemporary understandings of consent and sexual autonomy. These laws are often based on stereotypical assumption about appropriate female and male sexuality, gender identity and gender roles.[12] Moreover, the conservative approach towards 'marital rape' in the domestic laws in Bangladesh reflects the prevalent socio-cultural norm that husband is the superior authority and he has the total authority including sexual dominance over his legally wedded wife and that norm is backed by the religious sentiment. Hence, the interplay of historical, cultural and social factors significantly impacts the conceptualization of rape in Bangladesh.

Rape is an infringement of physical autonomy of victim which affects psychological and emotional wellbeing of a victim.[13] But in a country like Bangladesh, apart from physical and emotional consequences, rape leaves a victim with affecting many dignity related rights, such as, self-confidence, social

[9] Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (Simon & Schuster 1975). Here it is stated that rape is a conscious process by which all men keep all women in a state of fear, thereby reinforcing male dominance

[10] Ivana Rdacic, 'Barriers to Access to Justice for Victims/Survivors of Gender-Based Violence: Gender Bias in the Legal System' (Council of Europe Conference, *Improving Access to Justice for Women in Five Eastern Partnership Countries,* Georgia, 2015) <https://rm.coe.int > accessed 12 November 2024.

[11] Taqbir Huda, 'Why is marital rape still legal in Bangladesh?', *The Daily Star*, Law and Our Rights (26 July 2017).

[12] Ivana Rdacic, *Barriers to Access to Justice for Victims/survivors of Gender Based Violence: Gender Bias in the Legal System*, Council of Europe Conference Improving Access to Justice for Women in Five Eastern Partnership Countries, Georgia, 2015, < https://rm.coe.int > accessed 12 November 2022.

[13] Das (n 8)

acceptance, suicidal thoughts or attempts, stigmatization of rape victims, etc.[14] Here, physical chastity is considered to be important values of women and any compromise on these would bring about dishonor to the family concerned.[15] Hence, stigma surrounding rape causes the rape victim and her family undergo a network of social humiliation amounting to ostracism. So, a rape incident not only affects the physical and emotional rights but also social rights of a victim in Bangladesh.

3. Legislative Overview of Rape

The Penal Code,1860 (hereinafter referred to as PC, 1860) is the general penal law for offences occurred against both men and women. And it remains the basic law that contains provision for different types of sexual violence against women including rape. According to section 375 of the PC, 1860, 'rape' has been explained as follows:

> *"A man is said to commit 'rape' who has sexual intercourse with a woman …against her will; without her consent; with her consent which has been obtained by putting her in fear of death or of heart; 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; with or without consent, when her age is under Fourteen years of age."*[16]

Section 375 enumerates five situations where a man is said to commit rape and clarifies that penetration is sufficient to categorize the sexual intercourse as rape.[17] However, this section, includes an exception stating that sexual intercourse by a man with his own wife, who is not being under the age of thirteen years, is not rape.[18]

According to the Women and Child Repression Prevention Act (WCRPA),

[14] Joyful Heart Foundation, 'Effects of Sexual Assault and Rape' <http://www.joyfulheartfoundation.org/learn/sexual-assault-rape/effects-sexual-assault-and-rape > accessed 21 January 2025.

[15] Mannan MA, *Violence Against Women: Marital Violence in Rural Bangladesh* (CPD-UNFPA, n.p., 28 October 2002) <https://cpd.org.bd/publication/violence-against-women/> accessed 26 November 2024.

[16] PC 1860, s 375.

[17] Explanation, ibid.

[18] Exception, ibid.

2000, which is a key piece of legislation addressing violence against women and children, 'rape' is defined as having "sexual intercourse without lawful marriage with a woman not being under sixteen years of age, against her will or with her consent obtained, by putting her in fear or by fraud, or with a woman not being above sixteen years of age with or without her consent." [19] That means, consent is immaterial to constitute rape, if the woman is under sixteen years of age.

Section 9 of the Act is the reaffirmation of the definition given in the PC, 1860 with updated age factor which is sixteen here (fourteen in the PC,1860). However, like the PC, 1860 this Act also determines the threshold for whether a sexual intercourse amounts to rape or not on two factors: age of the victim and the consent given to the intercourse. Moreover, while the PC, 1860 impliedly excludes the marital rape of a girl over the age of thirteen, from the ambit of rape, the WCRPA, 2000 remains silent regarding this issue and by incorporating the words 'without lawful marriage' in the definition clause of rape, it ultimately reaffirms the stand of PC, 1860 that sexual intercourse with lawfully wedded wife does not amount to rape even if it is done against her will or without her consent.

The Penal Code, 1860 prescribes punishment for rape which is either life imprisonment, or imprisonment of ten years, with fine; [20] whereas, under WCRPA, the punishment is death penalty or life imprisonment and fine for rape or for committing murder after rape.[21] This Act provides categorized provisions for rape, such as rape by single perpetrator, gang rape, attempt to rape, rape leading to death or causing hurt, rape in police custody and prescribes punishment accordingly, ranging from five years rigorous imprisonment to death penalty along with fine.[22] In relation with sexual offences, the WCRPA contains provision penalizing influenced suicide. According to the Act, "If a woman commits suicide by reason of feeling undignified for a person's willful act and without her consent, the person is said to abet her committing suicide and shall be punished with imprisonment for not exceeding ten years and not less than 5years rigorous imprisonment and with fine."[23]

The WCRPA not only conceptualizes rape but also addresses its procedural

[19] WCRPA 2000, Explanation to s 9.

[20] PC 1860 s 376.

[21] WCRPA 2000, s 9.

[22] ibid.

[23] Section s 9 (ka), ibid.

aspect which is composed of investigation, prosecution, time-frame of the investigation and disposal of cases and mechanisms devised for the protection of accused or detection of crime.[24] Any investigation of an offence under this Act shall be completed within the period of sixty days from the date, the offence was reported or the Magistrate passed the investigation order and the period is fifteen days if the perpetrator is arrested on the spot while committing crime.[25] However, the investigation period may be extended to no more than further thirty days on reasonable ground, with the approval of the concerned authority tribunal or higher authority, as the case may be.[26] If it is not completed within the extended period, the investigating officer within twenty-four hours of expiration of the period will inform the concerned authority.[27] On receipt of the report, the authority may direct to complete the investigation by any other officer within the period not more than seven days, (if the perpetrator is in custody) or in other cases, not mor than thirty days.[28] In case, the officer fails to complete the investigation within the prescribed period, it shall be notified within twenty-four hours to the authority[29] and the authority may, after considering the reports may consider it as the incompetence or misconduct on the part of investigating officer and record report to take action against him.[30] Though in matter of procedural issues of any criminal offence, the Code of Criminal Procedure, 1898 are followed, but in case of crimes committed under the WCRPA, investigation time is limited by the Act. Moreover, as part of investigation, the WCRPA, 2000 requires for medical test of both the accused and victim and proceeds with authorizing the tribunal to direct the concerned authority to take action against the doctor on the ground of negligence if medical test has not been done immediately.[31] By an amendment in 2020, it introduces mandatory DNA testing of both the survivor and the accused (with or without the consent) which is to be done according to the provisions of the DNA Act 2014.[32]

[24] Abdullah Al Faruque, 'GOALS AND PURPOSES OF CRIMINAL JUSTICE SYSTEM IN BANGLADESH: AN EVALUATION', *Special Issue: Bangladesh Journal of Law*, Special Issue, (2021) 1-31.

[25] WCRPA 2000, s 18(1).

[26] Section18(2), ibid.

[27] Section18(3), ibid.

[28] Section18(4), ibid.

[29] Section18(5), ibid.

[30] Section18(6), ibid.

[31] Section 32, ibid.

[32] Section 32 A, ibid.

The WCRPA, 2000 mandates for establishment of the special tribunal in each district to try the offences under the Act.[33] In rape cases, the submission of complaint, investigation, trial and settlement, are regulated by the provisions of the Code of Criminal Procedure, 1898. [34] According to section 28 of the WCRPA,2000, the party, aggrieved by the order, judgment or punishment imposed by the tribunal, can prefer an appeal to the High Court Division within 60 days.[35] Rape related offences under the Act are cognizable, non-compoundable and non-bailable with some exceptions.[36] However, section 27 of the WCRPA, 2000, explicitly states that the tribunal shall not take cognizance of an offence under the Act except with the written report from a police officer or from any other person authorized by law to submit the report. [37] That means, a rape victim does not have direct access before the tribunal established under the Act.

The tribunal, once the trial commenced, shall hold trial on each working day until the completion of the trial and the completion time is one hundred and eighty days from the date the case was filed.[38] In case of non-completion of the case within the prescribed time-limit, the tribunal can release the accused on bail and shall notify the causes if the accused is not released on bail.[39] Moreover, in case of failure to complete the trial within statutory time-limit, the tribunal and the Public Prosecutor and the concerned police officer will send a report in this regard to the Supreme Court and the Government, respectively.[40] On the basis of the report, the concerned authority can take action against those who are responsible for failure to adjudicate the case within the statutory time limit.[41]

The WCRPA, 2000, not only focuses on punitive approach rather contains some protective provisions to be availed by rape victims. While taking into consideration the social stigma that a rape victim survivor may face, the Act criminalizes publishing the name, address or any other acquaintance of the victim survivor in the news media and in case of any infringement of this provision, the liable person shall be punished with imprisonment or maximum one lac taka fine or

33 Section 26, ibid.

34 Section 25, ibid.

35 Section 28, ibid.

36 Section 19, ibid.

37 Section 27, ibid.

38 Section 20, ibid.

39 Section 20(iv), ibid.

40 Section 31(ka), ibid.

41 ibid.

both.[42] Moreover, The Act states that, in rape cases, the tribunal can hold trial in camera.[43] This Act contains provision for victims' protection by directing to keep them in safe custody during the trial, if the court thinks it proper.[44] The tribunal will receive and consider the opinion of the women and child in this regard.[45] It also states that any child born as a result of rape may remain in the custody of the mother or maternal relatives until the child reaches the age of 21 if male, until marriage if female, or until the child becomes capable of earning a living, if disabled.[46] Till then, the maintenance of the child shall be borne by the State and can later be recovered from the accused.[47]

The WCRPA, 2000 for the first time incorporated the provision for compensation for victims of violence by stating that the tribunal, if thinks that it is necessary, may convert the fine (as imposed against rape) as damages for the victim of the offence.[48] Where fine cannot be realised from the convict or from his existing property, it can be recovered from any property that can be owned or possessed by him in future, and such claim shall prevalence over other claim on that property.[49]

4. Concerns on Existing Legal Guarantees against Rape

Over the past decades, Bangladesh has adopted significant legislative actions to address the issue of violence against women generally and the crime of rape specifically.[50] But Bangladesh's legal framework is not sufficiently strong to stop rape, or even to reduce the same; rather, here, adequate laws coexist with high prevalence of rape occurrence. The increasing rate of rape suggests the notion that the existing legal framework suffers from a number of limitations that ultimately limits the scope of legal protection for a rape victim.

42 Section 14, ibid.

43 Section 20(vi), ibid.

44 Section 31, ibid.

45 Section 20, ibid.

46 Section 13, ibid.

47 ibid.

48 Section 15, ibid.

49 ibid.

50 Rashida Manjoo, 'Violence against Women, Its Causes and Consequences' in *Report of the Special Procedure of the Human Rights Council* (Geneva: United Nations Digital Library, 2014) <https://digitallibrary.un.org/record/771930?ln=en >accessed 12 January 2025.

4.1. Definitional dilemma

The definitional dilemma of 'rape' in the existing laws create challenge in prosecuting the offence. Under the existing laws of rape, age of victim, requirement of consent to the sexual intercourse and penetration which has been explained as the form of sexual intercourse, are the three factors that must be taken into consideration to constitute rape.[51] But in all these three areas, some gaps exist.

The narrow definition of penetration as defined in the Penal Code covers only the penile-vaginal penetration, and leaves other forms of penetration, such as oral, urethral or anal penetration, outside the ambit of rape.[52] Moreover, the definition is silent about any other 'object of insertion' as means for penetration whereas if any other object or body part is inserted in the vagina of the victim, it should also amount to rape.[53] So, defining rape narrowly is particularly problematic one and the definition can keep numerous instances of sexual violence that should be amounting to rape, outside the perimeter of what is statutorily defined as 'rape'.[54]

Consent, a key factor in determining rape, is vaguely defined in the law. Section 90 of the Penal Code excludes consent given under fear, coercion, or misconception, but lacks clarity on voluntary consent and fails to address situations where consent is withdrawn during intercourse. There is a stereotyped concept is that absence of signs of resistance or force indicates that the sex is consensual here. Thus, when a rape case comes before the court, courts often rely on physical resistance to prove lack of consent, reinforcing this harmful stereotype.

Consent is a continuous process, and distinct consent is needed at each stage of the rape process. A woman may consent to kissing or touching but not to sexual activity; even if she engages in consensual sex and later withdraws from it or objects to its continuation and the other person uses force to carry on, her prior consent cannot be construed as consent to engage in sexual activity with the offender. It is very challenging to establish whether a sexual encounter is rape or consensual sex because there is no clear-cut guideline to establish whether the

51 PC 1860; WCRPA 2000 (n 7)

52 ibid.

53 Taslima Yasmin, 'The problematic legal definition of rape', *The Daily Star* (Dhaka, 3 November 2020) Law & Our Rights.

54 This kind of incidents are not regarded rape rather to be considered unnatural offences under section 377 of the Penal Code. See also, Sumaiya Anjum Troyee, 'Redefining rape: A medico-legal call for justice', *The Daily Star* (Dhaka, 13 October, 2020) Law & Our Rights.

consent is free or obtained under false or fraudulent assurance. So, the practice of considering lack of resistance as consent to sexual intercourse in question may lead to failure to justice.

Age standards for consent are inconsistent in the existing laws. The Penal Code sets the age at fourteen years,[55] while the WCRPA, 2000 raises it to sixteen years[56] and states that the later shall prevail.[57] In addition, under the present law, sexual intercourse by a man with his own wife is not rape if the wife is not under thirteen years of age, [58] which makes the situation worse. These provisions technically permit forcible intercourse with child wife, in other word, marital rape and impliedly encourages child marriage whereas contracting, allowing or solemnizing child marriage has been criminalized in Bangladesh under the Child Marriage Restraint Act (CMRA), 2017. CMRA prescribes eighteen years for female and twenty-one years for male for contracting marriage. Hence allowing intercourse with child wife if she is at thirteen years of age poses a legal vacuum in matter of cases where intercourse takes place with wife aged between thirteen to eighteen. This situation leaves the potential child victims of marital rape without any legal recourse.

4.2. Procedural hurdles

While seeking justice, a rape victim has to undergo several procedural steps; such as filing case, investigation, medical examination, trial, etc. In every step, she faces numerous hurdles, legal and extra-legal, that create different challenges for the victims in every stage of the justice system. Like other criminal cases, a rape case starts with filing a case with police station and the police on the basis of the report starts investigation. And the provisions of the Code of Criminal Procedure,1898 shall apply to the filing of complaints, investigation, trial, and disposal of any offense unless the WCRPA has not stated otherwise.[59]

In Bangladesh, poor and faulty investigation, delays in investigation and disposal of cases, insignificant ratio of punishment of perpetrator remain a persistent barrier for access to justice.[60] The situation is worse for rape victims.

55 PC 1860, s 375.

56 WCRPA 2000, s 9.

57 Section 3, ibid.

58 PC 1860, s 375 (n 18)

59 WCRPA 2000, s 25.

60 Najnin Begum and Nirmal Kumar Shaha, 'Women's Access to Justice in Bangladesh: Constraints and Way Forward' (2017) 44(22) *Journal of Malaysian and Comparative Law* 39 <https://ejournal.um.edu.my/index.php/JMCL/article/view/16346> accessed 15 November 2024.

While the WCRPA contains provisions regarding the time limit within which the investigation has to be completed, it allows extension of investigation period with prior approval of the concerned authority.[61] Here, factors like 'reasonable period' or 'reasonable grounds' are used to allow the extension of investigation time. But what is reasonable period or ground is a question of fact which has not been explained anywhere in the law. Moreover, though non-completion of investigation may be considered as incompetence on the part of the investigation officer,[62] this provision act as directory as no action has taken on this ground in practice.

Along with the regular investigation process as required by the CRPC, while dealing with a rape case, the WCRPA, 2000 requires that a DNA test has to be done for both victims and accused persons irrespective of their consent to such examination.[63] But mandatory inclusion of DNA test may amount to delaying the whole investigation process and create extra pressure on the investigation officer. Because, this test is not necessary in every case of rape. In particular, if the accused is detected, DNA test is of no help to the court to detect whether the sexual intercourse was consensual or not, an inevitable element to prove rape. Moreover, section 32 of WCRPA states that no consent is required either from victim or from accused before taking their samples for DNA test which is a clear contradiction with the DNA Act, 2014 which states that no person can be required to go for DNA test without his written consent.[64] The DNA Act states that in case of any conflict between the provisions of the Act and that of others, the DNA Act will prevail.[65] So the recent amendment of WCRPA requiring a mandatory DNA test with or without the consent of the parties concerned creates ambiguity in the criminal justice system in Bangladesh.

Conducting a thorough medical examination of the victim is required under the WCRPA, 2000 to document injuries, collect forensic samples, and evaluate the victim's overall health. This evidence is crucial for corroborating the victim's account during legal proceedings. But, often the process of medical examination is criticized as humiliating, degrading, and a violation of women and girls' fundamental rights to equality and dignity.[66] Examination by male doctors in many cases, in crowded hospital, delays and insensitive behaviors

61 WCRPA 2000, s 18.

62 Section 18(6), ibid.

63 Section 32, ibid.

64 The Deoxyribonucleic Acid (DNA) Act 2014, s 6.

65 ibid.

66 Staff Correspondent 'Two-Finger Test: It violates rape victims' basic rights' *The Daily Star* (Dhaka, 31 August 2023)1.

are often placed as criticism against this process.[67] Many women reportedly avoid undergoing the test because of its intrusive and degrading nature, which ultimately deprives them of justice.[68] However, the disgraceful two-finger test, applied during the medical examination of the rape victims, has been banned by a HC verdict in 2018 in the case BLAST and Others v Bangladesh. [69] The HC issued a guideline as to how to conduct the test with respect and sensitivity and includes direction to ban Two-finger test, to ensure consent and privacy and to provide trained professional to handle the examination.[70] But still this guideline has not been practiced at satisfactory level. Though the WCRPA, 2000 contains provision authorizing the tribunal to direct the concerned authority to take action against the doctor on the ground of negligence if medical test has not been done immediately,[71] this provision is rarely implemented in practice.

There is another area where women face challenge to access to justice. Under WCRPA legal action before the court can only be initiated with the written complaint or report of the authorized officials, who must be the police officer not below the rank of Sub-Inspector or any other persons especially empowered to do such report by the order of government.[72] In a country like Bangladesh, victims usually do not feel comfortable reporting the incidents to police because of distrust in them (police) or they feel feared that the perpetrators would retaliate against them for having reported the crime.[73] Moreover, because of conservative social set-up in Bangladesh, women are usually discouraged by society and the family members to report incidents of rape as they feel it will disgrace their family, their reputation, or police may not take their case seriously.[74] In that context, restricting direct access to courts and reliance on police authority solely create extra obstacles for women to get justice.

67 ibid.

68 ibid.

69 Bangladesh Legal Aid and Services Trust (BLAST) and Others v. Bangladesh. (HCD) 2013.

70 ibid.

71 WCRPA 2000, s 32.

72 Section 27, ibid.

73 Rosie Pasqualino, 'Will Bangladesh Ever See an End to Gender-Based Violence?' [website] (12 November 2020) <https://theowp.org/reports/will-bangladesh-ever-see-an-end-to-gender-based-violence> accessed 19 November 2024.

74 ibid.

Apart from poor investigation and lengthy procedure, another challenge that a victim may face is longer disposal time of a case. Though the WCRPA prescribes specific time limit for the disposal of cases, contains provision to take action against the responsible authority in case of failure to dispose of the case with in that time-limit, this provision appears to be directory in practice as cases seem to be pending before courts for years.[75] Apart from legal loopholes, some extra -legal factors are there that demotivate the witness, even the victim, to appear before the court causing delay in disposal of cases; such as, lack of confidence in police force because of their discourteous attitude towards victim, political influence, low morale of police, etc.[76] victims frequently encounter delays due to adjournments, time petitions, etc.[77] Hence, faulty and lengthy investigation in one side, and non-appearance of witness and repeated time petition on the other side, combinedly play role for such lengthy disposal. As a result, cases often exceed the prescribed time limit, leading to the release of the accused on bail.[78] Once released, the accused may attempt to influence the prosecution through threats and coercion. Eventually, when justice delayed and influenced, justice is denied. Moreover, there is little accountability or enforcement of actions against authorities for failing to complete trials within the stipulated period.

4.3. Punishment-centric philosophy

The criminal justice system in Bangladesh is predominantly punishment-centric, focusing on penalizing perpetrators only rather than addressing the root causes of violence. While penal philosophies worldwide have shifted from retribution to deterrence and ultimately to reformation and social integration of offenders, Bangladesh's approach remains fixated on stringent punishments such as imprisonment and the death penalty for severe crimes like rape and murder.[79] Bangladesh continues to respond to concerns about legal ineffectiveness by merely increasing punishment severity. For instance, in 2020, punishment for committing rape has been amended to death penalty from life imprisonment in the face of countrywide protest arose over increasing incidents of sexual violence. Despite the amendment, rape has not been controlled; rather

[75] Hussain Mohammad Fazlul Bari, 'An Appraisal of Criminal Investigation in Bangladesh: Procedure and Practice' (2015) 60(2) *Journal of the Asiatic Society of Bangladesh (Humanities)* 139–159.

[76] ibid.

[77] Human Rights Watch, '"I Sleep in My Own Deathbed": Violence against Women and Girls in Bangladesh: Barriers to Legal Recourse and Support' [Analysis] (29 October 2020) <https://reliefweb.int/report/bangladesh/i-sleep-my-own-deathbed-> accessed 19 November 2024.

[78] ibid.

[79] Faruque (n 24)

remains at alarming levels. According to a report of ASK, rape incidents have increases by 122 per cent in 2020, since 2018 and based on the news reports, it documented 732 rape incidents in 2018, 1,413 in 2019 and 1,627 in 2020.[80] This demonstrates that harsh punishments alone are ineffective as deterrents. Bangladesh's punishment-centric laws primarily focus on post-occurrence remedies, overlooking the social, political, and economic dimensions of crime.[81] Consequently, these laws fail to act as effective deterrents for future perpetrators.

4.4. Absence of gender-sensitive approach

The criminal justice system in Bangladesh is often blamed for its insensitivity and inaction towards victim protection.[82] Whereas it focuses heavily on guaranteeing certain safeguards for accused by embedding the plea of innocence, the principle of proving a case beyond reasonable doubt, rights against arbitrary arrest, right to fair trial, etc., it fails to prioritize the needs and safety of victims.[83] Rather, victims, including survivors of rape, are often left unprotected under the current legal framework, as there is not any specific law addressing protection and safety of the rape survivors.

Absence of a specific protection law for victims under the current legal framework reveals the insensitive justice system to support rape survivors. Moreover, in every stage of access to justice, ranging from reporting incidents at police station to undergoing an intrusive medical examination in a crowded hospital, mostly by male doctors, they(victim) may face discrimination, harassment causing 'secondary victimization' for the rape survivors. These experiences further traumatize victims instead of providing support and justice.

Such harassment may be lessened if the concerned authorities are properly trained to deal the rape cases with gender sensitivity. Frustratingly, laws addressing violence against women lacks to contain any provision for providing training of relevant personnel. Even when different government-initiated training is arranged, they often fail to attain expected result as the laws remain silent on reviewing and monitoring the outcome of such training.[84]

[80] Ain O Salish Kendra (ASK), 'Rape Incidents Have Increased by 122 Per Cent in 2020 Since 2018' (2020) <https://www.askbd.org> accessed 22 December 2024.

[81] Faruque (n 24)

[82] ibid.

[83] ibid.

[84] Zarizana Abdul Aziz and Janine Moussa, *Due Diligence Framework: State Accountability Framework for Eliminating Violence Against Women* (Global: Peace Women, 2016) <https://www.peacewomen.org> accessed 14 January 2025.

4.5. No effective reparation strategy

While accused's rights are well protected with different protection strategy, the rights of victims are mostly ignored in the criminal justice system in Bangladesh. Where punishment-centric criminal justice system deals with perpetrators, reparation strategy responds to victim's needs. Reparation measures aim to eliminate or mitigate the effects of violence suffered, ranging from monetary compensation to restitution or rehabilitation.[85] However, Bangladesh lacks laws that effectively address reparation strategy for rape victims.

The WCRPA, 2000 for the first time incorporated the provision for compensating victims of sexual and gender-based violence.[86] Despite to statutory mandate, there is not any substantive development in this area, and instances of awarding compensation are very rare.[87] In fact, the Act creates a room for exercising discretion on the part of tribunal to decide when and whether a fine can be converted into compensation for the victim, but it does not establish a standalone right to compensation.[88] The absence of a clear standard and guidelines for computation and awarding compensation, allows the judges remain passive and reluctant in awarding compensation in criminal cases, even when the law authorizes them to do so.[89] According to the report "No Justice without Reparation: Why Rape Survivors Must Have a Right to Compensation," published by the Bangladesh Legal Aid and Services Trust (BLAST) as part of the "Rape Law Reform Now" campaign, supported by the UN Women Combating Gender-Based Violence Project funded by Global Affairs Canada, the court has awarded compensation to victims in only 6.8% of rape cases in Bangladesh.[90]

Rape is a direct attack on human dignity which kills a women's many dignity related rights, such as personality, confidence, social acceptance, etc. Due to its invasive sexual nature, rape is specially traumatizing; it can cause deep physical, emotional and psychological trauma for years to come.[91] Apart from physical

85 Mostofa Hasan, 'Compensation for the Crime Victims', *The Daily Star*, (Dhaka, 9 January 2018) Law & Our Rights.

86 WCRPA 2000, s 15.

87 Taqbir Huda, 'BLAST Report: Compensation awarded in only 6.8% Rape Cases', *The Daily Star* (Dhaka, 7 March 2021) Law & Our Rights.

