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A collection of writings on various judicial and legal topics

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FOREWORD

In modern democracy judiciary acts as a social engineer. It protects, declares and even creates right. In a complex, democratic society like Bangladesh, which undergoes radical transformation every day, the Judges and the Magistrates have to be sensitive, responsive and receptive. They must be imbibed with the Constitutional Philosophy of equal justice and social justice. Further, in the context of diversification of complex litigation, explosion in knowledge, along with technological innovation the Judge cannot afford to be static and rigid in his thought and view. To be abreast with changing trend both socially and legally it has now become imperative for a Judge and a Magistrate to have continuous and periodical judicial training. The mission of continuing education is to improve the quality of judicial performance by helping the Judges to acquire tools for professional competence. Therefore, services offered by Judicial Administration Training Institute are mainly focused on practical assistance in performing their day to day role as Judges and Magistrates.

JATI has so far organized 97th training programs providing training to Judges, Magistrates, court support staff and law officers of the Government. Besides the faculty members of the Institute, resource persons amongst others include the judges of the Supreme Court, reputed lawyers and subject matter specialists who have proficiency in the relevant subject. Hon'ble Chief Justice of Bangladesh, Hon'ble Minister for Law, Justice and parliamentary affairs and other legal luminaries are invited as resource persons in the training program of JATI. Their valuable contribution, in course of time will make the JATI a centre of excellence for judicial education in this region.

The present issue of JATI JOURNAL is an endeavor to enlighten our esteemed readers on different problems relating to dispensation of justice.

We express our sincere thanks and deep gratitude to the authors for their contribution in publishing this Journal. I hope the articles published in this Journal will shed light upon the readers on the particular subject. However, we feel some mistakes, errors or omissions may have crept in, despite our best efforts and endeavors. We shall be thankful if those are brought to our notice. The suggestions and recommendations from our esteemed readers are always welcomed and will be kept in view at the time of publishing the next issue.

May 2010, Dhaka

Justice Md. Hamidul Haque
Director General, JATI
and
Chairman of the Board of Advisors
Journal Publication Committee

Technique of Quick Disposal of Criminal Cases.

Justice Kazi Ebadul Hoque

From newspaper report we hear about congestion of cases in different courts of the country from time to time and know that civil cases remain pending for years together and criminal cases also remain pending for several years. From the information gathered from the Cabinet Division of the Government of Bangladesh it was found that in the year 2005, 3,57,583 criminal cases were filed in the Magistrate court and added with the pending 4,07,902 criminal cases there were in total 7,65,440 criminal cases in the Magistrate courts in that year and out of those cases only 3,40,510 cases were disposed of in that year including the cases sent to the Courts of Sessions and Session level courts and Tribunals and 4,24,930 cases remained pending at the end of that year increasing the number of pending cases at the end of the year. In other words number of filing of the cases is more than the number of disposal of the cases during that year. Similarly from the information collected from the Ministry of Law, Justice and Parliamentary Affairs it was found that in the year 2005, 95,951 criminal cases were sent to the Courts of Session and Session level courts and Tribunals for disposal and added with 74,555 pending cases, there were in total 1,70,506 cases and out of those 94,905 cases were disposed of by those Courts and Tribunals during that year leaving 75,601 cases pending at the end of that year increasing the number of pending cases at the end of that year.

To tackle with the congestion of cases pending in the courts, especially in the criminal court, it is necessary to devise new method and strategy. Judges in America with the active cooperation of the prosecution and defence lawyers and even social workers, in some cases, invented a new method of reducing congestion of criminal case in the court. That method is known as plea bargaining which has no legal backing like Alternative Dispute Resolution (ADR) method applied in civil cases. Initially ADR method was also invented by the American Judges with the active cooperation of lawyers of the parties. Realizing utility of ADR method about 25 out of 50 States of USA gave legal recognition to the same. Plea bargaining is yet to get legal recognition in that country. In spite of that about 94% of criminal cases were decided adopting the plea bargaining method in the USA at the end of the last century. Plea bargaining method of disposal of criminal cases is also gaining ground in the United Kingdom. By amending the Code of Criminal Procedure in 2005 India also introduced plea bargaining system of disposal of criminal cases except the cases in which the accused is punishable with death or imprisonment for life or imprisonment for a term exceeding seven years. By the

said amendment Chapter XXIA has been inserted in that Code which include sections 265A-265K. In our country we gave legal recognition to the ADR method by amending the Code of Civil Procedure in 2003. If the Judge adopt plea bargaining method in our court by encouraging the lawyers of the parties in criminal cases disposal of criminal cases could be expedited and in course of time legal recognition of the same could be expected.

Let us try to understand what is meant by Plea Bargaining. It is a method of disposal of criminal cases without taking the trouble of examining witnesses by the court on the basis of settlement arrived at by the prosecution and defence lawyers about the plea of guilt to be made by the accused to the charge or the amended charge and sentence to be imposed on him with the tacit consent of the court.

A criminal trial begins with the framing of charge against the accused by the Magistrate or the Judge before whom he is brought or appears. The charge framed against the accused is read over and explained to him by the Magistrate or the Judge and he is asked as to whether he pleads guilty or not to the charge. If the accused pleads guilty he may be convicted and sentenced by the Magistrate or Judge. Whether an accused shall enter a plea of guilt or innocence after framing of charge against him is absolutely within the discretion of the accused and his lawyer. When a lawyer is engaged to defend an accused, he acts according to the instruction of his client (the accused) but the accused also very much depends on the advice of the lawyer. Defence strategy is decided after mutual discussion between the lawyer and the accused party and study of prosecution materials by the lawyer. An experienced lawyer knows well from the study of prosecution materials and discussion with his client what is the chance of success in the trial. If the lawyer finds that chance of success is not bright one, he may advise his client accordingly and with the consent of the client he may enter into negotiation with the prosecutor and if both the prosecutor and defence lawyer agree to some measure both of them may jointly approach the trial Magistrate or Judge for this concurrence to such a measure. If the Magistrate or Judge even tacitly consents to such agreed measure the deal is struck and the accused pleads accordingly. Entire process beginning from negotiation by the defence lawyer (with the consent of his client) with the prosecutor and measure to be taken as agreed between them and tacit consent of the Magistrate or Judge to the same is called 'Plea bargaining' because through this process is decided what plea would be entered before the Court by the defence. By the process of negotiation between the prosecutor and defence lawyer it is decided whether the accused would plead guilty to the prosecution accusation of the offence or to a lesser offence, if there is scope to do so, or whether he would plead guilty to the prosecution accusation of the offence, on an assurance of lesser sentence to be awarded for which tacit concurrence of

the Magistrate or Judge is necessary. Entering a guilty plea by the accused saves the prosecutor's trouble of time consuming process of proving the case against the accused by bringing the witnesses to the Court and also cost of such trial. Similarly Court is spared the trouble of examining witnesses consuming much judicial time and achieving quick disposal of a case lessening his fattening work-load. Defence is saved the anxiety of uncertainty of the result of the trial and the cost of defending the case on the assurance of certain known sentence to be suffered by him.

It is now clear that the tool of plea bargaining is more useful to the prosecutor, the Magistrate and Judge in disposing of criminal cases speedily saving much time and cost and also avoiding uncertainty of the result of a contested trial. Moreover the Magistrate or Judge is saved from the embarrassment of reversal of his judgment on appeal. Similarly the accused also can avoid uncertainty of the result of trial to be undertaken for which much expenses are necessary to engage an experienced lawyer and he knows in advance what sentence he is going to suffer through plea bargaining. Moreover under such a deal the accused may get a suspended sentence or probation if allowed under the law or merely a sentence or fine where the offence is punishable either with imprisonment or fine.

In our country normally accused pleads guilty to minor offences like traffic offences, Metropolitan Police offences and some other petty offences which entail a sentence of fine only not as a result of any plea bargaining with the prosecutor but to avoid the harassment of lengthy trial and expenses in the Magistrate Courts. Since major offences are tried by Courts of Session and Session level Court there is hardly any guilty plea in those Courts which awards higher period of imprisonment and death sentence. In capital offences there is discretion of the Judge to award either death sentence or imprisonment for life. In murder cases there is scope to plead to a lesser offence of culpable homicide not amounting to murder (Section 304 of the Penal Code) and even to much lesser offence of grievous hurt (Section 326 of the Penal Code). In theft cases there is scope for pleading to lesser offence of receiving stolen property (Section 411 of the Penal Code) and in robbery or dacoity case there is also scope for pleading to a lesser offence of receiving property stolen by robbery or dacoity (Section 412 of the Penal Code). In case of criminal breach of trust there is scope for pleading to a lesser offence of criminal misappropriation (Section 403 and 404 of the Penal Code). There is also scope for pleading to lesser offences of cognate nature in various other cases under the penal laws. Moreover amended provision of section 35A of the Code of Criminal Procedure gives ample opportunity to employ plea bargaining. If an accused deprived of the privilege of bail, especially indigent ones, spends long period in jail custody he may be persuaded to enter a guilty plea

in exchange for his release from jail custody. This initiative can be taken by the prosecutor or the Magistrate or Judge in case the accused is undefended. If the accused is defended by a lawyer such initiative can be taken by the defence lawyer with the consent of his client when he finds little chance of success in a costly and lengthy trial. When out of several accused in a case some are on bail and rest in custody for long time those on bail might be interested in a trial but it is in the interest of those in custody of enter in a guilty plea in exchange for an assurance of release from custody by a reduced sentence equal to the period of custody already undergone by the accused. In such a case those on bail might be tried after convicting and releasing those in custody on the basis of their guilty plea without waiting for completion of trial of the remaining accused. There is no legal bar to sentence some of the accused pleading guilty to the charge brought against them and trying the rest pleading not guilty separately.

In our country there is great propensity to enter a not guilty plea and to claim trial without properly examining the prosecution materials and considering the chances of success in such defence. There is also propensity in our country to gain over prosecution witnesses and even to threaten or prevent them from appearing in court when attempt to gain over them fails. There is also propensity of unduly influencing the other operatives in the criminal justice system. Such evil methods are resorted to by the resourceful offenders and not by the ordinary accused persons who from the bulk of the accused charged with criminal offences, most of them are even unable to engage a competent lawyer to defend them for want of resources. Except in capital offences state defence is not ordinarily available to the bulk of the indigent offenders defended mostly by inexperienced lawyer, if they could at all engage one with their limited resources. Of course there is provision for legal aid for the poor litigants but neither fund is sufficient nor is the system foolproof. End result is that most of the indigent offenders remains undefended or ill-defended. When such is the scenario accused persons and their engaged lawyers should seriously consider the chances of success in the trial of a criminal case. If the lawyer after examining the prosecution materials and consultation with the accused finds that chance of success in the trial is very little rather it would entail harsher sentence he should persuade his client to agree to enter a guilty plea and then the defence lawyer should negotiate terms of such plea with the prosecution. It could be a guilty plea to a lesser offence than one contemplated by the prosecution or if could be a guilty plea to the offence contemplated by the prosecution on the assurance of the prosecutor to recommend for awarding a lesser sentence than normally awarded. In cases conditional discharge or probation is available to the accused under sections 4 and 5 respectively of the Probation of Offenders ordinance, 1960 the prosecutor should recommend for such conditional

discharge or probation in exchange for a guilty plea by the accused. The prosecutor would gain more than the defence by obtaining a guilty plea thereby securing a conviction of the offender without going to trial saving time and cost as well as trouble of adducing evidence. The Magistrate or the Judge would also gain by considering to the request of the prosecutor to reduce the charge or to award lesser sentence or conditional discharge or probation enabling him to reduce the crushing burden of work-load. Moreover there is risk of reversal of the decision of the Magistrate or Judge by the Appellate or Revisional Court if plea bargaining request by the prosecutor is not conceded to by him. When the prosecutor, defence as well as the Magistrate or the Judge is going to gain from plea bargaining why not give a chances to the same. Of course, there is no legal sanction under the law to do so. But there is also no legal bar or prohibition to do so. Not only the prosecutor and Magistrate or Judge gains from plea bargaining by reducing the work-load of criminal docket. Government also gains from efficient management of the criminal cases and reducing the number of pending cases and prison inmates saving huge expenditure on those accounts. It is said habits die hard and people are shy to adopt new methods and tools. If we desire to improve the system of criminal justice in the country the prosecutor, defence and Magistrate or Judge should act in unison to introduce plea bargaining in the system.

Principle of Joint liability with special reference to sections 34, 109 and 149 of the Penal Code

Md. Zakir Hossain

The doctrine of joint liability deals with the conditions under which more than one person incurs responsibility before, during and after committing crimes. When one is accountable for another's conduct, it does not matter whether the defendant's own conduct, the conduct of the other or others or the conduct of all taken collectively or both together establish the elements of the crime charged.

The common law recognized four parties to Crime viz. (i) principals in the first degree- actual perpetrators; (ii) principals in the second degree – aiders and abettors, such as get way drivers, conspirators; (iii) accessories before the fact – aiders and abettors not present when the crimes are committed, such as one who supplies the weapon that a third person uses in a murder; and (iv) accessories after the fact- individuals who give aid and assistance to criminals who are fugitive. If they were not convicted before the accomplices were brought on trial, common law complicity shielded the accomplices even in the face of sure proof of their guilt.

Normally and naturally the person who is liable for wrong is be who does it. Yet both ancient and modern laws admit instances of vicarious liability in which one man is made answerable for the acts of another.

In the Mosaic legislation it is deemed necessary to lay down the express rule that "Fathers shall not be put to death for the children, neither shall the children be put to death for the fathers; every man shall be put to death for his own sin."

Modern civil law recognizes vicarious liability in two chief classes of cases. In the first place, masters are responsible for the acts of their servants done in the source of their employment. In the second place, representative of dead men are liable for deeds done in the flesh by those whom they represent.

The rational basis of this form of vicarious liability is in the first place evidential. There are such immense difficulties in the way of proving actual authority, that it is necessary to establish a conclusive presumption of it. A word, a gesture, or a tone may be a sufficient indication for a master to his servant that some lapse from the legal standard of care or honesty will be deemed acceptable service. Yet who could prove such a measure of complicity? Who could establish liability in such a case, were evidence of authority required, of evidence of the want of it admitted.

For better appreciation and understanding the provisions of sections 34, 109 and 149 may be read as follows:

Section 34 says, when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

Section 149 provides that, if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

For proper understanding of the definition of the unlawful assembly section 149 should read in conjunction with section 141 of the penal code which may be read as follows:

An Assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is-

First, to overawe by criminal force, or show of criminal force, or any public servant in the exercise of the lawful power of such public servant; or Second, to resist the execution of any law, or of any legal process; or Third, to commit any mischief or criminal trespass, or other offence; or Fourth, By means of criminal force or show of criminal force, to any person to take or obtain possession of any property or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth, By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation; An assembly which was not unlawful when it assembled may subsequently become an unlawful assembly.

Section 109 provides that, whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation- An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

Section 34 of the Penal Code deals with common intention: it merely enunciates a principle of joint liability for criminal acts done in furtherance of common intention of the offenders. It means, that if two, or more persons intentionally do a thing jointly it is just the same as if each of them had done it

individually In other words once it is found that the accused persons had common intention to commit the crime, it is immaterial as to what part was played by whom as law as to vicarious liability is that those who stand together, must fall together." It does not perse creates any offence.

The ingredients of this section are:

(i) Several persons must have a common intention and pre-arranged plan to commit an offence; (ii) in furtherance of which the criminal act is done; (iii) each of such persons must actually participate in the commission of the offence in some way or other at the time the crime is actually being committed." (iv) The participation must be in doing the act, not merely in its planning. But this participation need not in all cases be by physical presence. In offences involving violence, normal presence at the scene of offence on the principle of joint liability may be necessary, but such is not the case in respect of other offences where the offence consists of diverse acts which may be done at different times and places.

In the case of **Noor Mohammad Mohd. Yusuf Momin (appellant) V. The State of Maharastra**[1] the trial Court convicted Mohd. Taki Haji Hussain Momin under Section 302 and acquitted three other accused including the appellant. On appeal against acquittal, the Bombay High Court reversed the acquittal and convicted the appellant and two others under Section 120B and 302 read with Section 34 India Penal Code. The appellant was also convicted under Section 302/109 IPC and sentenced to imprisonment for life on two counts separately. The appellant's conviction under Section 302/34 IPC was set aside on the following observations:

"From the evidence it seems highly probable that at the time of the actual murder of Mohd. Yahiya the appellant was either present with other three co-accused or was somewhere nearby. But this evidence does not seem to be enough to prove beyond reasonable doubt his presence at the spot in the company of the other accused when the murder was actually committed .....we are, therefore, inclined to give to the appellant the benefit of doubt in regard to the charge under Section 302 read with Section 34 Indian Penal Code."

The application of Section 34 in respect of the offences other than physical violence have been explained in **Tukaram Ganpat's**[2] case wherein the facts against the accused including the appellant Tukaram were that they stole some bundles of copper wire from the godown of a company after breaking open the godown and removed them away by a lorry which stopped at a weigh-bridge where the brokers for sale were present. There was no evidence about the presence

1 AIR 1971 SC 885
2 AIR 1976 SC 2027.

of the appellant at the scene of offence. The concurrent findings of the courts below were that the appellant was in possession of duplicate keys of the burgled godown found missing from the factory and that he was present at the weigh bridge. The appellant had no explanation for possessing of godown keys nor for his presence at weigh-bridge. In the context of the matter the Supreme Court maintained the conviction of the appellant on applying the principles of common intention as under:

"Mere distance from the scene of crime cannot exclude culpability under Section 34 which lays down the rule of joint responsibility for a criminal act performed by a plurality of persons. In **Barendra Kumar Ghosh v. The King Emperor**[3] the Judicial Committee drew into the criminal net those 'who only stand and wait.' This does not mean that some form of presence, near or remote, is not necessary, or that mere presence without more, at the spot of crime, spells culpability. Criminal sharing, overt or covert by active presence or by distant direction, making out a certain measure of jointness in the commission of the act is the essence of Section 34. Even assuming that presence at the scene is a pre-requisite to attract Section 34 and that such propinquity is absent. Section 107 which is different in one sense, still comes into play to rope in the accused. The act here is not the picking the godown lock but house-breaking and criminal house trespass. This crime is participated in by those operating by remote control as by those doing physical removal. Together operating in concert, the criminal project is executed. Those who supply the duplicate key, wait at the weigh bridge for the break-in and bringing of the booty and later secrete the keys are participles criminal. And this is the role of accused No.2 according to the Courts below. Could this legal inference be called altogether untenable?

There must be general intention shared by all the persons concerned. A furtherance of a common design is a condition precedent of convicting each of the persons who take part in the commission of a crime, and the mere fact that several persons took part in a crime in the absence of a common intention is not sufficient to convict them of that crime. This principle was well illustrated by Privy Council in the case of Mahabub Shah v. Emperor[4]. Subsequently in the case of Mahmood V. The King Emperor[5], it was clarified that the existence of such pre-concert could be established even by proof of acts performed by individuals after the completion of the main crime. Chief Justice Cornelius (as he then was) while delivering judgment of the case of Hamida Bano vs. Ashiq Hossain[6] observed that everything said by this court in a judgment and more particularly, in a judgment in a criminal case must be understood with great particularity as having been said with reference

3 *(1924) 52 IA 40- (AIR 1925 PC 1)*
4 (1945 Law Weekly [Madras] Vol. 58, p. 368.
5 AIR 1964 PC 45
6 15 DLR (SC) 65

to facts of that particular case.

Common intention is a question of fact and is subjective. But it can be inferred from facts and circumstances.[7]

When the evidence establishes that the accused committed the offence in furtherance of a common intention with others, then section 34 may apply to that case even though no formal charge under section 34 has been framed against the accused. The omission to frame the charge is a mere irregularity which is curable if the defence is not prejudiced.

When the charge is under section 302/149, Indian Penal Code, the conviction under section. 302/34 is permissible. If the facts to be proved and the evidence to be adduced with reference to the charge under section. 149 would be the same if the charge were framed with the aid of section. 34, then failure to frame the charge under section 34 would not result in any prejudice to the accused and the conviction with the aid of section. 34 is permissible[8].

The differences in the ingredients under section 34 and section.149 may be tabulated as follows:

Section 34	Section 149
(i) The common intention may be of 'several persons', i.e., more than one person.	(i) There must be an unlawful assembly of five or more persons.
(ii) There must be a prior concert and meeting of minds of the several persons.	(ii) There need not be any prior concert and meeting of minds; it is enough that the number of persons is 5 or more and their common object is the commission of an offence."
(iii) What is essential is the formation of the 'common intention."	(iii) The pre-condition is the formation of an unlawful assembly, having for its common object the commission of any of the offences mentioned in s. 149. Once this is formed each member of the unlawful assembly will be liable for any offence committed in furtherance of the common object even though he might not have done it with his own hands.
(iv) Section 34 is applicable only where the act done is the same act which was intended by way of common intention.	(iv) Section 149 is wider and is applicable not only where the act done was the same as was intended but also where it is a different act, provided it is immediately connected with the common object of the assembly or an act which the members of the assembly knew to be likely to be committed in prosecution of that object.

7 1983 Cr. L.J. 218 (S.C)
8 36 DLR 22

Section 34 embodies the principle of joint liability in the doing of a criminal act and the essence of that liability is the existence of the common intention and the participation in the commission of the offence in furtherance of common intention invites the application of the section. Section 109 may, on the other hand, be attracted even if the abettor is not present when the offence abetted is committed provided he has instigated the commission of the offence or has engaged with one or more persons in the conspiracy to commit an offence and in pursuance of that conspiracy some act or omission takes place or has intentionally aided commission of an act or illegal omission. Both ss. 34 and 149 deals with a combination of persons who become liable to be punished as sharers in the commission of offences. The non-applicability of s. 149 is, therefore, no bar in convicting the accused under s. 34, if the evidence discloses the commission of an offence in furtherance of the common intention of them all. Under s. 120B, P.C., the criminal conspiracy postulates an agreement between two or more persons to do or cause to be done an illegal means. It differs from ss. 34 and 109, P.C., in that here a mere agreement is made an offence even if no step is taken to carry out the agreement.

The application of Section 34 is well illustrated in the decision of the case *Barendra Kumar Ghosh v. Emperor* by Privy Council.[9] In this case the appellant was charged under section 302 of the Indian Penal Code with the murder of Post-Master. On August 3rd 1923, the Sub-Post-Master at Sankaritolla Post Office was counting money at his table to the back room, when several men appeared at the door, demanded of him to give up the money. Almost immediately afterwards they fired pistols at him. He was hit in two places and died almost at once. Without taking any money the assistants fled, separating as they ran. Once man was pursued by other post office assistants and was caught with a pistol in his hand. He was the accused Barendara Kumar Ghose. In the subsequent trial for murder his contention was that he was standing outside and he had not fired at the deceased. He was compelled to join others for alleged robbery and had no intention to kill the Post-Master. The trial judge directed the jury that if they were satisfied that the Post-Master was killed in furtherance of common intention of all three men, then the prisoner was guilty of murder whether he fired the fatal shot or not. It was held by the Calcutta High Court and the Privy Council that upon the true construction of Section 34 of the Code the direction was correct and Barendra Kumar Ghosh was held guilty with the murder of the Post-Master.