88 Hasan (n 85)

89 ibid.

90 Huda (n 87)

91 Action Aid, 'Rape and sexual assault'. [website], (31 January 2023), < https://www.actionaid.org.uk/about-us/what-we-do/violence-against-women-and-girls/rape > accessed 31 June 2023.

consequences, rape leaves a victim with mental effects of depression, suicidal thoughts or attempts, detachment including, not being able to focus on school work, as well as not feeling present in everyday situations.[92] Furthermore, the legal process itself can be re-traumatizing. In every stage of access to justice, ranging from reporting the violence incident to police station to undergoing an intimate medical examination in a crowded hospital, mostly by male doctors, they(victim) may face discrimination, harassment causing 'secondary victimization'. Therefore, apart from monetary compensation, a more holistic legal response is necessary; one that includes mandatory access to psychological counselling, trauma-informed judicial procedures, and confidentiality safeguards throughout the trial process, and on the other hand, establishing comprehensive rehabilitation programs, including educational and economic support for survivors, can significantly enhance their social reintegration.

4.6. No accountability mechanism: Absence of a strong accountability mechanism in the justice system remains a concern which ultimately allows to persist delayed investigation or disposal of cases, negligence in conducting medical examinations or providing other services to the victim. Though under the law, non-completion of investigation may be considered as incompetence on the part of the investigation officer,[93] this provision act as directory as no practical actions are taken for such failure. On the other hand, though law stipulates specific time limit to dispose of the case, in practice, trial remains pending for longer period. Despite of having provision to take action against such delayed disposal of cases, in practice, they are rarely enforced, leading to continued inefficiency and lack of accountability. While an effective accountability mechanism should include both answerability and consequences, existing laws covers only the 'answerability' aspects and lack provisions for consequences if they are found liable for such failure.

4.7. Lack of preventive approach: States are under obligation to prevent violence and eliminate all types of discrimination including socially constructed gender-based discrimination which would help eradicate rape including many other gender-based violence.[94]

The prevention strategy commonly includes training and education campaign, awareness programme and post-incident legal protection available through

92 Heart Foundation (n 14)

93 WCRPA 2000, s 18(6).

94 Aziz and Moussa (n 84)

appropriate legislation.[95] But, laws on gender-based violence in Bangladesh are mostly protective rather than preventive in response. Though government has taken many awareness generating initiatives by using media and other forms, such as, postering, seminar, etc., legislative provisions mandating these activities are substantially ignored in the legislative trend in Bangladesh.

5. Pathways to Reform: Strengthening Anti-rape laws

The alarming prevalence of rape occurrence demands an urgent need for comprehensive reforms to strengthen anti-rape laws to deliver justice to survivors, and create a safer society for women. To this end, the existing rape related legislation should be aimed at a reform by taking into consideration the loopholes associated. In reforming the anti-rape legislation, followings are the areas of intervention.

Redefining rape: The first area of priority intervention should be to redefining rape to expand the legal coverage of protection of women from this heinous crime. In the context of present penile-vagina interaction based narrow definition, rape should be redefined comprehensively so as to include all forms of penetration, through either penis or any objects other than penis or part of the body and the penetration takes place into the vagina, mouth, urethra or anus of a woman and the definition should also include any kind of manipulation of the women's body to cause such penetration. Penetration should be clearly explained and include appliance of mouth to the vagina, anus, urethra of a woman as 'penetration'.

The amended definition of rape should explain clearly what constitutes 'consent', a core element to decide whether rape occurs or not. Moreover, the age of the women to give consent to the particular sexual acts must be extended to eighteen years, in line with other consent related statutory provisions.

Criminalization of marital rape is another area of reform in rape laws. The present legal provisions stating that sexual intercourse by husband with his wife if the age is not under thirteen years of age, as rape, must be repealed and the relevant laws should be amended to this effect.

Enhancing justice mechanisms: Improving access to justice for victims of rape requires adequate legal protection, fair and just procedure, timeliness and

[95] ibid.

accountability and provisions for effective remedy and reparation.[96] To this end, the whole investigation process should be remodeled. A separate investigating body should be established who are assigned with women-related cases only and are well- trained and equipped to respond to all forms of violence against women, including rape cases more sensibly. This specialized section should have a significant percentage of female police officer and should be designed to provide expertise and psychological support and motivation to the investigation. Moreover, mechanism should be developed to ensure strict compliance with the disposal time as prescribed under the law, which is 180 days for rape cases. To this end, factors that cause delayed disposal should be identified and responded through legal reform.

The reporting of crime system and case filing system should be women friendly. Law should be amended to establish all-women police station (WPS) in every district who are trained to assist victim in filing cases and dealing them with gender-sensitivity. Introducing an online complaint mechanism and e-tracking system of the progress of the case should be considered fruitful in this area. Moreover, the discriminatory legal provisions that bar direct filing of cases before the court should be re- examined and should be removed.[97] Law should be reformed allowing the victim to avail direct access to court to file rape and other gender-based violence cases under WCRPA,2000.

Provisions for mandatory DNA test should be re-examined and reforms should take place to avoid unnecessary DNA test and requires the test only to detect the perpetrator or when the suspected denies his liability. Moreover, the medical examination of the rape victim should be conducted in a gender-sensitive way that would not affect the privacy or dignity of the victim. In this connection, the guidelines delivered by the High Court Division (HCD) in BLAST and others v Bangladesh can be taken into consideration.[98] In 2013, ASK along with others petitioners filed a writ petition challenging the 'two finger test', which is conducted during the medical examination of a rape victim. In August 2023, the full verdict has been published banning the disgraceful 'two finger test'. The judgment did not confine itself to banning the test only, rather proceeded with a direction as to how to conduct the medical examination of a rape victim in a gender-sensitive way. As per the guideline, with fully informed consent of the victims or the guardians, such examinations shall be conducted in the presence

96 Dr Shazia Choudhry, *Women's Access to Justice: A Guide for Legal Practitioners* (Council of Europe 2018) <https://rm.coe> accessed 10 December 2024.

97 The WCRPA 2000, s 27.

98 BLAST v. Bangladesh (n 69)

of a properly trained female police officer, a female relative of the survivor/victim and a nurse, preferably by female forensic experts/physicians.[99] To this end, Rule should be framed to form guidelines for the medical examination to be carried on in a respectful way.

Accountability and monitoring mechanism: An effective accountability mechanism should be developed to hold the concerned authority liable for unreasonable delay in investigation and disposal of cases. There should be a monitoring committee and monitoring cell which would be entrusted with the responsibility of supervision of the overall case proceedings. A monitoring committee should be formed comprised of concerned duty bearers which shall be assigned with the responsibility of ensuring proper service of summons to witness, safe appearance of witness on the hearing dates and monitor other issues for quick disposal of cases. The seven-point Directives given by the Supreme Court in the case *State* v. *Md. Ariful Islam and others* would be worthwhile to be referred to here, which forms significant guidelines to ensure quick disposal of rape cases and protection of witnesses.[100] The Directive suggests for District-level monitoring committees, which will have to be formed in every district so that the witnesses come to the court on hearing dates and their security is ensured.[101] Moreover, the committees will have to monitor the issue of a prompt use of summons calling up a witness.[102] It states for accountability of the monitoring committee as well in case the witnesses does not appear on hearing day.[103]Even the concerned public officials fail to appear to give testimony without satisfactory reasons, the tribunal may take actions against them, including withholding their salaries.[104]

Regarding the monitoring mechanism, it is worthwhile to refer here the HCD rulings delivered in 2016, in the case *Md. Milad Hossain* v*. The State*, that directed the formation of a monitoring cell, which is composed of the registrar general of the Supreme Court as head and two other representatives from law and home ministry.[105] The court in its ruling said the monitoring cell would review reports submitted by judges, public prosecutors and investigating officers on women

99 ibid.

100 State v. Md. Ariful Islam and others (Criminal Appeal No. 9135 of 2019).

101 Rezaul Karim, 'Rape Case: HC Directives on quick disposal just on paper', *The Business Standard* (Dhaka, 17 October, 2020).

102 ibid.

103 ibid.

104 ibid.

105 Md. Milad Hossain vs. The State, (Criminal Appeal No.4417 of 2016) 2016.

and children repression cases that have not been disposed of within six months, and notify the HCD and the cell would also recommend actions against the individuals responsible for the non-disposal.[106] Hence, these rulings, given by the HCD, can act as guideline to develop an effective accountability and monitoring mechanism in the justice system for a rape victim.

Establishing gender-sensitive justice system: As a part of reformative interventions to establish a gender-sensitive justice system, preserving victims' safety, dignity and integrity throughout the entire justice process must be prioritized. A victim-centric criminal justice system encouraging the victims to come, report and continue fearlessly with the justice process should be developed through enactment and implementation of protection laws. Acknowledging that the range of protection may differ depending on the need of the victim or witness, both civil and criminal protection measures should be made available. A specific legislation regrading victims and witness protection should be adopted. This law would allow institutional protection, emergency shelter, psychological support of survivors or witnesses and this institutional protection would continue till the victim (survivor) and the witness would not be under any threat.

In 2006, the Law Commission of Bangladesh proposed a law on victims and witnesses' protection. Later, based on another report of the Law Commission, the government drafted *the Witness Protection Act* in 2011. Then, in 2015, responding to a Writ Petition filed by BNWLA in 2010, the High Court Division ordered the government to enact a law to protect the victim and witness of sexual harassment.[107] Again, in 2017, the Witness Management Policy for subordinate Courts and Tribunals, 2017 was drafted.[108] Despite all these steps, it is regretting that no witness protection law or scheme has been yet to take effect.

Victim compensation and reparation: The present punishment-centric philosophy in the criminal justice system in Bangladesh should be re-examined. Without focusing on stricter punishments only, initiatives should be taken to establish a strong reparation strategy addressing the victim's demand as suited to the nature and gravity of offence. Compensation needs to be considered as a component of reparation strategy. Ffurthermore,

106 ibid.

107 S M Mahbubullah, 'The State of witness protection in Bangladesh', *The Daily Star* (Dhaka, April 7, 2023) Law & Our Rights.

108 ibid.

the existing provisions of WCRPA, 2000, should be amended to establish compensation for rape victims/survivors as a guaranteed right rather than leaving it to judicial discretion.[109]

A separate law should be in place to regulate compensation scheme for rape survivors. In 2007, the Law Commission proposed a draft law, the Crime Victims Compensation Act which mandates for the formation of "Crime Victim Compensation Fund" in every district.[110] A Victim Services Committee (VSC) was recommended to be formed which would determine compensation approval, amount, recipients, and payment methods.[111] Hence, initiatives should be taken to give effect to this proposed law with required amendments to address the evolving demands of victim compensation.

Shifting from protection to prevention: The present protective approach of anti-rape legislation should be shifted to preventive approach. Here, creating awareness should be applied as a key prevention strategy. When legislation has been enacted, a provision for awareness intervention should be incorporated to ensure that everyone should know the law regarding what constitutes rape, what are the consequences to be faced by perpetrator, etc. Starting from school-level interventions, public and private efforts including dialogues, debates, and other media roles by the government and the mass public must be taken in relation to spreading awareness. An express provisions mandating awareness generation would ensure to promote gender equality and respect for women, that will result in lessening the rape occurrence.

5.1. Learning from Regional Legal Reforms

Anti-rape legislation in Bangladesh requires a comprehensive and integrated approach to ensure that victims have effective access to justice. In response to increasing demands for reform, comparative analysis of anti-rape laws in neighboring countries can provide valuable insights for Bangladesh. Countries such as India, Pakistan, and Nepal, which share similar legal legacies and socio-cultural contexts, and same regional dynamics have made notable legal developments that may guide effective reforms in Bangladesh.

In Bangladesh, the definitional scope of rape has long been criticized for being narrow and conservative, excluding several forms of penetration from the legal definition of rape. In contrast, India has significantly modernized its rape laws through the Criminal Law (Amendment) Act, 2013. This reform expanded

[109] Huda (n 87)

[110] Nilima Jahan, 'Crime Victims Compensation Act: A law that never saw the light' *The Daily Star* (Dhaka, 25 Nov. 2023).

[111] ibid.

the definition of rape under Section 375 of the Indian Penal Code (IPC), 1860, to include not only vaginal penetration but also oral, anal, and urethral penetration.[112]

Section 375 of IPC outlines seven situations under which if penetration takes place, rape commits; these are, against her will, without her consent, or with her consent which is obtained by fear of death or fraudulently make her believe that she is lawfully married with perpetrator, or she is in unsound or intoxicated condition or in a position not to communicate consent.[113]

Moreover, keeping in pace with today's different perverse sexual behavior, it states that insertion of any body part or object (other than the penis) to any extent shall amount to rape.[114] That means fingering the vaginal, urethral or anal orifice or insertion of any sex-toy or object of the same may amount to rape under the present definition. The IPC clearly states that if a man orally stimulates the vagina, urethra, mouth or anus of the victim, rape commits.[115] Finally, IPC prescribes the standard age of giving consent which is 18 years which is internationally recognized age of adulthood.[116]

The IPC has given fullest effort to highlight what constitutes 'consent' a decisive factor to prove rape. The IPC views consent as 'no consent' if it is obtained by fear of death or hurt or the giving consent is not in condition to understand the consequence of consent.[117] Moreover, it attempts to give a clear explanation regarding what constitutes consent and takes a strong stand stating that absence of physical resistance to the penetration cannot be considered as consent to the rape.[118]

Despite these advancements, Indian law still does not criminalize marital rape, maintaining an exception for sexual acts with a wife above the age of 15.[119] However, the Protection of Children from *Sexual Offences Act (POCSO)*, 2012, effectively raised the age of consent to 18 for all individuals, including married girls.[120]

112 Indian Penal Code (IPC) 1860, s 375.

113 ibid.

114 ibid.

115 ibid.

116 ibid.

117 ibid.

118 ibid. Section 375, Explanation 2.

119 ibid. Section 375, Exception 2.

120 Taslima Yasmin, 'Rape of a Child Bride: Laws locked in a time erap', *The Daily Star*, (17 November 2020), 9.

Pakistan, which shares a similar colonial legal legacy, made a notable reform in 2006 by removing the marital rape exemption from its Penal Code-an area where India continues to lag behind.[121] Pakistan has passed separate laws at both the federal and provincial levels to ensure witness protection.[122] Nepal, meanwhile, has taken steps to protect victims through enactment of *the Crime Victim Protection Act*, 2018 which is an essential component in ensuring successful prosecution and access to justice in sexual violence cases.

India also has institutional mechanisms such as the National Commission for Women (NCW), a statutory body that plays a significant role in reviewing legal provisions for women's rights, handling complaints, and advising the government on policies affecting women.[123] This body could serve as a model for institutional reform in Bangladesh.\Another notable development in India is the inclusion of compensation as a victim right. The Code of Criminal Procedure (CrPC), 1973 was amended to insert section 357 A empowering courts to award monetary compensation to victims.[124] Section 357A of the CrPC mandates that each State Government, in coordination with the Central Government, establish a compensation scheme for victims requiring rehabilitation.[125] This led to the establishment of the Central Victim Compensation Fund Scheme in 2015, which ensures financial support for rape survivors regardless of whether the offender is convicted.[126]

121 The Protection of Women Act, (Pakistan), 2006 attempted to repeal anti-women rape laws and amend the infamous Hudood Ordinance by reintroducing the rape laws from the commonly inherited colonial Penal Code. While reinserting section 375, the Pakistan Parliament quite simply removed the exemption clause from it, thereby relinquishing the legal safeguard that was enjoyed by husbands who raped their wives. See also, Why is marital rape still legal in Bangladesh? By Taqbir Huda, July 26, 2017, Law & Our Rights.

122 The Federal law on Witness protection was enacted on 7th June 2017. The legislation is named as the Witness Protection, Security and Benefit Act, 2017. The law is not applicable to the provinces. It applies to the Islamabad Capital territory. Sindh, Punjab enacted separate witness protection law to be applied to the respective province.

123 The National Commission for Women Act. (India), 1990.

124 The CrPC. (India). 1973. s. 357 A.

125 ibid.s.357 A.

126 Taqbir Huda, 'The court has awarded compensation to victims in only 6.8% of rape cases in Bangladesh', in *Combatting Gender Based Violence Project Funded by Global Affairs Canada*. (Bangladesh: UN Women, 2021), < https://blast.org.bd > accessed 22 December 2021. See also, Taqbir Huda, 'BLAST Report: Compensation awarded in only 6.8% Rape Cases', *The Daily Star*, (7 March 2021).

6. Conclusion

The existing anti-rape legislation in Bangladesh is often termed as discriminatory in nature, as it remains conservative in recognizing many abusive acts as rape, and this conservative approach has its roots in age-old socio-cultural and religious belief regarding stereotyped gender roles and gender relations. Moreover, the complex procedure throughout the journey to justice, often causing delays in investigation and disposal of cases, lack of effective accountability mechanisms, absence of a gender-sensitive justice system, etc., affects fair access to justice. So, there is a pressing demand to review the existing anti-rape legislations not only to ensure equal access to justice for victims of violence but also to significantly prevent the occurrence of such heinous crimes.

A comprehensive reform agenda is essential that involves broadening the scope of rape that includes all forms of penetration and criminalization of marital rape. A gender-responsive procedural setup should be in place to ensure that gender perspectives are integrated into the investigation process, medical examination, and other stages of justice, which ultimately results in the timely disposal of cases. Moreover, clear compensation and witness protection frameworks and stronger accountability measures will further promote fairness and deter perpetrators. Progressive legal developments adopted in neighboring jurisdictions can serve as a comprehensive reference point for reforming anti-rape legislation in Bangladesh. By learning from regional advancements, Bangladesh can establish a legal framework that is both victim-cent red and aligned with international human rights standards.

Acknowledging the fact that only legal reform is not enough to deal with rape occurrence, initiatives should be taken to achieve a violence-free society for women through cultural transformation. Preventive strategies that involve different awareness campaigns must complement the reform agenda to bring social change that will positively contribute to the reduction of rape. In brief, to establish an effective anti-rape legislation, the state must ensure adequate legal protection for rape victims /survivors, prosecute and punish the perpetrators in a way that will deter future crimes, prevent repetition of the same crime, provide adequate reparations to victims/survivors to rebuild their lives and address women's societal fears through prevention campaigns.[127]

[127] Aziz and Moussa (n 84)

Impact of the *Gambia Case* on the Voluntary Repatriation of the Rohingya Refugees in Bangladesh

A.B.M. Imdadul Haque Khan*

Abstract

Rohingya crisis remains among the most scorching humanitarian emergencies in the globe, having with over 1.2 million refugees in today's Bangladesh who had to escape persecution by Myanmar. This article offers an analysis regarding the claim submitted by the Gambia before the International Court of Justice ("ICJ"). Here repatriation may trigger significant outcomes of the Rohingya people as refugees. The article also discusses the systematic persecution of the Rohingya and the persistent failures of the previous repatriation efforts, tainted by safety risks and Myanmar's failure to achieve global standards. The study additionally considers the means of enforcing ICJ rulings as well as the part played by the UN Security Council ("UNSC") in this process. The analysis identifies the potential of ICJ decisions to spur states to comply and the natural limitations of enforcing such decisions. The article argues that the doctrine of voluntary repatriation is in alignment with the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"). Additionally, the goal is firmly rooted in customary international law ("CIL"), backed by state practice and United Nations High Commissioner for Refugees ("UNHCR") guidelines. It also argues that an effective ICJ ruling in favor of The Gambia has the potential to compel Myanmar to establish safe conditions for the Rohingya and, as such, mobilize the global effort towards an organized solution to the crisis. The article concludes by proposing an integrated approach to the Rohingya crisis through repatriation and resettlement/ integration techniques. The significance of the matter transcends the immediate plight that the Rohingya people are confronted with, offering the international community a guideline for addressing the crime of genocide and the quest for justice for minority groups everywhere.

Keywords: Actio Popularis, Bangladesh, Genocide, Obligation, Refugees, Repatriation, Rohingya.

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Introduction

The crisis affecting the human welfare of the Rohingya people remains a prominent example of the most acute globally, with over 1.2 million refugees residing in Bangladesh after systematic persecution in Myanmar. Globally recognized as a Muslim minority with a history of settled habitation in Myanmar's Rakhine State, the Rohingya, have yet to be given official recognition or citizenship, particularly after the imposition of the 1982 Citizenship Law, making them the largest stateless group on earth.[1] During the case of devastation, about 10,000 Rohingya people including babies, children, girls, and women, were murdered, and more than 300 villages were destroyed. The government has been responsible for acts of brutality and discrimination against them and systematic persecution by the state and parts of the majority population for decades, as illegal immigrants.[2] The brutal spike in violence in August 2017, marked by mass killings, sexual violence, and the burning of villages, led to the forced displacement of over 742,000 Rohingya, mostly unregistered, into neighboring Bangladesh, swelling the refugee population there.[3] These acts, characterized by killings, causing physical or psychological damage, and creating circumstances designed to destroy the group physically, and preventing births, all unambiguously point to actions carried out with the goal of wiping out the Rohingya group, which is known as genocidal intent, and constitutes an evident transgression of the 1948 Genocide Convention, signed and ratified by Myanmar.[4]

This article examines the potential impact of the historic case initiated by The Gambia and Myanmar about Rohingya refugees in Bangladesh choosing to go back to Myanmar. The article begins by tracing the history of the crisis and the legal basis for genocide charges. The analysis subsequently gives an overview setting forth the substance of Gambia's application, evidence presented of genocidal intent based to a large extent on UN reports, Gambia's claims for relief such as cessation of violations and reparations to facilitate safe return, and Myanmar's objections raised at the outset regarding jurisdiction and admissibility.

1 UNHCR, 'Rohingya Refugee Crisis Explained' (unrefugees.org, 2023) <https://www.unrefugees.org/news/rohingya-refugee-crisis-explained/> accessed 20 January 2025.

2 'Six Years On, a Solution to the Rohingya Crisis Is Still Elusive' *The Daily Star* (11 August 2023) <https://www.thedailystar.net/opinion/views/news/six-years-solution-the-rohingya-crisis-still-elusive-3387131> accessed 22 January 2025.

3 Agence France-Presse, 'Bangladesh plans to move Rohingya refugees to island in the south' *The Guardian* (28 May 2015) <https://www.theguardian.com/world/2015/may/28/bangladesh-plans-to-move-rohingya-refugees-to-island-in-the-south> accessed 18 May 2024

4 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 ("Genocide Convention").

The article also discusses the current Rohingya repatriation issues, such as previous failed attempts because of ongoing safety risks in Myanmar and the state's unwillingness to facilitate a return that is safe, respectful, and voluntary. It analyzes the UN Charter mechanisms for the enforcement mechanisms for ICJ judgments, highlighting the UNSC's role and limitations, and referencing historical precedents for enforcing ICJ rulings.

One of the key arguments of this article is that the principle of voluntary repatriation is an inherent objective of the Genocide Convention and constitutes an established norm of CIL, grounded through state practice as well as UNHCR guidelines. It contends that a positive ICJ ruling, determining Myanmar was found to infringe upon the Genocide Convention, can have the effect of sharply increasing pressure on Myanmar to end continuing abuses, bring perpetrators to justice, and establish the conditions for voluntary return. This could galvanize international efforts towards a sustainable resolution.

Finally, the article ends by advocating for a coordinated response to solving the Rohingya crisis, suggesting that while a positive ICJ outcome can be an effective catalyst for voluntary repatriation, it should be paired with resettlement and local integration policy where required. The significance of the ICJ case, therefore, transcends the Rohingya's immediate crisis in setting a vital precedent for international responsibility for genocide and protection of vulnerable minority groups everywhere.

International Justice Mechanisms and the Rohingya Crisis: The *Gambia v. Myanmar* Case and Repatriation Efforts

Application of the Gambia

There has been a glaring lack of accountability in relation to genocide and crimes against humanity inflicted upon the Rohingya people. An independent human rights analyst has condemned the global community for its inability to fulfill its responsibility to the Rohingyas, highlighting the fact that the situation in Myanmar has not yet been submitted before the ICC by the UNSC six years post-event, although there is ample evidence to corroborate the commission of atrocity crimes.[5] Under these circumstances, Bangladesh has suffered the most. The then Prime Minister categorically

[5] UN News, 'Myanmar: Bachelet Calls for Stronger International Action amid Rohingya Crisis' (UN News, 25 August 2023) <https://news.un.org/en/story/2023/08/1140032> accessed 26 January 2025.

argued that Bangladesh had welcomed the Rohingyas on humanitarian grounds and expressed heartfelt appreciation to the Cox's Bazar residents for their patience during the crisis unleashed by the inflow of the Rohingyas.[6] She further noted that 'Rohingyas are a big burden to Bangladesh. Cox's Bazar local people are to suffer because of them (Rohingyas), Myanmar should take them back.'[7] A sequence of reports of investigations attests to the assertion that the actions of Myanmar amount to genocide, an area that shall be further examined in this article. In turn, Bangladesh has not yet pursued proper redress regarding Myanmar's Genocide Convention violations, as it has retained its stance as per Article IX, which authorizes State Parties to initiate proceedings.[8]

The case was brought before the ICJ in which it was argued that Myanmar was unmistakably contravening the Genocide Convention and directly held Myanmar responsible for all such genocides. Myanmar's actions also constitute infringements of core responsibilities under the Genocide Convention, which include efforts and plots to carry out genocide, incitement to genocide, complicity in its commission, and neglecting to prevent it or bring the perpetrators to justice.[9]

Gambia recognizes the vital function as custodian of the Genocide Convention since there is no other global crime court to impose liability on individuals for the crimes as specified in the application concerning genocide. In assisting the Court to complete its vital responsibility, the Application brings to them an extensive summary of the history and material facts relevant beyond the regular requirement.[10] It is, however, disheartening that Bangladesh has not yet actively engaged in joining the proceedings. Bangladesh is allowed to join the controversy and be heard on the case should it join the case, according to the terms in Articles 62 and 63 contained within the ICJ Statute[11] since it is not an original party to the controversy.[12] Article 63[13] is an intervening interpretive tactic

6 Staff Correspondent, 'Rohingyas, a Big Burden for Bangladesh: PM' *The Daily Star* (28 September 2019) <https://www.thedailystar.net/rohingya-crisis/rohingya-refugees-big-burden-bangladesh-1802272> accessed 25 January 2025.