In *Sheoram Singh and Another v. The State of U.P.*[10] the Supreme Court held that common intention may develop all of a sudden during the course of the

9 1925 L.L.R. Calcutta Vol. 52, p. 197.
10 (AIR 1972 S.C 25555)

occurrence, but still unless there is cogent evidence and clear proof of such common intention, an accused cannot be vicariously held guilty under s. 34. In this case where a father and son had trespassed into the house of H with the object of killing d, and H met with death at the shot of the father when H refused to send out D from his house, the court held that the son cannot be held guilty of the offence of murder of H, as there was no cogent evidence to show that the son had any intention to kill H. The common object of father and son was to kill, who happened to be in the house of H. The son too had fired at D their common enemy which causes his death, for which he had been rightly held guilty under s. 307 of the I.P.C. But he was acquitted of the charge under s. 302 read along with s. 34, for the death of H which was due to the firing by the father. The latter was found guilty under s. 302, I.P.C.

In the case of *Abdur Rahim vs. State*,[11] it was held that a common intention may develop on the spot between the participants. To apply section 34, the persons must be physically present at the actual commission of the crime. Thus again, even in regard to an offence involving physical violence it is not necessary that every accused must take an active part in the attack on the victim.

The ingredients of an unlawful assembly are:(a) an assembly of five or more persons.(b) they must have a common object(c) the common object must be one of the five specified in the section 141 of the Penal Code.

We have noticed that when more persons than one is involved in an offence, all of them may be tried together in the circumstances as stated in section 239 of the Cr.P.C. But the principle of joint liability in a criminal act has been described in section 34, 109 and 149 of the Penal Code. If more than one person commits an offence, any of the above sections may be applicable. The above sections do not create any distinct offence.

When more then one person commit an offence in furtherance of common intention than all of them shall be charged by adding section 34 with the principal section of the offence. When an offence is committed by one and others abet it then section 109 is to be added along with the substantive offence against those who abetted the offence. When it is not clear as to who actually committed the offence because there was no eye witness, then all may be charged with the offence by adding section 109.

The allegation was that 'A' and 'B' called the victim from his house and before calling the victim both of them and 'C' were talking with the victim in a field near his house. After about one hour, dead body of the victim was found near a bus stand. In this case it was not known which of the three accused murdered the

11 29 DLR (SC) 246.

victim. In such a circumstance, charge is to be framed against all the three u/s 302/109 of the Penal Code[12].

When an offence is committed by a member of an unlawful assembly, all the persons forming unlawful assembly shall be charged by adding section 149 if the allegation is that the offence was committed in prosecution of the common object of that assembly. An unlawful assembly is an assembly of five or more than five persons if the common object of the assembly is one of the objects as enumerated in section 141 of the Penal Code.

To add section 149, it is to be seen whether the accused persons constituted an unlawful assembly and whether the offence was committed by any one of that assembly in prosecution any common object or objects as enumerated in section 141. But in case of adding section 34 of the penal Code, it is to be seen whether the accused persons committed the offence in furtherance of a common intention. The expression 'common intention' is not defined in the Penal Code. However, from judicial pronouncements we find that two conditions are required: (i) the presence of the accused persons at the place of occurrence coupled with actual participation in any form; and (ii) a pre-concert or previous meeting of mind. However, from the later decisions of the Appellate Division, it is now an accepted principle that previous meeting of mind or pre-concert is not essential and a common intention may develop on the spot[13].

To add section 109 of the Penal Code it is to be seen whether there was any abetment. What is abetment is explained in section 107of the Penal Code. According to this section, abetment is constituted (a) by instigating a person to commit an offence; or (b) by engaging in a conspiracy to commit the offence; or (c) by intentionally aiding a person to commit the offence or intentionally aids by any act or illegally aids by any act or illegal omission the doing of that thing. So, to add this section it is not necessary that there shall be actual participation in an offence; a conspiracy will make a person liable to be charged for abetment u/s 109.

Section 149 is not a substantive penal section. This section deals with constructive liability i.e., liability of one person for an offence not committed by himself but committed by another person. So, this section can be added to the charge of any substantive offence.

In this case, some accused were convicted under section 304 part II, but all were convicted under section 149, all could be convicted under section 304 part II/149 but none can be independently convicted under section 149[14].

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12 52 DLR (AD) 143.
13 9 DLR (SC) 7, 22 DLR (SC) 297, 44 DLR (AD) 287.
14 44 DLR (AD) 23.

It is true that abetment is not mentioned as an offence in the above Act and abetment is an offence under the Penal Code. It has been decided in the case of Hossain Mohammad Ershad Vs the State[15] that even if the offence of abetment is not mentioned as an offence in a special law, a person may be charged for abetting an offence punishable under such a special law.

At night, the victim was called by the accused persons and thereafter, the dead body of the victim was found in the following morning. As the taking way of the victim from the house has been proved, the accused is to explain what happened to the victim after he was called by them. There is no material to show that the accused persons have been falsely implicated due to any previous enmity. So, the evidence of the informant and his mother may be considered as sufficient and cogent evidence to convict the accused persons in this case.

Conviction cannot be given in this case under section 302/34. There is no evidence of any pre-concert. The murder has been proved but it is not proved as to which of the accused caused the murder, so in this case instead of section 34, section 109 shall apply.[16]

In the case of Abdul Awal Vs. The State[17] the accused married the victim and demanded dowry of TK. 10,000/- which the father of the victim could not give. The accused on one day came to the house of his father- in-law of take his wife with him and actually he left the house of his father-in-law along with his wife. After several days when the father sent some one to know whether his daughter was in the house of the accused, he came to know that neither the accused nor his daughter were in that house. Thereafter, a dead body of a woman was found and the father identified the same as the dead body of the daughter. The police after investigation submitted charge-sheet against the accused and five others who used to visit the house of the accused. Charge was framed against them u/s 302/34. At the time of trial, as there was no eye witness the prosecution could not prove as to who actually murdered the victim. But 4 witnesses proved that they saw the accused taking the victim with him. The accused made a confession before a competent magistrate stating that he took his wife with him and other accused ravished her and thereafter murdered her in his presence. At the time of examination u/s 342, the accused also repeated what he said in his confession and begged mercy of the Court. It was held that the husband was found guilty for abetment under section 302/109 though charge was not framed under section 34 of Penal Code.

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15 14 BLD (AD) 178
16 7 BCR (AD) 157.
17 14 BLD (AD) 224

In the case State Vs. Md. Abdus Samad Azad[18] It was held that though, charge was not framed under section 302/109 of the Penal Code conviction was awarded for offence of sections 302/109 of the Penal Code on the basis of evidence led by prosecution and learned trial Judge was well justified in the decision in convicting condemned prisoner Sharifa and convict-appellant Arif for offence of sections 302/109 of the Penal Code.

In the case of Kapu Mahamud & Others Vs. The State[19] learned Sessions Judge Nilphamary convicted and sentenced six accused persons under section 302/149 of the Penal Code. High Court Division set aside those conviction and sentence and made a comparison between section 149 & section 34 in the following manner:

(i) It requires an assembly of five persons. (ii) the common object must be one of those specified in section 141 of the Penal Code. (iii) the offence actually committed is required by section 149 to be one which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object. (iv) section 34 requires some act, however small, to the done whereas under section 149 mere membership of the assembly is sufficient. (v) Section 34 enunciates a mere principle of liability but creates no offence, section 149 creates a specific offence.

Section 34,109,114 and 149 of the Penal Code, provide for criminal liability viewed form different angles as regards actual participants, accessories and men actuated by a common intention: and the charge is a rolled up one involving direct liability and constructive liability without specifying who are directly liable and who are sought to be made constructively liable. Judicial officers in charge of administration of criminal justice and member of the legal profession should know the actual connotation and proper legal implication of the liability created under the above sections. Without comprehension of the actual legal implication of the different words and expressions used in those sections the proper administration of justice may inherently be hindered and the duties bestowed upon the persons responsible for administration for justice may be considered to have been discharged unjustifiably.

18 9 BLC (HC) 39.
19 2 LG 260

Speedy Disposal of Criminal Cases and the Scope of Introducing ADR in Criminal Justice Administration in Bangladesh : Some Observations

Md. Akhtaruzzaman

1.1 Introduction

So far as dispensation of justice is concerned the backlog of cases, as ever, comes to the forefront for discussion. It is not only a great problem in our country but also a global menace. There have been many researches and deliberations all over the world, our country are not excepted, as to how to lessen the number of cases and how to dispose of them in the quickest possible way. Now-a-day, it is said that the democracy and development go side by side. But in the absence of strong, impartial, independent, quick and dynamic judicial system neither democracy nor development can flourish and sustain. Keeping all these in mind, law makers mandated speedy and fair trial in Article 35(3) of the Constitution of the Peoples' Republic of Bangladesh. With the insertion of this provision in our Constitution it has become a citizens' constitutional right to get speedy trial. In spite of the constitutional guarantee, speedy trial, however, remains a far cry for the citizens of Bangladesh due to some practical problems which cause inordinate delay in disposal of cases.

'Justice delayed is justice denied' and another maxim 'justice hurried is justice buried' are frequently and deliberately used by the people of our country. In the ordinary course of law, justice is not hurried in Bangladesh but practically it is true that, with a few exceptions, justice is usually delayed and thereby often seen to be denied.

If the civil cases are not expeditiously disposed of it has a disastrous effect on the society. Sloth and tardiness in disposal of the civil cases breed criminal propensity. Those who wait for years together for result of their cases in civil courts ultimately take to violence giving rise to criminal cases.

1.2 Causes of Delay in the Disposal of Criminal cases

There are various reasons for which criminal cases are impeded. The most detestable feature in the trial of criminal cases in the Sessions' Courts which seems to have become a routine matter is that even after commencement, the trial is adjourned and the case left part heard not only day but months after months. The invariable answer for such adjournments is the failure of the prosecution to

produce its witnesses, particularly, the official witnesses in time. The Public Prosecutors in most of the cases have uniformly expressed their disgust and helplessness and blame the administration for, utter non-cooperation and indifference. For failure to produce witnesses in time, the cause of justice has suffered in many cases.

The following factors causing impediments in criminal proceedings and trials:

1. Like civil suits the numbers of criminal cases as well as the number of courts are also not distributed duly, properly and proportionately.
2. Delay in starting investigation. At the same time delays in submitting the investigation report.
3. Shortage of number of investigation officers corresponding to a large number of cases waiting for investigation.
4. Absence of separate, independent well equipped and well trained investigating agency.
5. Delay in disposal of *Naraji* petition in pursuance of the acceptance and rejection of police report.
6. Non-submission of allied documents like seizure list, medical certificate, expert opinion, inquest report etc. along with the police report under section 173(3) of the Code of Criminal Procedure.
7. Non-execution of writs of proclamation and attachment under section 87 and 88 of the Code of Criminal Procedure for appearance of the absconding accused before the court causing delay in getting a case ready for hearing.
8. It is the duty of the police to ensure the attendance of the witnesses. But the reality is that in spite of repeated issuance of processes, police personnel hopelessly and miserably fail to perform their duty duly and properly.
9. Absence of efficient, conversant and knowledgeable Public Prosecutors and defence lawyers.
10. During investigation stage and in cases pending for trial before the Magistrates, records are called for, for disposal of applications for bail in the Sessions' Courts and then undue delay occurs in returning these records back to Magistrates' Courts.
11. After submission of charge sheet incomplete records are sometimes sent to the Sessions' Courts by the Magistrates.

Reluctance of appellate courts to hear and dispose of criminal appeals and revisions with the impression that such disposal will not be taken into

consideration by the Supreme Court to asses the total disposal of cases.

1.3 Alternatives to Reduce Criminal Case-loads

Plea Bargain

A plea bargain is an agreement in which a prosecutor and defendant arrange to settle criminal charges against the accused. The accused agrees to plead guilty in exchange for some concession from the prosecutor. The concession can vary from reducing the original charge to dismissing some charges against the accused. Consequently, the court must approve the plea bargain and may impose any sentence that is reasonable and just.

Plea bargaining is a significant part of the criminal justice in the United States and Canada, as it helps courts and prosecutors managing caseloads. In the United States, an accused has a constitutional right to a speedy trial. If the speedy trial is not held, the case is dismissed. By plea bargaining, prosecutors can reduce the number of cases set for trial so that cases are not dismissed. Indeed, the vast majority of cases in the United States (nearly ninety percent) are settled by plea bargain rather than by a jury trial.[1]

A criminal trial begins with the framing of charge against the accused by the Magistrate or the Judge before whom he is brought or appears. The charge framed against the accused is read over and explained to him by the Magistrate or the Judge and he is asked as to whether he pleads guilty or not to the charge. If the accused pleads guilty he may be convicted and sentenced by the Magistrate or Judge. Instead of pleading guilty accused may deny the charge and claim to be tried. In that case prosecution has to prove the charge against the accused by adducing evidence against him. Whether an accused shall enter a plea of guilt or innocence after framing of charge against him is absolutely within the discretion of the accused and his lawyer. When a lawyer is engaged to defend an accused he acts according to the instruction of his client (the accused) but the accused also very much depends on the advice of the lawyer. Defence strategy is decided after mutual discussion between the lawyer and the accused party and study of prosecution materials by the lawyer. An experienced lawyer knows well from the study of prosecution materials and discussion with his client what is the chance of success in the trial. If the lawyer finds that chance of success is not a bright one he may advise his client accordingly and with the consent of the client may enter into negotiation with the prosecutor and if both the prosecutor and defence lawyer agree to some measure both of them may jointly approach the trial Magistrate or Judge for his concurrence to such a measure. If the Magistrate or Judge even

1 *'The Pros and Cons of Extrajudicial Modes of Dispute Resolution'* paper presented by US District Court Judge Paul A. Magnuson on May 17-19, 2006 in an International Judicial Conference, Prague, Czech Republic

tacitly consents to such agreed measure the deal is struck and the accused pleads accordingly. Entire process beginning from negotiation by the defence lawyer (with the consent of his client) with the prosecutor and measure to be taken agreed between them and tacit consent of the Magistrate or Judge to the same is called plea bargaining because through this process is decided what plea would be entered before the Court by the defence.[2] By the process of negotiation between the prosecutor and defence lawyer it is decided whether the accused would plead guilty to the prosecution accusation of the offence or to a lesser offence, if there is scope to do so, or whether he would plead guilty to the prosecution accusation of the offence , on an assurance of lesser sentence to be awarded for which tacit concurrence of the Magistrate or Judge is necessary. Entering a guilty plea by the accused saves the prosecutor trouble of time consuming process of proving the case against the accused by bringing the witnesses to the court and also cost of such trial. Similarly, court is spared the trouble of examining witnesses consuming much judicial time and achieving quick disposal of a case lessening his fattening work-load. Defence is saved the anxiety of uncertainty of the result of the trial and the cost of defending the case on the assurance of certain known sentence to be suffered by him.[3]

It is now clear that the tool of plea bargaining is more useful to the prosecutor and the Magistrate or Judge in disposing of criminal cases speedily saving much time and avoiding uncertainty of the result of a contested trial. Moreover the Magistrate or Judge is saved from the embarrassment of reversal of his judgment on appeal. Similarly the accused also can avoid uncertainty of the result of trial to be undertaken for which much expenses are necessary to engage an experienced and he knows in advance what sentence he is going to suffer through plea bargaining. Moreover under such a deal the accused may get a suspended sentence or probation if allowed under the law or merely a sentence of fine where the offence is punishable either with imprisonment or fine.[4]

In our country normally, accused pleads guilty to minor offenses , Metropolitan Police offences and some other petty offences which entail a sentence of fine only not as a result of any plea bargaining with the prosecutor but to avoid the harassment of lengthy trial and expenses in the Magistrate's court. Since major offences are tried by Courts of Session and courts having similar power and jurisdiction, there is hardly any guilty plea in those courts which award higher period of imprisonment and death sentence or imprisonment for life. In murder cases there is scope to plead to a lesser offence of culpable homicide not

2 Hoque, Justice Kazi Ebadul, *'Plea bargaining and criminal work-load'*, 56 DLR(2004)Journal, 53
3 *Ibid.*
4 *Ibid*

amounting to murder (Section 304 of the Penal Code) and even to much lesser offence of grievous hurt (Section 326 of the Penal Code). In theft cases there is scope for pleading to lesser offence of receiving stolen property (section 411 of Penal Code) and in robbery or dacoity case there is also scope for pleading to a lesser offence of receiving property stolen by robbery or dacoity (Section 412 of the Penal Code). In case of criminal breach of trust there is scope for pleading to a lesser offence of criminal misappropriation (Sections 403 and 404 of the Penal Code). There is also scope for pleading to lesser offences of cognate nature in various other cases under the penal laws. Moreover, amended provision of section 35A of the Code of Criminal Procedure gives ample opportunity to employ plea bargaining. If an accused deprived of the privilege of bail, specially indigent ones, spends a long period in jail custody he may be persuaded to enter a guilty plea in exchange for his release from jail custody. This initiative can be taken by the prosecutor or the Magistrate or Judge in case the accused is undefended. If the accused is defended by a lawyer such initiative can be taken by the defence lawyer with the consent of his client when he finds little chance of success in a trial. When out of several accused in a case some are on bail rest in custody for long time those on bail might be interested in a trial but it is in the interest of those in custody to enter in a guilty plea in exchange for an assurance of release from custody. In such a case those on bail might be tried after convicting and releasing those in custody on the basis of their guilty plea without waiting for completion of others' trial.

If the lawyer after examining the prosecution materials and consultation with the accused finds that chance of success in the trial is very little, rather it would entail harsher sentence, he should persuade his client to agree to enter a guilty plea and then the defence lawyer should negotiate terms of such plea with the prosecution. It could be a guilty plea to a lesser offence than one contemplated by the prosecution or it could be a guilty plea to the offence contemplated by the prosecution on the assurance of the prosecutor to recommend for awarding a lesser sentence than normally awarded.

Alternative Dispute Resolution (ADR)

Apart from traditional justice delivery system alternative dispute resolution system (ADR) means to resolve the disputes between the parties in the court or outside the court. Alternative dispute resolution system (ADR) is adopted in civil justice system of Bangladesh. But no such device has yet been inserted in the laws relating to criminal justice delivery system. Section 345 of The Code of Criminal Procedure enacts provision for compromise between the adversary parties to a little extent. Besides this *Gram Adalat Ain*, 2006 and *Birodh Mimangsha (Poura Elaka) Board Ain*, 2004 deals to dispose of some petty criminal offences by compromise. The criminal court has no other alternatives but to acquit the

offenders if compromise petition is submitted in case of compoundable offences. So resolving of criminal disputes by alternative dispute resolution system is prevailing earlier than that of civil disputes as it enacted in the Code of Civil Procedure. Our Supreme Court also encourages resolving dispute with or without intervention of the Court. Describing the necessity of compromise in the criminal cases Justice Badrul Haider Choudhury opined:

"Our criminal administration of justice encourages the compromise of certain disputes and even certain offence can be compound as provided by section 345 CrPC, *Shalish* or compromise had been ... a mode of settlement of dispute in this sub-continent from time immemorial."[5]

The opinion of the Supreme Court of Bangladesh, mentioned above, encourages alternative dispute resolution system (ADR). There are also other petty criminal offences not mentioned in section 345 of the Code of Criminal Procedure which can be solved at once and all concerned should be helpful when the parties realize their errors.

It is found that in case of false cases the informant and other witnesses deposed as such that it becomes very difficult to find out any 'contradiction' or 'doubt'. In this way possibility of conviction of innocent person is not rare. A family dispute case very often bears non compoundable sections and the period of imprisonment is more for those offences. In course of times the parties realize their fault and try to compromise but due to non compoundable offences they fail to reach any composition. Though the informant or the complainant agrees to composition but there is no way for the Court as the offences are of non -compoundable in nature.

Sometimes criminal proceedings have been initiated for genuine reasons. But to maintain good relations with the neighbours and peaceful conduct of service and business the disputes have been resolved between the adversary parties and there need to composition of cases. If the parties realize their regret, there is no alternative but to compromise the cases and the result of such composition is early disposal of the cases, cost effective, establish co-operation and direct involvement of the patties, less mental pressure, no harassment and satisfaction of the parties and overcome the heavy work load of the court.

Statistics reveals that thousand of cases are under trial in our criminal Courts and the accused persons have to keep in long custody which interfere their human rights. The trial of criminal cases prolong due to complicity of trial, want of Judges, delay in submitting police report and failure to produce witnesses in time before the Court. This is not cost effective and people have to suffer for long time. After long delay trial if the accused persons acquit the relation between the parties

5 *Md. Joynal and others* v. *Md. Rustam Ali and others*, 36 DLR (AD) 240,244

becomes worsen and it continues over the generations and creates multifarious litigation between them. To overcome this situation ADR system should be introduce in criminal justice delivery system.

1.4 Advantages of ADR

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

On March 7 and 8, 2004 the British Council, Dhaka organized ***'South Asian Regional Workshop on Alternative Dispute Resolution.'*** In concluding remarks of the workshop Justice Syed J. R. Mudassir Hussain, the former Chief Justice of Bangladesh commented:

"In our present legal system, increasing expenses of litigation, delay in disposal of cases and huge backlogs have virtually shaken the confidence of the people in the judiciary. In this backdrop, we cannot but ponder about the device like ADR which is potentially useful for reducing the backlogs and delay in some cases of our Courts. Alternative dispute resolution, being much cheaper and speedier than the existing legal system, can greatly mitigate the sufferings of poor litigants."

So, it may be concluded that ADR is an imperative system for resolving the disputes in this present world.

1.5 Guiding Principles in Compounding of Criminal Cases

Penal Code covers wide range of offences, defining the offences and the provisions of punishment. Whereas the Code of Criminal Procedure prescribes the procedure to try the offences compoundable offences can also be compromised outside the court. Main object of composition is to maintain peace and tranquility in the society and it works outside the court and increases brotherhood between the rival parties. But all kind of offences are not compoundable; basically compromise is prohibited in heinous offences.

The ultimate motive of compromise of criminal cases is to resolve the wrong doing between the rival parties and to maintain peace and tranquility in the society. Following points should be kept in mind while compromising an offence:

a. The composition proceeding should be guided by legal process and no legal provisions shall be hampered by compromise.

b. Patience hearing should be given to both the parties.

c. Conciliator should not impose any decision over the parties.

d. Extra benefit should not be given to any parties and satisfactions of all the parties should be maintained.

e. No one should be declared guilty or convicted in conciliation proceeding.

f. Equality should be ensured in case of male and female.

g. Deed of composition should be in written from and both the parties and their witness and the conciliator should be singed in the deed.

h. Copy of the deed of composition should be provided both the parties.

1.6 Composition of Criminal Cases and the Role of the Judiciary

Section 345 of The Code of Criminal Procedure bears provisions to compromise in the Court and outside the Court. Section 345(2) provides the offences mentioned in this section may be compounded in the Court before which any prosecution for such offence is pending with the permission of the Court. A large number of criminal cases are pending in our Court and people are suffering a lot. They are very much ignorant about law and even they have no knowledge regarding compounding of offences. So the Court should encourage the parties for compromise. In this way early disposal of criminal cases can be possible and people will be the ultimate beneficiary.

At any stage of criminal proceeding the parties may take initiative to submit deed of compromise and even in appellate stage it can be submit before the Court. The order is discharge of the accused when the deed is filed before framing of charge whereas the accused is to be acquitted if the compromised deed is submitted after framing of charge. Before pronouncement of judgment compromise deed can be filed. The Pakistan Supreme Court permits submission of deed of compromise after serving the conviction and acquit the accused in appellate stage.[6] But when the lower Courts' record is called for under section 435 of the Code of Criminal Procedure, Magistrate can not permit the parties to submit compromise deed.