7 Ibid.

8 Genocide Convention (n 4) Art IX.

9 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Preliminary Objections, Judgment) [2022] ICJ Rep 479, [2].

10 Ibid.

11 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI Arts 62, 63 ("ICJ Statute").

12 Khan Khalid Adnan, 'Bangladesh & The Gambia v Myanmar' *The Daily Star* (11 July 2023) <https://www.thedailystar.net/law-our-rights/news/bangladesh-the-gambia-v-myanmar-3413701> accessed 26 January 2025.

13 ICJ Statute (n 11) Art 63.

that offers an avenue to develop the common interests of states participating in the system for resolving disputes between two parties.[14] Prior to the 2022 case of Ukraine v Russia, the intervention provision in the Court's Statute had been rarely utilized.[15] In the case, of 33 states, all signatories to the Genocide Convention submitted their requests for intervention. In the wake of the recent ruling on June 5, 2023, the Court found the admissibility of these declarations.[16] They accepted all the pronouncements on the interpretation regarding Article IX[17] as well as the stipulations of the Genocide Convention, with the exception of the US's declaration.[18] The US's intervention was held to be inadmissible on the ground of its reservation to Article IX[19] (referenced in paragraphs 93-99). The notable intervention in the proceedings involving Ukraine and Russia is held to be an encouraging pointer to the case of the *Gambia v Myanmar*, considering that all the cases are grounded in the Genocide Convention.[20] But according to the Court's recent decision, Bangladesh cannot intervene under Article 63 [21] since, concerning the provisions of Article IX in the Genocide Convention, this reservation resembles the reservation entered by the United States.[22]

This article is dedicated to investigating the impact of the case addressing the voluntary return of Rohingya refugees currently in Bangladesh. The concerned global community is anxiously awaiting Myanmar to cease committing this atrocity on the global stage and open the gate to the Rohingyas to travel to the land of their birth. Various attempts were made in this direction. Nevertheless, Myanmar never thought to explore the possibility granting the Rohingyas safe and terror-free conditions to return to their land of birth. Abdul Jalil, one of the Rohingya refugees, stepped forward to express, 'We want to return to Burma [Myanmar] as it is our motherland, we were born and brought up there. But we experienced nothing but atrocities there, and it turned into a 'death hole' for us.'[23] This statement is sufficient to prove that the primary obstacle to the voluntary

14 Ibid.

15 Ibid.

16 Ibid.

17 Genocide Convention (n 4) Art IX.

18 Ibid.

19 Ibid.

20 Ibid.

21 ICJ Statute (n 11) Art 63.

22 Ibid.

23 Nasir Uddin, 'Ongoing Rohingya Repatriation Efforts Are Doomed to Failure' *Aljazeera* (22 November 2018) <https://www.aljazeera.com/opinions/2018/11/22/ongoing-rohingya-repatriation-efforts-are-doomed-to-failure> accessed 26 January 2025.

repatriation of the Rohingyas is the refusal of Myanmar to offer them asylum and other rights according to the constitution.

This article will explore whether the case can provide an effective remedy to the Rohingya people.

Proof of Genocide

In the cause of doing justice to the Rohingyas, the primary and most important responsibility of Gambia is to establish that Myanmar's actions had a genocidal character. In aid to the above objective, the Application filed by Gambia argued that various UN investigations had established the genocidal intent behind the said crimes.[24] Ms. Yanghee Lee, the Special Rapporteur on human rights in Myanmar, undertook a comprehensive fact-finding concerning Myanmar's operations targeting the Rohingya. He provided direct testimonies of 'attacks in which homes were set ablaze by security forces, in many cases with people trapped inside, and entire villages were razed to the ground.' [25]

Paragraph 9 of the Application claims that Mr. Adama Dieng, in his capacity as UN Special Advisor on the Prevention of Genocide, during the fact-finding mission, incorporating accounts gathered from survivors, asserted that the Rohingya Muslims were subjected to killing, torture, rape, burning, and humiliation due to their identity. Everything I've learned indicates the perpetrators sought to drive them out of the northern state of Rakhine and perhaps even exterminate the violent acts directed toward the Rohingya community, as confirmed, constitutes a crime of genocide.[26]

Paragraph 10 of its application, Gambia describes the specific reasons for the significance of the Independent International Fact-Finding Mission ("FFM") of the UN Human Rights Council. It came into being as tensions towards the Rohingya

[24] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Application Instituting Proceedings and Request for Provisional Measures (11 November 2019) [15]; Human Rights Watch, 'Developments in Gambia's Case Against Myanmar at the International Court of Justice' *Human Rights Watch* (14 February 2022) <https://www.hrw.org/news/2022/02/14/developments-gambias-case-against-myanmar-international-court-justice> accessed 05 May 2025.

[25] Yanghee Lee, 'Statement by Ms Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar' (Speech at the 37th session of the Human Rights Council, 12 March 2018) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22806&LangID=E> accessed 27 January 2025.

[26] Adama Dieng, 'Statement by Adama Dieng, United Nations Special Adviser on the Prevention of Genocide, on his visit to Bangladesh to assess the situation of Rohingya refugees from Myanmar' (UN Note to Correspondents, 12 March 2018) <https://www.un.org/sg/en/content/sg/note-correspondents/2018-03-12/note-correspondentsstatement-adama-dieng-united-nations> accessed 27 January 2025.

were escalating and had the mandate 'to determine the facts and circumstances of the reported recent human rights violations committed by military and security forces, and abuses, in Myanmar, particularly in Rakhine State.'[27]

In para 12, Gambia submits that, the FFM, through its collection and analysis of evidence, determined in the comprehensive findings report presented to the UN Human Rights Council ("UN HRC") a given 'the factors allowing the inference of genocidal intent are present.' Citations of Mr Adama Dieng, the UN Special Rapporteur, the UN HRC, and the FFM affirm that Myanmar's actions constitute the crime of genocide.

Claim of Gambia

By this filing, Gambia respectfully seeks a finding through the ICJ that Myanmar has contravened the Genocide Convention, particularly regarding stipulations found in Articles I, III (a)-(e), IV, V, and VI, and the fact that these infringements continue;

i. Myanmar must immediately stop its ongoing wrongful actions and completely perform its responsibilities under the Genocide Convention, focusing on those outlined in Articles I, III (a)-(e), IV, V, and VI;

ii. Myanmar will take legal action against those who committed genocide in a competent court, such as via an international criminal tribunal, as per the provisions of Articles I and VI;

iii. Myanmar will make reparations to the victims of genocide affecting the Rohingya population, notably actions like ensuring their safe and dignified repatriation, upholding their rights to citizenship and their basic human rights, and ensuring their protection from any form of discrimination or persecution, in line with its responsibility, as stipulated in Article I, to stop genocide;

iv. Myanmar is obligated to give assurances and guarantees that there will be no recurrence of infringements of the Genocide Convention, notably covering the responsibilities under Articles I, III (a)-(e), IV, V, and VI.

[27] UN Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* UN Doc A/HRC/39/64 (12 September 2018) para 4; UN Human Rights Council, *Detailed Findings of the Independent International Fact-Finding Mission on Myanmar* UN Doc A/HRC/39/CRP.2 (18 September 2018) 4.

Reply of Myanmar

In para 10 of the Preliminary objection, Myanmar has raised four preliminary objections separately. All four objections are preliminary in nature. If any of these objections are held by the Court to be well-founded, the proceedings will be discontinued, the Court is not authorized to scrutinize the key aspects of the case, or the application as a whole cannot be accepted.

i. The initial argument is that this court lacks the authority to decide the case, or if that is not possible, that the application should be deemed inadmissible, given that the true applicant here is the Organization of Islamic Cooperation ("OIC"). Alternatively, the application shouldn't be accepted for the same reason – the OIC being the true applicant. Given that the ICJ Statute, Article 34(1) stipulates that '[o]only States may be parties in cases before the Court,' which is not permitted to judge a case within its contentious jurisdiction actually brought by an international organization.[28]

ii. The second initial argument is that The Gambia, because it's a country that signed the Genocide Convention but isn't a direct victim in this situation, doesn't have the entitlement to take legal action against Myanmar pursuant to Article IX[29] in line with the Convention, which prevents a legal action brought on behalf of an *actio popularis*.[30]

iii. The third initial argument is that The Gambia, since it's not a country directly harmed by the alleged genocide, is not permitted to pursue this matter against Myanmar based on the Genocide Convention. This stems from Myanmar having made a reservation concerning Article VIII at the time it joined the Convention.[31]

iv. The fourth initial argument is that this court doesn't have the authority to hear the case, or that the application shouldn't be accepted, because The Gambia and Myanmar weren't actually in a dispute when the application to start proceedings was filed. It's The Gambia's responsibility to prove that a dispute did exist.[32]

28 *The Gambia v Myanmar* (n 9) [25].

29 Genocide Convention (n 4) Art IX.

30 Ibid.

31 Ibid.

32 Ibid.

Analysis of the Jurisdiction and Legal Standing

This case cannot possibly assist in the repatriation of Rohingyas if the ICJ is not empowered to consider this case, since it does not have jurisdiction over it. In the application, the Gambia presented its case and attempted to confirm the jurisdiction of the case. They specified in their application that both states, the Gambia and Myanmar, have acceded to the Genocide Convention.[33] Article IX[34] reads: 'disputes between Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State under Article III, [35] shall be referred by any of the parties to the dispute to the ICJ at the request of such party.'[36]

To the extent that jurisdiction is involved, Gambia, in para 20 of its application, contends that, the prohibition against genocide is a basic and inalienable rule under international law, and the Convention imposes obligations as *erga omnes* and *erga omnes partes*,[37] Gambia has specifically informed Myanmar's actions reflect an evident infringement of its responsibilities under the Convention. Myanmar has opposed and disproven claims of violating the Genocide Convention's provisions. Similarly, para 21 stipulates that the FFM expressed support for initiatives by 'the Gambia and the OIC to promote and pursue a case against Myanmar before the ICJ under the Genocide Convention.'[38]

Accordingly, in accordance with the ICJ Statute,[39] Article 36(1)[40] and Genocide Convention, Article IX,[41] , the ICJ is empowered to consider allegations as described in the case currently underway between the Gambia and Myanmar. The Court, in its 1951 decision about "objects" of the Genocide Convention, held that it was obviously taken up for the exclusive purpose of promoting humanitarian and civilizing efforts. It's challenging to picture a convention

33 *The Gambia v Myanmar* (n 9) [17].

34 Genocide Convention (n 4) Art IX.

35 Genocide Convention (n 4) Art III.

36 Ibid, 18.

37 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 3, [85]-[88]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, [161].

38 UN Human Rights Council, D*etailed Findings of the Independent International Fact-Finding Mission on Myanmar* UN Doc A/HRC/42/CRP.5 (16 September 2019) [40].

39 ICJ Statute (n 11) Art 36(1).

40 Ibid.

41 Genocide Convention (n 4) Art IX.

with such a twofold character to a larger extent because, from one perspective, it aims to secure the persistence of existence of particular human groups; conversely, it strives to support and legitimize the core moral tenets. This convention states that the states that are parties to it have no vested interests of their own; they have, all of them, only one common interest, and that is the achievement of those significant goals that are the fundamental aim of the convention.[42] Para 123 below further discusses that; the Court has recognized on multiple instances that 'the norm prohibiting genocide [is] assuredly a peremptory norm of international law (*jus cogens*)'[43] and that 'the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*.'[44] Thus, every State possesses a legitimate concern in safeguarding the rights being discussed.[45]

The Politics and Practicalities of Rohingya Repatriation

Failed Efforts of Repatriation

It has been more than eight years since Bangladesh has been sheltering more than 1.2 million Rohingya refugees. Two previous repatriation efforts were halted in 2018 and 2019.[46] In November 2022, Bangladesh and Myanmar made efforts to send Rohingya refugees back to Myanmar, but were forced to halt the plan in response to overwhelming global pressure.[47] Myanmar's government had already cleared over 3,000 Rohingya to return, but not a single refugee volunteered to board the buses that were going back to Myanmar.[48] Another effort to return the thousands of Rohingya Muslims who sought refuge in Bangladesh after escaping Myanmar has failed because the government couldn't reassure the refugees

[42] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.

[43] *Bosnia and Herzegovina v Serbia and Montenegro* (n 37) [161]; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility, Judgment) [2006] ICJ Rep 6, [64].

[44] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Preliminary Objections, Judgment) [1996] ICJ Rep 595, [31]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 3, [87].

[45] *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase, Judgment) [1970] ICJ Rep 3, [33].

[46] 'Six Years On, a Solution to the Rohingya Crisis Is Still Elusive' (n 2).

[47] Uddin (n 23).

[48] Associated Press, 'Rohingya Refugees Turn Down Second Myanmar Repatriation Effort' *The Guardian* (22 August 2019) <https://www.theguardian.com/world/2019/aug/22/rohingya-refugees-turn-down-second-myanmar-repatriation-effort> accessed 26 January 2025.

about the safety of their return. 'The majority of Rohingya who participated in the intention survey made it very clear that they were extremely fearful of their physical safety in Rakhine, and this is the significant reason why they do not wish to go to Myanmar at present' - Mohammad Abul Kalam, who serves as Bangladesh's refugee relief and repatriation commissioner. [49] So, it is very clear that for initiating successful repatriation, the fear of persecution needs to be removed first. To do that, Myanmar should be brought to justice for breaching its commitments.

Enforcement mechanism of the ICJ's verdict

The ICJ contains a single provision that addresses the enforcement of its ruling under the United Nations Charter ("UN Charter"), Article 94.[50] It stipulates that 'Each Member of the United Nations undertakes to comply with the decision of the ICJ in any case to which it is a party.' [51] It also oppositestates that if a party fails to comply with its obligations, the opposing party may approach the UNSC. The UNSC may then recommend or determine what steps should be taken to ensure the judgment is enforced.[52] It is restricted to peaceful means, though, and the UNSC ought not to alter the judgments of the ICJ.[53] The phrasing of this article makes clear that judgments can only be enforced, and only the injured party may request redress.[54] In addition, it is for the UNSC to determine if and how to act. There were already some apprehensions at the San Francisco Conference in relation to the ICJ's separation from the UNSC.[55] C. Schulte concludes that a monitoring mechanism of compliance in an orderly manner may prove more promising than enforcement.[56] A. Tanzi argues that since there does not exist a systematic mechanism of enforcing ICJ judgments, self-regulation stands as one of the most powerful means of guaranteeing the enforcement of judgments. [57] Practically, Article 94(2) of the Charter of the

[49] Ibid.

[50] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art 94(2).

[51] Ibid.

[52] Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (OUP 2004) 47.

[53] Ibid 48-52.

[54] AP Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2007) 18 EJIL 815, 822.

[55] Attila Tanzi, 'Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations' (1995) 6 EJIL 539, 541.

[56] Schulte (n 52) 58-60.

[57] Tanzi (n 55) 539.

United Nations[58] is rarely invoked (*Bosnia-Herzegovina case,*[59] *Anglo-Iranian case*[60]).

The ICJ does not possess the jurisdiction to enforce its verdicts in case they are not followed. The sole enforcement authority in the UN system is the UNSC, which is also the leading political structure within the organization.[61] Article 60 of the Statute declares that the judgment is final and not appealable.[62] In accordance with Article 61 of the ICJ Statute, the Court alone holds the authority to revise its rulings.[63] While under Sub-article 3 the Court can require compliance with its judgments before it makes any revisions, the Court has no power of enforcement.[64] There are, however, some limitations to the enforcement process of the ICJ ruling. In the *Anglo-Iranian case*, the enforcement concern was centered around interim measures. Interim measures are not addressed by Article 94(2), which deals only with judgments,[65] that were contentious in terms. The President's interpretation of the resolution was presented to the UNSC under the provisions of Article 94(2) of the UN Charter,[66] due to the US veto, it was not adopted. [67]

Plausible Outcome of the Gambia Case: Why Repatriation

The controversy involving the Gambia and Myanmar concerning how to understand and use the Genocide Convention and whether Myanmar is fulfilling its commitments regarding the prevention of genocide and cease genocidal practices, alongside Myanmar's responsibility to compensate victims and to promise and ensure that such acts will not happen again.[68]

58 UN Charter (n 50) Art 94(2).

59 *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits, Judgment) [1986] ICJ Rep 14.

60 *Anglo-Iranian Oil Co Case (United Kingdom v Iran)* (Interim Protection, Order) [1951] ICJ Rep 89.

61 Tanzi (n 55) 542.

62 ICJ Statute (n 11) Art 60.

63 Ibid Art 61.

64 Ibid Art 61(3).

65 UN Charter (n 50) Art 94(2).

66 Ibid.

67 Tanzi (n 55) 545.

68 *The Gambia v Myanmar* (n 9) [23].

Repatriation is compatible with the Object of the Genocide Convention

The Vienna Convention on the Law of Treaties (VCLT), under Article 31,[69] demands the sincere interpretation of treaties, based on their usual meaning within their context, and considering what they aim to achieve.[70] The context of a treaty can be found in a preamble or any attachments to a treaty or agreement made between the parties before or after the treaty, and any applicable legal frameworks in international law. If meaning remains ambiguous, resort can also be an auxiliary means of interpretation, namely, references to the *travaux preparators* (similar to legislative history) concerning the treaty and the conditions under which it was adopted.[71] The Court has accepted that the correct interpretation for all States Parties, the Genocide Convention, is of paramount importance.

The Genocide Convention, referring to the "objects" in connection, the ICJ remarked that "for a purely humanitarian and civilizing purpose," stating the Convention has as "its object on the one hand to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality."[72] In this respect, nations that have ratified the Genocide Convention 'have no interests of their own; they have only, one and all, a common interest, namely, the realization of those high purposes which are the *raison d'être* of the Convention.' Thus, it is plausible that for the end of humanity and civilization, enhancing its jurisdictional ambit, the Court can interpret the Genocide Convention in a way to make a direction for the repatriation of the Rohingya.

The order for a dignified return of the Rohingya refugees is in the vein of the Prayers of Gambia

Affirming or allowing the first three prayers of the Gambia without considering the prayer for the dignified return of the Rohingya Refugee would go in vain, as the later prayer is in the vein of the other three prayers of the Gambia in this case. Article 34 of the Articles on the Responsibility of States For Internationally

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69 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 Art 31.

70 *Aegean Sea Continental Shelf Case (Greece v Turkey)* (Jurisdiction, Judgment) [1978] ICJ Rep 3, [52]; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (Judgment) [1994] ICJ Rep 6, [51].

71 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Preliminary Objections, Judgment) [2016] ICJ Rep 100, [26].

72 Reservations to the Convention on Genocide (n 44) 23.

Wrongful Acts (ARSIWA), restitution is considered one mode of reparation.[73] Further, the Permanent Court of International Justice (PCIJ) in the *Factory at Chorzów* stated that states shall try to 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.'[74]

Additionally, the ICJ's precursor in *Factory at Chorzow* noted that reparation is to be in a sufficient form.[75] What constitutes "reparation in a sufficient form" plainly differs in line with the distinct facts regarding the distinct aspects of each case, as well as the specific degree and type of harm[76] In the Arrest warrant, this court ruled that the status, which, had the illegal act not occurred, would probably have existed, cannot be reinstated through a determination by the Court that the act violated international law, but the proper legal consequence was to direct that the arrest warrant in question be annulled.[77] So, voluntary repatriation of the Rohingya Refugees can only be an adequate reparation.

Voluntary Repatriation is claimed to be a part of CIL.

In observance of the prerequisites of CIL, the "general practice" under the authority granted by the ICJ Statute, enabling reliance on established customs acknowledged as law by nations,[78] must signify a collective agreement in terms and recurrent practice (state practice), with a source based on the understanding that the conduct is mandated by law (*opinio juris et necessitatis*). Any actor invoking CIL must do so under a recognized legal duty to prove that it satisfies both prerequisites.[79] As numerous General Assembly resolutions invoke voluntary repatriation in circumstances after conflict, it readily follows that a comfortable majority of states, indeed most states, endorse the principle of voluntary repatriation. Sir Jennings conceded that states are obliged to accept the return of their refugees; otherwise, they would be violating customary norms.[80]

[73] ILC, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001) UN Doc A/RES/56/83 annex, Art 34.

[74] *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) PCIJ Series A No 17 (1928) 4, 47.

[75] Ibid, 21.

[76] *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment) [2004] ICJ Rep 12, [119].

[77] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3, [76].

[78] ICJ Statute (n 11) Art 38(1)(b).

[79] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3, [72]-[77]; *Asylum Case (Colombia/Peru)* (Judgment) [1950] ICJ Rep 266, 276-277.

[80] Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (Martinus Nijhoff 1997) 21.

It was concluded by the UNHCR Executive Committee in 1980 that "voluntary repatriation was in accordance with international law and general international practice."[81] Certainly, the "state practice" and '*Opionio juris*', analysis supports that this principle has extensive state practice to become a CIL. [82]

Impact of the Gambia Case on the Voluntary Repatriation of the Rohingya Refugees in Bangladesh

Considering universal international law, international jurisprudence serves as a source of the greatest significance to determine the regime of humanitarian law.[83] Thus, the judicial proceedings commenced by the Gambia against Myanmar can prove to be effective for the voluntary repatriation of the Rohingya. The reasons for the same are:

i. ICJ Statute, Article 59: The decision rendered by the ICJ is limited in scope, to bind exclusively on the parties engaged in the case.[84] Regarding the issue before the Court, the ICJ judgment is to be binding on Myanmar and on the government of the Gambia also. Therefore, had the ICJ pronounced the decision in The Gambia's favor, it would be obligatory on Myanmar to repatriate the Rohingya community and grant them a safe and equitable atmosphere.

ii. UN Charter, Article 94(1): Any decision by the ICJ in a case involving United Nations Member States is binding on those states. [85] Myanmar, in addition to other parties, is involved in the case, and it is also a state belonging to the United Nations ("UN"). Thus, Myanmar is bound by the UN Charter to abide by the ICJ's decision.

iii. UN Charter, Article 94(2): When a party, neglects to adhere to the judgment issued by the ICJ, the UNSC is empowered to recommend or determine what action is to be taken to affect the judgment.[86] The

[81] Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, 'Voluntary Repatriation' (36th Session, 1 August 1985) UN Doc EC/SCP/4 [40].

[82] Vic Ullom, 'Voluntary Repatriation of Refugees and Customary International Law' (2001) 29 Denv J Intl L & Pol'y 115.

[83] Stephen M Schwebel, 'The Treatment of Human Rights and of Aliens in the International Court of Justice' in V Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP 1996) 327.

[84] ICJ Statute (n 11) Art 59.

[85] UN Charter (n 50) Art 94(1).

[86] UN Charter (n 50) Art 94(2).

> UNSC is one of the essential UN bodies burdened with the responsibility to safeguard the peace and security of states. Thus, in case Myanmar does not implement the court decision, the UNSC can act. This is a very rare case for the ICJ. Moreover, the UNSC is empowered to act with and without the use of armed forces as and when it deems fit to restore or preserve, as mandated by the UN Charter, the protection of world peace and security.[87]

Cases where the ICJ's decisions were enforced

The enforcement of ICJ judgments in such cases as The *Gambia v. Myanmar, in* which the applicant state does not have immediate victimhood, raises subtle challenges involving the Interface of state standing, erga omnes obligations, and unavailability of central enforcement mechanisms. Discussion of these issues is as follows:

Legal Standing Through Actio Popularis and Erga Omnes Partes Obligations

The Gambia's authority to pursue legal proceedings against Myanmar based on jurisdiction arises from duties established as a tenet enshrined in international law of genocide prevention that binds the worldwide community of states (*erga omnes partes*). The ICJ restated its support for this view in 2022 by a jurisdictional judgment, arguing that all countries possess a "common interest" to prevent genocide such that even non-injured parties like The Gambia have a right to initiate proceedings.[88] This is in keeping with the *actio popularis* theory, which enables states to sue breaches of collective norms even where there is no direct harm.[89]

Enforcement Difficulties in Non-Victim State Cases

While the ICJ's jurisdiction has been established, enforcement remains politicized and institutionally oriented. ICJ decisions are legally obligatory under Article 94 of the UN Charter, but there is no enforcement mechanism beyond state compliance or Security Council measures. For example, the ICJ order of provisional measures in 2020 instructed Myanmar to desist from genocide and preserve evidence, but such reports of compliance are non-

87 UN Charter (n 50) Arts 41-42.

88 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Provisional Measures) [2020] ICJ Rep 3, 430-434.