Our Supreme Court takes lenient view to dispose off cases through compromise and it encourages the conciliation process. In the case of Abdus *Sattar*

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6 PLD (1980) SC 161

& others v. ***The State and another***[7] the court supports vehemently the alternative dispute resolution process. To explain the matter the Appellate Division expresses:

> "... Our criminal administration of justice encourages compromise of certain disputes and some of the cases can be compounded as provided by section 345 Cr. P.C Section 379, Penal Code is compoundable by the owner of the property stolen. Mrs. Jobeda Khatun is the complainant and is the owner of the property in question. She has now filed an affidavit praying for composition of the offence as the parties are inter-related. As we have noticed that the law encourages the composition of the offence and since this matter is pending by way of special leave before this Court, we have no hesitation in allowing the composition and as a result this composition shall have the effect of acquittal of the accused."

Offence under section 325 of the Penal Code can be compounded with the permission of the court. In the case of ***Md. Joynal and others*** v. ***Md. Rustam Ali Mia and others***[8] it is decided that compromise of extensive disputes is not illegal between the rival parties. In this case the Appellate Division stated that offence compoundable (i.e. one u/s 325 Penal Code) with the permission of the court compounded by the parties for settling a long standing dispute valid in law, nothing wrong. On the other hand, in the case of ***Mobarak Ali and others*** v. ***Mobaswir Ali and others***[9] the Appellate Division observes that the court may acquit the accused under section 245(1) of the Code of Criminal Procedure if prosecution does not take any steps for long time. The fact of the case, briefly, is that the informant was severely beaten up by the accused persons being assembled unlawfully with sophisticated fire arms while he was going for purchase of ration materials at about 7.00 am on 06-11-1986 and thereafter committed theft taking money by force from the informant. A police case has been initiated and the investigation officer submits charge sheet under section 107/ 148/ 149/ 324 /323/307/379 of the Penal Code. The case was being tried by the Additional District Magistrate, Sylhet for long time. Meanwhile the informant as PW-1 deposes in the Court stating that the dispute has already been compromised by the parties and he has no allegation against the accused persons. The prosecution filed time petition and the same was allowed by the Court and on 30-08-1988 time petition of the prosecution has been allowed for the last time. Thereafter the time petition has also been allowed by the Court and next date was fixed on 21-01-1989. That very day the accused persons appear but the prosecution has failed to produce any witness. Considering the fact of compromise between the parties out

7 38 DLR (AD) 38, 40
8 36 DLR (AD) 240
9 49 DLR (AD)36

side the Court, the Court acquitted the accused persons. Two of witnesses of this case preferred appeal and lastly the case was before the Appellate Division for decision. His Lordship the then Chief Justice of Bangladesh Mr. Justice ATM Afzal held that the prosecution having not taken any steps the learned Magistrate rightly acquitted the respondents under section 245(1) of the Code of Criminal Procedure.

1.7 Necessary Steps to introduce ADR in Criminal Justice Delivery System

As we have observed that under the existing law, certain offences are compoundable and a list of those offences is given in section 345 of the Code of Criminal Procedure. There are some offences which can be compounded without the permission of the Court, while for some offences prior permission of the Court is necessary for composition. In recent years, there has been a general increase in the incidence of crime due to various factors. The acquittal of the accused in a large number of cases by the Courts due to want of requisite legal evidence in support of the prosecution is resented by the victims' relatives who then take the law in to their own hands and avenge themselves by killing the acquitted person and in this way the boold-feud spreads wider and wider. The fear of reprisals also deters the public from coming forward to give evidence even in the case of murders committed in their view in broad-daylight. This non-cooperative attitude is attributed to the general sense of insecurity prevailing among the public against notorious and desperate criminals, who do not hesitate to take revenge from those who come forward to depose against them. The composition of offences is one of the best and most effective methods of checking the incidence of crime, because, when a case has been compounded, the chances of retaliation or revenge are negligible.

With this background, the research work reveals that majority of the litigants favour the idea of enlarging the scope of section 345 of the Code of Criminal Procedure. It is further commented by them that it would eliminate the various malpractices now resorted to be the parties to put an end to criminal proceedings pending in the Courts in which a non-compoundable offence has, in fact, been compounded out of Court.

In criminal jurisdiction, thousands of cases filed under section 138 of the Negotiable Instruments Act, 1881 are tried by Court of Sessions' which are not compoundable. It is observed that in course of trial the accused persons pay back the money and thereby witnesses are produced roughly and thereby acquit the accused persons. Basically, these types of cases have been filed by the bank and other financial institutions and they are not interested to proceed with the trial of the cases after realization of money. In this case ADR system may be very much effective and the complainants will be benefited. A considerable number of cases filed under section 385

of the Penal Code are pending in the Courts' of Sessions' for years together. Sometimes on the basis of family or land disputes parties filed these types of cases but after passing considerable time they do not show their interest of appearing before the Court. The presiding Judges took so many steps to compel the attendance of the prosecution witnesses but when they appear the told before the Court that the dispute between the parties has already been adjusted outside the Court. Accordingly, after examining the prosecution witnesses the Courts are acquitting the accused persons consuming a lot of time. Cases filed under sections 143, 307, 326, 404, 411, 412, 420, 468, 506(part II) of the Penal Code are pending in our courts causing a huge backlog of cases. Some of the cases are filed before the Nari O Shishu Nirjatan Daman Tribunal can also be made compoundable as because most of the cases are practically settled outside the court. These types of cases are suitable for composition through court if necessary amendments be made in the procedural laws. A considerable number of criminal cases are filed under the Forest Act, 1927 and the Electricity Act, 1910 and those are triable the Magistrate of the First Class. In those cases Magistrates can settle the matters by way of composition if he is empowered properly. So, to preserve the human rights it is necessary to introduce ADR system in criminal justice delivery system.

1.8 Recommendations

From the above discussions in conclusion it can be said that, in principle, there can be no objection to the enlargement of the scope of section 345, because the amicable settlement of a dispute is always the best solution as it puts an end to the dispute once for all. The study, is however, not in favour of recommending any radical change in the matter, because, in view of the general social structure of our country, it would not be conducive to the improvement of the law and order situation to leave the settlement of serious offences in the hands of private persons. We have not reached the stage as yet where the composition of serious offences even with the leave of the court should be made permissible. The principle of composition can, however, be extended to less serious offences, because there are certain offences particularly against persons which if compounded, can bring about better results than if the accused is convicted and awarded sentence of imprisonment by the court. Except for the offences already mentioned in clause (1) of section 345 of the Code, the compounding of offences against persons should be made permissible only with the previous permission of the Court. Therefore, like the Code of Civil Procedure, ADR system can be introduced in the Code of Criminal Procedure by expanding the scope of section 345 or by inserting a new section like ***345A*** and empower the trial court as well as appellate courts to dispose of criminal cases through ADR.

Liberalization of Locus- standi and growth of Public Interest Litigation (PIL) in Bangladesh.

Atwar Rahman

INTRODUCTION :

Eminent jurist Lord Denning once commented, *"Law does not standstill. It moves continually. Once this is recognized then the task of the Judge is put on a higher plane. He must consciously seek to mould the law as to serve the needs of the time."* This worthy opinion implies that Law should be liberally interpreted & used to meet the demand of the changing circumstances of the day since it is a medium of social engineering. Hence the concept of PIL has been originated from liberal interpretation of *Locus Standi* to comply with changing socio-economic circumstances.

PIL for Enforcement of Fundamental Rights and Lawful Administration Actions :

PIL purports to attain two fold purposes. *Firstly,* it ensures the enforcement of fundamental rights. *Secondly,* it imposes checks & balance upon administrative actions by means of Writ Petitions in the nature of *Mandamus*, *Prohibition*, *Certiorari*, *Habeas Corpus* & *Quo Warranto*. Thus PIL act as a watchdog by keeping a vigilant eye over the Governmental action. Role-played by PIL for the enforcement of fundamental rights & compel the Government to fulfill its duties rendering justice to the poor & ignorant people has well summed up by Dr. B. L. Wadehra as follows[1]: *"PIL offers opportunity to genuine public-spirited individuals or groups or associations of such individuals to come out of their shells & challenge the wrong doings & wrongdoers before the Courts of competent jurisdiction for relief to the suffering public who for reasons of illiteracy, ignorance, poetry or fear of those handling the State machine are not in a position to themselves reach out for judicial intervention & relief. Relief for others or the in the service of others, is the service of the Almighty. PIL is service of people, which is service of God."*

WHAT IS PIL :

The question, *"What PIL means & is?"* has been deeply surveyed, explored & explained not only by various judicial pronouncements in many countries, but also by eminent Judges, activist lawyers, outstanding scholars, journalists & social scientists etc with a vast education. If we want to have a crystal clear conception

1 Wadehra, Dr. B. L., *Public Interest Litigation: A Hand book*, 1st Ed., Universal Law Publishing CO. PVT. LTD., Delhi, 2003, pp. 8-9.

about PIL, then adequate knowledge regarding public interest, public interest law & litigation are must. So let's check out the appropriate definitions of these terminologies & their relationship with PIL.

Definition of Public Interest :

The word *Public* literally means pertaining to the people of a country or locality.[2] The term can be used for either all members of the community or groups of members or any section or class of that community.[3] The term interest is a relation of being objectively concerned in something by having a right or title to, a claim upon or share in that thing.[4] It includes varying aggregates of rights, privileges, powers & immunities.[5] Therefore *Public Interest* means a commonality of interest, a single interest that a certain group of people or citizens are presumed to share.[6]

In Stroud's Judicial Dictionary, *Public Interest* is defined as- *"A matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement; but that is which a class of community have a pecuniary interest, or some interest by which their legal right or liabilities are affected."* Anwarul Hoque Chowdhury J, in ***AR Shams-ud-Doha v Bangladesh & others***[7], supported this definition relying on the decision of ***South Hetton Coal Company Case*** [8].

Definition of Public Interest Litigation (PIL) :

The expression litigation means a legal action including all proceedings therein, initiated in a Court of law with the purpose of enforcing a right or seeking a remedy.[9] Therefore the expression lexically means a legal action initiated in a Court of law for the enforcement of public interest or general interest in which thepublic or the class of community have pecuniary interest or some interest by which their legal rights or liabilities are affected.[10]

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2 Ahmed, Naim, *Public Interest Litigation: Constitutional Issues & Remedies,* 1st Ed., BLAST, Dhaka, 1999, pp. 52-53.

3 Ibid.,

4 Ibid.

5 Ibid.,

6 Ibid.,

7 46 DLR 405 at 408.,

8 (1894) 1 QB 133.

9 Banerjee, Prosad Bhagabati J, *Writ Remedies: with Special Chapter on Public Interest Litigation,* 3rd Ed., Wadhwa & Company Nagpur, New Delhi, 2002, p. 997.

10 Ibid..

PIL as defined in ***People's Union of Democratic Rights v Union of India*** [11] by Bhagwati J. as follows: PIL is essentially a co-operative effect on the part of the petitioner, the State or public authority & the Court to secure observance of the constitutional or legal rights, benefits & privileges conferred upon the vulnerable section of the community & to reach social justice to them.

In the context of Pakistan Faqir Hussain says[12]: *"PIL means what it says namely litigation in the interest of the public...it must be emphasized that the raison detre of PIL is to break through the existing legal, technical & procedural constraints & provide justice, particularly social justice to a particular individual, class or community who on account of any personal deficiency or economic or social deprivation or state oppression are prevented from bringing a claim in the Court of law."*

Hence PIL may be defined as which recognises maintainability of legal actions by a third party (not the aggrieved) in unique situation.[13] In short, PIL may be described as a type of litigation where the interest of the public is given priority over all other interests with an aim to ensure social & collective justice, the Court being ready to disregard the constraints of the adversary model of litigation.[14] Thus when conscious citizens or organizations, with bonafide intentions, approach the Court for the interest of the public in general or a disadvantaged or under privileged segment of the society & not for any private, vested, special or group interest, it is termed as PIL.[15]

Distinction between PIL & Ordinary Litigation :

PIL may be distinguished from ordinary litigation in the following way e.g.[16]

***First,* PIL is for the benefit of the people as a whole or a segment of the**

11 AIR 1982 SC 1473 at 1477.

12 Hussain, Faqir, 'Public Interest Litigation in Pakistan', *PLD Journal*, 1993, pp. 72-73. Quoted by Op.cit, Ahmed, Naim, p. 50.

13 Talukder, S.M. Hassan, *Development of Administrative Law in Bangladesh: Outcomes and Prospects*, 1st Ed., Bangladesh Law Researchers' Association and Law Readers Bangladesh, Dhaka, 1997, p. 155. Here Writer by the term *'Third Party'* signifies who is not directly injured in money or property; he or she is not the actual victim but a party (plaintiff) to the case or litigation. Writer also explains that *'Unique Situation'* means situation where third party acts as friend in good faith for public interest without any malafide intention (*Pro Bono Publico*), not for his own vested interest.

14 Op.cit, Ahmed, Naim, pp. 50-51.

15 Ibid..

16 Op.cit, Ahmed, Naim, pp. 50-51.

society. It aims to enhance social & collective justice & there must be a public cause involved as opposed to a private cause.

Second, in the PIL any individual or organization may approach the Court. It involves liberalization of the rules of standing. This includes cases initiated *Suo Motu*, because the Judge himself is a concerned citizen in such a case.

Third, the Court adopts a non-adversarial system as opposed to an adversarial system of litigation. This includes procedural aspects as well as the aspects of granting relief. As a result, the Court may treat letters as petitions, appoint commissioners, award commissioners, award compensation or supervise & monitor the enforcement of its orders.

Essentials of PIL :

From the classical exposition of PIL by Bhagwati J., in ***S.P Gupta v Union of India*** [17] one can call out the essentials of PIL, as under [18]:

a) There must be a legal wrong caused to a person or to a determinate class of person, on whom burden is imposed in violation of law without legal authority.

b) The wrong must arise from violation of any constitutional or legal right.

c) The wronged person or determinate group of persons must be unable to approach the Court for relief because of poverty, helplessness, social or economic disability.

d) If the above conditions are satisfactory, then any member of the public can seek judicial redress for the above wrong.

e) But the Court should be anxious to ensure that the person initiating the proceedings is acting *Bona Fide* to get redress for a public grievance & not to pursue any personal gain or from malicious motives.

f) If the case is otherwise appropriate for PIL then the Court can act even on letters addressed to it.

Procedural Uniqueness of PIL :

Under the traditional procedural law, two competing interests clash in front of the Judge who acts as a neutral umpire.[19] This is so called adversarial model of

17 AIR 1982 SC 149.

18 *P.M. Bakhi's Encyclopedia of Writ Law: An Indepth Study of Law relating to Writs,* Revised by S.T. Srinivasan, 1st Ed., Capital Law House, Delhi, 2004, p. 297.

19 Op.cit, Ahmed, Naim, pp. 56-65.

litigation that has developed in relation to private interest litigation.[20] Where public interest is concerned, this model is unsuitable for obvious reasons.[21] The poor & the disorganized, or a conscious citizen, cannot compete with powerful vested interests in terms of time, money & energy required to fight a case.[22] Anti public interest elements can easily out-resource good intentioned PIL activists.[23] So the PIL activists stress on the fact that, in many cases, *'equal treatment of unequals is inequality'*.[24] To remedy the situation, the concept of PIL suggests that, a non-adversarial model may be chosen over the adversarial system of litigation.[25]

Suitability of private law litigation model for resolving public law issues has been seriously questioned backed in 1976 by Abram Chayes.[26] He observed the fact that a public law litigation approach reserves many of the crucial characteristics & assumptions of the traditional concept of adjudication.[27]

In a public law model[28]:

1) The scope of the lawsuit is no exogenously given but is shaped primarily by the Court & parties;
2) The party structure is rigidly bilateral but sprawling & amorphous;
3) The fact inquiry is not historical & adjudicative but predictive & legislative;
4) Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability & confined its impact to the immediate parties;
5) The remedy is not imposed but negotiated;
6) The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the Court;
7) The Judge is active, with responsibility not only for credible fact

20 Ibid.

21 Ibid.

22 Ibid.

23 Op.cit, Ahmed, Naim, pp. 56-65.

24 Ibid.

25 Ibid.

26 Ibid.

27 Ibid.

28 Op.cit, Ahmed, Naim, pp. 56-65.

evolution but for organizing & shaping the litigation to ensure a just & viable outcome;

8) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy. Although Chayes dealt with the American jurisdiction, in the Bangladesh perspective also, his model holds good & true.[29]

THE DOCTRINE OF LOCUS STANDI

Traditional View of Locus Standi :

Locus Standi means the legal capacity to invoke the jurisdiction of the Court. It the petitioner has no *Locus Standi*, he cannot be heard in a Court of law.[30] The traditional view in regard to *Locus Standi* in writ jurisdiction has been that, only such person has *Locus Standi* who[31]:

a) has suffered a legal injury by reason of violation of his legal right or legally protected interest; or

b) is likely to suffer a legal injury by reason of violation of his legal right or legally protected interest.

Thus before a person acquired *Locus Standi*, he had to have a personal individual right which was violated or threatened to be violated.[32] He should have been a person aggrieved in the sense that he had suffered or was likely to suffer some prejudice, pecuniary or otherwise.[33]

In UK as regards the availability of writ remedies, the traditional rule was that a person who invoked the jurisdiction of the Court could be heard only if he had suffered a legal injury as a consequence of the violation of his legal right. It was not enough that the entire public had suffered an injury & the person complaining was one of them. The classical case was on the strict doctrine is ***ex parte Sidebotham*** [34].

Object of Strict Rule Locus Standi :

The law insists on *Locus Standi* for two main reasons e.g. juristic & practical.[35]

a) Juristically, if a person does not have a right, then he should not be allowed

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29 Ibid
30 Op.cit, Wadehra, Dr. B. L., p. 10.
31 Ibid.
32 Ibid
33 Ibid
34 (1880) 14 Ch D 458.
35 Op.cit, *P.M. Bakhi's Encyclopedia of Writ Law: An Indepth Study of Law relating to Writs*, Revised by S.T. Srinivasan, pp. 299-300.

to sue. The legal maxim is- *"If there is a legal right, then there is a legal remedy"*.

b) In the practical aspect to the matter is *"Court should not waste time on futile matters"*. If ultimately no relief can be given, then there is no point in going into facts & the law. A Court does not sit as academic adjudicator. *Locus Standi* thus denotes the link between-

a) the person bringing a suit or proceeding.

b) the right asserted by him in the suit or proceeding.

If the above link is absent, then the suit must fail.

The Liberalization of Locus Standi :

The origin of PIL lies in the liberalization of *Locus Standi* by the Supreme Court. For PIL to exit, someone else should be able to approach the Courts on behalf of others who cannot come and that person cannot be a person aggrieved in the traditional sense. The person instituting a PIL for redressal of public wrong or public injury may be:

a) an individual acting with benevolence (and not for personal ends);

b) an association or organization having a legal personality & interested *Bona Fide* in the matter;

c) an organization having a legal personality, but interested in the subject matter;

d) even the State (in exceptional cases).

However, the member of the public should not be a mere busybody or a meddlesome interloper but one who has sufficient interest in the proceeding.

The case that liberalized the doctrine of *Locus Standi* in UK was ***R. v Thomas Magistrate's Court, ex parte Greenbaum*** [36] involved a pitch in a street market which was awarded to a seller of jellied eels rather than a newspaper seller. Since the newspaper seller had no legal right to the pitch he was barred by the strict doctrine of *Locus Standi* and quashed the order of the Magistrates awarding the pitch.

Again in *R. v Paddington Valuation Officer, ex parte Peachey Property Corpn. Ltd.*, [37] a ratepayer alleged that the property valuation list of the whole area had not been properly prepared. He was however not able to show that his own property was rated wrongly. In spite of this, Lord Denning accorded him *Locus Standi* and held-*"The question is whether the peachy Property Corporation is person aggrieved so as to be entitled to ask for certiorari or mandamus. If a*

36 (1957) 5 LGR 129.
37 (1966) 1 QB 380 (400).

ratepayer or other person finds his name included in a valuation list, which is invalid, he is entitled to come to the Court & applied to have it quashed. The Court would not listen of course to a mere busy body who was interfering in things, which did not concern him. But it will listen to anyone whose intersects are affected by what has been done...so here it will listen to any ratepayer who complains that the list is invalid."

The Mc Whirter Case

In the case of ***Attorney-General v Independent Broadcasting Authority***, [38] Mr. Ross Mc Whirter came to the Court alleging that the television was going to show a film that evening about an actor called Andy Warhol. That, from the reports of newspaper reporters who had seen it was an outrageous film & was likely to offend public feelings. The Court granted a junction to stop the film being shown. The Attorney General contended that the Court could not hear Mr. Mc Whirter without his consent. Lord Denning held- *"The first point is whether Mr. Mc Whirter had any Locus Standi to come to the Court at all... This is a point of Constitutional significance. We live in an age when Parliament has placed statutory duties on Governmental departments & public authorities- for the benefit of the public- but has provided no remedy for the breach of them. If a Government department or a public authority transgresses it, can a member of the public come to the Court & draw the matter to its attention? He may himself be injuriously affected by the breach. So many thousands of others like him. Is each & every one of them debarred from access to the Courts? In such a situation I am of opinion- & I state it as a matter of principle- that the citizen who is aggrieved has a Locus Standi to come to the Courts. He can at least seek a declaration.*

I regard it as a matter of high constitutional principle that if there is good ground for supposing that a Government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then in the last resort any one of those offended or injured can draw it to the attention of the Courts of law & seek to have the enforced. But this, I would compromise, is only in the last resort when there is no other remedy reasonably available to secure that the law is obeyed."

Reasons behind the Liberalization :

Justice Bhagwati in S.P. Gupta v Union of India[39] stated: "Today a vast resolution is taking place in the Judicial process, the theatre of law in fast changing & the problems of the poor are coming to the forefront. The Court has to innovate new methods & device new strategies for the purpose of providing access to

38 (1973) QB 629.

39 AIR 1982 SC 149.

Justice to large masses of people who are denied their basic human rights & to whom freedom & liberty have no meaning. The only way in which this can be done is by entertaining writ petitions & even letters from public spirited individuals seeking Judicial redress for the benefit of persons who have suffered a legal wrong or a legal injury or whose constitutional or legal rights have been violated, but who by reason of their poverty or socially or economically disadvantaged position are unable to approach the court for relief."

Development/Growth of PIL in Bangladesh and new principles :

PIL under the Constitutional Scheme of Bangladesh :

The bias towards social and collective justice in the Constitution of Bangladesh can be traced back to its origin.[40] In April 1971, the Proclamation of Independence was issued.[41] A major aim was *'to ensure for the people of Bangladesh equality, human dignity and social justice'*.[42] So the document envisaged was an autochthonous and social justice Constitution.[43]

In December 1972, the Constitution was adopted.[44] The third paragraph of the preamble of the Constitution of Bangladesh says[45]:

"Further pledging that it shall be a fundamental aim of 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."

While interpreting the Preamble in favour of social collective justice, it must be read along with Article 7.[46] It declares[47]:

"(1) All powers in the Republic belong to the people and their exercise on behalf of the people shall be effected only under and by authority of this Constitution.