89 Ying Sun, 'ICJ dismisses the preliminary objections over The Gambia's claims regarding Myanmar's violation of the Genocide Convention: The Gambia v Myanmar' (*Investment Treaty News*, 7 October 2022) <https://www.iisd.org/itn/2022/10/07/icj-dismisses-the-preliminary-objections-over-the-gambias-claims-regarding-myanmars-violation-of-the-genocide-convention-the-gambia-v-myanmar-ying-sun/> accessed 5 May 2025.

public that Myanmar's junta has submitted.[90] The UNSC can mandate actions under Chapter VII (i.e., sanctions, peacekeeping).[91]

The United Nations' central judicial authority is the International Court of Justice. The ICJ, in most cases, had the capability to enforce its verdict, which raised the hope of implementing its decision against Myanmar. For instance,

i. *Corfu Channel Case (United Kingdom vs. Albania, 1949)*[92]
With breathtakingly curt and evasive referral to the "elementary considerations of humanity," the *Corfu Channel Case*, on 9 April 1949, was under consideration by the ICJ's initial judgment. Mines planted beneath the Corfu Channel, between Albania and Corfu, caused damage to British ships. The British insisted Albania knew about the mines. The ICJ ruled in the UK's favor, and since Albania had known about the mines, Albania was held to be liable. The UK was awarded £843,947 in damages, which Albania subsequently paid.

ii. *Bosnia and Herzegovina vs. Serbia and Montenegro (1993)*[93]
The Balkans during the 1990s were characterized by a series of ethnic wars that followed the dissolution of Yugoslavia. Among these was the 1992-1995 Bosnian War. The war was characterized by ethnic cleansing on a large scale, the most notable of these being against Bosniak ("Bosnian Muslim") civilians, as in the 1995 Srebrenica massacre. The ICJ ruled that Serbia stood in default according to the Genocide Convention by reason of its failure to avert the Srebrenica genocide and of its failure to bring the organizers to justice. [94]The United Nations Security Council (UNSC) adopted numerous resolutions as a measure of reaction towards the war.[95]

90 Human Rights Watch (n 24).

91 W M Reisman, 'The enforcement of international judgments' (1969) 63 Am J Intl L 1, 9.

92 *Corfu Channel Case (United Kingdom v Albania)* (Merits, Judgment) [1949] ICJ Rep 4.

93 *Bosnia and Herzegovina v Serbia and Montenegro* (n 37) 43.

94 Ibid, 238.

95 SC Res 2669 (21 December 2022) UN Doc S/RES/2669; United Nations, 'Security Council Demands Immediate End to Violence in Myanmar, Urges Restraint, Release of Arbitrarily Detained Prisoners, Adopting Resolution 2669 (2022)' (Press Release SC/15159, 21 December 2022) <https://press.un.org/en/2022/sc15159.doc.htm> accessed 5 May 2025; United Nations, 'As Crisis in Myanmar Worsens, Security Council Must Take Resolute Action to End Violence by Country's Military, Address Humanitarian Situation, Speakers Urge' (Press Release SC/15652, 4 April 2024) <https://press.un.org/en/2024/sc15652.doc.htm> accessed 5 May 2025.

iii. *Aerial Incident of 10 August 1952 (Pakistan vs. India, 1960)*[96]
Indian Air Force shot down the Pakistan International Airlines Lockheed Super Constellation aircraft over the Rann of Kutch, an area within the Indian state of Gujarat, on August 10th, 1952. The 16 people on the plane were all killed. The plane, according to the Pakistanis, was on a training mission and within Pakistani airspace when attacked by the Indian Air Force. The Indians claimed the aircraft had entered Indian airspace. The dispute was ruled upon by the ICJ in India's favor. Both parties accepted it, and special enforcement was not necessary.

iv. *The Temple of Preah Vihear (Cambodia vs. Thailand, 1962)*[97]
Preah Vihear Temple, a Hindu temple, sits on the plateau marking the boundary between the Thai and Cambodian nations. The two countries clashed on the grounds of the ambiguity of an earlier Franco-Siamese boundary treaty and maps demarcated during the early 20th century. Cambodia claimed ownership of the temple and surrounding land, but the Thai side held the claim to the site. The court relied on the maps (which put the temple within Cambodia) and the failure of Thailand to protest the map or the Cambodian administration of the temple for decades as major proof. The court called for the withdrawal of the police or military staff that might have been stationed at the Temple. The UNSC did not take action directly after the 1962 ICJ decision. But when there was another conflict in 2011, the UNSC called on both countries to establish a cease-fire and enter into negotiations. From the debate, it is evident that the ICJ decision is of the highest importance to the immediate parties to the conflict.

96 *Aerial Incident of 10 August 1999 (Pakistan v. India)* (Judgment) [1999] ICJ Rep 46.

97 *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Merits, Judgment) [1962] ICJ Rep 6

Conclusion

On closer examination of the situation, it can be said that unless the ICJ's ruling is executed respectfully and ensures the relief sought by the Gambia, Myanmar cannot be safe for the Rohingyas. Therefore, voluntary repatriation of the Rohingya refugees can be an option. Even though Myanmar shows its unwillingness to negotiate under such circumstances as it has already done previously, the ICJ is the rightful court to compel Myanmar to accept its citizens. But that is not the only option. It is one of the options that can complement the repatriation process.

The author is of the view that, actually, repatriation could fail to be the ultimate remedy for the Rohingya problem in the long term. Other durable solutions may be involved in addressing this problem. These alternative long-term solutions include local integration, where refugees stay permanently and integrate as members of society in their host country (e.g., Bangladesh), and resettlement, where refugees are resettled from the host country to a third country willing to offer them permanent residence. Knowing that repatriation is not possible, safe, or even preferable for all Rohingya, introducing these other durable solutions as part of an integrated strategy allows for different paths to security, stability, and the return to life, thus greatly contributing to a more complete and lasting solution to the crisis. The solution is an integrated one where the portion is integrated locally, another is resettled, and the remaining one is repatriated. Nevertheless, an ICJ victory for Gambia, one that ascertains voluntary repatriation with dignity, will undoubtedly advance the entire repatriation process and be of far-reaching consequences in addressing the problem in the long term.

Developing a Leniency Program for Bangladesh's Competition Law: Insights from Practices

Shuvadeep Paul*

1. Introduction

Being a developing country, Bangladesh has been fighting against price volatility since her independence. In this arena of multifarious global crisis, price fixation in different sectors has been acute. There have been many instances where we have seen the existence of cartels in various sectors which has triggered crisis to the consumers and all stakeholders.

In Bangladesh, before independence, there was an act[1] that was not implemented practically. After repealing that Act, the government introduced the Competition Act, 2012. Though it came into force in Bangladesh on 21 June 2012, it took 4 more years to constitute the "Bangladesh Competition Commission" (hereinafter BCC), the specialized authority to enforce this act. To address the cartel issues there has been certain enforcement mechanisms have been enshrined in this Act, but the cartel detection rate is quite unsatisfactory. Hence, in this paper, I will focus on addressing cartel issues by proposing a leniency mechanism to be included in the Bangladeshi Competition Act. The leniency mechanism has been a game changer in the competition law field in many jurisdictions. By using the leniency model, the average range of identifying cartels was between 45% and 55% for countries like Canada, Germany, Korea, and New Zealand, and the highest rate was for the EU, which was approximately 80% of the total cartel detection rate (OECD, 2017)[2]. Therefore, this anti-cartel enforcement mechanism has been popular among the maximum jurisdictions, almost over 64. Hence, it might better fit in Bangladeshi competition law to address cartel problems.

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1 Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (Ordinance No. V of 1970), repealed by Competition Act, 2012.

2 OECD, 'Challenges and Co-Ordination of Leniency Programmed - Background Note by the Secretariat', (05 June, 2018) <https://one.oecd.org/document/DAF/COMP/WP3(2018)1/en/pdf> accessed 04 January 2025.

This study is conducted mainly based on qualitative data using both primary and secondary sources. As primary sources, competition legislations of domestic and international have been consulted, and data from official sources have been used. Various issues on the leniency program have been scrutinized. Secondary sources in the form of books, academic journals, documents, magazines, working papers, study reports, and internet sources are reviewed.

The purpose of this paper is to formulate a new anti-cartel enforcement, namely leniency program for Bangladeshi competition law. To develop a leniency program, I will delve into salient features of global jurisdictions, especially the US and the EU. However, it is kept in mind that this is neither possible nor desirable to follow a "one size fits for all" policy. Considering the Bangladeshi perspective, I will try to develop a leniency program which will include an incentive structure, procedures of leniency applications, and conditions for receiving leniency, taking inspiration from the global context.

2. Challenges to the Existing Anti-Cartel Enforcement in Bangladesh

Price-fixing cartels are horizontal agreements between the cartel participants who dominate the market illegally. In most jurisdictions, therefore, anti-cartel provisions have been given importance. Even in Bangladesh, there have been separate provisions kept for cartel enforcement. Cartel has been defined in Bangladesh as follows: "Cartel means any person or association of persons who, by explicit or implicit agreement, limit or control or attempt to limit or control over the production, distribution, sale, price or transaction of goods or services to establish a monopoly in trade".[3]

The existing anti-cartel provision in Bangladesh has been ascribed as pre-inquiry, inquiry, and post-inquiry phases in the Competition Act of 2012. During the pre-inquiry stage, "if the commission is satisfied that immediate prevention is expedient to obstruct any activity which contravenes the spirit of the Competition Act of Bangladesh, then hearing the necessary parties, it may issue proper directions as it deems fit."[4] While conducting an inquiry procedure by '*Suo moto*' or 'upon receipt of complaint' by anyone, the commission can direct a "cease and desist" order until the conclusion of such inquiry or further

[3] The Competition Act 2012 (Act No. XXIII of 2012), s 2(e).

[4] The Competition Act 2012 (Act No. XXIII of 2012), s 17.

orders by allowing the accused to present his defense.[5] According to 20(b) of the Competition Act, 2012 which directly deals with cartels narrates that after the inquiry if it appears before BCC that any person has entered into an 'anti-competition agreement' or 'misused his dominant position', "BCC may impose every cartel participant an 'administrative financial penalty' of either 'up to three times of its profit for each year of the continuance of such agreement' or '10% of the average of his turnover for the last three preceding financial years', whichever is higher"[6]. Failure to submit the penalty results in further payment of a fine of not more than one lac BDT per day.

From the above-mentioned discussions and legal provisions under the statute, the nature of the cartel, definitions, and prevalent provisions against anti-cartel enforcement have been explained. However, there are various kinds of challenges while enforcing anti-cartel provisions in Bangladesh.

The anti-cartel enforcement provision was enacted in 2012 in Bangladesh under the Competition Act, and it has been a decade since its enactment. Anti-cartel enforcing authority in Bangladesh is given to the BCC, which was established in 2016. Since its establishment to date, it has given "final orders in 21 cases"[7], some of which were preceded by Suo moto or upon receiving information from the daily newspaper. BCC so far has dealt with 87 cases, and 66 cases are pending at different stages[8]. To be specific, BCC, on its motion, brought 48 cases, and it received 6 complaints only in 2023.[9] The ratio of receiving complaints is less than the Suo moto cases of BCC. There might be various reasons for such a lower rate of complaints, but, one of the reasons possibly might be lack of incentives by means of providing information to the concerned authority.

Obtaining evidence for the proof of monopoly is a very big challenge for the complainant. In one case[10], the respondent, along with six other institutions, was alleged to price fixing in the rice market by forming a syndicate. Being informed by different media, BCC decided to bring the case on its motion against

5 ibid, s 19.

6 ibid, s 20(b).

7 Bangladesh Competition Commission, 'Orders and Judgments' <https://ccb.gov.bd/site/page/297cbd94-89ce-4133-a966-d889bdd3ca0b/%E0%A6%86%E0%A6%A6%E0%A7%87%E0%A6%B6> accessed 05 January 2025.

8 ibid.

9 ibid.

10 SuoMotoSuit27/2022, <https://ccb.portal.gov.bd/sites/default/files/files/ccb.portal.gov.bd/page/86298a48_bc4b_46d1_a5ea_3d23f69d5f7e/2023-06-18-10-43-8fb89a0a25316ee8640bab9d6f7b5478.pdf> accessed 03 January 2025.

a giant group of Bangladesh. However, BCC could not impose a penalty since the investigation team failed to establish adequate evidence against the alleged corporation. BCC, in its observation, held that the investigation team miserably failed to complete the investigation with due diligence, and the investigation report was incomplete. In this regard, BCC could not prove its *Suo moto* case due to a lack of sufficient and complete evidence, and the case was closed, thereby with no result. Therefore, this *Suo moto* case showed us the scenario of evading a financial penalty by the accused due to insufficient and weak evidence.

Lack of expertise while conducting an inquiry or investigation is another challenge for enforcing anti-cartel provisions. What should be noted is that investigating the activities of a cartel requires knowledge and training relating to the way commercial transactions of this nature are conducted and special expertise in tracking cartel activities.[11]

The investigation procedure done by the inquiry and investigation department under BCC has a problem with its structural function. A specified and separate body needs to be organized for investigating and detecting cartels. To ensure transparency, reliance, and neutrality, the investigation department should be free from biases and the influence of any members of the BCC.

No incentives are available in the existing competition act of Bangladesh for the informants to encourage them to provide information about cartels. Members of the cartel are reluctant to adduce evidence or provide reliable information before the enforcing authority due to the non-existence of any immunity or awards. From the establishment of BCC in 2016 to date, only five cases have been dealt with direct allegations of the cartel. Among the five cases, BCC imposed administrative financial penalties on the accused in three cases and it has restrained itself from imposing penalties in rest of cases.

From the above discussions, we find that the greatest challenge for enforcing an anti-cartel provision in Bangladesh is, on the one hand, lesser detection of the cartel in comparison to other cases due to inadequate information, and on the other hand, enforcement by imposing financial penalty is lesser due to lack of proper shreds of evidence by the investigation team and informant against the cartel members and organizations which are the matter of concern at this moment.

[11] Thiruvengadam Ramappan, *Competition Law in India: Policy, Issues, and Developments,* (1st end, Oxford University Press 2006) 22.

3. Concept of Leniency Program

Since the cartel had been a global phenomenon for ages, and to dismantle that market conspiracy, countries worldwide were bound to think something out of the box, which could address these challenges. From that inspiration, the leniency program came into existence to help antitrust authorities detect and prove cartel conspiracies. "For easy understanding, in this mechanism, any member of the cartel conspiracy comes forward to reveal the occurrence and confess before the competition authority, and if his information leads to a successful investigation by the competition, authority and the cartel is debarred, then the successful applicant can be awarded with incentives according to prescribed law"[12].

The origin of leniency programs can be traced back to the 1970s when it was first introduced in the US in the year of 1978. "Despite the lower detection rate under the 1978 Leniency Policy, a good number of cartel cases that were prosecuted were found after the year 1978"[13] . However, the success story of one jurisdiction lured other countries as well to incorporate leniency programs in their jurisdiction. According to a report published by the OECD in 2018, "more than 60 jurisdictions around the world practice the leniency model as an anti-cartel enforcement tool"[14]. Most of the respondents to the OECD Survey answered that for identifying cartel activities, they have found the "leniency mechanism as the most effective [15]. "By using the leniency model, the average range of identifying cartels was between 45-55% for countries like Canada, Germany, Korea, and New Zealand, and the highest rate was for the EU, which was approximately 80% of the total cartel detection rate (OECD, 2017)" [16]. So, the test run of leniency passed the examination well, which was the reason for encouragement by other countries to go on with the leniency model.

[12] Shuvadeep Paul, 'Time to enable the Competition Commission to dismantle syndicates' *The Daily Star* (Dhaka, 29 October 2024) <https://www.thedailystar.net/opinion/views/news/enable-competition-commission-syndicates-3738811> accessed 08 May 2025.

[13] Vivek Ghosal and Daniel David Sokol, 'The Rise and (Potential) Fall of U.S. Cartel Enforcement' (2020) 2 U Ill L Rev 471, 478.

[14] OECD, 'Challenges and Co-Ordination of Leniency Programmed - Background Note by the Secretariat', (05 June, 2018) <https://one.oecd.org/document/DAF/COMP/WP3(2018)1/en/pdf> accessed 04 January 2025.

[15] ibid, 4.

[16] ibid.

The history of the leniency program mentioned above gives us the prima facie idea of its urge for introduction. By the lapse of time, this program has been strengthened because of some innovative ideas like transparent reduction guidelines, clear incentives, lesser discretionary power of authorities, conditions for leniency aspirants and further leniency like leniency plus, penalty plus, and so on. Nevertheless, this program is contextualized in each jurisdiction according to their socio-political background, suitability, adaptability of stakeholders, and capacity of competition commissions. Despite differences from country to country, the basic goal remains the same. The goal is to detect the cartels and establish those activities before the authority with adequate evidence so that no further occurrences can happen.

4. Rationale for the Introduction of Leniency Program to Combat Cartels

In the preceding discussion at point 2, the challenges for enforcing anti-cartel provisions in Bangladesh have been identified so far. So, we have to find a durable solution for addressing the hindrances in the pragmatic approach which is well recognized around the world. Since cartels could not be detected in a significant number and were established before the enforcing authority due to the scarcity of sufficient and reliable evidence, the probable strategy can be introducing a leniency program in Bangladesh.

To obtain information and evidence for infringement, enforcement authorities have found leniency as an effective investigative tool. Practically, a leniency program allows authorities to accumulate all kinds of information, documents, and communication with others. The collection of evidence is cost-effective and reliable, and it saves the resources of the competition authority. Besides that, this might "subsidize the competition law enforcement by augmenting the difficulty of creating and maintaining cartels"[17]. So, it is used for detecting cartels and provides aid for supplementary anti-cartel provisions. For the success rate in cartel enforcement, leniency programs have been considered the 'single and most significant development'[18]. The leniency system tends

[17] Wouter Pieter Johannes Wils, 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30(1) World Compet. 25, 38-45 <https://kluwerlawonline.com/journalarticle/World+Competition/30.1/WOCO2007003> accessed 06 January 2025.

[18] Scott D. Hammond, 'The Evolution of Criminal Antitrust Enforcement over the Last Two Decades', (Presentation at the 24th Annual National Institute on White Collar Crime, ABA Criminal Justice Section and ABA Center for Continuing Legal Education, Miami, Florida, 25 February, 2010) <https://www.justice.gov/d9/atr/speeches/attachments/2015/06/25/the_evolution_of_criminal_antitrust_enforcement_over_the_last_two_decades.pdf> accessed 03 January 2025.

to offer either full immunity or a significant penalty reduction in exchange for providing accurate information about cartel occurrence to the authority, which satisfies certain parameters before or during an investigation done in the concerned jurisdiction.

The theoretical foundation for the concept of leniency in cartel enforcement is the 'prisoner's dilemma'[19] . When there is fear of imprisonment and heavy fines, it widens the way of disclosing the blueprint of cartels. Being in a prisoner's dilemma, any member of the cartel conspiracy comes forward to reveal the occurrence and confess before the competition authority. This game-theoretical model describes a situation where players achieve a sub-optimal outcome because they emphasize personal interest instead of collaborating in pursuit of their collective interest.[20] Again, the strategy of leniency is to raise mistrust among the members of the cartel conspiracy and entice them to confess by providing clues, necessary information, evidence, and every detail so far they know about the cartel.

The purpose of the Leniency Program is to identify the latent cartels in reciprocal of awarding incentives to the informants, who are successful at the end of the race. One of the strongest arguments for introducing leniency is that it was impossible to detect many cartels unless the presence of leniency. Another rationale for incorporating leniency models is their cost-effective mechanism, which is significant for developing countries like Bangladesh. ICN manuals also mentioned some advantages of incorporating leniency in countries. They are "deterrence, detection, sanctioning, cessation, and co-operation"[21].

There is no enforcement mechanism beyond drawbacks. Eventually, critics said that leniency mechanism may create strategic manipulation among the competitors, and over-reliance on the leniency program may lessen the capacity of competition authorities. There might be some uncertainties in making leniency applications, and without their dedicated cooperation, it might be difficult for authorities to proceed. To counter argue of those criticisms, I think, leniency program should not be focused on as the only tool; rather, this is a supplementary

[19] Baskaran Balasingham, 'The Development of the Leniency Programmed of the United States Department of Justice and the European Commission', in Steven Van Uytsel and others (eds) *Leniency in Asian Competition Law* (Cambridge University Press 2022) 37, 38.

[20] Christopher R. Leslie, 'Antitrust Amnesty, Game Theory and Cartel Stability' (2006) 31 J Corp L 453, 455.

[21] ICN, 'Anti-Cartel Enforcement Manual', (April 2014), 4 <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMLeniency.pdf> accessed 03 January 2025.

mechanism with other traditional methods like fines, imprisonment. For clarity, leniency guidelines should be simple at the beginning, and the onus of proof is always upon the applicant, because their overall cooperation should be genuine, which will lead the authorities to prove the cartel. So, leniency aspirants should keep those conditions in mind to obtain incentives which will lessen the burden of overreliance for the competition commissions.

Another potential drawback of this program is "balancing leniency with criminalization"[22]. Where criminalization deters through fear of punishment, leniency detects and breaks up cartels from within. As an anti-cartel mechanism, "if criminal enforcement and leniency mechanisms both exists in any competition jurisdiction, it results in more deterrence and detection of cartels"[23]. And, in countries where there is no criminal enforcement like ours (Bangladesh), leniency is expected to act as a more effective anti-cartel mechanism. So, leniency doesn't weaken criminalization; rather strengthens it. There is another significant concern about leniency program which is the decreasing number of leniency applications. In one OECD report, it has shown "the declining trend of leniency applications"[24]. "The success of the leniency mechanism is influenced not only by its internal features, such as clarity and consistency, but also by outside elements that lie beyond the influence of lawmakers and competition regulators"[25]. Though the declining trend persisted mostly in the COVID-19 season and in the post-COVID era, that situation changed as well. However, proper advocacy, transparent reduction guidelines, prompt action from authorities, and socio-political willingness will be milestones for the steady growth and success of this leniency program.

If we highlight the success of the Asian leniency perspective, we will find that most of the jurisdictions have yielded better results experimenting with this anti-cartel enforcement tool. Japan introduced its leniency program in 2005, which

[22] Caron Beaton-Wells, 'Leniency Policies and Criminal Sanctions: Happily Married or Uneasy Bedfellows?' (The Pros and Cons of Leniency and Criminalization, Swedish Competition Authority, Stockholm, 13 November, 2015) <https://www.konkurrensverket.se/globalassets/dokument/engelska-dokument/knowledge-and-research/the-pros-and-cons/2015_3---beaton-wells.pdf> accessed 08 May 2025.

[23] ibid.

[24] OECD, 'The Future of Effective Leniency Programmes: Advancing Detection and Deterrence of Cartels' (2023), 9 <https://www.oecd.org/en/publications/the-future-of-effective-leniency-programmes-advancing-detection-and-deterrence-of-cartels_9bc9dd57-en.html> accessed 08 May 2025.

[25] ibid.

was revised twice, latest in 2019. After the latest modification, it has become more structured program among Asian competition jurisdictions. Since its inception till 2022, "the Japan Fair Trade Commission (JFTC) received 1,395 leniency applications"[26]. Bangladeshi Competition Act followed Indian Competition Act by maximum wordings and provisions, however, India introduced leniency program in 2009 with its latest amendment in 2023. In a recent round table conference, a delegate from India confirmed that using the leniency mechanism, "60% of uncovered cartels have been detected"[27]. In South Korea, "KFTC (Korean Fair-Trade Commission) has been maintaining active and strong engagement with leniency applications, yearly about 100 applications"[28].

To sum up, in this part, I have shed light on the rationales behind introducing leniency mechanism to detect and deter cartels along with potential drawbacks and success rate of this program in Asian jurisdictions. In fine, the leniency program aims to detect the cartel through creating trust and mutual benefit among the different stakeholders and the competition authority. Despite some drawbacks, leniency has become a comparatively useful tool with its effective implementation for the competition-enforcing authority in combating cartels in the market.

5. Proposal of Leniency Model for Bangladesh

In the previous part, I have shown how the leniency mechanism has evolved to address the cartel issues. Despite fewer drawbacks, this model is well accepted around the world, and from the Asian perspective, the leniency tool has been used as a supplementary anti-cartel mechanism. I have cited the popularity and effectiveness of this program from Asian references as well especially in Japan, India, and South Korea.

[26] Atsushi Yamada, 'Japan: Evolving JFTC cartel regulation continues to target unreasonable restraint of trade' (Global Competition Review, 10 March 2023) <https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2023/article/japan-evolving-jftc-cartel-regulation-continues-target-unreasonable-restraint-of-trade?utm_source=chatgpt.com> accessed 08 May 2025.

[27] OECD, 'Summary of Discussion of the Roundtable on the Future of Effective Leniency Programmes: Advancing Detection and Deterrence of Cartels', (13 June 2023) <https://one.oecd.org/document/DAF/COMP/WP3/M(2023)1/ANN1/FINAL/en/pdf> accessed 08 May 2025.

[28] Adelaide Luke and others, 'Overview: Cartels and Abuse' (Global Competition Review, 21 April 2021) <https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2021/article/overview-cartels-and-abuse#footnote-023> accessed 09 May 2025.

To combat cartels in Bangladesh, we need to introduce a supplementary mechanism that has been experimented with globally with success. In this regard, I have already focused on a leniency mechanism which can be simply inserted by amending the competition act, and the BCC can then promulgate regulations for leniency guidelines. Before proposing my suggestions, I would like to outline the salient features of the USA and the EU leniency models. Since the US is the pioneer of leniency programs, and the EU has an advanced leniency model for a long way. That's why I am referring to these jurisdictions' basic features of the leniency model. For a basic leniency model, we need to formulate an incentive structure, procedures, and conditions to receive leniency that have been followed by all jurisdictions internationally. These might be structured as leniency guidelines or reduced penalty regulations by the BCC after incorporating a leniency mechanism into the Act.

5.1- Features of Leniency Model in the US and the EU

The United States of America has a long tradition of tackling Antitrust issues. To combat cartels, among the countries in the world, the US Antitrust Division was the first jurisdiction to introduce the leniency program. After some amendments, it has been stronger, and leniency application rates have been increased in the past, a report says, 'more than once in a month'.[29] The European Commission formally established a leniency program in 1996.[30] After some changes in 2002, it now stands on the "2006 Leniency Notice" [31]. Since the adoption of the leniency program till 2023, 157 cartel cases have been decided by the EU. [32]

At first, I will discuss the incentive structure of the USA and the EU. In the USA, there is "Type A" and "Type B" leniency for pre-investigation and post-investigation applicants, respectively. "Under 'Type A' leniency is automatic

[29] US Department of Justice, 'Status Report: Corporate Leniency Program', (07 March 2002), <https://www.justice.gov/atr/status-report-corporate-leniency-program> accessed 03 January 2025.