(2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

As to the rights & interests of the people that are to be upheld in accordance

40 Op.cit, Ahmed, Naim, pp. 89-102.
41 Ibid.
42 Ibid.
43 Ibid.
44 Ibid.
45 Ibid.
46 Ibid.
47 Ibid.

with Article 7, the Constitution declares certain matters to be fundamental.[48] Part two of the Constitution (Articles 8-25) contains the fundamental principles of state policy while Part three (Articles 26-47) sets out the fundamental rights.[49] Article 8(1) says that the principles of absolute trust & faith in the Almighty Allah, nationalism, democracy & socialism meaning economic & social justice, together with the principles derived from them as set out in part two constitute the fundamental principles of state policy.[50] It also states that absolute trust & faith in the Almighty Allah shall be the basis of all actions.[51] Regarding the fundamental principles of state policy Article 8(2) says[52]: *"The principles set out in this part shall be fundamental to the governance of Bangladesh, shall be applied by the State in making laws, shall be a guide to the interpretation of the Constitution & of the other laws of Bangladesh, & shall form the basis of the work of the State & of its citizens, but shall not be judicially enforceable."*

As regards fundamental rights, Article 26 declares that all existing & newly made laws must conform with part three containing fundamental rights & any law inconsistent will become void to the extent of such inconsistency.[53] Article 44 declares that the right to move the High Court Division for the enforcement of fundamental rights conferred by Part three is guaranteed.[54] Powers of the High Court Division to issue *'certain orders and directions'* in order to enforce the fundamental rights are elaborated in Article 102.[55] Article 102 thus provides a mechanism to enforce public rights & interests.[56]

Basis of Constitutional Legitimacy of PIL in Bangladesh :

What is the nature of the Constitutional mandate that enables PIL to be recognized & accepted in Bangladesh?[57] One uniqueness of the Bangladesh Constitution is its autochthonous nature- which in consequence highlight the *'people's power concept'*.[58] Accordingly, since this autochthonous Constitution reflects the power of the people, a PIL approach is mandated.[59]

48 Ibid.
49 Ibid.
50 Ibid.
51 Ibid.
52 Op.cit, Ahmed, Naim, pp. 89-102.
53 Ibid.
54 Ibid.
55 Ibid.
56 Ibid.
57 Ibid.
58 Ibid.
59 Ibid.

Dr. Mohiuddin Farooque advocated *'autochthonic constitutional litigation'* (ACL) and agued that to build a credible national jurisprudence the functional Constitutionalism should be autochthonic.[60] Its spirit is to consider people's rights & public duties.[61] Such autochthonic litigation, he argued would consolidate the supreme & sovereign authority of the people instead of disempowering them.[62]

Appellate Division's Interpretation in the FAP 20 Case :

In the FAP 20 Mustafa Kamal J, begins with the argument of inclusive interpretation.[63] He says[64]: *"Article 102 of our Constitution is not an isolated island standing above or beyond the sea-level of the other provisions of the Constitution. It is a part of the over-all scheme, objectives and purposes of the Constitution. And its interpretation is inextricably linked with the 1) emergence of Bangladesh and framing of its Constitution, 2) the preamble and Article 7 of the Constitution, 3) Fundamental Principles of State Policy, 4) Fundamental Rights and 5) the other provisions of the Constitution."*

Discussing the first point, he denies that the Bangladesh Constitution is just a replica with local adaptations of a Constitution of the Westminster model among the Commonwealth countries of Anglo-Saxon legal tradition.[65] It is not the result of a negotiated settlement with a colonial power or consent or a foreign sovereign.[66] Although it has been amended 13 times, it is not the last of an oft-replaced and oft-substituted Constitution.[67] It is a Constitution in which the people feature as the dominant actor[68]:*"It was the people of Bangladesh who in exercise of their own self-proclaimed native power made a clean break from the past un-shackling the bondage of a past statehood & adopted a Constitution of its own choosing. The Constitution, historically & in real terms, is a manifestation of what is called 'the people's power'. The people of Bangladesh therefore are central, as oppose to ornamental, to the framing of the Constitution."* [69]

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60 Ibid.
61 Ibid.
62 Ibid.
63 Ibid.
64 Ibid.
65 Ibid.
66 Ibid.
67 Ibid.
68 Ibid.
69 *Dr. Mohiuddin Farooque v Bangladesh & Others* (FAP 20), 17 BLD (AD) 1. Quoted by Op.cit, Ahmed, Naim, pp. 89-102.

As regards the second point, the preamble & Article 7, he again argues that the Bangladesh Constitution stands a different footing by the very fact of the essence of its birth, which is different from others.[70] The people themselves have adopted, enacted & given themselves a real & positive declaration of pledges reflecting the ethos of the historic war of independence.[71] The pledges in the preamble indicate the course or path that the people wish to tread.[72] Article 7 makes it clear that all legislative, Judicial & executive powers are conferred by the people through the Constitution.[73] The people, again, are the repository of all power.[74]

Regarding third point, the fundamental principles, he says that since Part two shall be a guide to interpretation, it is constitutionally impermissible to leave out of part two when an interpretation of Article 102 needs guidance.[75]

As for the fourth point, regarding the fundamental rights, he observes that Article 102 is a mechanism of the enforcement of the fundamental rights, which can be enjoyed by an individual alone & can also be shared by an individual in common with others when the rights pervade & extent to entire population & territory.[76] So Article 102(1) cannot be divorced from part three.[77]

Finally, regarding the fifth point, the Judge observes that the other provisions of the Constitution will come into play their role in the interpretation of Article 102, although their importance may vary from case to case.[78]

Development of PIL in Bangladesh through Case laws :

Long before this wave of liberalization of the rule of *Locus Standi* to enable PIL reached Bangladesh in the case of ***Kazi Muklasur Rahman v Bangladesh*** [79], known as ***Beru Bari Case*** petitioner, an advocate, challenged the legality of the Delhi Treaty of 1974 entered into between India & Bangladesh for demarcation of land boundary between the two countries.[80] Court held[81]: *"It appears to us that*

70 Op.cit, Ahmed, Naim, pp. 89-102.
71 Ibid.
72 Ibid.
73 Ibid.
74 Ibid.
75 Ibid.
76 Op.cit, Ahmed, Naim, pp. 89-102.
77 Ibid.
78 Ibid.
79 26 DLR (AD) 44.
80 Hoque, Kazi Ebadul, *Administration of Justice in Bangladesh,* 1st Ed., Asiatic Society of Bangladesh, Dhaka, 2003, pp. 224-231.
81 Ibid.

the question of Locus Standi does not involve the Court's jurisdiction to hear a person but of the competency of the person to claim a hearing, so the question is one of discretion which the Court exercises upon due consideration of the facts & circumstances of each case." Of course that decision is no authority for the proposition that a person whose own fundamental right has not been infringed has a right to move the Court for espousing the cause of other persons whose fundamental rights have been violated.[82] So in that case no general rule for liberalizing *Locus Standi* even in public interest having been made High Court Division of the SC of Bangladesh continued to stick to the traditional view on *Locus Standi*.[83]

In case of ***Dada Match Workers Union v Bangladesh*** [84], the question was whether a trade union can made an application for judicial review under Article 102 of the Constitution on behalf of its members.[85] The Court held[86]: *"The expression 'person aggrieved' contemplates a person directly affected by the impugned order. Such relief cannot be asked for by any person in their representative capacity."*

Same view was expressed by the High Court Division in case of ***K. S. Employees Union v G.M. Khulna Shipyard*** ,[87] as follows[88]: *"For violation of the right of individual workers collective bargaining agent (trade union) has no authority to invoke writ jurisdiction of this Court, simply because he is not the person aggrieved... the petitioner got no Locus Standi to maintain an application under Article 102 of the Constitution."*

In the case of ***M. G. Bhuiyan v Bangladesh*** [89], appellant, an advocate, as petitioner filed a writ petition seeking declaration that Government Notification giving effect to the *Law Reforms Ordinance 1978* (amending some procedural laws) was without lawful authority as according to him the same was *Ultra Vires* the Constitution.[90] AD held[91]: *"As to the Locus Standi of the appellant to present an application under Article 102 of the Constitution seeking the declaration prayed for therein, we fail to understand how he could be considered as an*

82 Ibid.
83 Ibid.
84 29 DLR 188.
85 Op.cit, Hoque, Kazi Ebadul, pp. 224-231.
86 Ibid.
87 30 DLR 368.
88 Op.cit, Hoque, Kazi Ebadul, pp. 224-231.
89 (1981) 1 BCR (AD) 81.
90 Op.cit, Hoque, Kazi Ebadul, pp. 224-231.
91 Ibid.

aggrieved person with in the meaning of the expression used in the Article. It could not be shown that by divergence between the law & the Constitution, if any, his right has been specifically affected. He is not a person aggrieved."

In the case of ***BSP v Bangladesh*** [92], an association of owner of newspapers & news organizations, registered under the Societies Registration Act challenged the constitutionality of the relevant Act & formation of an Wage Board and its interim award. On the question of *Locus Standi* of the petitioner the view expressed in the ***Dada Match workers' Case*** was approved.

The High Court Division for the first time in the case of ***Retired Government Employees v Bangladesh*** [93], held[94]: *"Since this association has an interest in ventilating the common grievance of all matters, who are retired Government employees, to our view this association is a person aggrieved within the meaning of clause (1) & clause (2) of Article 102 of the Constitution. It is, therefore, entitled to maintain this writ petition."*

In the case of ***Dr. Mohiuddin Farooque v Election Commission & Others*** [95], petitioner filed writ petition seeking prohibition of activities in connection with the DCC election in 1994 causing nuisance violating law & directives of Election Commission.[96] The case was disposed of in view of the assurance of the Attorney General that Government would take all necessary steps to implement all the directives of the election commission.[97] In this case question of *Locus Standi* of the petitioner was not raised and decided.[98]

Some times after the election of 1991 to the Bangladesh Jatiya Sangsad members of the then Parliament belonging to the opposition political parties started boycotting the sessions of the parliament demanding amendment of the Constitution incorporating provisions for a care taker government to hold the general elections for the parliament. In the case of ***Anwar Hossain Khan v Speaker of Bangladesh Sangsad Bhavan and Others*** [99], petitioner filed writ petition seeking direction & mandamus on boycotting members of the parliament.[100] The Court held[101]: *"As Constitution is a solemn expression of the*

92 43 DLR (AD) 126
93 46 DLR 426
94 Op.cit, Hoque, Kazi Ebadul, pp. 224-231.
95 46 DLR 235
96 Op.cit, Hoque, Kazi Ebadul, pp. 224-231.
97 Ibid.
98 Ibid.
99 47 DLR 42.
100 Op.cit, Hoque, Kazi Ebadul, pp. 224-231.
101 Ibid.

will of the people, the supreme law of the Republic, any violation of it by anybody including the members of the parliament shall be called in question by each & every citizen of Bangladesh. The petitioner has got a Locus Standi to file this application by calling in question the conduct & actions of the respondent Nos. 3-5 for getting appropriate relief."

In the case of ***Dr. Mohiuddin Farooque v Bangladesh represented by Secretary Ministry of Law, Justice and Parliamentary Affairs*** [102], the petitioner sought direction on the Government to be issued by the Court for filing up vacant post of Judges in the both Divisions of the SC of Bangladesh in public interest.[103] Court rejected the writ petition on the question of *Locus Standi* with the following observations[104]: *"Inaction or failure of the respondents to appoint Judges of the SC does not make him an aggrieved person within the meaning of Article 102 as shock sustained by him for such omission on the part of the respondent is not infringement of either any constitutional or legal right."*

In the case of ***Dr. Mohiuddin Farooque v Bangladesh represented by Secretary Ministry of Heath & Family Welfare and Others*** [105], petitioner filed writ petition for prohibiting importation of contaminated food items in violation of the fundamental right to life and protection of life sought enforcement of those rights in his own interest & in the interest of the people.[106]

Court held[107]: *"The right to life under Articles 31 & 32 of the Constitution not only means protection of life & limbs necessary for full enjoyment of life but also includes, amongst others protection of health & normal longevity of an ordinary human being."*

Finally, in the case of ***Dr. Mohiuddin Farooque v Bangladesh and Others*** [108], meaning of the expression *'any person aggrieved'* occurring in Article 102 (1) and 102 (2) (a) of the Constitution has been liberalized & extended in respect of PIL. In the leading judgment Mustafa Kamal J, observed[109]: *"When a public injury or public wrong or infraction of a fundamental right affecting an indeterminate number of people is involved, it is not necessary in the scheme of our Constitution, that the multitude of individuals who has been collectively*

102 48 DLR 433.
103 Op.cit, Hoque, Kazi Ebadul, pp. 224-231.
104 Ibid.
105 48 DLR 438.
106 Op.cit, Hoque, Kazi Ebadul, pp. 224-231.
107 Ibid.
108 49 DLR (AD) 1.
109 Op.cit, Hoque, Kazi Ebadul, pp. 224-231.

wronged or injured or whose collective fundamental rights have been invaded are to invoke jurisdiction under Article 102 in a multitude of individual writ petitions, each representing his own portion of concern. In so far as it concerns public wrong or public injury or invasion in common with others or any citizen or an indigenous association, as distinguished from a local component of a foreign organization, espousing that particular cause is a person aggrieved & has right to invoke the jurisdiction under Article 102. If he espouses a purely individual cause, he is a person aggrieved if his own interests are affected. If he espouses a public cause involving a public wrong or public injury he need not be personally affected. Viewed in this text interpreting the words 'any person aggrieved' meaning only & exclusively individuals & excluding the consideration of people as a collective & consolidated personality will be a stand taken against the Constitution."

CONCLUSIONS :

From the above discussion it quite evident that there should not be any conflict between the fundamental rights and fundamental principles of state policy for proper use of PIL. We need to adopt the rule of harmonious interpretation and the fundamental rights should be interpreted in the light of fundamental principles of state policy. This positive approach will help a lot to ensure healthy growth of Public Interest Litigation.

Reference :

1. The Constitution of People's Republic of Bangladesh.
2. Wadehra, Dr. B. L., *Public Interest Litigation: A Hand book*, 1st Ed., Universal Law Publishing CO. PVT. LTD., Delhi, 2003.
3. Ahmed, Naim, *Public Interest Litigation: Constitutional Issues & Remedies,* 1st Ed., BLAST, Dhaka, 1999.
4. Banerjee, Prosad Bhagabati J, *Writ Remedies: with Special Chapter on Public Interest Litigation,* 3rd Ed., Wadhwa & Company Nagpur, New Delhi, 2002.
5. Hussain, Faqir, 'Public Interest Litigation in Pakistan', *PLD Journal*, 1993.
6. Talukder, S.M. Hassan, *Development of Administrative Law in Bangladesh: Outcomes and Prospects*, 1st Ed., Bangladesh Law Researchers' Association and Law Readers Bangladesh, Dhaka, 1997.
7. *P.M. Bakhi's Encyclopedia of Writ Law: An Indepth Study of Law relating to Writs,* Revised by S.T. Srinivasan, 1st Ed., Capital Law House, Delhi, 2004.
8. Hoque, Kazi Ebadul, *Administration of Justice in Bangladesh,* 1st Ed., Asiatic Society of Bangladesh, Dhaka, 2003.
9. **(1894) 1 QB 133.**
10. AIR 1982 SC 1473.
11. (1880) 14 Ch D 458.
12. (1957) 5 LGR 129.
13. (1966) 1 QB 380 (400).
14. (1973) QB 629.
15. 26 DLR (AD) 44.
16. 29 DLR 188.
17. 30 DLR 368.
18. (1981) 1 BCR (AD) 81.
19. 43 DLR (AD) 126.
20. 46 DLR 405.
21. 47 DLR 42.
22. 48 DLR 433.
23. 49 DLR (AD) 1.

Judicial Education: My CJEI Experience

Badrul Alam Bhuiyan

On the invitation of Hon'ble Judge Sandra E. Oxner, Chairperson of the Commonwealth Judicial Education Institute (*referred to as* CJEI), Halifax, Canada, and the Hon'ble Chief Justice of Bangladesh was pleased to nominate me as a member of the two members Bangladeshi delegation—to attend the 15th Intensive Study Program offered by CJEI .

On the welcome session of the 15th Intensive Study Program hon'ble Judge Sandra E. Oxner, the Chair of the session preach the Participants about the objectives of the aforesaid training program. She, the hon'ble Judge Sandra E. Oxner, told the participants about the role of CJEI in judicial education through out the commonwealth.

It was told to the participants that the CJEI is a product of the Commonwealth Judges and Magistrate's Association (CMJA) and is a voluntary organization. All the chief justices of commonwealth are its patrons. It is run by a Board of Directors supported by an Advisory Board. The advisory board consists of heads of judicial training institutes in commonwealth countries. Hon'ble D.G. of J.A.T.I. Mr. Justice Md. Hamidul Haque is one of the members of the advisory board of CJEI.

The CJEI's own Course Objectives in details of the 15th Intensive Study Program :

- Identification and study of objectives and standards of judicial education for proposed national adoption.
- To identify the best practices in the structure, function and curricula of judicial education bodies.
- Study and design of long range national plans for national judicial education.
- Design of judicial education program curricula responsive to the community's perception of judicial weaknesses.
- Study of interactive pedagogical techniques suitable for adult education.
- Design and use of teaching tools (print, video, audio, electronic – online and disk, video teleconferencing, drama and role play).
- Ongoing transfer of judicial education information and experiences and information on human and material resources through receipt of the "CJEI Report".
- Study of curriculum development which responds to community needs.
- Design of a broad based needs assessment survey suitable for national use.

- Study of fundraising for judicial education program – sources, proposal design, required accounting systems and report writing.
- Inclusion in Commonwealth and common law judicial education networks for post program sustainability and exchange of information and resources.
- While the program deals primarily with methodology, the curriculum development section reviews the human rights aspects of the requirement for judiciaries to diagnose and rectify hidden bias against minorities, principles of sentencing to achieve
- Uniformity and rationalization, efficient court administration and case flow management, ADR and environmental issues.
- Transfer of skills learned to colleagues on the participant's return home.

Last of all-

- To provide an understanding & ideas to the participants about latest trends in judicial education and methodologies.

We the participants also identified the following objectives of the said training program through discussion.

1. Sharing of knowledge
2. Updating the knowledge
3. Access to justice
4. Identification of problems in justice delivery system
5. Bringing uniformity in decision making
6. Improvement in procedural justice
7. Strengthening and confidence building of judges
8. Building confidence of public in judiciary

Discussion also took place on different qualities of judges. These were identified by the participants and as shown in below:

- Impartiality
- Knowledge
- Integrity
- Courteous
- Shaping the law
- Effective communication
- Hard worker
- Prudence
- Good listener
- Inspire confidence of public and litigant
- Good conducting of trial

- Efficient, confident and fearless
- Free from gender bias
- Strong enough to stand pressures
- Aware of social problems.

The purpose of any judicial training academy is to look after these areas to introduce the best approach in judicial officers so that they can perform at their optimal qualities. The approach of CJEI towards judicial education stands on the following four key objectives which are known as **ICEE** approach.

- Integrity
- Competence
- Efficiency
- Effectiveness

However instruction also given on the following mattes the in the15th Intensive Study Program offered by CJEI which are described in a nutshell in bellow.

Teaching Methodology for adult education:

The core emphasis on this subject was using of modern teaching tools by the faculty / resource person of any judicial training institute. It was sensitized that the traditional "lecture" method is now a days considered as an obsolete form of delivery of knowledge. Instead, the researchers reveals that the lecture method only provide 5% retention rate for the trainee. The Learning Pyramid developed by the National Training Laboratories, Bethel, Maine classifies the teaching tools and their impact on the learner's retention rate in the following ratio:

Lecture 5%

Reading 10%

Audio Visual 20%

Demonstration 30%

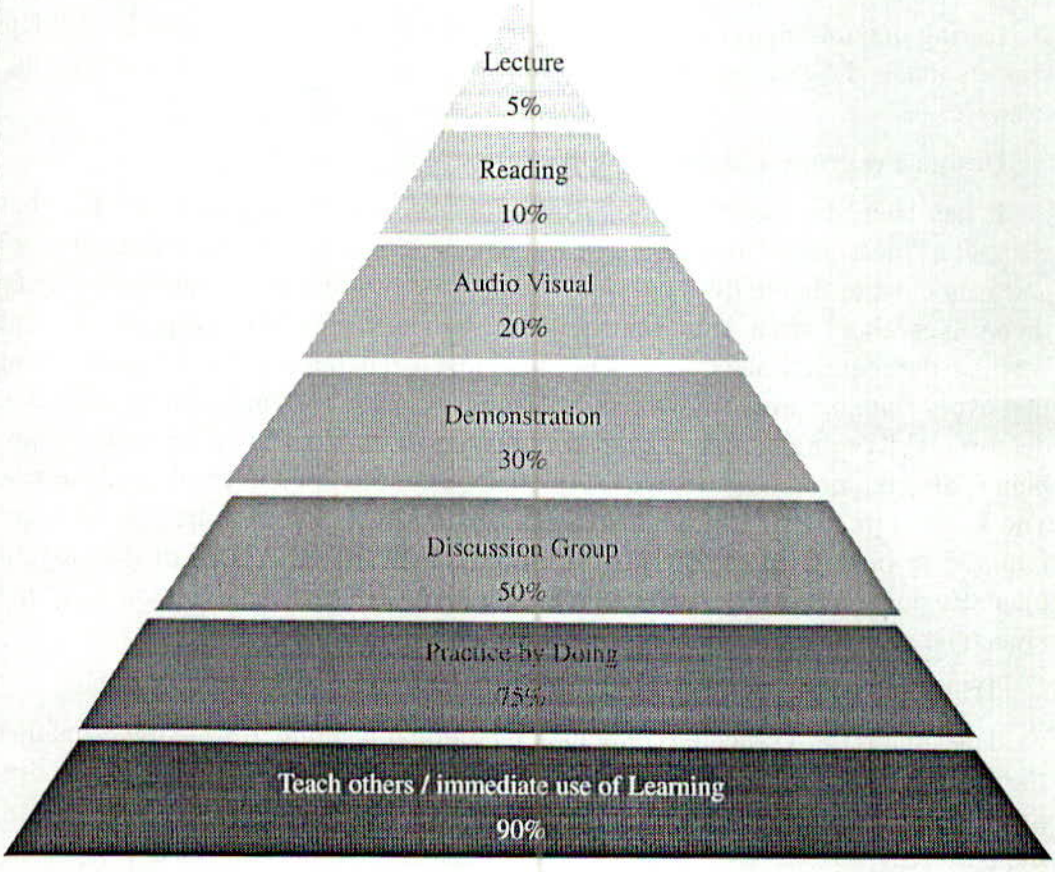
Discussion Group 50%

Practice by Doing 75%

Teach others / immediate use of Learning 90%

DIAGRAM

LEARNING PYRAMID



Source : National Training Laboratories, Bethel, Maine

It was therefore, strongly urged by the CJEI that the judicial trainers must use different teaching tools during their sessions to make the teaching more effective, relevant and alive. For example, a mix of use of the tools like power point presentation, questionnaires, white board, flip chart, hypothetical, Q&A, group-discussions, movie, audio-video, demonstration, role play, mock trials, web-conferencing, literature, story-telling, etc. may be relevant in this regard.

During the training program at CJEI, use of different teaching tools in training session made the session alive and we participants felt more involved in the exercise.

Design Program and Session Objectives:

It has been discussed extensively during the training sessions at CJEI that without a "measurable" objective, the training programs may become directionless and it is most probable that the trainer and trainees will remain unable to satisfy themselves about what they were required to teach and learn respectively and weather the required outcome has been achieved. Therefore, it is very important that every training program must be properly defined with 'measurable' objective determined.Keeping in view the pattern of program plan, a replica for each session plan is also required with objectives of each session defined in measurable terms. The same 'Pro forma' can be used for a session plan. The resource persons are required to prepare themselves in accordance with the objectives of the session plan. Evaluation, during and after the session will be a tool to know if the objectives have been met.