[30] Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases [1996] OJ C 207/4.

[31] Commission Notice on Immunity from Fines and Reduction of Fines in Cartel cases [2006] OJ C 298/17.

[32] European Commission, 'Cartels Cases Statistics', (07 December 2023), <https://competition-policy.ec.europa.eu/system/files/2023-12/cartels_cases_statistics.pdf> accessed 03 January 2025.

when the applicant can meet six objective criteria"[33] . Under Type B, immunity is available to the corporation when the investigation has already been commenced. Unlike the USA leniency policy, the EU has broadened its incentives to subsequent applicants having significant information and fixed up reduction bands in different categories. The present incentive structure in the EU is that the first applicant will be granted full immunity if his contribution leads the commission to conduct successful inspections and find a violation of the concerned act.[34] There are different 'leniency bands' fixed by the commission in terms of fine reductions. "The first applicant who will provide significant added value information may receive a 30- 50 percent fine reduction, the second one may receive a reduction between 20-30 percent, and the rest of leniency applicants may receive a reduction of up to 20 percent"[35].

Secondly, as to leniency procedure in the USA, there is time race among cartel participants to confess which popularly known as marker. The applicant who comes first before authority secures his position for a certain period to collect additional evidences. In the EU, they have introduced own database system to file applications even anonymously. The submitted data leads the authority to grant conditional immunity or rejection or no-action.

Thirdly, in regard to conditions for leniency, the common thing followed in those jurisdictions is a genuine support towards antitrust authority or commission. An applicant has to confess their illegal involvement in the cartel activity and the rule goes the same for the company as well. In the EU Leniency program, the conditions for obtaining leniency are that "full, frank and complete cooperation is a must from the side of the applicant towards the commission"[36]. The leniency aspirant has to obey the directions of the commission regarding the active involvement with cartel activity and his

[33] US Department of Justice, Justice Manual § 7-3.310 [2022]. The six criterions are: 1) having no possibility to get the information from other sources, while the applicant reaches to it; 2) discovering the illegal activity, applicant has immediately taken measures to aloof from that illegal activity; 3) reporting with full-fledged information and confessing of it; 4) co-operating properly with the concerned authority at the time of investigation; 5) trying best to make restitution to injured parties and improving inner corporate activity of the alleged corporation in such way to refrain from engaging such cartel activity in future; and 6) not coercing another party to participate in the activity and the applicant clearly was not the ring leader or the originator of that cartel.

[34] European Commission, 'Frequently Asked Questions (FAQs) on Leniency (Version of October 2022)', Question 4, < https://competition-policy.ec.europa.eu/system/files/2022-10/leniency_FAQs_2.pdf> accessed 07 January 2025.

[35] ibid, Question 12.

[36] European Commission, (n 34), Question 5.

behavior should not be in such a way that would disclose the commission's next move to catch the conspirators.[37]

5.2- Suggestions for Bangladesh on Leniency Model

In this part, I will propose incentive structure, procedures and conditions for leniency programme, taking inspiration from international guidelines and best practices.

Incentive Structure

On the eve of inaugurating the leniency program in Bangladesh, the incentive structure ought to be the simplest for easy understanding by the applicants. Since Bangladesh is a novice in the competition law field, the incentive structure shall be easily adaptable for a new beginning to combat cartels. Most importantly, incentives should be lucrative and purposeful to attract leniency aspirants and dismantle the cartels in the long run.

My proposed immunity and fine reduction structure is as follows

Stage	Ranking of Application	Immunity/Penalty Reduction
Before BCC starts the inquiry	1st	100% (Immunity)
	2nd	80% (Fine reduction)
	3rd to 5th	60% (Fine reduction)
	6th onwards	30% (Fine reduction)

Stage	Ranking of Application	Immunity/Penalty Reduction
After BCC starts the inquiry	1st	70% (Fine reduction)
	2nd	50% (Fine reduction)
	3rd to 5th	30% (Fine reduction)
	6th onwards (<10)	20% (Fine reduction)

[37] ibid.

Therefore, I have suggested incentives for leniency aspirants in two stages. One is when BCC does not start an inquiry about that cartel, and another is when BCC has already started the inquiry. Analyzing the two phases, it is seen that there shall be immunity, but not for all first applicants. The applicant meeting all criteria will be eligible for complete immunity only in the pre-inquiry stage. The reason is that BCC is unaware of the cartel, and due to the applicant's information and cooperation, the cartel shall be detected, therefore, it should be highly appreciated by giving full immunity only to the first applicant in one stage only. In this way, immunity has been guaranteed clearly.

In the post-inquiry stage, the reduction percentage is not higher than in contrast to the previous stage. The first applicant in the post-inquiry stage will be granted a 70% reduction, the second, third-fifth, and sixth-tenth applicants might receive a 50%, 30%, and 20% reduction respectively. My reason for setting up the reduction level in this way is that, in the latter stage, although BCC starts its process, it doesn't have provable evidence which is also substantial matter to prove the cartel. That's why, nevertheless I have not suggested entire immunity for the successful applicants in the latter stage, my suggestion implies for providing a decent portion of reduction to them.

Now, the second element of the incentive structure is the penalty reduction of fines. All other successful applicants except the immunity receiver shall be granted a penalty reduction. Subsequent applicants will be granted fine reduction at different levels. In general, applications during pre-inquiry have been prioritized over applications done during post-investigation. If the degree of incentive in both phases is kept the same, then, BCC will get less information about the cartel before it inaugurates an investigation. The fine reduction level is arranged comparatively higher in the pre-inquiry stage. Because at the pre-inquiry stage, BCC is in darkness about the cartel occurrence. So, applicants who provide accurate information, and consistent assistance to the BCC are to be granted a higher degree of penalty reduction.

The number of applicants has been kept open for the pre-inquiry stage, and, it has been limited to ten applications in the post-inquiry stage. My suggestion regarding these categories of application quantity is that, it will enhance the quality of the application and applicants will try to appear before BCC starts its inquiry. In the initial stage to reduce case load, I have suggested limiting the applications in the post-inquiry stage. At this point, ten applications might be considered. It will create competition among the applicants at that stage. But, for the pre-inquiry stage, all applications should be welcomed, since without their

timely approach BCC would not get the cartel information. However, irrespective of the number of applicants, only meritorious applications shall be considered, because dormant applicants who are not active after providing the information to the authority shall not be considered for incentives. So, the reduction rate shall be based on the order of application and other criteria set by the guidelines from BCC. Here, the discretionary power of BCC has been minimized, however, they will only look for continuous cooperation by the applicants until proving the cartels. In addition, during the inquiry, if BCC finds any intentional discrepancy and non-cooperation from the leniency applicant through any frivolous, fraudulent document filed by the applicant, it will be treated as ineligibility, and he cannot apply for leniency for the next five years, which is my suggestion. This will create a check and balance for reducing false applications filed by the applicants to an extent.

Procedures for Leniency Applications

For formulating a vivid program, BCC should coordinate transparent guidelines for leniency aspirants. Without having a clear procedural concept, the whole program can create an anomaly.

As I have mentioned, about two kinds of incentives (immunity and penalty reduction) in two stages, which have stipulated different reduction bands for the applicants. To check out the status before applying, anonymous communication or consultation with the enforcing authority is very much needed. In the pre-application stage, an anonymous consultation with the concerned official of BCC should be available to predict the authority's knowledge about the cartel and estimate the position of the leniency queue, whether an application is made. Previously, I have mentioned about institutional capacity of BCC, including its manpower which is regularly updated. BCC can depute any of its officials like the assistant director to hold the post of 'consultation desk' for dealing with communications as a representative of BCC. Any information given during informal consultation should not be revoked by BCC which will enhance trust-worthiness.

Secondly, after the consultation, when the applicant is ready with proper information and materials, it should reach the BCC without making any delay. Time is of the essence which will determine the priority order of the applications. When there are multiple successful applications, to determine the immunity or fine reduction, their order of application has to be considered. The applicant has to provide its name and in particular cartel conduct that came to his knowledge,

information, supporting materials, and evidence before BCC within a time frame not exceeding 30 days. It will be counted from the date of receipt of an application by BCC. Provided that, the stipulated period can be extended (another 15 days) not more than once if the applicant by written applies for the extension before BCC with sufficient cause.

Thirdly, the application medium should be widely circulated so that all can easily access it. There might be four ways to submit a leniency application to the BCC:

i) By submitting the online application,

ii) By applying email or Fax to the completed leniency application form designed by BCC together with supporting documents,

iii) By posting the completed leniency application form designed by BCC together with supporting documents,

iv) By calling the BCC's hotline number to set up an appointment in person.

Fourthly, unlimited applications are accepted according to my proposal in the pre-inquiry stage, but, in the post-inquiry stage not more than ten applications should be considered. Applications have to be filtered by the designated officials of BCC. BCC through its official shall give written acknowledgment to the applicant on the receipt of the leniency application. After filtering ten applications, BCC might inform other applicants about their status of waiting.

Fifthly, the applicant should have the option to withdraw his application in the necessary case before the decision of the concerned authority is made, and in case of withdrawal, he has to write the reasons thereof.

Sixthly, the eligible applications will lead to an investigation following the law. Therefore, if the enforcing authority is satisfied, then, it may issue a conditional incentive letter to the applicant in writing. When all other conditions are fulfilled, then the conditional immunity may turn into final, and successful applicants shall be granted immunity or penalty reduction following reduction guidelines.

Seventhly, when BCC thinks that the applicant seeking immunity or priority status, has fulfilled all the conditions of final immunity and has all the evidence needed, it will issue final immunity according to the incentive structure prescribed for Bangladesh. The decision of the Commission of granting or rejecting the leniency application shall also be communicated written or digital version to the applicant.

Eighth, in case of refusal, the communicating process will also be the same. Where BCC after examining initial information and evidence provided by the applicant has reason to reject the application, after hearing from him, BCC will make a final decision on his application.

Ninth, when the first applicant fails to succeed, then the applicant from the waiting area can be called on to proceed, and the subsequent one will go up the rank and the cycle will go on. Unless the evidence submitted by the first applicant has been evaluated, the next applicant shall not be considered by the Commission.

Tenth, unless it is necessary by law or for public welfare or mutual agreement, BCC shall maintain identity confidentiality of the applicant and materials provided by him. All communication between BCC and applicant on approval, rejection, or others shall be confidential.

These above-mentioned procedures might be suitable for leniency applications in Bangladesh. Following these procedures, applications should be proceeded by the applicants which may lead to a successful inquiry led by BCC and detect the cartel or reject the same as well.

Conditions to Obtain Leniency:

Now, I would like to shed light on the essential conditions to be incorporated for receiving leniency. Broadly, the conditions are twofold: information requirements and behavior requirements.

Generally speaking, the information requirement for obtaining immunity is that an applicant has to appear before BCC apprehends any information against the cartel. His information shall include the necessary whereabouts, identity of that cartel, significant documents, and pieces of evidence that jointly be convergence for successful operation by BCC. My suggestion is that in the guidelines to be issued by BCC should specify the nature and contents of the information of the particular stages so that there shall be consistency among the applicants to apply for leniency and consideration criteria on behalf of BCC as well.

Regarding behavioral requirements, if the applicant's behavior is towards assisting the enforcing authority with good faith, then, subject to the fulfillment of other conditions, the applicant may get conditional immunity. The conditional immunity will be turned into final immunity when enforcing authorities' conditions will be implemented by the applicant. This supervising, monitoring

authority, and tendency should be prevalent while adopting a leniency program in Bangladesh. Because, if BCC time to time follows up on the applicant's attitudes and if it helps BCC to detect and prevent that cartel it will be helpful for both of them. How the applicant behaves after applying, is a determining factor for his obtaining leniency treatment. His cooperation level should be standard enough so that the objectives can be achieved by BCC.

Now, if I characterize what might be the conditions for obtaining leniency under the Leniency Guidelines in Bangladesh, all leniency applicants must satisfy certain conditions set out below. For obtaining leniency treatment in the pre-inquiry stage, the conditions to be followed are as follows:

i) Applicant seeking incentives in the present or past was an active member of that cartel.

ii) He has to confess his act, which contravenes the cartel section under the prevalent Competition Act of Bangladesh.

iii) While the applicant comes forward, BCC is unaware of any source of information.

iv) Whenever the applicant realized his misdeed, he took the necessary steps to refrain from that activity.

v) The applicant should not be involved in leaking any important information that would otherwise hamper BCC's inquiry.

vi) Until the end of the inquiry or otherwise directed by BCC, the applicant should continue to provide its assistance.

vii) The applicant will not coerce any other party to involve the cartel and maintain the confidentiality of his application and communication with BCC unless directed otherwise by BCC.

viii) If the applicant is the ringleader or originator in the cartel activity, he will be ineligible for immunity, only reduction can be considered for these categories.

ix) An applicant cannot be considered for incentives if he applied more than twice before BCC. So, the applicant's past record must be checked by BCC.

These conditions could be formulated in the 'lesser penalty regulation' guideline made by the Competition Commission Authority of Bangladesh to grant immunity for the pre-inquiry phased leniency applicants.

The other phase, which basically ought to deal with post-inquiry leniency application and for obtaining leniency, above mentioned conditions will be applicable here also. Basically, at this stage, the main theme is that when the applicant comes forward, BCC does not have provable evidence against the wrongdoers, and most importantly, the information provided by the applicant must carry added significance. So, for the post-inquiry leniency treatment all other conditions of the previous phase will be applicable and these two elements should be additionally present there. On the one hand, immunity shall be automatic for the first successful applicant in Bangladesh in the pre-inquiry stage, and on the other hand, several factors like ranking of application, quality of information, and level of cooperation should be the determining factors for penalty reductions of other applicants.

The conditions enumerated above for obtaining leniency in two phases are to be maintained carefully by the applicants. The category of conditions conceptualized here for Bangladeshi leniency applicants is information, order, time, obligations and cartel participants. The information requirements are discussed here for the proposed two phases. Then, the order and time are described in the second, and third chapters where 'incentive structure' and 'procedures for leniency applications' have been discussed respectively. The obligations are the behavioral requirements of leniency applicants. Concerning the cartel participants, the originator or ring leader in the cartel activity cannot claim immunity except reductions and the applicant should not have coerced other parties to participate in the cartel. However, multiple offenders need to be debarred from granting incentives whatsoever his ranking of application is, rather he might be considered for penalty reduction. My suggestion is that, if a leniency applicant applies before BCC more than twice, that means, if he is engaged with cartel activity more than two times, then, from my perspective, he should not be considered for incentives by BCC. For the young competition law-enforcing jurisdiction, the conditions are kept as simple, predictable and transparent for better understanding to all. The main targets of these conditions are the unconditional admission from cartel participants, monitoring leniency aspirants' behavior and actual purpose, and abstaining from further involvement in the cartel activity unless otherwise directed by BCC. By meeting the conditions, applicants might be eligible for obtaining conditional leniency. In the process of final immunity, an applicant has to follow further requirements asked by BCC and continue its assistance throughout the investigation with good faith. In addition to that, if BCC seeks cooperation from the applicant about any digital evidence or any record that he has access to or any other assistance, it

will be the responsibility of the prospective leniency applicant to support and cooperate with BCC by providing so. The information requirements and behavior requirements suggested by BCC are to be filled up by the applicant, and this will lead the prospective applicant to obtain final leniency.

So, these are the proposed conditions for leniency applicants in Bangladesh to obtain leniency to an extent. The Commission can draft a lesser penalty regulation or leniency guidelines including those conditions for my suggested two phases specially designed for Bangladesh which will enable leniency applicants to apply the same in a formalized way for obtaining leniency.

Analyzing the proposed Leniency model, it can be said that BCC shall not be entitled to exercise discretionary power to a greater extent. Before the inquiry starts, if the applicant fulfills the above-mentioned criteria, he shall be qualified for immunity or penalty reduction. The first successful applicant shall enjoy full immunity as automatic and subsequent applicants will be eligible for a specified reduction of fines in different levels. After the inquiry is started by BCC, if an individual or corporation comes with a leniency application, then, BCC can exercise some discretionary power to cross-check the worthiness of value-added information provided by the applicant. The prime criterion for granting leniency is accomplishing the conditions set by leniency guidelines. But, to check the information bearing added value provided by the leniency aspirant, BCC might consider how far it can grant leniency as per the reduction band or percentages mentioned previously. However, the discretionary power by BCC is to be exercised to a limited extent so that applicants will not fear getting into the web of administrative discretion irrespective of satisfying leniency criteria, especially when the matter is for obtaining immunity. My justification is that too much dependency upon administrative discretion may make the whole program in a question.

Therefore, the overall leniency program including incentive guidelines, procedures, and conditions should be in a simpler format and transparent enough, so that, potential applicants feel encouraged to come up with valuable cartel information and potential evidences before BCC that will bring about the efficacy of this mechanism.

6. Conclusion

In this article, I highlighted how Bangladesh should conceptualize its leniency model in the future to detect the cartels. I have presented some real case scenarios of price fixing and BCC's action on some cartel cases. The presented data showed that despite having sufficient production, prices of products are at peak, artificial scarcity is there, and the market is mostly manipulated by unscrupulous businessmen and middlemen, which can be termed as market syndication. Being the implicit nature of cartels, its detection has been tough for enforcing authority. Collecting official data from the BCC, I have shown in sub-part B that from 2018 to 2023, out of 87 cases, there have been so far 21 cases finally heard and ordered by BCC. By this time, 5 cartel cases (mostly in 2022, and 2023) have been detected either by complaint or by Suo moto action taken by BCC. The existence of cartels is acutely prevalent in Bangladesh in the form of price fixing mostly, and authority is unable to prevent those due to scarcity of information and adequate evidence. However, due to unresponsiveness, repealing the 1970 Act, Bangladesh introduced the Competition Act in 2012. This Act has an anti-cartel provision to impose three times administrative financial penalties by BCC. Then, I have shown the challenges of the current anti-cartel provision in Bangladesh. Since obtaining adequate evidence and objective information about cartel occurrence are the basic problem, leniency might be helpful to solve this problem. After that, I have shown how leniency has evolved in the global competition field, its importance, and global application while combatting cartels. There are counter-arguments prevalent at which stage leniency should be adopted by a country. Academic debates will go on, nevertheless, amidst different mechanisms a tested tool might be a better choice for a younger competition law field, like in Bangladesh. In my case, Bangladesh has already passed a decade with its competition law and experienced more or less like other countries. Hence, for combatting cartels, leniency would not be a surprising one in this regard. All stakeholders are aware of the price-fixing issues in Bangladesh. Even, from the businessmen community, their leading associations have been showing a welcoming attitude towards the Government to fight together against this issue. But, without a legal framework, it will be tough to coordinate these problems regarding price fixing, and market syndication. From the socio-political-economic prospect, leniency might be helpful to add some significance to address cartels. Moreover, the organizational capacity of BCC has been doubled, and from its inception, it has been equipped with a separate financial contingency named competition fund, and, from time to time, necessary manpower has been newly engaged. It is mentionable

that, the Ministry of Commerce as part of the Government is very positive about the functioning of BCC and facilitating its further development like other institutions (for example, the Anti-Corruption Commission of Bangladesh). As of administrative recommendations, BCC has shown its high eagerness to modify the law by introducing leniency mechanism and some other provisions, guidelines, as well.

While conceptualizing the leniency program in Bangladesh, transparency and good design should have been given importance. In this respect, incentive structure, procedures, and conditions have been proposed by me. According to my leniency model for Bangladesh, incentives are designed with immunity and penalty reduction formation. It has been kept wide enough so that applicants find it interesting to apply. Individuals tend to enjoy incentives. Again, there has been demarcated specific borderline when and in what manner applicants will be qualified for penalty reductions. Because, if the applicants are not sure about the consequences of the process, they will be discouraged. The discretionary power of BCC has been suggested to keep it in limit so that leniency aspirants do not evaluate the programme as less attractive. And, whenever any design flaws will come out, it has to be amended without unintentional delay. This leniency program should be drafted by the concerned authority but in this process, recommendations, evaluations, and comments from national and overseas experts in this field like judges, legal practitioners, administrative officials, and academicians should be highly welcomed. At the same time, in-house training for staff needs to be increased than before. In this way, BCC may enhance its internal mechanism to handle the leniency program more effectively.

Bangladesh entered into the digital era long ago and digitalization in every sector from rural to urban is highly noticed and praise-worthy. Digitalization in the leniency program is also highly recommendable. The nature of cartels is getting extended, like in e-commerce and via other digital platforms. With this changing environment, leniency programs should be equipped with technologically advanced to respond eventually. It is delightful that, Bangladesh is advancing technologically creating and adopting software developments in every sector. Therefore, in the leniency program, we should emphasize tech intelligence and assistance mutually running with manual treatment for its smooth beginning.

To sum up, while the detection of cartels, and obtaining evidence have been the ultimate difficulty, as a complementary mechanism the leniency program might be of great help as anti-cartel enforcement. Its global application, success, and popularity enticed me to recommend this proposal for Bangladesh, and in this prospect, I have conceptualized this model in the context of Bangladesh. There is no model or regulation which is out of criticism.

To make this program more lucrative, transparency and simplicity will be a milestone for achieving its goal. Proper advocacy of this initiative will increase awareness among businessmen and other stakeholders, to come forward to ensure a competitive market in Bangladesh eliminating cartels largely which will work as a catalyst for steady growth of the economy and decrease the suffering of all consumers to a great extent.

Analyzing Endemic Sexual Violence in Bangladesh and its Psychological impacts on Victims

Rahul Dey*

1. Introduction

Tanima, a second-year law student at just 21, faced the most brutal act of violence, which turned her life upside down. Walking home from tuition in the evening, a group of men attacked her. Then they took her to an isolated area, paying no heed to her desperate cry for help and consequently subjected her to brutal sexual violence. That incident caused her several physical injuries, which were recovered after a few days of proper treatment. However, does anyone realize what psychological damage has been done to her? As a result of that harrowing experience, the life of a young woman who had dreamed of giving herself for the betterment of humanity and working towards greater equity now struggles to believe that there is really any justice in the world. Now, she fights her depression and anxiety by secluding herself from her friends and family members. In every step towards getting justice, she repeatedly faces taunts and blame, which victimize her again and again. For her, the attack may have ended, but the violence continues to torment her relentlessly.

Tanima's story is not unique; rather, it echoes the voices of countless survivors of sexual violence. Violence against women and children is identified as a global problem and has become an inescapable reality in their lives.[1] And sexual violence is one of the most ubiquitous human rights violations around the world.[2] The pervasiveness of such violence is a harsh reality and an enduring problem in Bangladesh, as well, leaving deep and often invisible scars on its victims. Beyond its physical toll, the survivors (mostly women and children) frequently

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1 Towards Ending Violence Against Women in South Asia' (*Oxfam Policy & Practice*) <https://policy-practice.oxfam.org/resources/towards-ending-violence-against-women-in-south-asia-115043/> accessed 16 September 2024.

2 García MC, "The Role of Social Movements in the Recognition of Gender Violence as a Violation of Human Rights: From Legal Reform to the Language of Rights" [2016] The Age of Human Rights Journal 60; Gaggioli G, "Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law" (2014) 96 International Review of the Red Cross 503

grapple with severe and lasting psychological impacts. Although our legal landscape contains multiple laws addressing different forms of sexual violence and outlining specific procedural guidelines and punishments, these scarcely address the psychological ramifications and their way out.

This article explores the dynamics of sexual violence in Bangladesh, highlighting its prevalence, the psychological toll it imposes on victims, and the legal and institutional responses to their plight. This paper focuses on the negative impact of sexual violence on the psyche of the survivor victims. Although there is a vast range of literature on sexual violence-related offences, their causes and consequences, there has been only limited investigation on the phase-specific psychological repercussions of such violence and the significance of multisectoral collaboration and capacity-building to create a more supportive and victim-centered justice system, particularly in Bangladesh. Some research described how women with mental disorders experience violence,[3] while other authors have looked at how male child sexual abuse survivors in Bangladesh get suicidal[4]. There have been studies of the abuse-specific reaction patterns in women survivors of violence,[5] whilst others have addressed how different forms of violence affect the mental health of victims.[6] There has also been work that demonstrated the rise of sexual violence during the COVID-19 pandemic, which might create a long-term impact on the well-being of the victims.[7]

Given the literature's background, acknowledging some advancements made through judicial decisions, law and policy reforms, and multisectoral responses, this study calls for more comprehensive legal and policy advancements, as well as strengthened intersectoral coordination to bridge this gap effectively. The research emphasizes the fact that the challenges faced by sexual violence survivor victims after being victimized go far beyond the physical suffering. By contextualizing the prevalence of sexual violence in Bangladesh, this study aims

[3] Islam Md M, Jahan N and Hossain Md D, "Violence against Women and Mental Disorder: A Qualitative Study in Bangladesh" (2018) 46 Tropical Medicine and Health

[4] Siddik MAB and others, "Suicide Attempts and Depression Associated Factors among the Male Child Sexual Abuse Survivors in Bangladesh" (2024) 16 Journal of Affective Disorders Reports 100736

[5] Akter F and Deeba F, "Psychological Reactions to Different Types of Gender-Based Violence in Women Survivors of Violence in the Context of a Developing Country" (2021) 37 Journal of Interpersonal Violence NP19961

[6] Hasan Md K, Zannat Z and Shoib S, "Violence against Women (VAW) in Bangladesh and Its Mental Health Repercussions" (2022) 9 Journal of Affective Disorders Reports 100369

[7] Sifat RI, "Impact of the COVID-19 Pandemic on Domestic Violence in Bangladesh" (2020) 53 Asian Journal of Psychiatry 102393

to scrutinize the relevant laws concerning different forms of sexual violence against women and children. This research supports the bold moves taken by the Hon'ble Supreme Court through issuing directives from time to time to prevent violence against women, as well as to minimize the mental toll on the victims of such violence. The paper also shows how multiple sectors and organizations have been working towards an empathetic and inclusive environment for sexual violence victims. This study emphasized how the victims are getting re-victimized right from the outset after confronting violence, throughout the justice-seeking period, and over a prolonged period, what measures have been taken to lessen the adverse effect of such violence on the mental health of the survivors, and what more can be done to reduce the re-victimization and curtail the impact of violence on mental health.