Training Needs Assessment:

This area is most crucial for any judicial training institute. It was suggested that the judicial academies must get involved in empirical and statistical data collection and analysis regarding the training needs of judicial education. For this purpose, the Academy should develop and design Q&A Form which can be distributed to all the stakeholders like judges, bars, public, litigants, NGOs, media organizations, independent writers on judicial affairs, academicians, and government representatives. This is important because unless the judiciary will not realize its weaknesses as are understood by the stakeholders, the purpose of judicial training and education will not result in fruitful outcome.

Long Range Judicial Education Planning:

Apart from the judicial training on needs basis, it is also important for a judicial training institute to have a long range plan in accordance with its objectives and goals. The CJEI is of the view that there must be defined at least a three-year plan using the ICEE (Integrity, Competence Efficiency Effectiveness) approach so that the training and education needs of the judiciary are properly planned.

The methodology for preparing the long-range plan will be to first re-visit the goals and objectives of the Academy, then to review and analyze the training needs assessment feedback, then to consider the weak areas of judiciary and finally to set the priority areas of training and education from amongst the general list. Once it is done, the Academy can also decide the pitch and target audience of the training programs before hand.

Topic of "Sentencing" in Judicial Education Program:

There is a need to study the sentencing approach of judicial officers so that the ''Training Institute'' can suggest a way out for minimizing the inconsistent sentencing by different judicial officers regarding cases having same set of facts. This is important for the obvious reasons that the inconsistent sentencing brings bad name to judiciary and shows weaknesses in the system. Further, bias among the judges and their personal values regarding an issue may bring harm to overall justice delivery system.

Judicial Communication:

The importance of this subject lies in the fact that the judges have to use their communication skills in a number of ways that create an impact, inter alia, on the litigant, lawyer, general public, media, justice system and public confidence. Judges communicate on the bench and off the bench. They communicate either verbally, in writing through orders and judgments, by gestures, or by their do's and don'ts. Every such action or restraint has a perception value. Therefore, judges, magistrates, and court personnel are required to use the communication skills in such a way where the perception value is positive and confidence inspiring for judiciary and justice system. Any wrong perception or any lack of proper communication between the court and the litigant creates gaps that may cause unnecessary criticism of court decisions.

Therefore, it has been sensitized to the participants of the course at CJEI that judicial communication should be simple, relevant, unbiased, timely, non-technical and without legal jargons, articulate, short, and understandable by ordinary person. This list is not exhaustive but caters for the least required elements.

Professor Zimmerman from University of Nevada, USA had delivered talk on this subject. He is considered an authority on the topic in North America.

For faculty members, this subject becomes relevant and important because it is the art of communication that transfers information and knowledge from resource person / judicial educator to trainees. In case the judicial educators are not sensitized about the possible gaps in communication, they may not be able to deliver properly and the trainees may remain in confusion about the topic under

discussion.

Judgment Writing Skills:

Professor James C. Raymond, a professor of international repute from the USA on the topic of judgment writing skills delivered talks on the topic of prime importance. He has provided relevant materials on the topic and suggested that the art and craft of writing judgment must be taught in light of plain language movement around the globe.

Judicial Wellness, Health Breaks and Exercises / excursion trips:

It is found that the CJEI had designed its Intensive Study Program in a way where the physical exercise was made a regular feature for its participants. There were five Yoga sessions during three weeks program. Further, a number of city trips and out of city trips were organized by the CJEI for participants excursions and relaxations, e.g., visit to Niagra Falls, city tours of Halifax, Ottawa and Toronto, reception and meeting with Hon'ble Mayann E. Francis, Lieutenant Governor of Nova Scotia, luncheons and dinners hosted by the CJEI. They were apart from official field visits to different judicial and non-judicial organizations.

Why Judicial Wellness is necessary:

- Judicial Stress is of unique kind
- The role that judges perform causes stress
- Judicial isolation
- Judicial renaissance
- Inadequate compensation

Effects of Judicial Stress are:

- Physical
- Emotional
- Relationship related and
- Job performance related

Symptoms and Signs:

- Irritable
- Worried
- Loss of sense of humour
- Excessiveness
- Forgetfulness
- Increase in pain

- Increasing fatigue
- Chronic stress
- Heart related problems

How the problem of judicial stress is tackled?

Institutionally

- Freedom and space to express yourself
- Day off
- Improved quality of life at offices and residences

Personally

- Regular physical exercise
- Good diet
- Accepting our own limits to work
- Talking about difficulties
- Humour
- Have fun

Movies for Judicial Education:

A special session was organized to inform the participants about the importance of film as a teaching tool of judicial education. Participants were shown six movies that were produced by the previous batches of training programs conducted by the CJEI. Each movie's script was written by the participants themselves and they also performed roles in it. The objective of movie making was to bring an issue on video and shown to the participants on any issue of judicial education. The participants then are required to discuss the issue shown in the movie. This way, their learning capacity retains more as compared to lecture method.

The participants from South Asia including me were grouped together and we produced a movie clip on the topic of delays in family cases and miseries of women were highlighted in it. It may be used as a teaching tool for lectures on family law. Other participants of the Training Program also produced their own propositions and movie clips.

Conclusion and Suggestion

Conclusions:

The CJEI's Intensive Study Program was a great source of information about

new modes of judicial training and education. It was informative, educative and instructive. It provided an insight into the latest trends in imparting judicial education and the JATI can use the services of the CJEI fellows in redesigning its teaching techniques on the lines suggested by the CJEI. The faculty of the JATI must be provided an orientation on the use of different teaching tools during their lectures. Use of new ways of teaching like educational videos and power point presentations must be encouraged and faculty may be provided proper training of trainers program about the use of teaching tools. Every program and session of training must be defined in accordance with "measurable objectives" and "feedback" must be an integral part of any training program.

Academy should also go for its short term and long rage plans so that proper budgeting can be requested from the government and other donor agencies. The training needs assessment must be conducted every year to know the weak areas of the judiciary so that proper training programs may be arranged accordingly. Society, press, media, bars and general public including litigants should be included in training need assessment target groups so that the training programs may be more representative of the demand of the public.

It is also pertinent to mention that to constantly understand the changes in judicial education field, it is necessary that the JATI comes into collaboration with other national and international judicial training bodies and institutes. There must be active participation by the JATI in all the international events relating to judicial education. Faculty members of the JATI must be encouraged to participate in conferences, seminars and judicial training programs . To fulfill this requirement, the Academy can introduce a separate head in its budget under the title "Faculty Development Program". This is also international best practice.

Information technology or IT can be effectively used for distance learning by judicial officers and other related human resources and JATI can think to go for open an avenue to that purposes.

Suggestions for improvement in judicial training and education in Bangladesh:

1. Training Need Assessment
2. Measurable Objectives
3. Evaluation of Resource Persons
4. Increase in Judicial Training and Education Budget
5. Preparation of Short-Term and Long-Term Annual Plan

6. Faculty Development through international interaction
7. New Judicial Code of Conduct as per International Best Practice.

More emphasis on following subjects may be given such as Judgment Writing Skills, time Management, Court Management, Case Management, Case Flow Management etc must be taught.

8. Preparation and use of "Judicial Movies" as a Teaching Tool
9. ADR and Mediation Skills
10. International Linkage Program for the JATI
11. Foreign Training of Judicial Educators Research and Publication as an integral part of judicial education
12. JATI to provide Distance Learning through use of IT

These essential aforesaid matters may be materialized in a bid to make a better judiciary in Bangladesh.

FAMILY COURTS IN BANGLADESH: AN ANALYSIS OF LACUNAS, PROBLEMS AND REFORMS

Md. Al Amin

1. Introduction

It has been well settled in the case of ***Pochon Rikssi Das v Khuku Rani Das***[1] that Family Courts Ordinance (herein after FCO), 1985 applies to all citizens irrespective of religion and litigant of any faith can invoke jurisdiction of Family Court (or Court of Assistant Judge) in family matters. But regret to say that effective and speedy functioning of Family Court has been hindered by lacunas existed in various laws as well as some substantive, procedural and non-legal problems.

2. Lacunas in Various Laws

FCO, 1985 which regulates powers, functions and jurisdiction of Family Court, has been suffering from certain lacunas. Family Court has no inherent power like Civil Court.[2] Amount of fine for contempt of Family Court is insufficient and there is no alternative punishment for non payment of fine.[3] There is no lower limit regarding imprisonment period or amount of decree money beyond which appeal can be filed against judgment, decree or order of Family Court to Court of District Judge.[4] Family Court while executing decree relating to money can act either as Civil Court under Code of Civil Procedure (herein after CPC), 1908 or first class magistrate under Code of Criminal Procedure (herein after CRPC), 1898.[5] But there are no clear provisions in FCO, 1985 regarding determination of prior mode of execution and the person who will chose such

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1 50 DLR 47.

2 Jashim Uddin, N.A.M., 'A Legal Analysis with Critical Appreciation: Establishments and Operations of the Family Courts in Bangladesh', Law and our Rights, *The Daily Star*, Issue No: 188, May 7, 2005.

3 Ibid.

4 Chowdhury, Advocate Jamila Ahmed, 'Achievements of and Obstacles to Effective in-Court Mediation in Bangladesh: A Perspective on Family Disputes', *The Chittagong University Journal of Law*, Vol. IX, 2004, p. 116.

5 Islam, Zahidul, 'The Confusions and Uncertainties Thwarting the Family Courts', *Bangladesh Journal of Law*, Vol. 10, Nos. 1&2, June & December, 2006, p. 114.

mode among the executing Court, decree holder and judgment debtor.[6] Lack of specific provisions in FCO, 1985 and conflicting decisions of higher Courts have created confusion among academicians, lawyers and litigants concerning two issues, e.g. whether interlocutory order of Family Court is appealable to Court of District Judge and whether plaint or written statement submitted to Family Court is amendable.[7] Although Section 20(1) of FCO, 1985 provides for non application of CPC, 1908 except Sections 10 and 11 of the Code to proceeding before Family Court; there are conflicting decisions of higher Court regarding the issue whether such bar is absolute or qualified bar.[8] FCO, 1985 lacks provision of penalty for any party to family suit for making intentional delay in appearing before Court or presenting written statement or in mediation process at pre-trial and post-trial hearing or producing witnesses.[9] There is also no time limit to conclude pre-trial and post-trial hearing.[10] Section 22 of FCO, 1985 has fixed twenty five taka as Court fee for any family suit which is inadequate now a days.[11] Section 3 of FCO, 1985 declares the overriding effect of the provisions of the Ordinance over other laws regarding matters mentioned in the same. But provisions of Court Fees Act, 1870 about Court fees in suit for maintenance, dissolution of marriage and restitution of conjugal rights are inconsistent with FCO, 1985. Section 7(ii) of Court Fees Act, 1870 provides that amount of fee payable in suits for maintenance and annuities or other sums payable periodically shall be computed according to the value of the subject matter of suit and such value shall be deemed to be ten times the amount claimed to be payable for one year with some exceptions in case of suits filed by widows for maintenance. Number 12(vii) of Schedule II of Court Fees Act, 1870 has fixed Sixty Taka as Court fee for obtaining a decree for dissolution of marriage or restitution of conjugal rights (reduced proper fees). Although District Judge Court and Joint District Judge Court have been established in Chittagong hill tracts; there is no Assistant Judge Court for either tribal or Banglee people and FCO, 1985 is not applicable at that region. Clause 18 of Muslim marriage contract as prescribed by rule 8 of Muslim Family Laws Rules, 1961 provides for delegation of conditional right of divorce to wife (Talaq-e-tawfeez) by husband; but in most cases such right is not delegated and if delegated conditions are fixed by marriage registrar.[12] Muslim Family Laws Ordinance (herein after MFLO), 1961 and Dissolution of Muslim Marriages Act

6 Ibid,
7 Ibid, pp. 102-112.
8 Ibid, pp. 107-111.
9 Op.cit, Chowdhury, Advocate Jamila Ahmed, p. 115.
10 Ibid, pp. 115-116.
11 Op.cit, Jashim Uddin, N.A.M.
12 Huda, Dr. Shahnaz, 'Personal Laws in Bangladesh: The Need for Substantive Reforms', *The Dhaka University Studies, Part-F*, Vol. XV (1): 103-126, June 2004, p. 110.

(herein after DMMA), 1939 lack specific provision for determination of actual and free consent of parties to marriage specially of women.[13] There remains confusion as to application of FCO, 1985 to Christians of Bangladesh since Christian Marriage Act, 1872 (relating to solemnizing of Christian marriage) provides for jurisdiction of District Judge and Divorce Act, 1869 (relating to divorce and matrimonial causes of Christians) provides for jurisdiction of District Judge and High Court Division (herein after HCD) of Supreme Court (herein after SC) to deal with matters under these laws. Such confusion is intensified by Section 24(1) of FCO, 1985 which states that Family Court is considered to be a District Court for the purposes of Guardians and Wards Act, 1890 and there is no other specific provision in FCO, 1985 regarding jurisdiction of Family Court for the matters under Christian Marriage Act, 1872 and Divorce Act, 1869. Moreover, Law Commission of Bangladesh in a final report on the proposed amendment of the Divorce Act, 1869 along with a draft of the Divorce Act, 1869 (Amendment) Bill published in 2006 restates the jurisdiction of District Judge and HCD of SC to deal with matters covered by the Act.[14] Existing Hindu law contains no provision for dissolution and registration of marriage.[15] Furthermore laws concerning capacity and consent in marriage, polygamy, Intercaste marriage, adoption, property rights, maintenance to minor children and aged parents, custody and guardianship applicable to Hindus are mostly uncodified and requires substantial reform.[16] Muslims and Christians are not within the ambit of Special Marriage Act, 1872 and this law puts certain restrictions on rights of divorce, succession and adoption.[17] Section 9 of MFLO, 1961 allows a Muslim wife to claim only maintenance during continuance of marriage to chairman of arbitration council ignoring the right of divorced Muslim wife to claim Iddat period maintenance to same.[18] Under Section 7 of MFLO, 1961 divorce given by any party to marriage becomes effective with expiration of ninety days from the day on which notice of divorce is delivered to chairman of Union Parishad even without formation of

13 Huda, Dr. Shahnaz, 'The Concept of Consent in Muslim Marriage Contracts: Implications for Women in Bangladesh', *The Dhaka University Studies, Part-F*, Vol. XVI (2): 41-70, December 2005, p. 66.

14 Bangladesh Law Commission, *'A Final Report on the Proposed Amendment of the Divorce Act, 1869 (Act IV of 1869) along with a Draft of the Divorce Act, 1869 (Amendment) Bill, 200-'*, Office of the Law Commission, Dhaka, February 19, 2006.

15 Sharma, Shanchita, 'Hindu Women in Bangladesh: Suffering for Absence of Marriage Registration', Law and our Rights, *The Daily Star*, June 27, 2004.

16 Huda, Dr. Shahnaz, 'Double Trouble: Hindu Women in Bangladesh- A Comparative Study' *The Dhaka University Studies, Part-F*, Vol. IX (1): 111-133, June 1998, pp. 116-126.

17 Ibid, pp. 130-131.

18 Op.cit, Huda, Dr. Shahnaz (2004), p. 118.

arbitration council or process of reconciliation between parties.[19] Such provision has prejudiced divorced party as in most cases she/he gets copy of divorce later than that of chairman of Union Parishad due to intentional delay of party initiating divorce.[20]

3. Substantive, Procedural and Non-Legal Problems

Family Court has concurrent ordinary civil jurisdiction as Court of Assistant Judge and workload of such non family matters not only hinders practice of mediation and trial in camera but also causes delay in getting judgment and executing decree.[21] Inadequate number of Family Court and its staffs, poor infrastructure and logistic support, insufficient training to Judges and lawyers about family matters along with lack of social awareness regarding mediation and trial in camera also hamper smooth functioning of Family Court.[22] Some lawyers ignorantly invoke jurisdiction of Magistrate Court for custody of children and restitution of conjugal rights under Section 100 of CRPC, 1898 which is applicable for search of persons wrongfully confined.[23] There remains confusion as to issue whether law of restitution of conjugal rights is discriminatory and violative of provisions of Constitution and High Court Division of Supreme Court provides conflicting decisions is this issue.[24] There exists no firm policy to determine amount of maintenance and present mechanism is not enough to compel an unwilling husband to pay maintenance.[25] Although a Muslim woman exercising her delegated right of divorce by talaq-i-tawfeez is entitled to her dower; most of the people misconceive it as khula form of divorce where she has to forgo her right of dower.[26] Right to insert special conditions prescribed in clause 17 of nikahnama is rarely exercised by parties to marriage due to ignorance.[27] In legal arena there is a misunderstanding that in family execution cases maximum period of

19 Ibid, p. 112.

20 Ibid, p. 113.

21 Huq, Dr. Naima, 'Divorce Conciliation: Without the intervention of the Court and Built-in Conciliation in Family Court Proceedings', *The Dhaka University Studies, Part-F*, Vol. XII (1): 1-14, June 2001, pp. 13-14.

22 Op.cit, Chowdhury, Advocate Jamila Ahmed, pp. 116-117.

23 Op.cit, Islam, Zahidul, p. 105.

24 Alam, Md. Khurshid, Legal Aspects of Restitution of Conjugal Rights, *The Dhaka University Studies, Part-F*, Vol. IX (1): 135-155, June 1998, p. 150.

25 Monsoor, Dr. Taslima, 'Maintenance to Muslim Wives: Legal Connotations', *The Dhaka University Studies, Part-F*, Vol. IX (1): 63-86, June 1998, p. 85.

26 Huda, Dr. Shahnaz, 'Protection of Women in the Marriage Contract: An Exploration', *Bangladesh Journal of Law*, Vol. 5, Nos. 1&2, 2001, p. 71.

27 Huda, Dr. Shahnaz, 'Untying the Knot- Muslim Women's Right to Divorce and other Incidental Rights in Bangladesh', *The Dhaka University Studies, Part-F*, Vol. 5, No. 1, 1994, p. 152.

imprisonment is three months for unpaid decretal amount of money.[28]

4. Suggested Reforms

To overcome aforesaid lacunas of laws and substantive, procedural and non-legal problems we have to undergo various reforms. Number of Family Court which exclusively deals with family matters should be increased by appointing more experienced and qualified Judges as well as staffs with improved infrastructure and logistic support. Special training should be provided to Judges, lawyers, police and local Government members on camera trial and proper mediation techniques along with its sociological and psychological aspects.[29] Family dispute settlement office needs to be established under every Family Court consisting of non-Judge mediators like sociologists, psychologists, lawyers, retired Judges, representative of police and local Government from respective upazilla by amending laws.[30] Police should be more sensitized about family execution cases for prompt execution of levy, arrest and attachment warrants. Social awareness requires to be enhanced about in-Court and out side Court mediation along with camera trial through electronic and print media, seminar, symposium, workshop, cultural programmes, rally etc.[31] Special incentives e.g. speedy promotion, reasonable posting, performance bonus etc must be granted to Judges for disposing of family disputes through mediation.[32] Family Court and Assistant Judge Court have to establish in Chittagong hill tracts both for tribal and Banglee people as well as tribal family laws need to be codified. Domestic violence legislation should be enacted ensuring jurisdiction of Family Court to try matters under the same. In executing degree for money Family Court should first act as Civil Court under CPC, 1908 and if decretal money is not recovered then it should proceed as Magistrate Court under CRPC, 1898.[33] Provisions for inherent power, amendment of plaint and written statement should be incorporated in FCO, 1985. Hindu family laws should be codified and reformed in the light of Indian enactments e.g. Hindu Marriage Act, 1955, Hindu Minority and Guardianship Act, 1956, Hindu Adoptions and Maintenance Act, 1956 etc introducing marriage registration, divorce, prohibition of polygamy, approval of Intercaste marriage and so on. Christian Marriage Act, 1872 and Divorce Act, 1869 should be amended so that Christians can take resort to Family Court directly without intervention of

28 Op.cit, Islam, Zahidul, p. 116.

29 Op.cit, Chowdhury, Advocate Jamila Ahmed, p. 121.

30 Ibid, pp. 118, 121.

31 Ibid, pp. 122-123.

32 Ibid, p. 119.

33 Op.cit, Islam, Zahidul, pp. 115-116.

District Judge Court or High Court Division of Supreme Court. Amount of fine for contempt of Family Court should be increased and provision of alternative punishment for non payment of fine needs to be incorporated in FCO, 1985.[34] Adequate Court fee requires to be fixed for filing any family suit under FCO, 1985 as well as inconsistency between Court Fees Act, 1870 and FCO, 1985 regarding Court fee should be removed by amending respective laws. Concept of nullity in marriage should be introduced in Muslim marriage with a uniform age of marriage and of consent to marriage.[35] Signature or thumb impression of bride should compulsorily present in nikahnama. Right of delegated divorce should be compulsorily conferred on bride through nikahnama by bridegroom without any condition.[36] In case of custody and guardianship of minor 'welfare' or 'best interests of child' should be given priority rather than the age of child.[37] Provision for interim maintenance order till disposal of suit for wife and children requires to be incorporated in FCO, 1985.[38] Provision for claiming iddat maintenance before arbitration council by divorced Muslim wife should be inserted in MFLO, 1961.[39] Separate fund for providing maintenance to women and children who has got decree of maintenance from Court but judgment debtor fails to pay decretal amount should be raised by levying marriage tax, domestic and foreign donation etc.[40] Family Court should have power to realize decretal amount directly from salary of judgment debtor through his employer or if judgment debtor is businessman from his profit of business.[41] In the case of ***Maksuda Akhter v Md. Serajul Islam***[42] it was held that when installments are allowed for payment of decretal amount, judgment debtor is liable to suffer imprisonment for default of each installment. Limitation should be imposed on the basis of imprisonment period or amount of decree money for filing appeal against judgment, decree or order of Family Court to Court of District Judge.[43] Provision of imposing high adjournment cost upon absent party on a day fixed for appearing before Court, submitting written statement, mediation and producing witnesses should be added

4 Op.cit, Jashim Uddin, N.A.M.
5 Op.cit, Huda, Dr. Shahnaz (2005), p. 66.
6 Op.cit, Huda, Dr. Shahnaz (2001), p. 71.
7 Monsoor, Dr. Taslima, 'Women's Rights under Muslim Family Law with Particular Reference to Custody and Guardianship', *The Dhaka University Studies, Part-F*, Vol. VIII (1): 49-65, June 1997, p. 65.
8 Op.cit, Monsoor, Dr. Taslima (1998), p. 86.
9 Op.cit, Huda, Dr. Shahnaz (2004), p. 118.
0 Op.cit, Chowdhury, Advocate Jamila Ahmed, p. 122.
1 Ibid.
2 5 MLR (HCD) 276.
3 Op.cit, Chowdhury, Advocate Jamila Ahmed, p. 122.

in FCO, 1985.[44] Specific time limit must be fixed to conclude mediation process at pre-trial and post-trial hearing.[45] Special Marriage Act, 1872 should be amended following example of Special Marriage Act, 1954 applicable in India to introduce options so that all communities of people irrespective of their religion can get married under this Act removing limitation concerning divorce, succession and adoption.[46] Section 2(vi) of DMMA, 1939 should be amended to add suffering of husband from AIDS as a ground for obtaining decree for dissolution of marriage by a woman married under Muslim Law. Section 6 of MFLO, 1961 need to be amended to introduce provision of taking previous written permission from concerned Family and Assistant Judge Court to contract another marriage during subsistence of an existing marriage substituting the present authority of Arbitration Council to grant such permission. Furthermore, MFLO, 1961 require to be amended to prohibit divorce through notary public and to incorporate penalty provision for submitting forged notice or papers of divorce before Family Court or Arbitration Council. Now it the high time to review subject matter jurisdiction of Family Court and extend it so that Muslims, Hindus, Christians, Buddhists and tribal people can get relief regarding their all family matters under FCO, 1985.

5. Conclusion

A large number of personal laws in Bangladesh are applied by Family Court. Modernists' proposal for adopting a 'Uniform Family Code' (drafted by NGOs named *Ain o Salish Kendra* and *Bangladesh Mahila Parishad*) for all citizens of Bangladesh irrespective of sex and religion, on basis of equality provisions of Constitution and International human rights has been rejected by Law Commission Report, 2005 taking shelter of adverse public opinion, Section 2 of Muslim Personal Law (Shariat) Application Act, 1937 and Articles 8(1) and 8(1A) of Constitution.[47] In this circumstance, Biswajit Chanda has advocated for harmonisation of personal laws that is to say reforming personal law system to bring harmony, equality or equity on same kind of issues along with an optional secular system for people who prefer it.[48] In such harmonisation process, sustainable reform of Family Court should be given paramount importance which is only possible by concerted effort of public, private and autonomous bodies as well as common people.

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44 Ibid, pp. 119-120

45 Ibid, p. 120.

46 Op.cit, Huda, Dr. Shahnaz (1998), pp. 129-132.

47 Chanda, Biswajit, 'Personal Laws in Bangladesh: A Search for Harmonisation', this paper was presented at the International Workshop on *'Management of Gender Relations in Bangladeshi Law'* held at the SOAS, University of London in 18 June 2008, p. 3. See also Bangladesh Law Commission, *'Report on a Reference by the Government towards the Possibility of Framing out of a Uniform Family Code for all Communities of Bangladesh relating to Marriage, Divorce, Guardianship, Inheritance etc'*, Office of the Law Commission, Dhaka, July 18, 2005.

48 Op.cit, Chanda, Biswajit, pp. 4-5.

Adoption of Restorative Justice in Criminal Justice Delivery System of Bangladesh : An Appraisal

MIR MD. AMTAZUL HOQUE

Abstract

Restorative Justice (RJ) is a key aspect to which the future of the Criminal ustice System is approaching. The concept of RJ have been rapidly gaining solid round throughout the world, especially in common law countries. This is an lternative way of resolving cases in criminal matters. The Government of angladesh (GoB) is also actively considering about it. In this article I have tried o clarify the widely accepted model of restitutive justice and to explore the ossibilities of introducing it in our criminal justice system. Among the agencies f the Criminal Justice System (CJS) of Bangladesh, charged with maintaining law nd order and the administration of justice, I have selected the Judiciary. I have specially explored the possibility of introducing the RJ in our lower courts. nother point for consideration is whether the RJ may be introduced in addition o normal criminal trials or as a diversion from court (Diversionary RJ). At the end, have put forward several suggestions which have come up from the body of my iscussion. Throughout the article, I have advocated the fact that prevailing age-ld criminal justice delivery system of Bangladesh will be more effective and enefited with the introduction of the RJ. Bangladesh has already introduced lternative Dispute Resolution (ADR) mechanism in the civil justice delivery ystem which has helped reduce the case-jam to some extent and has made the ystem somewhat more effective than earlier. This article aims at increasing ufficient national awareness about the potential of RJ.

Method

In completing this assignment I have chiefly relied on related literatures, ational and international journals' articles, websites of the government and non-overnment organisations including the official website of the Honourable upreme Court of Bangladesh, national and international organizations relating to riminal justice matters. Internet searches were carried out using Yahoo and oogle.

Background

After nearly two hundred years of British and twenty five years of Pakistani

subjugation Bangladesh, a South-Asian developing country, finally got its independence in 1971. Even though thirty eight years are not enough for the institutionalisation of judicial system, still the Judiciary of Bangladesh enjoys comparatively more independence than that of any developing country in the world, thanks to epoch-making separation of Judiciary in 1 November 2007[1]. Not only that. The Governemnt of Bangladesh (GoB) now actively thinking of establishing separate Secretariat for the Judiciary with a view to fully implementing the separation[2]. Efforts are ongoing to ensure justice and accessibility especially in the lower Judiciary of Bangladesh. Recently, at least two matters have been successfully introduced in the Civil Justice System with a view to adding some dynamism. One is "Judicial and Legal Capacity Building Project (LJCBP)"[3] and the other is the introduction of Alternative Dispute Resolution (ADR) mechanism[4]. Unfortunately, the criminal trial of the country still have been continuing the colonial hang-over to a great extent. However, the scenario is not that bleak at this stage. The incumbent Government of Bangladesh (GoB) has rightly addressed the weaknesses of the Criminal Justice System (CJS) of the country. It is actively thinking of introducing mandatory provision of ADR mechanism in the CJS [5]. Given the backdrop, it is high time to ponder over

1 On that auspicious day the Judiciary of the country, especially the Lower Judiciary formally got separated from the Executive. For a brief accounts on the separation of the Judiciary see the official publication of the Honourable Supreme Court of Bangladesh, Annual Report on the Judiciary, 2007, *Separation of the Judiciary from the Executive: A Brief History*, p.9. See also *"The Direrctives of the Supreme Court Judgment Concerning Separation of Judiciary"*, p.13. See also *"Bangladesh Judicial Service Commission and Bangladesh Judicial Service Pay Commission"*, p.15

2 The Daily Star, 11 October 2009, "*Free Secretariat of Judiciary Soon*", p.1; URL: http://www.thedailystar.net/newDesign/news-details.php?nid=109249

3 The Legal and Judicial Capacity Building Project of World Bank for Bangladesh has stressed a need to improve the environment for doing business by increasing the efficiency, effectiveness, and accountability of the civil justice system, and increasing access to justice, particularly for women and the poor. The overall results of the project are to provide a solid foundation for protecting against corruption and improving governance in Bangladesh. For a brief accounts of the ongoing reform and development activities in the Judiciary including LJCBP see the official publication of the Honourable Supreme Court of Bangladesh, Annual Report on the Judiciary,2007, *"Ongoing Reform and Development Activities in the Judiciary"*, p.95

4 ADR means and includes alternative processes of dispute resolution by going beyond the formal process of justice. ADR includes mediation, settlement conference, arbitration and others. For more information on ADR in Bangladesh see the official publication of the Honourable Supreme Court of Banlgadesh, The Annual Report on the Judiciary, 2007, *"ADR in the Judicial System of Bangladesh"*, p. 105

5 The Financial Express, 17 September 2009, "Govt plans compulsory provision for Alternative Dispute Resolution"; URL: http://www.thefinancialexpress-bd.com/2009/09/17/79252.html

adopting Restorative Justice (RJ) in the CJS of Bangladesh as a form of ADR. The RJ model has entered into the scenario with the potential to bring about a radical change in traditional CJS. The model is getting popular worldwide for its bright prospect.

What is Restorative Justice

Restorative Justice is a new way of thinking about crime and criminal justice system. Restorative justice seeks to address the relational aspects of crime, and create justice by being sensitive to the needs and concerns of victims, offenders and the community. This process is getting immensely popular even in the Western countries because of their supposed informal nature, community involvement and focus on reparation. Due to its overwhelming efficacy, the United Nations (the UN) itself has come forward to advocating the standards and principles of the RJ approaches. The UN has already published a handbook namely **"UN Handbook on Restorative Justice Programmes" on the use and application of the Declaration of Basic principles on the use of restorative justice programmes in criminal matters**[6]. It offers an overview of key considerations in the implementation of participatory responses to crime based on a restorative justice approach.

The UN handbook on Restorative Justice Programmes has defined 'restorative process' as-

"A restorative process is any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator"[7].

Restorative justice gives as much importance to the **process** as to the outcome.

There are at least four critical ingredients for a fully restorative process to achieve its objectives: (a) an identifiable victim; (b) voluntary participation by the victim; (c) an offender who accepts responsibility for his/her criminal behaviour; and, (d) non-coerced participation of the offender[8].

The main types of restorative justice programmes, including victim offender mediation programmes, community and family group conferencing, circle sentencing and reparative probation. It also includes a discussion of indigenous and customary justice forums and the main characteristics of existing criminal justice programmes[9]. The oldest and most widely used expression of restorative justice is **victim-offender mediation,** where the victim and offender come to an

6 *URL: http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf* ,
7 *Id.*
8 *Id.*
9 *Id.*

out-of-court agreement with the help of a mediator[10]. Hence, victim-offender mediation will be the focal point in this discussion.

Even though restorative justice is a comparatively new movement, it has every potentional to positively change the facet of the traditional **criminal justice system**[11]. Theories of RJ have been continuing to evolve. It is a totally different way of thinking about how the stakeholders (victims, offenders, law enforcement or judicial officers, the community as a whole) should respond to crime. It simply offers an alternative framework for addressing crime. Unlike traditional **retributive justice**[12], the RJ approach draws upon traditional notions of community building, reconciliation, healing, and peacemaking. By providing an opportunity for the victim to describe the harm suffered, the offender to take responsibility for the harm, and the community to offer support during this process, it offers an opportunity to repair the harm resulting from the criminal offence and create a social contract to build a balanced community.

Thus Restorative justice is concerned with healing the wounded victim: financially, emotionally, and socially[13]. It expects offenders to rectify the harms they have inflicted, but then seeks to reintegrate both parties back into society as contributing, law-abiding citizens[14]. It is about looking to the root of crime in its social context, and trying to break the cycle[15]. To put it simply, RJ empowers the victim in contrast with the marginalised position of him/her in the traditional justice system, gives offender an scope to repent and heal, and restores relationship within the community.

Restorative Justice principles and processes

As I have mentioned earlier, the **United Nations** itself has come forward to

10 Mark S. Umbreit, Restorative Justice Through Victim Offender Mediation: A Multi-Site Assessment, Western Criminology Review 1(1) (1998) *at* http://wcr.sonoma.edu/v1n1/umbreit.html.

11 The criminal justice system consists of three main parts: (1) law enforcement (police); (2) adjudication (courts); and (3) corrections (jails, prisons, probation and parole). In the criminal justice system, the People are represented by two separate yet equally important groups: the police, who investigate crime, and the district attorneys, who prosecute the offenders. Criminal justice agencies are intended to operate within the rule of law. **URL: http: // en.wikipedia.org/wiki/ Criminal_justice, as retrieved on 12.10.2009**

12 *Retributive justice* regulates proportionate response to crime proven by lawful evidence, so that punishment is justly imposed and considered as morally-correct and fully deserved. URL: http://en.wikipedia.org/wiki/Justice#Theories_of_retributive_justice, as retrieved on 12.10.2009

13 Restorative Justice, *at* www.restorativejustice.org. Restorative justice advocates restitution to the victim by the offender, seeking to make people whole, rather than retribution or punishment inflicted by the state against the offender.

14 *Id.*

15 Restorative Justice, *at* www.restorativejustice.org.

advocate and promote the principles and processes of RJ. The principles of RJ substantially differs from the punitive nature of our criminal justice system. In the traditional criminal justice system, the participants are judge, judicial magistrates, prosecution, offenders and victims. Generally, the prosecution is the State itself, as crime is considered as a threat to public safety and disruption to social order. The State is to establish the act or intention of the crime. The prosecution side has to prove the criminal charge brought agianst the accused beyond all reasonable doubt. The accused presents defense against the crime. The judge virtually plays the role of an umpire, who ensures that the rules of a fair trial are followed. At the end, he pronounces a winner. From top to bottom of the trial, the victim plays very limited role. In almost all cases, the offender is encouraged to keep mum and to avoid making admission of his/her guilt. Since the British Raj, the traditional criminal justice system of Bangladesh has been flowing in this line without virtually any exception. The RJ approach will certainly bring about fresh air into this stagnation.

The following are features of restorative justice programmes:

1) A flexible response to the circumstances of the crime, the offender and the victim, one that allows each case to be considered individually;

2) A response to crime that respects the dignity and equality of each person, builds understanding and promotes social harmony through the healing of victims, offenders and communities;

3) A viable alternative in many cases to the formal criminal justice system and its stigmatizing effects on offenders;

4) An approach that can be used in conjunction with traditional criminal justice processes and sanctions;

5) An approach that incorporates problem solving and addressing the underlying causes of conflict;

6) An approach that addresses the harms and needs of victims;

7) An approach which encourages an offender to gain insight into the causes and effects of his or her behaviour and take responsibility in a meaningful way;

8) A flexible and variable approach which can be adapted to the circumstances, legal tradition, principles and underlying philosophies of established national criminal justice systems;

9) An approach that is suitable for dealing with many different kinds of offences and offenders, including many very serious offences;

10) A response to crime which is particularly suitable for situations where juvenile offenders are involved and in which an important objective of the intervention is to teach the offenders some new values and skills;

11) A response that recognizes the role of the community as a prime site of preventing and responding to crime and social disorder.[16]

The principles and processes of RJ can be characterized as follows:-

Restorative justice programmes are based on the fundamental principle that criminal behaviour not only violates the law, but also injures victims and the community[17].

Main principle of the RJ model is that it focuses on **reconciliation**. It is an overwhelmingly **victim-centered** approach. In the process, crime is considered as harm to the victim and the community. The victim and the offender are given chance to sit face to face. It offers the victim an unique opportunity to share his or her story of the harm suffered as a result of the crime and its impact. In this way the healing process starts. On the other hand, the offender will gain a deeper understanding of the gravity of the offence. Althrough the process, he/she has to enshoulder duel accountability to both the victim and the community. The reconciliation process may give the offender an opportunity to find a way of re entry into the community. Offering an apology, performing community service providing restitution etc. may create for the offender such opportunities. The community, which offers personal development for the offenders is also a part and parcel of the process. The ultimate goal is to restore the **sense of community** that is diminished by crime and violence.

Following are several objectives of RJ:

1) Restore community order and peace and repair damaged relationships;

2) Denounce criminal behavior as unacceptable and reaffirm community values;

3) Support victims, give them a voice, enable their participation and address their needs;

4) Encouraging all concerned parties to take responsibility, particularly by the offenders;

5) Identify restorative, forward looking outcomes;

6) Prevent recidivism by encouraging change in individual offenders and facilitating their reintegration into the community [18].

The principles of Restorative Justice (RJ) have been adopted in principle by th

16 *http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf.*

17 *Id.*

18 *Id.*

11th United Nations Congress on Crime Prevention and Crime and Juvenile Justice. These principles are contained in paragraph 32 of the Bangkok Declaration which reads: "To promote the interests of victims and the rehabilitation of offenders, we (the Member States) recognize the importance of further developing restorative justice policies, procedures and programmes that include alternatives to prosecution, thereby avoiding possible adverse effects of imprisonment helping to decrease the caseload of criminal courts and promoting the incorporation of restorative justice approaches into criminal justice systems, as appropriate[19].

Restorative Justice and Traditional Criminal Justice System of Bangladesh

The criminal justice system of Bangladesh follows retributive model. It sanctions criminal behaviour through penal measures. The legal system in Bangladesh is overloaded, retributive, confrontational, expensive, time consuming and remains, therefore, beyond the reach of the country's agrarian and impoverished majority. Indeed, any experience the poor may have with the formal system is usually at the hands of the wealthy powerful elite and thus negative and disempowering as few are able to use the system voluntarily. Following table may give an overview about the overloaded condition of the criminal cases of Learned Sessions Courts and Judicial Magistracy in Bangladesh.

Brief statement on Criminal Cases of Sessions Courts in Bangladesh

Year	Pending at the beginning of the year	No. of cases filed in the year	Total no of Pending cases	Disposal	Transferred	Pending at the end of the year
1	2	3	4= 2+3	5	6	7=[4-(5 +6)]
2002	108527	110451	218978	87860	10854	120264
2003	120264	126320	246584	90217	11369	144998
2004	144998	120658	265656	99453	7517	158686
2005	158686	123837	282523	100123	11284	171116
2006	171116	147731	318847	104575	9061	205211

Source: Annual Report on the Judiciary, 2007, p.89

At the current rate of disposal, it will take the court additional one year nine months and three weeks approximately to dispose of all the pending cases. It does not include the new cases to be filed during the period.

19 URL: ***http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf***

Statement regarding institution and disposal of criminal cases in the Judical Magistracy

Month	Pending on the 1st day of month	Filing & received	Total	Disposed	Pending for next month
November'2007	563344	34131	597475	33104	564371
December'2007	564371	87789	652160	49987	502173
Total		**121920**		**83091**	

Source: Annual Report on the Judiciary, 2007, p.92

At the average rate of disposal, it will take the court additional one year two months and fifteen days to dispose of all the pending cases.

The existing criminal law system of bangladesh defines crime as acts against the State rather than as acts against individuals or communities. Even though victim or society are the main two factors who suffers due to the crime, we virtually overlook these two after the crime is committed. On the contrary, RJ seeks to keep those most effected by the crime directly involved with the process of responding to it[20].

An overview of adversarial and restorative processes

	Adversarial procedure	Restorative processes
1	Central control with imposed outcomes (requires huge state resources)	Community-based, consensual model (requires some community resources)
2	A two-party system (victims excluded)	Multi-party system, with victims central
3	Process dominated by professionals – hence -	Professionals have support roles only – hence -
4	… system favours the wealthy …	… wealth not a factor
5	… truth often suppressed	… truth is highly valued
6	Focus is on whether offence is proved	Offence admitted – focus on putting right
7	Little incentive on offenders to speak	Offenders do speak, and are valued as a source of information
8	Outcomes restricted by law	Flexible and often creative outcomes
9	Distorted by harsh penalties	Usually avoids harsh penalties
10	Procedure often formalistic and archaic	Informal, adaptable processes
11	A method of prosecution	Can follow or be alternative to prosecution
12	Emphasises the defendant's rights	Emphasises responsibilities

source: url: http://peace.fresno.edu/docs/WinchesterOct07.pdf

20 Restitution, *at* http://www.restorativejustice.org/rj3/Introduction-Definition/Tutorial/Restitution.htm.

Prospects of Victim-offender mediation in Bangladesh

Victim-offender mediation is somewhat different than traditional mediation. In both the systems, the parties come together, a neutral third person gets involved to resolve the dispute and reach a settlement. Whereas in a regular mediation, there is an assumption that both sides contributed to the conflict at hand, in victim-offender mediation there is an innocent victim and an offender who has usually already admitted to the crime[21].

In the criminal trial of Bangladesh, the victim never sit face-to-face with the offender. Here, it is normally assumed that punishment of the offender will bring about some solace to the pain of the victim. Confessional statement under section 164 of Criminal Procedure 1898 (henceworward Cr.P.C.), plead guilty under section 242 of Cr.P.C. can only expedite the punishment. Section 345 of Cr.P.C. also gives the parties to compound the offence. In general, there is no room for forgiveness. Forgiving someone who has caused harm may bring about sense of healing to the victim. Traditional criminal justice system of Bangladesh has been overlooking this side decades after decades. From my personal court room experience as a presiding judge I have noticed that many parties are at confrontation over very triffling matters. In many cases the victims and offernders are simply relatives or known to each other. Situations have compelled them to file criminal cases before the court, but at some stages of the cases, the victims become unwilling to carry on the proceeding and try to come out with a solution. In the meantime, other stakeholders of the criminal trial system including learned advocates take over and there vertually remain no scope to come back but to go ahead with the proceeding. In such situations, if the system ifself come forward and provides a scope for face-to-face confrontation with the victims and the offenders then they may question each other and may come out with a solution beneficial to each other. In this way the victim may feel the said sense of healing to the best possible level. Receiving true forgiveness for a criminal act is one aspect of victim-offender mediation that is absent in traditional criminal proceedings of our country. Often this forgiveness provides some offenders with sort of a "clean slate," deterring them from repeating criminal conduct[22].

It is vividly seen that victim-offender face-to-face confrontation can bring about radical positive effect regarding the outcome. Now the question is at which level of the traditional trial may the victim-offender mediation be introduced? It can be started at any point of the judicial proceeding. Therefore, they do not interrupt criminal justice in any way. The victims of crimes can chose mediation or decide to partake in the regular criminal and civil proceedings. In some countries that run victim-offender mediation programs, the state retains its right to

21 Marty Price, VOMA Quarterly, Victim-Offender Mediation: The State of Art, (discussing the beginning of victim-offender mediation) *at* http://www.vorp.com/articles/art.html.).

22 *See* Umbreit, *supra* note 10.

pursue criminal prosecution of the offender, regardless of what restitutionary agreement is reached during the mediation[23].

When cases will be mediated in this way, they will saves the trial times of the court to a great extent which will in turn help reducing the backlogs of criminal cases in Bangladesh. It will also be cost effective in the sense that the parties have to pay less money to their counsels. Given the socio-economic reality of our country this aspect can not be looked down upon.

There are three basic requirements that must be met before victim-offender mediation can be used:

1) The offender must accept or not deny responsibility for the crime;
2) Both the victim and the offender must be willing to participate;
3) Both the victim and the offender must consider it safe to be involved in the process[24].

There is every favourable conditions to introduce victim-offender mediation models in our juvenile justice system. It can also be introduced in petty criminal cases, such as offences under section 323 or almost all offences triable by judicial magistrates of the 2nd and 3rd class.

Benefits of Restorative Justice

1) The victim and community may substantially overcome the fear of **re victimization.**
2) **Healing** for all participants and collective accountability.
3) It offers an opportunity for the victim, offender, and community to work together collaboratively to address criminal behavior and create **durable solutions.**
4) Helping to decrease the **caseloads** of criminal courts
5) Will help to avoid possible adverse effect of imprisonment.
6) Reduction of backlogs of criminal cases. Disposal of criminal cases will be increased.
7) Will increase general people's confidence over criminal justice system.
8) Restorative Justice can be faster, cheaper and less stressful then going to court.
9) Because the process fosters cooperation, both sides are usually more satisfied with the outcome.
10) **Often quicker than going to trial**, a dispute may be resolved in a matter or days or weeks insteadof months or years.

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23 Juhani Ivari, Victim Offender Mediation- An Alternative, An addition or Nothing but a Rubbish Bin in Relation to Legal Proceedings?, Restorative Justice Online (April 2002), *at* http://www.restorativejustice.org/rj3/Full-text/Finland/VOMarticle.pdf

24 ***http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf***

Disadvantages of Restorative Justice

RJ certainly has several negative sides, as usual.

1) RJ may not be suitable for every offences.
2) If the RJ process is binding, the parties normally give up most court protections, including a decision by a judge or jury under formal rules of evidence and procedure, and review for legal error by an appellate court.
3) The mediator may charge a fee for his or her services. If the dispute is not resolved through RJ mechanism, the parties may then have to face the usual and traditional costs, such as advocate's fees and expert fees.

Suffice it to say, the list of avantages and disadvantages is not exhaustive. It is seen that the list of disadvantages is not that significant in contrast with that of advantages.

Recommendations

Here are several selective recommendations arising out of my previous discussion.

1) Implementation of RJ as a complement to the traditional Criminal Justice System of Bangladesh. Promote more effective forms of justice through applications of restorative and community justice principles and practice. In many developing countries, restorative justice practices are applied through traditional practices and customary law. In doing so, these approaches may serve to strengthen the capacity of the existing justice system[25].
2) Adoption of RJ in comparatively less serious offences and Juvenile Justice System of Bangladesh.
3) Establishing of an RJ department. This department will assists parties by providing information regarding RJ processes and services.
4) Increasing understanding of RJ. Training for Judicial Officers is necessary.
5) At the initial stage adopting **victim-offender mediation** approach in the CJS. Developments to be closely monitored.