This paper is organized into four sections. The first defines sexual violence and outlines the scope and patterns of such violence within the context of the existing legal framework. This section also examines the prevalence and trends of sexual violence in Bangladesh, addressing the crimes. The second identifies the multifaceted impact of sexual violence on victims, covering physical, social, and economic effects with a strong emphasis on psychological consequences. This research examines three distinct phases to analyze the psychological toll that sexual violence survivors have to endure. The third review examines existing laws and highlights how recent legal reforms have been crafted to prioritize the psychological well-being of victims. This section pays particular attention to key rulings and directives by the Bangladesh Supreme Court and different initiatives taken by multiple sectors that foster a compassionate, trauma-sensitive legal process for survivors of sexual violence. The fourth, recognizing the importance of mental well-being, identifies key areas for improvement and offers recommendations to develop a more empathetic and victim-centered legal system.

2. Understanding Sexual Violence: Prevalence, Patterns and Legal Protections in Bangladesh

Gender-based violence is a global phenomenon that threatens the lives of millions of women around the world.[8] Sexual violence, a form of gender-based violence, is far more prevalent in most societies than is usually suspected in daily life,[9] with women consistently being subjected to such exploitation. It is

[8] Madhumita Pandey (Ed), *International Perspectives on Gender-Based Violence* (2023)

[9] Charlotte Watts and Cathy Zimmerman, 'Violence against Women: Global Scope and Magnitude' (2002) 359 The Lancet 1232.

a global public health problem and a clear infringement of human rights.[10] It encompasses a range of behaviors, including rape, sexual assault, and sexual harassment, affecting people of all genders, ages, and backgrounds. Sexual violence against women generally refers to acts of violence against women that are likely to cause psychological, physical, or sexual harm, including threats to do so. This section delves into the dynamics of sexual violence through the lens of legislative responses and its prevalence in Bangladesh.

2.1 General Definitions

Violence against women is an individual, interpersonal, and societal issue. The United Nations defines *violence against women* as 'any act of gender-based violence that results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'.[11] Amongst different forms of violence, sexual violence is considered the most severe type of violence against women. Sexual violence is an umbrella term encompassing any unwanted sexual act or activity, from verbal harassment to sexual abuse to forced marriage or forced pregnancy.[12] The term denotes any sexual act or attempts to obtain a sexual act, regardless of the victim-perpetrator relationship, by coercion, threats, or force, including actions that are carried out without the explicit and free consent of the victim. People of all ages, genders (primarily women), and socioeconomic backgrounds are susceptible to being victims of sexual violence, which can occur in a range of settings, including homes, workplaces, educational institutions, and public places.

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[10] "Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner
Violence and Non-Partner Sexual Violence" (2013) <https://iris.who.int/handle/10665/85239> accessed 09 July
2024; 'Ending Violence Against Women: An Oxfam Guide' (*Oxfam Policy & Practice*) <https://policy-practice.oxfam.org/resources/ending-violence-against-women-an-oxfam-guide-254118/> accessed 6 September 2024.

[11] United Nations Declaration on the elimination of violence against women. New York: UN, 1993; The World Health Organization (WHO) also defines sexual violence as any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic or otherwise directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.

[12] OHCHR, *Sexual and gender-based violence in the context of transnational justice*, October 2014, available online athttps://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/Sexual_and_gender-based_violence.pdf (visited 05 July 2024)

Based on the relationship between the victim and the perpetrator, sexual violence can be broadly categorized into two primary categories, namely, Intimate Partner Sexual Violence (IPSV) and Non-Partner Sexual Violence (NPSV).[13] Sexual violence, be it IPSP or NPSV, takes multiple forms, including rape, sexual abuse, forced sterilization, forced prostitution, forced abortion, sexual trafficking, sexual enslavement, and forced nudity. Globally, about one-third of women are affected by such types of violence.[14]

To completely grasp this deeply ingrained societal challenge, it is necessary to comprehend the different forms of sexual violence, the available legal frameworks and the prevalence of such violence in Bangladesh. The different categories of sexual violence and current laws regarding those offences examined here is not intended to be exhaustive. Instead, this section explores different forms of sexual violence offences which Bangladesh is currently confronting analysed within the context of the existing legal framework.

2.2 Legal Frameworks relating to certain sexual violence offences

The legal framework of Bangladesh consists of both general and specialized laws targeting different forms of sexual offences with an aim to protect the survivor victims' rights and punish offenders. Here, I will briefly examine the existing laws against sexual violence in Bangladesh.

2.2.1 The Penal Code, 1860 –

Rape is perhaps the most heinous sexual violence committed against women in the world, which is why Professor Claudia Card termed this crime a terrorist institution[15] itself. Notably, the term rape is sometimes used interchangeably with the term 'sexual assault'.[16] In Bangladesh, *rape* is defined under section 375 of the Penal Code, 1860, as a man having sexual intercourse with a woman against

[13] Intimate-partner sexual violence refers to 'any unwanted sexual contact or activity by an intimate partner to control an individual through fear, threats, or violence'. Whereas non-partner sexual violence refers to violence perpetrated by anyone other than an intimate partner, who can be any family member, friend or acquaintance, neighbour, or even some stranger.

[14] World Health Organization, *Violence against Women Prevalence Estimates, 2018: Global, Regional and National Prevalence Estimates for Intimate Partner Violence against Women and Global and Regional Prevalence Estimates for Non-Partner Sexual Violence against Women* (World Health Organization 2021) <https://iris.who.int/handle/10665/341337>.

[15] Claudia Card, 'Rape as a Terrorist Institution' in Raymond Gillespie Frey and Christopher W Morris (eds), *Violence, Terrorism, and Justice* (1st edn, Cambridge University Press 1991) <https://www.cambridge.org/core/product/identifier/CBO9780511625039A019/type/book_part> accessed 9 July 2024.

[16] Jenny Petrak and Barbara Hedge *The Trauma of Sexual Assault: Treatment, Prevention and Practice* (1st Edition, Wiley 2002)

her will or without her consent, or with her consent under fear of death or hurt, or with her consent when she thinks the man is her husband but the man knows that he is not the husband.[17] *Sexual harassment* is another prevalent form of sexual violence in Bangladesh. Sexual Harassment is unwelcome sexual conduct [18]involving uninvited sexual approaches, requests for sexual favors, and other verbal or physical conduct of a sexual nature that creates a hostile environment. In the subcontinent, the word 'eve-teasing' has commonly been used to refer to acts of sexual harassment.[19] Bangladesh is, under international law, obligated to ensure that women are adequately safeguarded from sexual harassment as a result of its ratification of the CEDAW[20] and other key human rights treaties[21]. The Penal Code, in Section 354, outlines the provisions related to sexual assault[22]. Moreover, Section 509 of the Penal Code prohibits actions such as uttering any word, making any sound or gesture, or exhibiting any object, with the intention to insult the modesty of a woman and carries a punishment of imprisonment.

2.2.2 The Women and Children Repression Prevention Act 2000

Earlier in 2000, a specialized law, The Women and Children Repression Prevention Act 2000 (WCRPA)[23], was enacted to make necessary provisions for the strict

[17] An exception to this provision is that if a husband has sexual relations with his wife, who is 13 years of age or older, it is not rape. That means even if it is forced or without her consent, that act will not be treated as a crime. However, according to section 376 of the Penal Code, if a husband has intercourse with his wife, who is under 13 years of age but not under 12 years of age, he will be charged with rape. Therefore, it is clear that unconsented sexual intercourse with a wife of thirteen years or older is not 'rape' under section 375 of the Penal Code; And to prove rape with a wife, she must be under thirteen.

[18] 'Towards an End to Sexual Harassment: The Urgency and Nature of Change in the Era of #MeToo' (*UN Women – Headquarters*, 17 September 2019) <https://www.unwomen.org/en/digital-library/publications/2018/11/towards-an-end-to-sexual-harassment> accessed 5 July 2024.

[19] Taslima Yasmin, 'Laws against Sexual Harassment: Analyzing the Legal Framework of Bangladesh' [2022] Dhaka University Law Journal 103.

[20] The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is an international legal instrument that requires countries to eliminate discrimination against women and girls in all areas and promotes women's and girls' equal rights.

[21] UN General Assembly, Convention on the Rights of the Child (UNTS vol. 1577, p. 3, 20 November 1989) < https://www.refworld.org/docid/3ae6b38f0.html> accessed 06 July 2024; UN General Assembly, International Covenant on Civil and Political Rights (UNTS vol. 999, p. 171, 16 December 1966) < https://www.refworld.org/docid/3ae6b3aa0.html> accessed 06 July 2024; UN General Assembly, International Covenant on Economic, Social and Cultural Rights (UNTS vol. 993, p. 3, 16 December 1966) (accessed 06 July 2024)

[22] According to this section, "anyone who physically attacks or uses unlawful force against a woman, with the knowledge or intention of violating her modesty," will be liable for such offence.

[23] WCRPA is a Special Statute to define and punish offences particularly relating to violence against women and children. Special Tribunals have been established under this Act to try the offences.

prevention of offences relating to women and child oppression. This legislation has also defined *rape* under Section 9 of this Act. [24] It is worth mentioning that this statute contains a non-obstante clause [25], which states that it will take precedence over all other laws currently in effect in Bangladesh. The WCRPA also makes a provision for *sexual assault* with a higher degree of punishment than the Penal Code. Section 10 (titled 'sexual oppression' etc.) defines the offence of sexual assault.[26] However, "despite providing a harsher punishment in the 2000 Act, the provision does not cure the ambiguity of the existing provision on sexual assault, as the offence is still made contingent upon the vague concept of "outraging modesty" of a woman"[27].

2.2.3 The Domestic Violence (Prevention and Protection) Act, 2010

Domestic violence is a common yet hidden form of violence against women. The Domestic Violence (Prevention and Protection) Act was enacted in 2010 to address the issue of domestic violence. It provides several civil remedies for domestic violence. Section 3 of the Act defines domestic violence, which highlights sexual abuse as a form of domestic violence by not only the intimate partners but also by any family member.[28] The Act also provides for the granting of civil orders such as protection orders under Section 14, accommodation orders under Section 15 and compensation orders under Section 16. Notably, this statute also equips a special provision for interim protection orders under Section 13, where the Court has the discretion, upon receiving an application from the aggrieved, to grant an interim protection order to safeguard the victim of violence till a certain period or until the order of permanent protection of the victim.

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[24] According to this section, it is considered rape if a male, who is not lawfully married to a female, engages in sexual activity with a female who is older than sixteen without the female's consent or with consent obtained through coercion or deception. In case the female is under sixteen and has such sex with or without consent, it is considered rape.

[25] a statutory provision intended to give an overriding effect over other provisions or enactments

[26] According to it, "if any person, in furtherance of his sexual desire, touches the sexual organ or other organs of a woman or a child with any of the organs of his body or with any substance, or he outrages the modesty of a woman, he will be said to have committed sexual assault".

[27] Taslima Yasmin, International Labor Organization (ILO), 'Overview of laws, policies and practices on gender-based violence and harassment in the world of work in Bangladesh' (2020). <https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@asia/@ro-bangkok/@ilo-dhaka/documents/publication/wcms_757149.pdf> accessed 06 July 2024.

[28] Section 3 of the Act defines domestic violence as "Physical abuse, mental abuse, sexual abuse or financial harm to another female or child member of the family by a person in a family relationship".

2.2.4 The Prevention and Suppression of Human Trafficking Act, 2012

Human trafficking is a crime against humanity.[29] Trafficking for sexual purposes is emerging as a more pressing issue worldwide. The most common forms of human trafficking in Bangladesh include but are not limited to, trafficking for sexual exploitation, forced prostitution, etc.[30] The UN Protocol defines *Sex trafficking* as a form of human trafficking that encompasses the act of recruiting, sheltering, transporting, providing, or obtaining an individual for the explicit goal of engaging in commercial sexual activities.[31]

In 2012, the Prevention and Suppression of Human Trafficking Act was specifically promulgated to prevent and suppress transnational organized crimes relating to human trafficking and to ensure the protection of victims of such offences[32]. In 2017, the Prevention and Suppression of Human Trafficking Rules were enacted to supplement the 2012 legislation.

2.2.5 The Prevention of Child Marriage Act (PCMA), 2017

The Prevention of Child Marriage Act, 2017, is a new and updated law, replacing the British-era Act of 1929. Bangladesh currently has the eighth-highest rate of child marriage worldwide and is the country with the highest rate of child marriage in the South Asian region.[33] Although the legal minimum age is 18 for

[29] Rochester A, "The Reasons for and Methods of Recognizing Aggravated Sex Trafficking as a (Jus Cogens) Crime Against Humanity," *Springer Briefs in criminology* (2024) <https://doi.org/10.1007/978-3-031-51191-2_4> ;Tom Obokata, 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System' (2005) 54 The International and Comparative Law Quarterly 445.

[30] 'Bangladesh: Interview with Prof. Zakir Hossain on Human Trafficking' <https://www.unodc.org/southasia/frontpage/2009/September/bangladesh_-interview-with-prof.-zakir-hossain-on-human-trafficking-.html> accessed 6 September 2024.

[31] Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons>; Victims of Trafficking and Violence Protection Act. Available at: <http://www.state. gov/j/tip/laws/61124.htm> Accessed September 05, 2024

[32] Consequently, earlier provisions relating to the trafficking of women and children laid down under the WCRP Act and the Suppression of Immoral Traffic Act of 1933 had been repealed; Chapter II of the new Act deals with the offence of human trafficking and ancillary offenses and penalties. This chapter provides punishment for various crimes related to trafficking, including death penalty for organized crime of human trafficking. Chapter V provides for assistance, protection and rehabilitation of victims and witnesses of human trafficking. It provides for the establishment of Anti-Trafficking Offences Tribunals in any district, for speedy trial of offenses under Section 21 of the Act.

[33] -'Global Polycrisis Creating Uphill Battle to End Child Marriage – UNICEF' <https://www.unicef.org/bangladesh/en/press-releases/global-polycrisis-creating-uphill-battle-end-child-marriage-unicef> accessed 13 December 2024.

girls and 21 for men, most girls are married before the age of 18. Since early marriage increases a child's risk of physical, sexual, emotional and economic abuse,[34] the new law increased penalties for those involved in child marriage, such as parents and those who perform child marriages.

2.2.6 Pornography Control Act, 2012

Sexual violence, in many cases, includes various forms of cyber violence such as cyberbullying, trolling, sending obscene or indecent messages, or threatening or grossly insulting messages through digital media or mobile. The Pornography Control Act, 2012, was enacted to curb such offences.[35] Except for this major law, the Bangladesh Telecommunication Act 2001 under Section 69 and the Cyber Security Act, enacted in 2023, under Chapter VI also address the issue of *digital sexual harassment* by sending obscene or indecent messages or threatening or grossly insulting messages through digital media or mobile. In addition, the Metropolitan Police Ordinances for each of the six units of the Metropolitan Police[36] include a specific provision regarding sexual harassment.[37] Moreover, to ensure a women-friendly working environment in Bangladesh, Rule 361 KA[38] Bangladesh Labor Rules 2015 (as amended in 2022) introduced a specific provision regarding the prevention of sexual harassment in the workplace for women.

Apart from the above-mentioned legislations and policies, Bangladesh has also assumed specific obligations under several international instruments to battle

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34 PhD Student of Reproductive Health ,Medical Ethics and Law Research Center, Shahid Beheshti University of Medical Sciences, Tehran, Iran. and others, 'The Most Prevalent Intimate Partner Violence; Physical, Sexual, Verbal, or Emotional in Early Marriage: A Narrative Review' (2021) 9 Journal of Pediatrics Review 27.

35 The purpose of the Act is to prevent the erosion of social values, social unrest and degradation within the society. Any type of pornography offence, such as visual recording or taking still pictures of sexual acts with or without the consent of the party, is punishable by fines and rigorous imprisonment for various terms. Child pornography in any form is also an offence punishable under Section 8 (6) of this Act.

36 <https://www.police.gov.bd/bn/metropolitan_police > accessed 06 July 2024.;

37 More specifically, Section 76 of the Dhaka Metropolitan Police Ordinance, 1976 deals with the *women teasing* by penalizing actions such as indecent exposure, indecent sounds or gestures, and obstructing or insulting women in public spaces.

38 Under Rule 361 KA of the Bangladesh Labour Rules, Sexual Harassment for women includes - Unwelcome sexually determined behaviour (whether directly or by implication) as physical contact and advances, Attempts or efforts to establish physical relations having sexual implication by abuse of administrative, authoritative or professional powers, Sexually coloured verbal representation, Demand or request for sexual favours, Showing pornography, Sexually coloured remark or gesture, Attempt to establish sexual relation by intimidation, deception or false assurance etc.

against trafficking, particularly of women and children.[39] Notably, Bangladesh is also a party to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, which is also known as the Palermo Protocol.[40]

2.3 Prevalence of Sexual Violence in Bangladesh

In both developed and developing countries, sexual violence against women is a prevalent issue with profound implications for individuals and societies.[41] Numerous studies have analyzed the patterns and prevalence of sexual violence in different regions around the world on a cross-sectional basis in specific sub-communities, emphasizing women.[42] It was found that serious short and long-term physical, sexual, reproductive, and mental health disorders, including unintended pregnancies, sexually transmitted diseases (hereinafter referred to as STDs), depression, post-traumatic stress disorder (hereinafter referred to as PTSD), suicide, and other chronic health conditions, are linked to sexual violence.[43] Violence against women, particularly in the South Asian Region, begins long before they are born and continues throughout their lives.[44]

[39] These include the SAARC Convention on Prevention and Combating Trafficking of Women and Children for Prostitution 1997, the Convention on the Rights of the Child (CRC) 1989, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979, and the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949

[40] 'Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime' (OHCHR) <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons> accessed 6 September 2024.

[41] Nasrin Borumandnia and others, 'The Prevalence Rate of Sexual Violence Worldwide: A Trend Analysis' (2020) 20 BMC Public Health 1835.

[42] Karen Hughes and others, 'Prevalence and Risk of Violence against Adults with Disabilities: A Systematic Review and Meta-Analysis of Observational Studies' (2012) 379 The Lancet 1621; Alexa Martin-Storey and others, 'Sexual Violence on Campus: Differences Across Gender and Sexual Minority Status' (2018) 62 Journal of Adolescent Health 701; Jenny Dills, Dawn Fowler and Gayle Payne, 'Sexual Violence on Campus: Strategies for Prevention'; Hughes and others; Juliana De Oliveira Araujo and others, 'Prevalence of Sexual Violence among Refugees: A Systematic Review' (2019) 53 Revista de Saúde Pública 78; Gervin Ane Apatinga, '"Suffering in Silence": A Qualitative Inquiry of Sexual Violence against Married Women in Ghana'; Elizabeth A Swedo and others, 'Prevalence of Violence Victimization and Perpetration Among Persons Aged 13–24 Years — Four Sub-Saharan African Countries, 2013–2015' (2019) 68 MMWR. Morbidity and Mortality Weekly Report 350.

[43] Naeemah Abrahams and others, 'Increase in HIV Incidence in Women Exposed to Rape' (2021) 35 AIDS 633; Ruxana Jina and Leena S Thomas, 'Health Consequences of Sexual Violence against Women' (2013) 27 Best Practice & Research Clinical Obstetrics & Gynaecology 15.

[44] Mona Mehta, 'Towards Ending Violence Against Women in South Asia'. <https://policy-practice.oxfam.org/resources/towards-ending-violence-against-women-in-south-asia-115043> accessed 12 July 2024

The scale of sexual violence is staggering in developing countries, especially in Bangladesh. [45] Research has revealed that 87% of our women and girls are the victims of sexual and gender violence at least once in a lifetime.[46] In 2015, a survey conducted by the Bangladesh Bureau of Statistics indicated that, in Bangladesh, 72.6% of married women experienced some form of violence by their husbands, 49.6% experienced physical violence and 27.3 % experienced sexual violence.[47] This data shows that women and girls are already vulnerable to gender-based violence in everyday settings. From January 2001 to December 2019, 6,900 women in Bangladesh experienced incidents of domestic and sexual violence. About 1,490 women were brutally gang-raped, 483 women were killed after being raped, and 35 women tragically took their own lives following the traumatic experience of being raped.[48]

As the COVID-19 pandemic raged on, the enormous magnitude of its devastation wreaked across the world.[49] During the COVID-19 crisis, there has been a surge in the 'shadow-pandemic' of gender-based violence (GBV), particularly cases of sexual assault in Bangladesh.[50] Recent statistics from the ASK reveal that in 2023, Bangladesh witnessed a total of 574 reported rape cases, with 138 of these being gang rapes. [51] There was a significant 48% rise compared to 2014, with a total of

45 Tania Wahed and Abbas Bhuiya, 'Battered Bodies & Shattered Minds: Violence against Women in Bangladesh' [2007] INDIAN J MED RES.

46 'Bangladesh Demographic and Health Survey 2011', <https://dhsprogram.com/pubs/pdf/FR265/FR265.pdf> accessed 12 July 2024

47 Report on Violence Against Women (VAW) Survey 2015 <https://asiapacific.unfpa.org/sites/default/files/pub-pdf/Bangladesh_VAW_survey_report_2015_compressed.pdf> accessed 12 July 2024

48 Odhikar Organization, 2020. Statistics on Violence against Women, available at < http://odhikar.org/wp-content/uploads/2020/02/Statistics_Rape_2001-2019.pdf.> accessed 12 July 2024

49 Rajiv Tandon, 'COVID-19 and Mental Health: Preserving Humanity, Maintaining Sanity, and Promoting Health' (2020) 51 Asian Journal of Psychiatry 102256.

50 UN Women, Policy Brief: COVID-19 and Violence Against Women and Girls: Addressing the Shadow Pandemic, 2020, p. 3 <https://www.unwomen.org/en/digital-library/publications/2020/06/policy-brief-covid-19-and-violence-against-women-and-girlsaddressing-the-shadow-pandemic> accessed 20 May 2024; A regional human rights organization, Ain-o-Salish Kendra (ASK) conducted a survey during the COVID-19 situation where it was found that from January to September 2020, 397 women died because of domestic and sexual violence, and only 208 cases were filed. At least 975 women were raped, 204 women were made victims of rape attempt, and death after raped 43 women. Twelve women were committed to suicide after being raped. Among them, 762 women were raped by single accused, while 208 suffered gang rape. See 'Violence against Women-Rape (Jan-Sep 2020) | Ain O Salish Kendra (ASK)' (6 October 2020), available at <https://www.askbd.org/ask/2020/10/06/violence-against-women-rape-jan-sep-2020/> accessed 12 July 2024

51 Violence Against Women -Rape (Jan-Dec 2023) Ain O Salish Kendra(ASK)' (January 08, 2024), available at <https://www.askbd.org/ask/2024/01/08/violence-against-women-rape-jan-dec-2023/> accessed 13 July 2024

387 cases.[52] In 2023, the organization documented a total of 1013 instances of child abuse. [53] Their survey shows that approximately 142 women experienced harassment across different domains in 2023.[54] Moreover, a report by the US Department of State reveals that 'Child sex trafficking remained widespread with an estimated 30,000 girls exploited in Bangladesh'. [55]

3. Mental Health Challenges in Sexual Violence Survivors

Violence against women is a significant public health concern.[56] The survivors of sexual assault have severe and far-reaching ramifications as a result of their experiences. Moreover, sexual violence impacts people and societies across several dimensions[57] which can be broken down into several broad categories, including physical health impacts, mental health impacts, social consequences, and economic impacts.

The victim-survivors of sexual violence, more often than not, endure manifold immediate and long-term physical health challenges, greatly hindering their overall well-being and quality of life. Immediate consequences may include bodily harm such as contusions, lacerations, or fractures.[58] In addition, chronic

[52] 'Reported Victim of Rape in 2014 | Ain O Salish Kendra (ASK)' (January 17, 2015), available at <https://www.askbd.org/ask/2015/01/17/reported-cases-rape-2014/> accessed 13 July 2024

[53] 'Violence Against Children (Jan-Dec 2023) | Ain O Salish Kendra (ASK)' (January 8, 2024), available at <https://www.askbd.org/ask/2024/01/08/violence-against-children-jan-dec-2023/> accessed 13 July 2024

[54] Violence Against Women – Sexual Harassment (Jan-Dec 2023) Ain O Salish Kendra (ASK)' (January 08, 2024), available at <https://www.askbd.org/ask/2024/01/08/violence-against-women-sexual-harassment-jan-dec-2023/> accessed 13 July 2024

[55] 'Bangladesh' (*United States Department of State*) <https://www.state.gov/reports/2023-trafficking-in-persons-report/bangladesh/> accessed 27 September 2024.

[56] Patricia Tjaden, Nancy Thoennes, and US Department of Justice: Office ot Justice Programs: National Institute of Justice, 'Extent, Nature, and Consequences of Intimate Partner Violence: (300342003-001)' <https://doi.apa.org/doi/10.1037/e300342003-001> accessed 29 July 2024.

[57] Ruxana Jina and Leena S Thomas, 'Health Consequences of Sexual Violence against Women' (2013) 27 Best Practice & Research Clinical Obstetrics & Gynaecology 15."plainCitation":"Ruxana Jina and Leena S Thomas, 'Health Consequences of Sexual Violence against Women' (2013; Laura P Chen and others, 'Sexual Abuse and Lifetime Diagnosis of Psychiatric Disorders: Systematic Review and Meta-Analysis' (2010) 85 Mayo Clinic Proceedings 618.

[58] Tjaden, Thoennes, and US Department of Justice: Office of Justice Programs: National Institute of Justice (n 56).

pain,[59] gastrointestinal issues,[60] and gynecological issues[61] are possible long-term side effects for sufferers. Moreover, sexual assault raises the possibility of contracting HIV and other Sexually Transmitted Infections (hereinafter referred to as STIs),[62] as well as the possibility of an unintended pregnancy[63]. Furthermore, survivors often have reproductive health difficulties, including menstrual disorders and complications in childbirth.[64]

Sexual violence is a deeply traumatic experience that extends far beyond any physical damage and has long-lasting social repercussions and economic consequences for survivors. Sexual violence often leads to stigma and shame, causing victims to feel blamed and isolated.[65] Also, social isolation and withdrawal from social interactions due to fake media portrayals are common scenarios for the victims of such violence.[66] Besides, intimate relationships and family dynamics are severely affected, with survivors struggling with trust issues, fear of intimacy, and sexual functioning difficulties.[67] Moreover, victims face educational and occupational impacts, including performance disruptions, decreased productivity, absenteeism, and difficulty maintaining employment.[68] Furthermore, they also encounter economic consequences, including financial

59 Golding JM, "Sexual Assault History and Physical Health in Randomly Selected Los Angeles Women." (1994) 13 Health Psychology 130

60 Astbury, Jill *Services for victim/survivors of sexual assault: identifying needs, interventions and provision of services in Australia*. Melbourne: Australian Institute of Family Studies, 2006.

61 Santhya KG, "Early Marriage and Sexual and Reproductive Health Vulnerabilities of Young Women" (2011) 23 Current Opinion in Obstetrics & Gynecology 334

62 Utz-Billing I and Kentenich H, "Female Genital Mutilation: An Injury, Physical and Mental Harm" (2008) 29 Journal of Psychosomatic Obstetrics & Gynecology 225; Andersson N, Cockcroft A and Shea B, "Gender-Based Violence and HIV: Relevance for HIV Prevention in Hyperendemic Countries of Southern Africa" (2008) 22 AIDS S73

63 Acharya Dev Raj, Bhattarai Rabi and Poobalan Amudha, 'Factors Associated with Teenage Pregnancy in South Asia: A Systematic Review' (2010) 4 HEALTH SCIENCE JOURNAL.

64 Antai D and Adaji S, "Community-Level Influences on Women's Experience of Intimate Partner Violence and Terminated Pregnancy in Nigeria: A Multilevel Analysis" (2012) 12 BMC Pregnancy and Childbirth

65 Dana C Jack, *Silencing the Self: Women and Depression* (Illustrated, Harvard University Press, 1991).

66 Patricia Easteal, Kate Holland and Keziah Judd, 'Enduring Themes and Silences in Media Portrayals of Violence against Women' (2015) 48 Women's Studies International Forum 103.

67 Maltz W, "Treating the Sexual Intimacy Concerns of Sexual Abuse Survivors" (2002) 17 Sexual & Relationship Therapy 321

68 Kearns M and DiRienzo C, "Sexual Violence First Experienced as Childhood or Adolescent: The Effects on U.S. Female Education and Occupation" [2023] Forum for Social Economics/the Forum for Social Economics 1

instability due to medical expenses, therapy costs, and potential income loss.[69] Housing insecurity can also result from frequent relocations or homelessness.[70]

3.1 Psychological Challenges

Undoubtedly, sexual violence is a severe violation of a person's autonomy and integrity, which leaves enduring psychological scars on survivors. Apart from the physical injuries and socio-economic damages, the emotional and psychological impacts are profound and long-lasting, affecting survivors' mental health, which is an integral part[71] of overall well-being. Gaining insight into these psychological consequences is essential to grasp the gravity of the impact of different forms of sexual assault on the victim's mental health and to understand the challenges they face psychologically.

The definition of mental health, as per the World Health Organization, includes positive emotional and psychological well-being along with social integration within a supportive network of interpersonal relationships.[72] Mental Health is a state of mental well-being that facilitates stress management, skill cultivation, efficient learning and employment, and active participation in one's community.[73] It is a fundamental human right and is indispensable for personal, community, and socio-economic development.[74] Sexual violence victim-survivors experience a myriad of mental health issues, which include but are not limited to somatization, chronic pain, abnormalities in behavior, difficulties in learning, and substance abuse.[75]

This section examines the psychological ramifications of sexual abuse on survivors, drawing on relevant studies and reports to deliver a comprehensive understanding of this critical issue. To illustrate a thorough understanding of

69 Breiding MJ and others, "Economic Insecurity and Intimate Partner and Sexual Violence Victimization" (2017) 53 American Journal of Preventive Medicine 457

70 Baker CK and others, "Domestic Violence, Housing Instability, and Homelessness: A Review of Housing Policies and Program Practices for Meeting the Needs of Survivors" (2010) 15 Aggression and Violent Behavior 430

71 Siniša Franjić, 'Mental Health Is an Integral Part of the General Health' (2022) 1 MedPress Psychiatry and Behavioral Sciences.

72 'Mental Health' <https://www.who.int/news-room/fact-sheets/detail/mental-health-strengthening-our-response> accessed 28 July 2024.

73 Dinesh Bhugra, Alex Till and Norman Sartorius, 'What Is Mental Health?' (2013) 59 International Journal of Social Psychiatry 3.

74 'Intimate Partner Sexual Violence' (*VAWnet.org*) <https://vawnet.org/sc/intimate-partner-sexual-violence> accessed 4 September 2024.

75 Chen and others (n 57).

the psychological toll on victims of sexual violence, this section will explore the effects from the initial moment of victimization, through the justice-seeking process, and into the long-term period that follows.

3.1.1 The Initial Impact

After encountering sexual violence, the initial challenges mostly arise within the victim-survivors' own families. Since, in our culture, honor is tightly linked with women's purity,[76] upon disclosure of the horrific occurrence they faced, the family members often react with shame and provoke the helpless victim to remain silent in order to protect their family's reputation. However, such a response from close family members leaves the survivor feeling isolated, emotionally unsupported, or even betrayed. Due to a lack of family support, the victims go through shock and disbelief[77] which serve as a defense mechanism, allowing the mind to shut down and safeguard itself from emotional distress.

Moreover, the dispensation of fatwas[78] can exacerbate the mental toll on the victims, which has been a common scenario in Bangladesh, mostly in rural areas. It has been observed that Imams and religious teachers, either acting alone or within the structure of village arbitration bodies like Salish, have imposed punishments, including public flogging or stoning, on women accused of violating their interpretations of Islamic law.[79] In such events, the victim may face panic attacks, heightened alertness, and constant fretting that deepens their internal wound.[80] Furthermore, the survivor women and children often face manifold emotional challenges during the early days. Since they are already in a vulnerable position after encountering the violence, their internal shame and guilt may lead them to self-blame and intensify their feelings of self-hatred. Besides, feelings of helplessness and lack of control due to loss of autonomy are common symptoms that eventually affect their decision-making and self-efficacy.

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[76] Rashid, S. F., & Michaud, S. (2000). Female adolescents and their sexuality: notions of honor, shame, purity and pollution during the floods. *Disasters*, *24*(1), 54–70. https://doi.org/10.1111/1467-7717.00131

[77] Littleton, H., & Breitkopf, C. R. (2006). Coping with the Experience of Rape. Psychology of Women Quarterly, 30(1), 106-116. https://doi.org/10.1111/j.1471-6402.2006.00267.x

[78] A fatwa is an opinion; only an expert can give it. A fatwa, even if by an expert is not a decree, it is not binding on the court or the state.; Masud MK, Messick BM and Powers DS, *Islamic Legal Interpretation: Muftis and Their Fatwas* (1996).

[79] 'Forum' <https://archive.thedailystar.net/forum/2012/March/putting.htm> accessed 12 August 2024.

[80] Emily R Dworkin, 'Risk for Mental Disorders Associated With Sexual Assault: A Meta-Analysis' (2020) 21 Trauma, Violence, & Abuse 1011.

Upon examining relevant pieces of literature, it can be found that survivors may experience intrusive thoughts and flashbulb memories[81] as an immediate consequence of the violence, and such conditions may lead to cognitive confusion and impaired concentration.[82] Moreover, the victim may also suffer from dissociative amnesia, which generally functions as a defense mechanism for the brain.[83] It is worth mentioning that sexual abuse victims often resort to multiple avoidance strategies, such as self-medicating with drugs, alcohol abuse, and isolating from social activities, to cope with the initial emotional distress.[84]

3.1.2 While Pursuing Justice

Before surmounting the immediate psychological toll of facing violence, sexual violence victims usually have to undergo trauma and other adverse psychological effects while they pursue justice. Such a protracted journey of obtaining justice stimulates bitter recollections of the catastrophic event, aggravating their mental well-being or triggering re-traumatization or some new symptoms and consequently has a significant influence on their mental health.[858687].

While filing an FIR[88] at the police station or during the hearing of sexual violence cases in Court, it is a common scenario that the survivors have to disclose a detailed account of the abuse they have endured. More often than not, they have to provide testimonies relating to such occurrences, on multiple occasions, to

[81] McGaugh JL, "Memory--a Century of Consolidation" (2000) 287 Science 248

[82] 'Psychological Evidence Toolkit - A Guide for Crown Prosecutors | The Crown Prosecution Service' <https://www.cps.gov.uk/legal-guidance/psychological-evidence-toolkit-guide-crown-prosecutors> accessed 9 August 2024.

[83] Angi Jacobs-Kayam and Rachel Lev-Wiesel, 'In Limbo: Time Perspective and Memory Deficit Among Female Survivors of Sexual Abuse' (2019) 10 Frontiers in Psychology 912.

[84] Dworkin (n 80).

[85] Rebecca Campbell and others, 'Preventing the "Second Rape": Rape Survivor's Experiences with Community Service Providers.' (2001) 16 Journal of Interpersonal Violence 1239.

[86] The term 'Retraumatizing' has been defined by Dr Yael Danieli, a prominent clinical psychologist, as "one's reaction to a traumatic exposure that is colored, intensified, amplified, or shaped by one's reactions and adaptational style to previous traumatic experiences". See Yael Danieli, 'Fundamentals of Working with (Re)Traumatized Populations.', *Creating spiritual and psychological resilience: Integrating care in disaster relief work.* (Routledge/Taylor & Francis Group 2010).

[87] In essence, in the present context, re-traumatization signifies the emotional and psychological distress that survivors of sexual abuse may undergo when they are exposed to some elements of their original trauma.

[88] A First Information Report (FIR) is officially treated as the first piece of information transmitted to the police concerning the commission of an offence.

different agencies, including law enforcement, lawyers or even in a courtroom. In fact, frequent recounting of their harrowing experiences may result in increased anxiety, distress, and symptoms of PTSD.[89]

Moreover, throughout the trial phase, survivors have to confront their abusers and submit their statements in front of many people, including the accused, which can be extremely intimidating and stressful. Such exchange of information in that environment can lead to triggering some emotional reactions, including dissociation, panic attacks, and flashbacks.[90] Furthermore, some aspects of the legal proceeding can be re-traumatizing because of their intrusive nature. For example, cross-examination of the victim in a rape trial may be confrontational and challenging, where there lies a chance of the victim getting re-victimized by the opposition.[91] Under those circumstances, the defense lawyer gets the opportunity to conduct the cross-examination rigorously to scrutinize the veracity and the reliability of their (victims') recollections of the incident. This adversarial approach, where the primary objective of cross-examination is to discredit the survivor's testimony, can feel like an attack, reinforcing feelings of blame and shame because it can be emotionally harrowing and re-traumatizing. Hence, the chilling effect of re-traumatization[92] may make it more difficult for survivors to access the legal system and may even discourage them from participating in criminal proceedings.[93]

Not only while giving testimonies, but Survivors often also encounter insensitive approaches from the overall judicial system as they navigate the court corridors in search of justice. Skepticism from law enforcement, lawyers, or judges is one example of how insensitivity in the judicial system can manifest. Survivors often get the impression that their experiences are being questioned or that they are being held responsible for the abuse. [94] Understandably, questions or statements that indicate that the survivor might have done something to avoid

89 Campbell R and others, "Preventing the 'Second Rape'" (2001) 16 Journal of Interpersonal Violence 1239

90 Patricia A Resick, 'Trauma of Rape and the criminal Justice System' [1984] 9(1) Justice System Journal 61-52

91 Zydervelt S and others, "Lawyers' Strategies for Cross-Examining Rape Complainants: Have We Moved Beyond the 1950s?" [2016] The British Journal of Criminology azw023

92 Negar Katirai, 'RETRAUMATIZED IN COURT' 62 ARIZONA LAW REVIEW.

93 Mohammad Omar Faruk, Sanjeev P. Sahni and Gerd Ferdinand Kirchhoff, 'Absence of Respect and Recognition of Victims in the Criminal Justice System in Bangladesh' (2020) 8 International Journal of Emerging Trends in Social Sciences 51.

94 Rawat D, "Rape and Victim Blaming in India" (2017) <https://ijip.in/wp-content/uploads/ArticlesPDF/article_39da15fecfc2c20da2ddc380709f9c7a.pdf> accessed 10 August 2024.

the abuse may be extremely retraumatizing, and they can amplify feelings of regret and disgrace.[95] Additionally, the justice system's failure to use trauma-informed procedures[96] may exacerbate the suffering that survivors have already experienced. Furthermore, the judicial proceedings may be lengthy and riddled with interruptions, increasing the survivor's anxiety and unrest, and each postponement may prevent the victim from obtaining relief and healing chronic stress, which may consequently increase anxiety, depression, and PTSD.

The social stigma associated with sexual abuse may have a significant and long-lasting effect on survivors, especially when they are trying to get justice. Victim-blaming attitudes[97], social isolation[98] , and inaccurate media representations[99] are just a few ways in which this stigma may appear. All of these manifestations may substantially impact survivors' emotional well-being and inclination to pursue legal recourse.

In our society, a tendency to underestimate the severity of the abuse or doubt the survivor's account, implying that they are exaggerating or fabricating it, has been observed.[100] This kind of reaction from society can be profoundly invalidating and can discourage the victim-survivors from pursuing further support or legal action.

3.1.3 The long-term Challenges

The long-term psychological consequences of sexual abuse may linger for a prolonged period, significantly impacting several facets of survivors' lives. Such violence may lead to chronic psychological effects and have significant implications for the victim-survivors' interpersonal relationships and social well-being.[101]

95 Omar Faruk, P. Sahni and Ferdinand Kirchhoff (n 93).

96 'Taking Trauma Seriously: How Trauma-Informed Practices Can Help People Heal | Center for Justice Innovation' <https://www.innovatingjustice.org/articles/trauma-informed-courts> accessed 29 July 2024.

97 Haezreena Begum Binti Abdul Hamid, 'Exploring Victim Blaming Attitudes in Cases of Rape and Sexual Violence: The Relationship with Patriarchy' (2021) 6 Malaysian Journal of Social Sciences and Humanities (MJSSH) 273.

98 Emily Corbett and others, 'The Normalisation of Sexual Violence Revictimisation in Regional and Rural Areas: Our Failure to Respond' (2024) 59 Australian Journal of Social Issues 443.

99 'What Is the Connection between Media, Sexual Violence, and Systems of Oppression?' (*National Sexual Violence Resource Center*) <https://www.nsvrc.org/blogs/saam/what-connection-between-media-and-sexual-violence-and-systems-oppression> accessed 5 August 2024.

100 Lawrence G Calhoun and others, 'Victim Emotional Response: Effects on Social Reaction to Victims of Rape' (1981) 20 British Journal of Social Psychology 17.

101 Bonomi AE and others, "Health Outcomes in Women with Physical and Sexual Intimate Partner Violence Exposure" (2007) 16 Journal of Women S Health 987

Experiencing sexual violence imprints a profound scar on the minds of the victims. PTSD is a common long-term effect of sexual abuse[102], distinguished by symptoms including flashbacks, avoidance, and hyperarousal. People with depression, which is another common PTSD symptom,[103] demonstrate persistent sadness, despair, and loss of interest in activities.[104] Additionally, it is common for survivors to dread criticism from friends, family, and the community. They also may have concerns about being seen as "damaged" or "being blamed" for their victimization.[105] Thereby, victims may distance themselves from any social interactions to avoid likely adverse reactions, which can cause self-isolation. Moreover, the victim-survivors typically deal with adversities relating to trust and intimacy,[106] which restrict them from establishing meaningful relationships, resulting in emotions of seclusion and loneliness. This seclusion, however, can heighten their feelings of anxiety and loneliness. Such anxiety disorders may further isolate survivors by causing extreme stress, panic attacks, and generalized anxiety disorder (GAD)[107]. Furthermore, substance abuse is another frequently used coping strategy that also deteriorates the overall mental condition of the victim, causing new complications like substance use disorders.[108]

Lastly, when the traumatized victim survivors evolve as parents, they may face significant hindrances in raising their children due to the triggers associated with their past trauma. They may also encounter sensitive issues relating to physical affection or overprotectiveness. As a result, these issues may significantly affect their relationship with their children and their entire experience as parents.[109] Therefore, a vicious cycle of emotional discomfort and retreat may result.

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102 Susan Rees and others, 'Lifetime Prevalence of Gender-Based Violence in Women and the Relationship With Mental Disorders and Psychosocial Function' (2011) 306 JAMA <http://jama.jamanetwork.com/article.aspx?doi=10.1001/jama.2011.1098> accessed 16 July 2024.

103 Adi Herisasono, Made Warka and Otto Yudianto, 'The Concept of Psychological Impact Compensation for Rape Victims' 7 International Journal of Multicultural and Multireligious Understanding 268.

104 Chen and others (n 57).

105 Koss MP, "Blame, Shame, and Community: Justice Responses to Violence against Women." (2000) 55 American Psychologist 1332

106 *The Impact of Trauma on Adult Sexual Assault Victims* (Justice Canada 2019). <https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf> accessed 10 August 2024

107 Generalised Anxiety Disorder (GAD) means that someone is worrying constantly and cannot control it.

108 Dworkin (n 80).

109 P Krishnakumar and others, 'Prevalence and Spectrum of Sexual Abuse Among Adolescents in Kerala, South India' (2014) 81 The Indian Journal of Pediatrics 770.

4. Recent Developments and Reforms in Bangladesh

4.1 Reforms in Legal Frameworks

4.1.1 In-Camera trial

The cardinal principle of law is that a trial shall be held in an open court. However, the in-camera trial[110] is an exception to this doctrine. Section 352 of the Code of Criminal Procedure, 1898, outlines the scope of cases that can be tried in camera.[111] Moreover, under Section 54 of the Children Act, 2013, the Children's Court can conduct a camera trial session to ensure the child's protection and confidentiality, considering the child's best interest. In addition to these provisions, the Women and Children Repression Prevention Act 2000 under Section 20(6) and the Domestic Violence (Prevention and rotection) Act, 2010 under Section 23 also empower the court to conduct an in-camera trial if it deems necessary.[112]

4.1.2 Victim Anonymity

The Women and Children Repression Prevention Act 2000 (WCRPA) is specially designed to shield children and women from sexual violence offences. It includes provisions prioritizing the mental well-being of the victims. This Act prohibits the publication of information, such as the identity or picture, of an oppressed woman or a child in the media. Violating such a mandate is a punishable offence under Section 14 of this Act. Besides, the Children Act of 2013 also articulates provisions for victim anonymity under Section 28, which prohibits the publication of photographs, descriptions, news, or reports in the media or on the internet of a child relating to the concerned case. The underlying principle is to ensure the child's confidentiality, which is crucial for maintaining positive mental health.

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110 The term 'in-camera trial' refers to court proceedings that are conducted in private, away from the public and the media. Only after exercising due care and caution may the court direct that a part of the proceedings be conducted in camera. The principal objective of a camera trial is to safeguard the victim's dignity and personal privacy, and the provisions relating to in-camera trial are enshrined in various statutes.

111 It states that, '… the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court'

112 Section 23 of the Domestic Violence (Prevention and Protection) Act, 2010 states that – The trial under this Act may be conducted in camera if the parties concerned consent or if the court deems it appropriate.

4.1.3 Cross Examination –

In 2022, the Evidence Act of 1872 was amended, bringing several significant changes. One of the noteworthy amendments was the addition of a proviso to Section 146 (3) of the Act, where the law barred the opposition lawyers from questioning the rape or attempting to rape victims regarding their general immoral character or previous sexual behavior.[113] Another major change in the Evidence Act is the omission of sub-section 4 of Section 155. Before the latest amendment, this section was an apparatus to humiliate a rape victim by portraying her as a person of immoral character, reinforcing gender bias.[114]

In addition to the Evidence Act, the Children Act 2013, under Section 54, prescribes provisions regarding special measures and protections for a child victim. Aiming to preserve the dignity and safeguard the victim-child from any invasiveness of the judicial proceeding, this section allows examining the child through taking video recording evidence before the hearing.[115]

4.1.4 Ensuring Safety through Custody or Other Measures

The term safe custody denotes a certain protective measure to secure the safety and well-being, both physical as well as psychological, of the victim women or children of sexual crimes by placing those vulnerable victims in a secure environment from further harm. With a view to protecting the victim from further damage, the WCRPA 2000 empowered the Tribunal to place the woman or child under the custody of a government authority if the Tribunal deemed it necessary.[116] Similarly, the Children Act, 2013 also provided provisions relating to protective measures. Under this legislation, the Court has the discretion to undertake specific safety measures, such as, providing security for the concerned child through the police, if the Court believes that the child is at risk of harm.[117]

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113 Section 146 (3), the Evidence Act, 1872 states that, '. . . in a prosecution for an offence of rape or attempt to rape, no question under clause (3) can be asked in the cross-examination as to general immoral character or previous sexual behavior of the victim . . .'

114 It stipulated a provision of questioning the character of women in the trial of rape allegations shifting the focus from the accused-perpetrator to the victim, which is irrelevant, unjust, and detrimental to the mental health of a victim.

115 However, in such cases, defense lawyer shall have the opportunity to remain present and to cross-examine the concerned child at the time of taking evidence. The purpose of this process is to make the child victim feel less horrified while facing the frightful evidence recording proceeding.

116 Section 31 of the Prevention of Oppression Against Women and Children Act 2000

117 Section 58 of the Children Act, 2013

4.1.5 Child-friendly Court Environment

Bangladesh has become a party to the United Nations Convention on the Rights of the Child (UNCRC), which mandates that all actions concerning children must prioritize their well-being. To implement the provisions of the Convention and ensure access to justice, the Children Act of 2013 mandates the establishment of a child-friendly Children's Court in every district of Bangladesh.[118] Considering the necessity of making the Children's Court child-friendly and providing a supportive and non-traumatizing environment, the Act provides several provisions regarding the sittings, environment, and facilities to be arranged in the Children's Court.[119]

4.1.6 Protection of Mental Health

Mental health plays a crucial role since it is a core component of our overall health and well-being, but regrettably, it is one of the most overlooked sectors in Bangladesh. Being a state party to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), Bangladesh is under an obligation to take necessary actions to ensure the overall welfare of mental health and trauma patients. That being so, to address the mental health concerns, the Manoshik Shashtho Ain (Mental Health Act, 2018) was enacted, replacing the 106-year-old Lunacy Act. The provisions of this new law sketch the procedures for acknowledging, evaluating, and treating individuals with mental health conditions[120] , which eventually creates a scope for safeguarding the mental state of a sexual crime victim.

[118] Section 16 of the Children Act, 2013

[119] According to Section 19(2), the sittings of the Children's Court shall be held in an ordinary room instead of a courtroom with a witness box and the podium surrounded by the red cloth of the usual courtroom. Moreover, as per Section 19(3), special seating arrangements for the impaired children should be arranged if necessary. For a child who already faced violence, court proceedings can be intimidating and stressful for them, and if they observe police or other agency officers wearing their information, it can cause a distressing experience for that child. This is why the law provided a provision prohibiting the lawyer, members of the police, or other employees of the court from wearing their professional or official uniform in the courtroom during the trial of a child in a Children's Court under Section 19(4).

[120] Barua R, "Bangladesh's Mental Health Act 2018: A Critical Analysis" (2023) 32 Medical Law Review 101

4.2 Decisions and Directions Made by the Supreme Court of Bangladesh

4.2.1 Decisions regarding 'Fatwa'

As discussed earlier, *Fatwa* has become a common tale in Bangladesh. It is unfortunate to observe its misuse by a section of people who don't have adequate knowledge and are in no way eligible to pronounce a fatwa. For the past few decades, the legal validity of fatwas has been under close scrutiny by the Bangladesh Supreme Court. Since the early 1990s, the practice of issuing fatwas by rural elders or local religious leaders, followed by subjecting people, especially women, to corporal punishment, has garnered growing media and human rights organizations' attention nationally and internationally.[121] After passing multiple rules by the High Court Division, the Appellate Division ruled that fatwas can be given, but only on religious matters and by a properly educated person.[122] However, even after several rulings and directions provided by the Supreme Court, the violence associated with the fatwa continued to increase. At that time, BLAST, along with other human rights organizations, filed a writ petition on whose judgment the HCD agreed on the fact that the extra-judicial punishment in the form of lashing and beating was inflicted on women across the country and opined that the persons behind inflicting such punishment or injuries are liable to be punished.[123] Through such judicial interventions, the fundamental rights of women, including the right to life and the security of the person, equality before the law, and freedom of expression, association, and religion, have been safeguarded.