Conclusion

Restorative Justice may be a way to defy the decade-long failure in criminal justice of Bangladesh. However, Restorative justice cannot be a substitute for a trial system. It may simply be introduced as a complement to the traditional criminal justice system of Bangladesh. In this article, I have tried to focus on the criminal justice delivery system of our country. I have focued on the Restorative Justice mechanism from that very perspective. As I have mentioned in the article, this is the high time to actively thinking on adopting the RJ mechanism in our traditional criminal justice delivery system. With new and fresh blood pouring in the judiciary of Bangladesh, now is the time to venture to introduce positive changes in the Judiciary of Bangladesh.

Human Rights in Islam

Md. Rezaul Karim

The issue of human rights is one of the fundamental issues, and also one of the most sensitive, controversial and discussed issues of contemporary time. Popular terms like fundamental rights, basic human rights, and birthrights of man that are raised now a days with great emphasis in world politics are basically synonymous with human rights. The Encyclopedia Britannica defines human rights as "the rights to belong to an individual under natural as a consequence of his being human." Today it is generally believed that human rights law initially developed as a part of the constitutional law of the individual states and the concept of human rights is firmly established in international human rights law.

Luois Henkin in the Introduction to his edited work 'The International Bill of Rights' has written, "Human rights is an idea of our time."[1] This is the general view of almost all the jurists of western world on human rights.[2] But they overlook the contribution of Islam in the field of human rights. In fact, since 6th century A.D. Islam has provided a perfect Code for preservation and promotion of human rights and it conceptualized and internationalized human rights and enforcement mechanisms. In this study an effort has been made to bring together authentic evidences and historical facts to prove, among other things, that human rights guaranteed by Islam are far more comprehensive and have been implemented with greater success than the same affirmed by the UNO, or, as a matter of that, by any other body of the world.

This discussion has been divided into three parts. The division has been made to have clear idea of human rights provisions in Islam. The first part deals with a catalogue of rights framed on the basis of texts of Islamic law. The second part deals with a comparative discussion of human rights provisions in Islam and in Modem International Law. The third part deals with the safeguards provided by Islam in the field of human rights. It is hoped that this study would be able to focus a comprehensive picture of human rights system in Islam.

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1 Louis Henkin edited, The International Bill of Rights (New York: Columbia University Press)(1981)V.1, cited by Dr. A. B. M. Mafizul Islam Patwari in his edited work Human Rights in Contemporary International Law,p 258

2 Dr. A. B. M. Mafizul Islam Patwari in his edited work Human Rights in Contemporary International Law,(Humanist and Ethical Association of Bangladesh,1995) p 258

Part One

Human Rights Provisions in Islam:

Human rights in Islam means those rights which are granted by Allah and can either be suspended nor abrogated, as there is no higher purpose to which they re subservient.[3] They are an integral part of the Islamic faith. The Islamic attitude owards human rights is that it places their formulation and fulfillment entirely vithin the religious obligation, the duty to obey the dictates of the Holy Quran, and ne practice of Holy Prophet and the responsibility to answer for all actions on the ay of Last Judgment. Hence they are to be accepted, recognized and enforced. It nould be mentioned that, unlike the Universal Declaration of Human Rights or ne International Covenants on Human Rights, no particular Sura of the Holy Quran is to be found to provide for the list of human rights in Islam. Since Allah evealed the Quran piece-meal to meet the requirements of the Islamic Movement tarted by the Holy Prophet under His direct command) at its different stages, uman rights are to be found scattered in various verses of different Suras of the uran and the Prophet's Traditions. However, the following human rights can be aced from the Quran and Sunnah:

1. The Right to Life:

The human's right to life is the first and foremost basic human right as it is sential to the enjoyment of all other rights. Islam gives right to life to each and very human being irrespective of race, color, sex, language, religion, political or her opinion national or social origin or status. The Holy Quran declares human fe as sacrosanct.[4]

Islam ensures the security of life through imposing ban on killing except on asonable grounds. In the holy Quran Allah said, 'Kill not one another'.[5]

Allah also said, "Do not take life- which Allah made sacred except just cause. anyone slew a person unless it be a murder or for spreading mischief in the land, would be as if he slew the whole people. And if anyone saved a life it would be if he saved the life of whole people."[6]

Again Allah forbade the killing of a Mumin in the following language, 'Who slayeth a believer of set purpose, his reward is hell for ever. Allah is wrath

Dr. M. Ershadul Bari, Human Rights in Islam with special Reference to Women's Rights. In the Dhaka University Studies Part-F, Vol. V (1) 1-32 June 1994.

Dr. M. Ershadul Bari,ibid..

Quran: 4:29 "Quran: 17:33,5:55.

Quran: 4:93.

against him and hath cursed him and prepared for him an awful doom."[7]

Islam has introduced the system of compensation for committing murder wrongfully and, thus it saved the society from the curses of blood feud and revengeful murder.

'If anyone is slain wrongfully, I have given his heir the authority to demand Qisas or to forgive but let him not exceed the boundary in the matter of taking life."[8]

Thus Islam has clearly laid down the situations in which a person's life can be taken. And in any event this can only be taken in accordance with the decision of a competent court.

The prophet (PBUH) has also affirmed the inviolability of human life thus:

"The greatest sins are to associate something with Allah and to kill human-beings."

"One who kills a man under covenant will not smell even the fragrance of paradise."[9]

"O people verily your life, your property and your honour are sacred and inviolable until you appear before God."[10]

One of me most concise textual authorities for respecting individual rights to life, property and reputation is:

"Three things of a Muslim are prohibited for another Muslim: his blood, his property and his reputation."[11]

The Prophet (PBUH) has also prohibited killing of those persons, of an Un Islamic State who are not involved in war with an Islamic State. Islam enjoin upon Muslims to respect this right event for the child within the womb of it mother. The Prophet (PBUH) did postpone once the capital punishment of woman for protection of the right of life of the child within her womb.[12]

The extent to which this right was protected by the state can be inferred from the treaties and ordinances of Muslim Caliphs and their Governors, granted on various occasions. The treaty on the conquest of Azarbaijan by the army of the Islamic State during the Caliphate of Hazrat Omar contains: "Their lives

7 Quran: 4:93

8 Quran: 17:33.

9 Hadith: Bukhari and Kitabul-Zimma.

10 Farewell Hajj.

11 Hadith: Bukhari and Muslim.

12 Dr Shekikh Shaukat Hossain, Human Rights in Islam,(Kitab Bhaban, New Delhi 1990) P.43.

properties and religious laws are all safe."[13]

Treaty made by Hazarat Umar on the conquest of Jerusalem contains, "This security extends to their lives, properties, churches, crosses of all their healthies and sick".....[14]

In this way sanctity of human life, as most fundamental principle of any civilized community is protected by Quranic verses and Prophetic sayings and the activities of the companions of the prophet.

2. Equality of all persons

The principle of equality of all persons is the essence of the rule of law and human freedom. It implies the absence of any special favour or privilege of an individual by reason of birth, sex, creed or like and also equal subjection of all individuals and classes to the ordinary law of the land.[15]

The foundation of social system of Islam rests on the conception that all human beings are equal and belong to one universal brotherhood. Islam rejects all distinctions on the ground of birth, color, race and language. Anyone who believes in one Allah as his Lord and accepts the guidance of his Prophet as the way of this life can be a member of Muslim society.

Islam not only recognizes the equality among men but also men and women by declaring them descendants of common ancestors. As almighty Allah has laid down in the holy Quran:

"O mankind, we have created you from a single pair of male and female and we have made you nations and tribes so that you may recognize one another." Thus in the eye of Islam the artificial classification of society on the basis of differences upon certain grounds is meaningless."[16]

"O mankind, be careful for your duty to Lord who created you from a single being and from the same created your mate, and from them twain scattered countless men and woman and be careful to you duties to Allah in whose name you demand your mutual rights and be mindful of your ties of kinship. For Allah is ever watchful over you."[17]

"Mankind was single nation but differed later."[18]

13 Shibli Nomani Al-Farooque (English Edition), P.268.
14 Ibid., P. 264
15 Dr. M. Earshadul Bari, Ibid.
16 Quran: 49:13.
17 Quran: 4:1.
18 Quran: 2:213

The Prophet (PBUH) has declared the principle of entire human being in the address on his farewell Hajj thus:

"No Arab has any superiority over Non-Arab, nor does a Non-Arab has a superiority over a black man, or the black man any superiority over white man. You are all the children Adam and Adam was created from clay."

To prove that in Islam nobody is above the law, the following story can be briefly recounted : One day, a woman belonging to a high and noble family, fatimah al-Makhzmiyyah, was arrested in connection with an offence of theft that made her deserve amputation. The case was brought to the Prophet (SM) and Usamah was sent to him to plead on the woman's behalf with a recommendation that she be spared the punishment of theft. The Prophet replied:

"The nations that lived before you were destroyed by Allah because they punished the common men for their offences but their dignities went unpunished for their crimes. I swear by Him (Allah) who holds my life in His hand that even Fatimah the daughter of Prophet (SM.) had committed this crime then I would have computed her hand."[19]

The Prophet (PBUH) has been reported to have said:

"Give equitable punishment to the remote and near and have no fear of reproach of people in enforcement of his limits set up by God."

All the righteous Caliphs acted upon these injunctions of the Qur'an and Sunnah during their Caliphate. The extent to which they paid regard to this right of human beings can well be observed from various instances of the history of the righteous Caliphate. In an epistle to Abu Musa Ash'ari the Governor of Kufa, Hazarat Umar writes, "After adoration of God, justice is a great obligation. Deal equally with people in your assemblies and courts of justice so that the weak may not despair of justice and the rich and the elite may not expect favours."[20]

Being astounded with the unique role of Islam regarding equality Dr. Ahmed Galwash mentioned in his book "The Religion of Islam": "Equality of right was the distinguishing feature of Islamic Commonwealth. A convert from a humble clan enjoyed the same rights and privileges as one who belonged to the noblest quaraish."[21]

It must be mentioned here that objections are frequently raised as to discrimination made on certain grounds which are strictly contradictory with the modem principles of human rights and fundamental freedoms. It is true that there

19 Mishkat, Kitab-ul-Hudood

20 Athar Hussain, The Glorious Caliphate, P.222

21 Md. Nazrul Islam, Human Rights in Islam, (Prominent publication, Dhaka, 2002) P. 31

are certain contradictions. But there are strict justifications in this regard.

3. Right to wealth

Islam not only recognized the right to life, but it also guaranteed security to wealth. It is the duty of every Muslim to earn a lawful livelihood and also to contribute to the common pool for looking after the needs of those who have suffered permanent or temporal disability. Islam has ensured the right of every human being to the basic necessities of life. In this respect the following verses may be mentioned:

In the Quran it has been stated, "Do not eat up your property among yourself in vanity."[22]

It also states, "Do not squander your wealth among yourselves in vanity."[23]

In another verse it has been said, "And in their wealth and possessions the right of the (needy) him who asked, and him who for some reasons was prevented from asking."[24]

"And when the prayer is fished, then disperse in the land and seek the Allah's grace and celebrate the praises of Allah often, that you may prosper."[25]

In the Farewell Pilgrimage the Prophet (SM) said, "Your lives and your properties are sacred to one another like the sacredness of this day of yours in the city of yours."

The Prophet on another occasion said, "The blood, property and honour of a Muslim must be sacred to every Muslim."[26]

Islam has made "zakat" compulsory, its third pillar. In this context, the Prophet (PBUH) said, "It will be taken from the rich and given to those in the community in need."[27]

Islam, along with the security of life, confers the security of ownership of property upon each and every human being. This right is only with respect to property which has been acquired by lawful means.[28] This right includes the right of enjoyment and consumption, right of investment in some business, right of transfer and the right of protection of the occupation of one's property.[29]

22 Quran: 2:88.

23 Quran : 4:29.

24 Quran : 51:19.

25 Quran: 62:10.

26 Hadith : Muslim.

27 Hadith: Bukhari and Muslim.

28 Amina Ashan Ilahi, Islami Riyasat, Vol. V.P. -15.

29 Salabuddin, Bunydi Huqooque, 242.

An Islamic State cannot acquire the property of any person without his consent and payment of adequate compensation. "The Prophet (PBUH) acquired the property of some persons of Medina for the construction of a mosque and paid compensation to the owners in accordance with the prevailing prices although the owners did not demand any prices."[30]

This right was protected in each and every situation in the Islamic State headed by the Prophet (PBUH) and the righteous Caliphs. On the occasion of the Battle of Hunain, the Prophet (PBUH) acquired helmets of Sufwan bin Ummïah. When he asked whether these were to be taken without compensation the Prophet (PBUH) said, "All those helmets which will be lost during the battle will be compensated."[31]

During the Caliphate of Hazrat Umar, once, a Syrian cultivator complied that the army had trampled down his crops. Hazrat Umar ordered the payment of ten thousand dirhams to him as compensation out of the public treasury. A famous jurist of Hanfia school of Muslim Law declares, "Government cannot acquire the property of its subjects unlawfully. When the central mosque of Kufa was constructed during the Caliphate of Hazrat Umar, using the remains of some old forts which happened to be situated on the land of the Zimmis the amount of compensation to be paid buy the state was adjusted in the accounts of their Jazya.[32]

In this way, Quran as well as Sunnah and the practices of the companions of Prophet (PBUH) protects the right to property in a society in which no one shall be deprived of it without due process of law.

4. Right to personal freedom

Security to personal freedom means the freedom of the person or body from arbitrary assert or imprisonment physical coercion. Islam ensures the right to personal freedom. It ensures it by saying that no man may be wrongly arrested, detained or coerced in any manner not justified by law.

In Muwatta of Imam Malik it is written, "In Islam no man may be arrested or imprisoned without justice". Thus, no man can be arrested without any specific charge against him; and no charge can be made without specific investigation into the facts. Without trial no man may be punished and in the trial everyone would have the right to defend himself.

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30 Nairn Siddique, Moshine-e-Insaniyat 224.

31 Amin Ashan Elahi, Ibid., Vol. 4, P.I

32 Cited in various books which have been quoted by Sheikh Shaukat Hussain in Human Rights in Islam, (Kitab Bhaban ,New Delhi 1990)P-44.

No one may be held responsible for any crime committed by others including relatives like father and son etc. On this point the holy Quran is very much explicit "No one can bear the burden of another."[33]

"If a wicked person comes to you with any news, a secretion the truth lest ye harm people unwillingly and afterwards become full repentance for what ye have done."[34]

"And pursue not that of which thou hast no knowledge."[35]

Under Islamic law to assert a man only on the basis of suspicion and throw him into prison without proper court proceedings and without providing him with a reasonable opportunity to produce his defense is not permissible. This is inferred from the Sunnah:

A tradition is reported by Abu Daud to the effect that some persons were arrested on suspicion in Medinah in the times of Holy Prophet (PBUH). Subsequently while the Prophet was delivering the Friday Sermon, a companion asked him as to who and under what grounds had these persons been arrested. The Holy Prophet (PBUH) maintained silence while the question was repeated twice, thus giving an opportunity to the police officer who had carried out the arrest. When the question was asked third time and the police officer did not give any reply or reason for arresting in the open court, the Prophet ordered that those persons should be released apparently on the belief that the police officer had no valid reasons to disclose for the arrest.

On the basis of this tradition, it is argued that Islam recognizes only two kinds of detention (a) under the orders of the court (b) for the purposes of investigation.

Islam instituted regulations and means of elimination of slavery and bondage. The Prophet (PBUH) freed hundreds of slaves by paying ransom from Zakat. The Prophet (PBUH) advised his followers thus: "These are your brothers over whom Allah has granted you authority then he who has a brother under his authority should feed him on what he eats himself, should cloth him as he clothes himself, and should not set him a task beyond his capacity and if he is assigned something heavy and difficult should help him in carrying it out." The slaves were freed and allowed the same privileges as the citizens of the city even to the extent that they were married into the family of their former masters eg. Zaid marrying a cousin of the Holy Prophet (PBUH). The Prophet (PBUH) of Islam, fourteen hundred year ago, initiated the abolition of slavery and all forms of bondage."[36]

33 Quran: 6:1,2.

34 Quran: 49:6.

35 Quran : 49:36

36 Human Rights in Islam, In the journal of Muslim World League, Dec, 1980, P. 21

5. Right to privacy or sanctity or security of private life

Privacy of life, which is essential for a refined life of goodness and purity, is the right of everyone. Islam also ensures right of privacy. Islam ensures this by forbidding undue interference or encroachment on a person's private life. The holy Quran has laid down following injunctions. "Do not spy on one another."[37]

"Do not enter houses other than your own without first announcing your presence and invoking peace upon the folk thereof."[38] "If you find no one in the house, enter not until permission is given to you: if you are asked to go back, go back: that makes you greater purity."

The Prophet (PBUH) also went to the extent of saying that a man should not enter into his own house suddenly. He should somehow indicate to those inside that he is entering, so that he may not see his mother, sister or daughter in a condition in which they would not like to be seen, nor in which he himself would like to see them.

The Prophet (PBUH) has even prohibited people from reading the letters of others: indeed if a man is reading his letter and another man casts sidelong glances at it and tries to read it, his conduct become reprehensible.

The state is also prohibited to intervene in the private affairs of the citizens. Prophet (PBUH) has said, "When a ruler begins to search for the causes of dissatisfaction among his people, he spoils them." When Caliph Hazrat Umar once heard a man singing inside a house, he suspecting some mischief started peering into the house where he saw a woman and some wine along with the man. He started remonstrating them but on being reminded of the fact that he was violating their right of privacy he gave up his idea of punishing the man from him that he would lead life a pious life in future.[39]

Thus the right to privacy or sanctity of private life is ensured in Islam.

6. Freedom of expression

Freedom of expression means that a person is entitled to express his views freely so long it does not transgress the limitations placed by law. Islam gives this right to all human beings for propagating virtue and not for spreading evil. The believer is under and obligation to speak out the truth without fear and without desire to show favour.

"The believers, men and women, are protectors of one another: they enjoin what is just and forbid what is evil."

37 Quran: 49:12.
38 Quran : 24:27
39 Maududi, Tafhimul Quran, Vol.5 P.89,

The Prophet also said "Most honoured struggle of one who speaks the truth in ace of an oppressive ruler".[40]

He also urged the people to stop evil:

"If anyone of you comes across an evil, he should try to stop it with his hand; he is not in a position to stop it with his hand then he should try to stop it by neans of his tongue. If he is not able to use his tongue then he should condemn it n his heart. This is the weakest degree of faith."

During the Battle of Uhad when the Prophet (PBUH) asked his companions to esist the enemy inside the town of Medina, they asked him that in which capacity e was giving his ordinary human being not based on Divine Guidance, the ompanions insisted upon their own opinion and the Prophet (PBUH) agreed to ght this battle on the grounds of Uhad in accordance with their wishes. The uestioning of the companions regarding the capacity in which the Prophet PBUH) was suggesting particular course and their insistence on their own opinion fterwards clearly signifies the mentality which the Prophet (PBUH) had culcated among his companions.[41]

There are several other instances which signify the freedom of thought and xpression that prevailed in the ideal Islamic Society under the leadership of he rophet (PBUH). This atmosphere of free expression of opinions without any fear ntinued even after the Prophet (PBUH). The Prophet (PBUH) in Hadith has arned, "The people who endorse the wrong doings of the rulers after me are not y followers.[42]

Caliph Hazratt Umar and Hazrat Abu Bakar invited the people to criticise them they went wrong somewhere. People also criticized them without any hesitation. ne extent to which the freedom of thought prevailed during the righteous liphate can be well illustrated from an incident. When Hazrat Umar was on his urney to Syria he enunciated in a public gathering the reason for dismissal of azrat Khalid Bin Waled justifying the action. A person got up and said "0 Umar: y Allah, you have not acted justly. You have dismissed a person appointed by the rophet (PBUH) of Allah; you have put back into scabbard the sword drawn by e Prophet of Allah. You have dissolved ties of relationship. You have shown envy your cousin." Hazrat Umar said nothing more than, "You have felt indignant cause of loyalty to your brother".[43]

On one occasion a person rose again and again addressing' "0 Umar! fear lah," One of those present restrained him saying that was enough. Hazrat Umar

Tibrizi : Mishkat. At. Al-Masabeeh

Shaikh Shaukat Hussain, Human Rights in Islam, P.51,

Hadith, Nasai, Miskat,

Shibli Nomani, Al-Farooque, p.285.

said, 'Let him say it. If these people do not say so they are of no use and if we do not listen to them we are of no use".[44]

Kharijites during Caliphate of Hazrat Ali used to abuse him openly and threatened him with murder. Once Hazrat Ali was delivering a lecture in a mosque when Kharijites raised their special slogan there. Hazrat Ali said, "We will not deny the right to come to mosques to worship God, nor shall we stop to give you your share from the wealth of the state as long as you are with us (in war against unbelievers) and we shall not take military action against you as long as you do not fight with us.'[45]

The above examples clearly show that an Islamic State cannot restrict freedom of expression unless it is contrary to the basic principles of Islam. The attitude of Hazrat Ali towards Khrijites clearly shows that no one can be deprived of his rights on accounts of expression of difference of opinion with the people in power. There is no scope of denying opposition newspapers the facility of receiving Government advertisement as is done in the modern, 'civilized' states.[46]

7. Freedom of association

Freedom of association, which is important for the maintenance of political liberty, presupposes organization and a relation of some permanence between many persons to freely meet and discuss their grievances and to work out in unison a plan of action to set things and for nation of parties or organization. As the holy Quran declares:

"Let there arise out of you a band of people inviting to all that is good enjoining what is right and forbidding what is wrong. They are ones to attain felicity.[47]

"Be not like those who are divided amongst themselves and fall into disputation after receiving clear signs, for them is dreadful penalty.[48]

Islam has given the people the right to freedom of association and formation of parties or organizations. As is clear from the above verses of the Qur'an, this right is not an absolute right but it is subject to certain general limitations. It should be exercised for propagation of virtue and righteousness and should be never used for spreading evil and mischief. The people are free to organize meetings. An Islamic State cannot restrict this unless such an organization indulges in actual violence. The extent to which this right was regarded during the early days can b assesse

44 Katab-ul-Kharaj, P. 125,

45 Maududi, Human Right in Islam, P.32

46 Shaikh Shaukati Hussain, Human Rights in Islam, P. 52,

47 Quran: 3:140,

48 Quran: 3:105

from the following example:

During the Caliphate of Hazrat Ali there was a group of Muslims known as Kharijites. They used to abuse the Caliph openly and threatened to murder him. Whenever they were arrested for these offences Hazrat Ali would set them free and tell his officers; "As long as they do not actually perpetrate offences against the state the mere use of abusive language or the threat of the use of force are not such offences for which they can be imprisoned."

The freedom which Caliph Hazrat Alt gave to the opposition has no parallel in human history. He didn't arrest even those who threatened him with murder nor did he imprison them ever.[49]

Thus the right to freedom of association in Islam should be exercised for propagating virtue and righteousness and should be never used for spreading evil and mischief.

8. Freedom of movement

Freedom of movement means the right to free movement within and outside the country. Islamic state cannot impose any restriction on the right of any of its subjects from setting or residing in any particular part of the state. Similarly, no one can be restricted from going outside the country under ordinary circumstances.

The Holy Quran says, "It is He who has made the earth manageable for you, so travel you through the track and enjoy the substance which He furnishes but into him is the Resurrection."[50]

None can be restricted from going outside the state under the ordinary circumstances. The Qur'an while mentioning the sins of the Jewish society discloses that they used to throw people out of their houses. Islamic state only exiles people who are defaulters of the law. Hazrat Alt, during his Caliphate told the Khrijites who were opposing his Caliphate that they could reside any where in the Islamic State. No action would be taken against them unless they indulged in actual violence.[51]

Thus Islam and ensures freedom of movement within its arena.