[121] Sultana Kamal, Fatwas in Bangladesh. in Marieme Helie Lucas and Harsh Kapoor (eds), Fatwas Against Women in Bangladesh (Women Living Under Muslim Laws 1996); In December 2000, the HCD issued a Suo moto order upon certain Government authorities regarding a fatwa where the victimized woman had to undergo a hila marriage (Hilla marriages are a unique tradition some Muslim communities subject women to if they want to remarry an ex-husband. It requires the wife to marry another man, consummate the marriage and divorce him, before she can remarry the first husband) owing to the fact that she dissolved her marital ties with her then-husband. The Court in the case of Editor, The Daily Banglabazar Patrika and two others Vs. District Magistrate and Deputy Commissioner, Naogaon 21 BLD 45 declared that the imposition and execution of extra-judicial punishments in the name of fatwas in the village shalish is unauthorised and illegal. The Court also opined that one shouldn't rule out such fatwas, which can damage human dignity or basic human rights. Although the concerned government authority did not file any appeal against this ruling, astonishingly, two individuals filed for leave to appeal, arguing that the earlier verdict pronounced by the HCD is violative of the fundamental rights of freedom of thought and freedom of religion.

[122] Mohammad Tayeeb and Ors. vs. Government of the People's Republic of Bangladesh (Civil Appeal No. 593-594 of 2001), 12 ADC 01

[123] Bangladesh Legal Aid and Services Trust (BLAST) and others Vs. Bangladesh and others 63 DLR (2011) 1

4.2.2 Guidelines to protect women from sexual harassment

Sexual harassment is a social evil that is a common scenario globally, and Bangladesh is not an exception to it. In Bangladesh, women are the most vulnerable to sexual harassment in the workplace, educational institutions, and even public transportation, affecting their physical, mental, and social well-being. On the surge of such sordid incidents as sexual harassment, in 2008, the BNWLA filed a writ petition highlighting the fact that there were no legislative provisions, at that time, 'to address sexual harassment of women and girl children and in the absence of the legislative provisions the need to find out an effective and/or alternative mechanism to cater the need is an urgent social imperative'.[124] The High Court Division of Bangladesh, noting this issue seriously, formulated a set of guidelines defining sexual harassment to prevent any physical, mental, or sexual harassment of women, girls, and children at their workplaces, educational institutions, and other public places, including roads across the country.[125]

While in the above-stated case, the Court primarily dealt with sexual harassment in educational institutions and workplaces, another Bench of the Court on a different case[126] provided some supplemental directives and guidelines to deal with the horrific situation of eve-teasing and stalking in both private and public places around the country.[127]

4.2.3 Witness Protection

Bangladesh follows an adversarial legal system, where the requirement of proper witnesses is crucial, especially in the criminal justice system, to prove the complainant's case and eventually deliver justice. Many a time, witnesses have been observed to face multifaceted risks when they agree to present oral evidence before the court, supporting the complainant-victim.[128]

[124] BNWLA v. Government of Bangladesh, 14 May 2009, Writ Petition No. 5916 of 2008, [14 BLC (2009) 694]

[125] Ibid

[126] BNWLA v. Government of Bangladesh Writ Petition No. 8769 of 2010, [31 BLD (HCD) 2011 324]

[127] In those directives, the Court defined the terms '*Sexual Harassment*' and '*Stalking*' from a broader perspective and provided guidelines —to establish separate cells in every police station to deal with complaints or instances of sexual harassment, requiring such cells to report to the existing District Law and Order Committee of each district; to take the necessary initiative to insert new provisions regarding the mischief of sexual harassment and stalking and so forth.

[128] SM Mahbubullah, 'The State of Witness Protection in Bangladesh' (*The Daily Star*, 7 April 2023) <https://www.thedailystar.net/law-our-rights/news/the-state-witness-protection-bangladesh-3291146> accessed 13 August 2024.

Thus, protecting them from external harm implies protecting the victims' interests and safeguarding their sense of security and mental well-being. On this backdrop, in 2010, BNWLA filed a Writ Petition where the High Court Division ordered the enactment of comprehensive legislation for the protection of the witnesses of sexual harassment, keeping in mind that if the victim is unable to produce the witnesses and cannot prove the case thereby, she will eventually be the victim of a terrible injustice.[129] Nonetheless, a codified law safeguarding witnesses from external threats and intimidation is long overdue in Bangladesh.

4.2.4 Direction relating to Cross-Examination

In our legal system, parties must present evidence and arguments supporting their claims to the court. In a criminal trial, the primary objective of cross-examination is to discredit both the person and the evidence they present. Most often, victims get re-traumatized by the questions asked by the opposition while cross-examining the victim to impeach their credibility, undermining their emotional well-being[130] and they describe it as the most distressing part of their experience while seeking justice.[131] Realizing this very sensitive issue, the High Court Division of Bangladesh ruled that no lawyer shall ask any degrading questions to victims of sexual violence, which is not necessary to ascertain any information about such an offence.[132] The Court also directed the Nari O Shishu Nirjaton Tribunal to ensure that this matter is addressed. [133]

4.2.5 Banning the 2 Finger Test

The two-finger test[134] has been widely used in South Asian countries, including Bangladesh, to determine whether a rape victim is habituated to sex or not [135]. Since it involves a medical examiner inserting two fingers into the vagina of a sexual violence survivor to determine the laxity of the vagina, the test has been facing intense criticism for its invasive nature, similar to re-living the trauma

[129] BNWLA v. Government of Bangladesh, Writ Petition No. 8769 of 2010

[130] Murmu SK and others, "An Analysis of Psychological Perceptions of Survivors of Sexual Assault" [2023] Cureus 15 (5)

[131] Kebbell MR, O'Kelly CME and Gilchrist EL, "Rape Victims' Experiences of Giving Evidence in English Courts: A Survey" (2007) 14 Psychiatry Psychology and Law 111

[132] Writ Petition No. 10663 of 2013

[133] Ibid

[134] also known as the 'virginity test' or 'per vaginum' test

[135] Flavia Agnes, 'To Whom Do Experts Testify? Ideological Challenges of Feminist Jurisprudence' [2005] 40(18) Economic and Political Weekly 1859-1866

of being raped [136] and for violating the rights and dignity of the survivors.[137] Moreover, the two-finger test lacks scientific validity, making it unreliable.[138] Thus, in a landmark move towards justice, upon filing a writ petition by BLAST along with five major human rights, women's, and development organizations, the Supreme Court of Bangladesh banned the two-finger test in 2018 and provided eight directives.[139]

4.2.6 Directive regarding the Victim Anonymity

Spontaneous participation of the victims is a paradigm shift in the criminal justice system.[140] In sexual crimes, safeguarding the privacy, dignity and psychological resilience of a victim is a must. In many countries, including Bangladesh, victim-blaming is a common scenario,[141] especially in sexual violence-related offences, which is why protecting their identity by keeping it confidential is crucial so that they do not feel discouraged or face social stigma. It has been observed in various cases that, despite provisions regarding victim anonymity in Bangladeshi laws, television and print media journalists, as well as social media vloggers, continue to violate them. Thus, to encourage victims to come forward and participate actively in the justice process, the High Court Division provided a few guidelines, which include opening a designated website to enable the informant to register her complaint online; at all stages, the victim's identity should be kept confidential, not only victim's identity but also the location of Victim Support Centre should be discreet.[142]

4.2.7 Speedy Disposal of Rape Cases

The offences violating a woman's dignity are grave. Because of their nature and since the fair and speedy trial is recognized as a fundamental right in the Bangladesh

136 Zahid Maniyar, 'Patriarchy and Virtue: Why Is the Outlawed Practice of the Two Finger Test Still in Practice in India?' (*CJP*, 2 November 2022) <https://cjp.org.in/patriarchy-and-virtue-why-is-the-outlawed-practice-of-the-two-finger-test-still-in-practice-in-india/> accessed 13 August 2024.

137 Jain A, "Preventing and Managing Violence against Women in India" (2013) 346 BMJ f229 <https://doi.org/10.1136/bmj.f229>

138 Z Kmietowicz, "Group Calls on Indian Government to Ban 'Degrading' Finger Test after Rape" (2010) 341 BMJ c4904 <https://doi.org/10.1136/bmj.c4904>.

139 Writ Petition No. 10663 of 2013; While pronouncing the judgment, the High Court opined that such examination to test the virginity of a victim is not scientific, reliable and valid. Rather, it violates the fundamental rights of the survivor of sexual violence.

140 Petrossian G, "Victims in the Criminal Justice System: Victim Wishes – Justice Needs" (2022) 12 European Criminal Law Review 111

141 Meherun Nahar, Tasnim Tabassum and Rafikatun Nisa, 'Victim Blaming and Character Assassination: Media Framing of Controversial Issues of Bangladesh' (2024) 53 Informasi 261.

142 Naripokkho & ors. Vs. Bangladesh & ors. 10 SCOB [2018] HCD

Constitution[143], there are several laws in Bangladesh asserting speedy and fair justice for the victims. Nevertheless, despite having specific provisions for speedy trials, sometimes delays in trial proceedings have been noticed. Consequently, in 2019, the Bangladesh Supreme Court, in consonance with one of the fundamental maxims of the criminal justice system, i.e., justice delayed is justice denied, enunciated the speedy disposal of rape cases.[144] In another case, the Court also provided a detailed guideline for producing witnesses and concluding the trial within the stipulated time in the concerned laws.[145]

4.2.8 Directive related to the Primary Statement of the Sexual Violence Victims taken by the Magistrates

Section 22 of the WCRPA 2000 mandates the taking of a statement of the victim of sexual violence offences by a Magistrate. However, it has been observed that many a time, sexual assault victims fear being judged and face internalized feelings of shame and self-blame,[146] especially in front of a male officer. For this reason, in 2019, the Supreme Court administration issued a circular, emphasizing the importance of fair investigation and justice in sexual violence cases, at the instruction of the then-Honorable Chief Justice. [147] The circular stated that the female magistrates would record the statements of such victims in the cases filed for rape and sexual harassment incidents.

4.3 Introduction of Judicial Bench-books

In 2023, two bench books were published for Bangladeshi judges who handle cases involving gender-based violence. In order to develop these Bench Books, the Government of Bangladesh, in partnership with the U.S. Embassy and USAID, nominated members of the judiciary and the Ministry of Law to an advisory committee that included a U.S. federal judge.[148] These meticulously crafted

[143] Article 35(3) of the Constitution of the People's Republic of Bangladesh states that – "Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial Court or tribunal established by law."

[144] Md. Rahel alias Rayhan vs. The State, Criminal Appeal no 7253 of 2019 (HCD)

[145] Md. Sekandar Ali vs The State, Criminal Appeal 7357 of 2019 (HCD)

[146] King LL and Bostaph LMG, "'That Is Not Behavior Consistent With a Rape Victim': The Effects of Officer Displays of Doubt on Sexual Assault Case Processing and Victim Participation" (2023) 39 Journal of Interpersonal Violence 973

[147] The High Court Division, 'SRO No J-03/2019-A--Regarding the recording of the statement of a victim under Section 22 of the Nari o Shishu Nirjatan Daman Ain, 2000.' (Supreme Court of Bangladesh, 15 April 2019)

[148] A working group of 25 tribunal judges and magistrates played a key role by contributing their insights and eventually shaping these Bench-books. The publication was further enriched by the expertise and cooperation of the U.S. Department of Justice, Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT), and USAID's initiatives.

books are providing judges with a valuable tool to quickly find the most pertinent legal authorities and guidelines to ensure a justice system that protects sexual violence survivors. Currently, these books also serve as a concise and practical ready-reference for prosecutors, legal scholars and relevant stakeholders.

4.4 Initiatives taken by Bangladesh Police

To prevent sexual violence and to mitigate the after-effects of such violence, the Bangladesh Police has taken several praiseworthy steps, including the formation of the Victim Support Centre (VSC)[149], establishment of the Investigation Unit[150] and Quick Response Team (QRT)[151] .

4.5 Multisectoral Initiatives taken under the Ministry of Women and Child Affairs

A multi-sectoral program on violence against women (hereinafter referred to as MSPVAW) under the Ministry of Women and Child Affairs started in 2009 and provides various support services for victims of gender-based violence, including the National Trauma Counselling Centre (NTCC) [152], National Forensic DNA Profiling Laboratory[153], VAW database[154] and other support services. Among the most important aspects of MSPVAW are the One-Stop Crisis Centres

[149] With the collaboration of UNDP and under the Police Reform Program the initiative to establish VSCs started in 2009. Currently, with the partnership with ten NGOs, Bangladesh Police is serving sexual violence victim-survivors by providing legal assistance, counseling support and rehabilitation facilities; See <https://dmpwsid.gov.bd/view/details/about-us/about-vsc> accessed 18 December 2024

[150] The introduction of the Investigation Unit is another feather in the cap of Bangladesh Police. The primary purpose of this unit is to investigate the cases related to women and children repression lodged in 49 Police Stations of Dhaka Metropolitan Police (DMP). This unit tries to ensure, as much as possible, soothing the repressed victims who survived sexual violence and make the primary investigation process more friendly and safe. See <https://dmpwsid.gov.bd/view/details/structural-frame/investigation-unit > accessed 18 December 2024

[151] The formation of Quick Response Team (QRT) is another innovative step taken by the police department. This team, consisting of all female police officers, has been established to rescue the victims who faced sexual violence or any form of repression in educational institutions, working place or in the way or vehicle, or even family within the shortest possible time and to provide primary legal assistance and support. See <https://dmpwsid.gov.bd/view/details/structural-frame/quick-response-team-support-unit-qrt> accessed 18 December 2024

[152] <https://www.mspvaw.gov.bd/contain/35> accessed 18 December 2024

[153] <https://www.mspvaw.gov.bd/contain/36> accessed 18 December 2024

[154] < https://mspvaw.gov.bd/contain/61> accessed 18 December 2024

(hereinafter referred to as OCCs)[155], One-Stop Crisis Cell[156], National Helpline on Violence Against Women and Children, and other helplines[157]. These OCCs and cells involve various ministries in service delivery as well as liaise between government and non-governmental organizations, civil society and other stakeholders at the district and upazila levels, which is an excellent example of multi-sectoral support[158].

4.6 Role of Private Services for Victims of Sexual Violence

To effectively address the multifaceted needs of sexual violence victims in Bangladesh, a combined contribution is required not only from the government entities but also from the private organizations and non-governmental organizations (NGOs). Organizations such as the Bangladesh Legal Aid and Services Trust (BLAST), Law and Arbitration Centre (ASK), Madaripur Legal Aid Association (MLAA), Bangladesh Rural Advancement Committee (BRAC), Bangladesh National Women Lawyers Association (BNWLA), Bangladesh Mahila Parishad (BMP), several non-governmental organizations such as the Mankind Foundation (MJPF) play a pivotal role in bridging critical gaps in the justice system by providing legal advice and assistance to sexual-violence victims. Some of these NGOs, like BMP, ASK and BNWLA, also provide shelter services.

5. Scope for Improvements

The mental health needs of sexual violence victims often go unrecognized amidst other issues in our society. Although throughout the last decade, vital strides have been made in addressing multiple aspects of the impact of such violence on the victims, a critical gap remains in policies and practices focusing on the psychological well-being of victim-survivors of sexual violence. This

[155] *OCCs* located in medical colleges and hospitals of different departments of Bangladesh are one of the important components of MSVP. Currently, there are 17 OCCs in the country and each OCC provides health and medical services, police assistance, legal assistance, psychosocial counseling, DNA testing, social services and shelter support for victims of gender-based violence. See <https://mspvaw.gov.bd/contain/15> accessed 18 December 2024

[156] A total of 67 *one-stop crisis cells* have been established, including 47 in the district headquarters hospital and 20 in the upazila health complex, with the aim of expanding support services for women and children who are victims of violence across the country. See <https://www.mspvaw.gov.bd/contain/42> accessed 18 December 2024

[157] there are several helpline numbers for violence against women and children to call, and for information, support and other support services. See <https://mspvaw.gov.bd/contain/7> accessed 18 December 2024

[158] Abdur Rahim Mia, 'ROLE OF ONE STOP CRISIS CENTRE (OCC) IN PROTECTING WOMEN'S RIGHTS: AN ANALYSIS WITH SPECIAL REFERENCE TO RAJSHAHI DISTRICT'.

part will seek to provide a few recommendations to create a more empathetic, responsive, and supportive legal environment that prioritizes the psychological health and overall well-being of a sexual violence victim.

5.1 Incorporating Therapeutic Jurisprudence

Incorporating Therapeutic Jurisprudence[159] (hereinafter referred to as TJ) in our criminal justice system is essential to alleviate the mental suffering of a victim who has already endured enough misery before coming to seek justice for herself. This approach not only helps reduce recidivism rates[160] but also, I argue, protects the victims from re-traumatization during trial. The TJ movement advocates that empathy and warmth are essential interpersonal skills for individuals working in the criminal justice system.[161] Thus, some basic principles, including showing empathy while listening to the victim's feelings and perspectives without judging, blaming, or criticizing them might be used by the judges and other agents of the criminal justice system. However, this is not possible without proper education on this particular subject matter, as dealing with sexual offences and communicating with the victims is quite a delicate task. That is why sensitization training programs are crucial to effectively integrating this principle into Bangladeshi courts. The curriculum must be designed to teach police, judges, prosecutors, and other agents working in the criminal justice system to perform their duties more humanely and with dignity toward people.[162] As a result, such a victim-centric approach can lead to reducing the likelihood of secondary victimization of sexual violence survivors. Besides, while implementing the TJ principles, victims' feedback can be collected and used to gain insight into the entire justice process, which can then be used to develop further policies and ensure a more therapeutic justice system. Through such training and broader implementation of TJ principles, mitigation of mental suffering can be ensured.

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159 Law and psychology professor David Wexler coined the term 'therapeutic jurisprudence' in 1990. Wexler defined *therapeutic jurisprudence* as "the study of the use of the law to achieve therapeutic objectives". Therapeutic jurisprudence principles include the belief that the law can impact an individual's psychological well-being. Further Reading - McDaniel EG, "Therapeutic Jurisprudence: The Law as a Therapeutic Agent—Edited by David B. Wexier; Durham, North Carolina, Carolina Academic Press, 1990 ; Yamada DC, "Therapeutic Jurisprudence: Foundations, Expansion, and Assessment" [2021] SSRN Electronic Journal

160 McNiel DE and Binder RL, "Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence" (2007) 164 American Journal of Psychiatry 1395

161 Walker LE, Shapiro D and Akl S, "Therapeutic Jurisprudence and Problem-Solving Courts," Springer (2020)

162 Ibid

5.2 Compensation Scheme

A comprehensive Compensation Scheme for victims of sexual assault might be adopted in order to provide financial and rehabilitative assistance to the victim-survivors. Recognizing the trauma the victims of sexual violence encounter, the integration of such a scheme is a crying need in our society. Our neighboring country, India, has already adopted such a measure in 2018 to help the victims of sexual assault financially with a scheme called 'The National Legal Services Authority's (NALSA) Compensation Scheme'.[163] The primary objective of the scheme would not only to provide monetary support to the victims but also deliver reparative justice by offering counselling, legal aid, and other necessary forms of support to help victims heal and reintegrate into society.

5.3 Psychosocial Rehabilitation Program

Sexual violence and the consequent victimization by society significantly damage victims' confidence and self-esteem, which eventually hinder their recovery process. In such situations, Psychosocial Rehabilitation Programs can play an essential role in alleviating post-traumatic stress disorder and other psychological impacts. After encountering sexual violence, the victims often face different forms of psychological disorders, including shame and guilt, helplessness, sleep disorders and chronic depression. Thus, different forms of psychosocial rehabilitation programs can be introduced, such as therapeutic interventions (including counselling, cognitive-behavioral therapy, etc)[164], trauma-informed care[165], peer support groups[166], encouraging community and family engagement[167] and so forth, to cope with these sensitive issues. Implementing such a program will undoubtedly be fruitful in improving PTSD symptoms, resilience, and self-compassion among the survivors of sexual violence.

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163 NALSA Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes - 2018 <https://nalsa.gov.in/services/victim-compensation/nalsa-s-compensation-scheme-for-women-victims-survivors-of-sexual-assault-other-crimes---2018> accessed 31 August 2024

164 Lorna O'Doherty and others, 'Psychosocial Interventions for Survivors of Rape and Sexual Assault Experienced during Adulthood' (2023) 2023 Cochrane Database of Systematic Reviews <http://doi.wiley.com/10.1002/14651858.CD013456.pub2> accessed 31 August 2024.

165 Klein LB and others, "Trauma- and Violence-Informed Empowering Care for Sexual Assault Survivors" (2024) 20 Journal of Forensic Nursing 166

166 Murn LT and Schultz LC, "'Knowing I'm Not Alone': The Development of a Support Group for College Victims and Survivors of Sexual Assault" [2023] Journal of College Student Mental Health 1

167 Amy S Untied, Katherine W Bogen and Lindsay M Orchowski, 'Chapter 9 - Reducing the Risk of a "Second Assault": Engaging the Community to Enhance Social Reactions to Disclosure of Sexual Victimization' in Lindsay M Orchowski and Christine A Gidycz (eds), *Sexual Assault Risk Reduction and Resistance* (Academic Press 2018).

5.4 Data Collection and Policy Monitoring

Effective data collection and policy monitoring are paramount in creating a supportive legal environment for sexual violence victims. Since data collection functions as the foundation for policy development, collecting relevant data enables policymakers to understand the prevalence, forms, and contexts of sexual violence. Moreover, by disaggregating those data—categorizing them into different factors like gender, age, socioeconomic status, and geographic location—policymakers can intervene with equitable and inclusive policy frameworks addressing the distinct situations of all victims. Furthermore, ongoing data collection and regular audits of case timelines and police responsiveness work as fundamental feedback mechanisms in monitoring and evaluating the policy effectiveness; thus, prioritizing these mechanisms can help build an empathetic and supportive legal environment.

5.5 Collaborative, Multisectoral Capacity Building

Law and policy reforms, although they play a significant role, are not practically sufficient to build a suitable legal environment for the victims.[168] The importance of collaborative, multi-sectoral capacity-building comes from the fact that various state agencies can be held institutionally accountable. Establishing a more equitable and compassionate judicial system that supports victims while pursuing justice through a collaborative effort is possible. This is when government, law enforcement, and judicial institutions collaborate to enhance their capabilities. Developing sustained capacities in such formal institutions can help them function more effectively by coordinating across multiple sectors.[169]

5.6 Bridging Gaps Between Formal and Informal Systems by the Civil Society Organizations

The effectiveness of formal laws and policies in addressing the well-being of sexual violence victims largely depends on their interaction with informal systems and community practices. Thus, the Civil Society Organizations (hereinafter referred to as CSOs) can play a significant role in making informal systems more survivor-centered by bridging gaps with formal laws and policies. For example, CSOs can

168 Katherine Brickell, 'Violence against Women: Legal Reform Is No Silver Bullet' *The Guardian* (15 March 2013) <https://www.theguardian.com/global-development-professionals-network/2013/mar/15/csw57-violence-against-women-legal-reform> accessed 4 December 2024; Lori Michau and others, 'Prevention of Violence against Women and Girls: Lessons from Practice' (2015) 385 The Lancet 1672.

169 Diana Trujillo, 'Multiparty Alliances and Systemic Change: The Role of Beneficiaries and Their Capacity for Collective Action' (2018) 150 Journal of Business Ethics 425.

strategically involve informal systems in providing community-based legal aid services. Such services may address hindrances that survivor women encounter in navigating formal legal procedures, such as illiteracy, economic limitations, and social stigma.[170]

6. Conclusion

This work has attempted to highlight the endemic challenge of sexual violence in Bangladesh, paying special attention to the mental toll it imposes on victim-survivors. Although our legal landscape has made notable advancements in addressing the crimes relating to sexual violence, but a significant gap still exists in facilitating adequate mental health assistance for victims. The analysis presented in the paper reveals that though the recent amendments of laws, the directives given by the Hon'ble Supreme Court, positive initiatives taken by the police and multisectoral initiatives taken by different sectors have made significant contributions in minimizing the psychological impact, they fall short in addressing phase-specific psychological implications faced by the victim-survivors.

This article presented the available legal frameworks relating to sexual violence offences and their prevalence in Bangladesh. After assessing the current legal protections, this paper drew particular attention to three key phases of mental health challenges faced by the victim-survivors of sexual violence: first, the immediate impact of violence on the victim, where they may go through shock and disbelief and face societal and familial backlash, which sometimes results in cognitive dysfunction or sometimes makes them inclined to drug abuse. Second, while seeking justice, it is a common scenario that victims get re-victimized by the intimidating judicial process, which often causes PTSD, panic attacks, and other psychiatric conditions, driving them to distance themselves from personal relationships. And finally, sexual violence victims often endure long-term psychological challenges, such as flashbacks, seclusion from society, and generalized anxiety disorder, forcing them to get involved in permanent substance abuse. This paper also emphasizes the positive actions taken by state and non-state actors to ensure the psychological well-being of victims.

[170] This strategy finds a practical example in an Indian organization named 'Pragya', where they have done it by setting up socio-empowerment kiosks staffed by community volunteers. Here in Bangladesh as well, volunteers from particular localities can serve as intermediaries to formal justice systems and advocates for societal change, and by leveraging their understanding of cultural nuances and local traditions, they can build rapport with victim-survivors, encouraging them to seek assistance in environments where issues concerning gender-based violence are rarely openly discussed.

In conclusion, this paper demonstrates the importance of implementing a holistic approach by incorporating targeted measures to protect the victims from re-victimization and mitigate their psychological challenges. In our criminal justice system, therapeutic jurisprudence should be integrated to protect the victims from re-traumatization during trial through an empathetic approach. Moreover, the training modules should include sensitization training programs for the police, judges, prosecutors, and other agents working in the criminal justice system. , which will help build the quality to deal with the delicate victims of sexual violence. Furthermore, a comprehensive compensation scheme for victims of sexual assault should be adopted to provide them with counselling, legal aid, and support to help them reintegrate into society. Besides, organizing different forms of psychosocial rehabilitation programs, introducing data collection and monitoring programs, and active collaborations among various sectors of the state, including civil society organizations, will surely help the victims cope with the trauma and other mental issues. More research on the approaches to mitigate the psychological ramifications of sexual violence victims and how policy development can contribute to building a more empathetic and inclusive environment for victims would also complement this research.

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