9. Freedom of conscience and conviction

Islam recognizes the freedom of conscience and conviction of all human beings. Muslim can invite non-Muslim to embrace Islam but they cannot compel them to embrace Islam. For religion depends upon faith and will and these would

49 Moududi, Human Rights in Islam, P. 30
50 Quran : 69:65.
51 Amin Ashan Ilahi, Islamic Ryasat, Vol- V. P.38.

be meaningless if induced force. Hence the Holy Quran has laid the injunction.

"Let there be no compulsion in religion."[52]

The Prophet (PBUH) was asked by Almighty to convey to all the Divine Guidance. He knew the fact the he was not to compel anyone to follow Islam. The Prophet (PBUH) during the whole of his life adhered to this principle of freedom of conscience and conviction. The regard that was paid to this right can be observed by some instances from the history of the Caliphate.[53]

Astiq was a Christian slave of Hazrat Umar whom he often persuaded to accept Islam. When he refused, Hazrat Umar could only say, "There is no compulsion in Religion." Hazrat Umar freed the slave before his death. This freedom does not only extend to religion but also to the freedom of having political and ideological differences. Islam not only forbids coercion in the matter of faith but also the use of abusive language against the deities of religion. "Do not abuse they appeal to instad of God."

This freedom not only extends to the non-Muslims but also towards the various sects amongst Muslims themselves. The attitude of Hazrat Alt towards khrijities clearly supports the above observation. The freedom of conscience and conviction also includes the freedom to profess and propagate one's religion. No Islamic Government can ban propagation of any other religion on its territory. The followers of other religions are also entitled to construct their places of worship and Muslims cannot interfere with them.[54]

Thus Islam ensures the right to freedom of conscience and conviction.

10. Right to participate in the affairs of the state

In Islam, Governments are considered as the representatives (Khalifa) of the created of the universe. The method recommended by Holy Quran for running the affairs of the state is mutual consultation. The most direct verses on this point are:

"Their (Believer) affairs are (decided) by mutual consultation".[55]

"And consult then in matters of administration."[56] The above principle was applied to its fullest extent by the Holy Prophet (PBUH) in is private and public life, and early rulers of Islam. Modem representative government is an attempt to

52 Quran: 2:256,
53 Shaikh Shaukat Hussain, Human Rights in Islam P.53
54 Supra,
55 Quran: 42:38,
56 Quran: 3:159.

apply this principle in state affairs.

In Islam women have a direct say in the affairs of the state or to have a representative. Western women won the right to vote only during the beginning of this century; in contrast, Muslim women had this right from the earliest years of Islam and regularly participated in the affairs of the state.

11. The right to education

Education improves one's life chances and gives one opportunities to seek new horizons and better understanding of life and its potential. Hence Islam sanctions the right to every human being to educate himself. The seeking of knowledge has been repeatedly encouraged in the holy Quran by the words that one should "see" 'look'; 'think', 'judge' reflect etc.

The Prophet (SM) enjoined upon every Muslim to seek knowledge when he said, "knowledge is incumbent on every male and every female."

"Behold what is in the heavens and the earth."[57]

Islam sanctions the right of every human being to educate himself. The Prophet (PBUH) enjoined upon every Muslim to seek knowledge. It is the duty of every Muslim male and female. Hazrat Saeed Ibnul A'as says that of all that the father can give to his children the best is the good education and training.[58]

Islam thus goes one step further than the International Declaration of Human Rights which only negates any denial of the right to education. Similarly, Islam by making obligatory on every Muslim to seek education negates the simple recommendatory nature of this right prescribed in the International Covenants and Universal Deceleration of Human Rights. The Islamic State can enforce this obligation mentioned by the hadith reported above through its administrative. Non-Muslim citizens of an Islamic State will have the right to make arrangements for imparting knowledge of their own religion to their children in their own school and colleges.[59]

12. The right to basic necessities of life

Islam has sanctioned every human being to the basic necessities of life and has recognized the right of the needy to assistance. In this respect the following verses may be mentioned: -

57 Quran: 10:102.
58 Hadith, Mishkat, Kitab-ul-Ilm
59 Maududi, The Islamic and Law and Constitution, P.284.

"And in their wealth and possessions the right of the (needy) him who asked, and him who (for some reasons) was presented (from asking).[60]

"And when the prayer is finished, then disperse in the land and seek Allah's grace and celebrate the praises of Allah after, that you may prosper".[61]

Islam has made "Zakat" compulsory, its third pillar. In this context, the Prophet (PBUH) said," It (zakat) will be taken from the rich and given to those in the community in need."

Moreover, an Islamic state should support those who have nobody to support them. As the Holy Prophet (SM) declared "The Head of the state is the guardian of him who has nobody to support him."[62]

A treaty made by Muslim Commander Hazrat Khalid Bin Waleed during the Calphate of Hazart Abu Bakar on the conquest of Hira contains the following words:

"And I have granted the right that if an old person becomes incapable of working or had suffered from a mishap or after having been rich has become a destitute so much so that his co-religionists start giving him alms, his Jazia will be remitted; he and his children will received allowance of maintenance, from the public treasury as long as he lives in the Muslim country. If he leaves it, the Muslims will not be responsible for the maintenance of his family.[63]

The incident of old Jew has already been narrated in this context. Hazrat Umar while communicating the news of victory of Qadisa addressed an audience saying, 'I remain anxious to see that the basic necessities of the needy are furnished. I will continue to do so until our resources get exhausted. Then I will seek your cooperation and see that the needs of all are fulfilled I am not a king here to enslave you, but have been entrusted with the responsibility to serve you.[64]

The above two instance clearly show that each and everyone who is unable to earn his basic necessities is entitled to them without any discrimination on the basis of caste, creed or religion. The Islamic State is bound to support those who have none to support them Al-Mawardi (99a-1031) in his work Al Ahkam-us-Sultaniyah regards it to be one of the fundamental duties of an Islamic government to guarantee the livelihood of the people and to distribute alms and charity among

60 Quran: 51:19,

61 Quran: 51:19

62 Hadith Tirmizi,

63 Shivli Nomani Al-Faruque, P. 269,

64 Nijatullah Siddique, Islam ka Nazrana Milkiat, P.401,

he deserving people. In the words of the Prophet (PBUH), "The Government is he guardian of everyone who has no guardian."[65]

Thus if a Muslim comes to know that a certain person is in need of assistance, hen, irrespective of whether he asks for assistance or not it is the duty to give all he help that he can.

13. Rights of religious minorities

Regarding the religious rights of the non-Muslims, Islam is very liberal and it extends them full freedom to observe their respective religion. It ensures all types of social rights to the non-Muslims. Non-Muslims enjoy the full security of their ives and properties. Similarly they enjoy full rights of educational facilities. They enjoy maximum political rights.

14. Right to justice

It must be stressed here human rights are not only recognized in principle in slam, they are also accompanied by a system of legal and administrative rules lesigned to ensure their application, and that system in turn constitute a undamental right, in the absence of which all other right would be in danger of becoming a dead letter.

The application of a right implies that any violation of the right should be brought before judge whose competence and integrity are beyond questions. In the words of Prophet (PBUH)."He who knows the truth but violates it in his judgements shall go to ell, He who judges without knowing the truth shall go to hell. Only he who knows the ruth and judges according to that truth shall go to heaven".[66]

When the Prophet (PBUH) was making preparations for the attack on Mecca, one of his companions set a letter through a woman to the authorities in Mecca nforming them about the preparations. The Prophet (PBUH) came to know this hrough Divine Revelation. He ordered Ali and Zubair "go quickly on the route to Mecca and at such and such place you will find a woman carrying a letter, recover he letter from her and bring it to me." So they went and found the woman exactly where the Prophet (PBUH) had said. They recovered the letter from her and brought it to the Prophet (PBUH) who summoned Hatib to the open court where e was asked clarify his position regarding the case. There was no secret trail.[67]

Hazrat Umar during his Caliphate didn't hesitate to try his governors in open ourts although the situation was critical, as the areas under their governorship had een conquered just before the trials. During the days of the Caliphate of Ali,

5 Al-Mawardi, Al-Ahkamul Sultania.

6 Hadith : Bukhari and Muslim

7 Maududi, Human Rights in Islam, P.29.

Kharijities used to abuse the Caliph openly and threatened him with murder. But whenever they were arrested for these offences Ali would set them free and tell his officers, "as long as they do not actually perpetrate offences against the state mere use of abusive language or the threat of use of force are not such offences for which they can imprisoned."[68] Thus Islam ensures right to justice and fair trial.

15. Right to protest against tyranny

This is the right of people to come forward in case of tyrannical activities by the Government. Islam recognizes this right.

"God loveth not that evil should be noised abroad in public speech expect where injustice hath been done...."[69]

"Curses were pronounced on those among the children of Israel who rejected faith by the tongue of David and Jesus the son of Mary because they disobeyed and persisted in excesses nor did they (usually) forbid one another:

"Evil indeed were the deeds which they did."[70]

Thus Islam ensures the right to protest against tyranny.

16. Enemies' rights

Elaborate rules have been framed by Islam for following a code of ethics even during wars, and ensuring certain human rights for the enemies irrespective of their behavior. These are different for combatant and non-combatant enemies. While the non-combatant enemies (like old and infirm and sick people, women and children etc) are not to be harmed, the rights of the combatant enemies to be preserved include: protection of wounded, protection against torture with fire, protection against slaying PoWs, sanctity of property of enemy-country's population, the right of sanctity of a dead body, the right of return of dead bodies of the enemy; etc.[71]

The forgoing discussion reveals that Islam recognizes and ensures a number of rights that are recognized as human rights in modem sense. The essential feature of rights in Islam is that the rights are scattered. They are found in the holy Quran, the Hadliths of Prophet (PBUH) and the activities of the Companions of Prophet (PBUH).

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68 Ibid., P.30

69 Quran: 35:18,

70 Quran: 35:81,82

71 Seyed Khadim Husain Naqavi, Islam the Best Religion for Preservation of Human Rights, P.352 In Human Rights in Islam (Islamic Propagation Organization, Iran, 1987) , edited by-Sayyid Khadim Hussain Naqavi.

Part Two

Comparative Analysis of Human Rights Provisions

The provisions of various international documents concerning human rights may be compared with those of the Islamic provisions on human rights. The comparison may be helpful to pinpoint the differences and similarities between modern international human rights law on the one hand and to show the beauty, permanence, efficacy, superiority and peculiarity of the Islam provisions on human rights on the other. If we analyze the two types of sources, we will find that most of the rights recognized by Islam are identical with the rights recognized by modern international human rights law.

The documents for comparison are those of the International Bill of Human Rights, that is, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, the Inter-American Convention on Human Rights and the African Character on Human and Peoples' Rights.

1. Right to life:

	Article
Universal Deceleration of Human Rights (UDHR)	3
European Convention on Human Rights (ECHR)	2
American Convention on Human Rights (ACHR)	4
International Covenant on Civil and Political Rights (ICCPR)	6

No one may be deprived to his life intentionally other than by due process of law. There is no gainsaying the fact that all the documents share a common commitment to the protection of the human right to life; however, the Islamic provision makes the strongest condemnation of individual assassination and revenge. In Islam, human life is sacred and inviolable and it is recommended that every effort should be made to protect it. In particular, no one should be exposed to injury or death, except under the authority of the shari'ah (Islamic Law). Just as in the right to life, so also after death, the sanctity of a person's body is made inviolable. In other words, Islam makes it obligatory for Muslims to ensure that a dead person's body is handled with due solemnity.[72]

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72 Abdur Rahman 0. Olayiwola, Human Rights in Islam, In Islamic Quarterly.

2. Equability before law:

	Article
UDHR	7
ICCPR	14,26
ECHR	6
ACHR	8,24
ACHPR	7

The foundation of social system of Islam rests on the fact that all are equal and belong to one universal brotherhood. Islam rejects all distinctions on the ground of birth, color, race or language etc. Anyone who believes in one Allah as his Lord and accepts the guidance of his Prophet as the way of his life can be a member of Muslim society.

3. Right to property

	Articles
UDHR	17
ECHR	21

Everyone is entitled to own and enjoy private property without risk of arbitrary confiscation.

Islam provides for the right to protection of property. No property may be expropriated except in the public interest and on payment of fair and adequate compensation. Prohibitions of any attack on the property or the life of a man is also expressed in the saying of the Prophet Muhammad.

You are forbidden to attack the property of others; and
The property and blood of others are a sacred trust.

Hadith: Bukhari and Muslim

4. Right to personal liberty and freedom of movement

	Articles
UDHR	3, 4 and 13
ECHR	4,5
ICCPR	9,8,12 and 13
ACHR	7
ACHPR	6

All the agreements outlaw slavery. They also state mat people may not be detained against their will other than by due process of law. The right to move freely within one's own country and the right to leave and re-enter one's country will could also fall under this heading.

5. The Right to privacy

	Articles
UDHR	3, 4 and 13
ECHR	4 and 5
ICCPR	9, 8, 12 and 13
ACHR	7
ACHPR	6

International agreements recognizes the right of men and women to marry reely and found a family and state that no-one should be subjected to arbitrary or nlawful interference in his or her privacy or family home.

The Islamic perspective in insisting that every person is entitled to the rotection of his privacy is borne out of the fact that conventions of propriety are ssential to refined life of goodness and purity. For instance, the Muslim principle f asking respectful permission and exchanging salutations before entering a ouse insures privacy without exclusiveness, and friendliness without undue amiliarity.

6. Right to family life :	**Article**
International Covenant on Economic Social and Cultural Rights (ICESC)	10
ACHR	17
ACHPR	18

As far as family life is concerned, Islam maintains that every person is entitled o marry, found a family and bring up children in conformity with his religions radition and culture. It also provides for rights, duties, privileges and obligations f the parents, husband and wife.

7. Freedom of thought, conscience, religion and expression

	Articles
JDHR	18 and 19
ECHR	9-10
CCPR	18 and 19
ACHR	13
ACHPR	8,9

Individuals have the right to freedom of thought and expression, including the reedom to ask, receive and impart information and ideas of all kinds. Individuals ave the freedom to adopt a religion or belief of their choice, to practice that reedom, to observe and teach their religion or belief and to leave their religion or elief and adopt another if they so wish.

The Islamic provision on the above right is very comprehensive in that it warns that no none is entitled to disseminate falsehoods or to circulate reports which may outrage pubic decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons. In the same vein, Islam explains how Allah reproves any pressure exercised by one person on the conscience of another.

8. The Right to Assembly and Association :

	Articles
UDHR	20
ECHR	11
ICCPR	21 and 22

Everyone has the right to assemble peacefully with others and to join and leave a collective organization. Islam provides that every person is entitled to participate individually and collectively in the religious, social, economic and political life of his community and to establish institutions and agencies meant to enjoin what is right (Ma'roof) and to prevent what is wrong (munkar).

9. Right to Education :

	Articles
UDHR	26
ICESCR	13
ACHPR	17

Islam sanctions the right to every human being to educate has been repeatedly encouraged in the holy Quran by the words that one should 'see' 'look' thinks, judge, reflect etc. The Prophet (PBUH) also has given due emphasis on this right.

10. Economic and social rights

	Articles
UDHR	22-27

The UN Declaration includes the right to work, the right to rest and leisure, and the right to education and to take part in cultural life.

In Islam, every person is entitled to the right to food; shelter, clothing, education and medical care consistent with the resources of the community. This entitlement extends to both men and women. This is a duty of an Islamic state provide these basic necessities.

PART THREE

Ensuring Human Rights under the Auspices of Islam

The various protections, which Islam provides against the violations of human rights, are unique in nature. These protections and safeguard follows from the very

nature of the political system of Islam. Islam made a deep concern about aspect of human rights. Realizing the awesomeness of this task, it laid down two fundamental principles. First, it made human rights an integral part of religion. Since state and religion are inseparable and united, it becomes the fundamental duty of a Muslim state to implement them. Second, it emphasizes in unmistakable terms the importance of justice and independence of the judiciary. There are three safeguards provided by Islam for the protection of human rights.

1. Establishment of judiciary

The enforcement of human rights under Islam will be primarily conducted by the state machinery, i.e. court. If any party infringes any right the aggrieved party has the right to petition before the court for the enforcement of the infringed right. There is no evidence in Islam that judiciary was gagged or manipulated for selfish ends of the rulers. Centuries before the western nations realized the need of additional framework to protect the right of citizens. Muslim ruler had established special administrative tribunals to provide remedies to common people for their grievances against the government. Every student of Islamic administration knows that Muzalim constituted an integral part of administrative theory in Islam.[73]

2. Duties and obligations

Islam has enjoined upon the faithful that it is their duty to forbid evil and promote virtues. Islam, by enjoining this duty makes society vigilant against the state and all others who violate the divine limits. A man who dies while defending his rights has been accorded the status of a martyr. The Prophet (PUBH) has said the most excellent Jihad is to declare truth in the face of a despotic and oppressive ruler.

3. Punishment in the next world

Another safe guard has been provided in the Quran that if any body does mischief, infringes the rights of others, he will be severely punished in the next world. The Quran says, "Ye are the best community that hath been raised for mankind. Ye enjoin right conduct and forbid indecency, and ye believe in Allah".[74] In the Quran a distinction between right conduct and indecency has been made with a view to giving a clear picture of awful doom which will happen in the next world. Thus if any body violates in human right as ensured by Islam, he shall be questioned by Allah hereinafter as to why he failed to fulfill his obligation as a human being.[75]

73 Parveen Shaukat Ali, Human Rights in Islam, pp79-81,

74 3:110

75 Dr. A. B. M. Mafizul Islam Patwari in his edited work Human Rights in Contemporary International Law,(Humanist and Ethical Association of Bangladesh,1995) p 264-265

In the light of the above discussion concerning the position of human rights in Islam and its role to the development of human rights, we can easily come to a conclusion that Islam is not an idea of our time. Since 6th century A.D. Islam has provided a perfect code for the promotion and protection of human rights and it conceptualized, internationalized human rights and enforcement mechanisms. Modern international law provides human rights in various treaties, agreements etc. But the provisions of human rights in Islam are scattered and are not found in a single document. This does not mean that Islam gives less importance to the issue of human rights. Rather, the safeguards provided by Islam are comprehensive solution to the crucial problem of human rights that is unique in nature.

Juvenile Delinquency : Need for Comprehensive Legal Reform in Bangladesh

Nahid Ferdousi

Introduction

Juvenile delinquency is a major social problem in Bangladesh. The socio-economic structure and condition of Bangladesh are the root causes of juvenile delinquency.[1] At present, the traditional offences of juveniles are not only limited within- telling lies, running away from schools, stealing or teasing girls. They are also involved in unlawful, anti-social and suspicious activities which greatly affect the law and order situation of the society and the country at large. But there was hardly any focus on remarkable legal attention for juveniles before 1990.[2] Although the Children Act enacted in 1974 and the Government has incorporated the rules of the Convention on the Rights of the Child (CRC) 1989 in various national policies, but the proper implementation has not yet found. Thereafter, in 2003 and 2007, the High Court Division of the Supreme Court of Bangladesh passed landmark judgments and issued *suo motu* rules with various directions. To implement the *Suo motu Order,* National Task Force (NTF) were constituted at district and upazilla levels to study the problems of juveniles comprehensively but their recommendations remain generally unimplemented. Recently, GOs and NGOs conducting reform of the juvenile justice system by creating a common understanding and coordinating action among key actors. Unfortunately, there is no comprehensive reform for protection and welfare of the juveniles in Bangladesh. At the same time juvenile justice reform has received significant attention throughout the world. However, in Bangladesh, juveniles are treated with outdated colonial laws. In addition, the provisions to treat the children separately after arrest, to submit separate charge-sheet and to conduct separate trial in a homely atmosphere are not maintained due to avoidance of law, accompanied by an improper attitude of the concerned authority. Consequently the existing process of arrest, trial and custody destroy juvenile's childhood, as a result of being denies their right to, for example: family life, education, health, play, care and protection. Under the justice system, most of the juveniles have little chance of rehabilitation and reintegration into the society. Thus, the need for a comprehensive legal reform on juvenile justice is essential in Bangladesh to ensure the care and protection of juvenile delinquents.

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1 Abdus Samad and etal, *Juvenile Justice Administration and Correctional services in Bangladesh*, (Dhaka: Ministry of Social Welfare, 2002) p. 2.

2 *Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law*, (Dhaka: UNICEF, 2006), p. 39.

Juvenile Delinquency: Meaning and Age of Penal Responsibility

There are different views about the meaning of juvenile delinquency. It depends on the age of the delinquent and the nature of the crime. Different countries are having different age limits for juvenile under their own legal systems.[3] In general, juvenile delinquency may refer to either violent or non-violent crime committed by persons who are under the legal age and are still considered to be a minor.[4] According to Black's Law Dictionary, "Juvenile means a person who has not reached the age of 18 years [5] in Bangladesh, there are no specific laws on juvenile delinquency that is, laws prohibiting certain acts normally regarded as socially acceptable if indulged in by adults but declared unlawful if committed by children. Moreover, the meaning of child or juvenile is not uniform in the laws of Bangladesh. Determination of age of juveniles is a serious problem in Bangladesh legal system. Different legislations provide different age limits of juveniles. But all of them are within 12 to 18 years of age. The age limits of a child or juvenile provided under various legislations are as follows:

Age of Children/ Juvenile in Various Legislations in Bangladesh

Law	Age specified (in Year)
The Christian Divorce Act, 1869	Son: below 16 Girl: Under 13
The Contract Act, 1872	Before attaining 18
The Majority Act, 1875	Before attaining 18
The Guardian & Wards Act, 1890	Below 18
The Railway Act, 1890	Below 12
The Code of Criminal Procedure, 1898	Below 16
The Juvenile Smoking Act, 1919	Below 16

3 Abul Hakim Sarker, "*Juvenile Delinquency: Dhaka City Experience*", (Dhaka: Human Nursery for Development, 2001), p.45.

4 Mohammad Sajjad Hossain , "Separate Treatment Measures for Juvenile offenders in Indian Sub-continent: A Brief Historical Description", in *Human Rights, Investigation- Prosecution and Juvenile Treatment,* Edited by Abdul Hakim Sarker (Dhaka: Social Science Research Council, Ministry of Planning, 2008), 117

5 The Black Law Dictionary, Eighth Edition, p. 884.

Law	Age specified (in Year)
The Child Marriage Restraint Act, 1929 (According to Present Amendment)	Boys: Under 21 Girls : Under 18
The Suppression of Immoral Traffic Act, 1933	Female under 18
The Vagrancy Act, 1943	Under 14
The Orphanages and Widows Homes Act, 1944	Below 18
The Children Act, 1974	Below 16
The Bangladesh Shishu Academy Ordinance, 1976	Below 16
National Children Policy (NCP), 1994	Below 14
The Convention On the Rights of the Child, 1989	Below 18
The Anti-women and Children Oppression (Amendment) Act, 2003	Not over 16 years.
Bangladesh Labour Code, 2006	Below 14

Age of penal responsibility is most important factor to treat the children as a juvenile delinquent. The Penal Code, sections 82 and 83 states nothing is an offence, which is done by a child under 9 years of age. Once the child has attained the age of 12, he or she is fully responsible for his or her actions. However the Children Act, 1974 sets the maximum age for youth in the juvenile justice system is 16 years. Therefore a young person from 9 to 16 years of age will be dealt with as a juvenile in Bangladesh.

Review of the Existing Laws and Practice

On Legal Framework

Since the British administration in this Subcontinent, a number of laws have been enacted to control the anti-social and unlawful activities of juveniles. But the Children Act, 1974 is the only piece of legislation in Bangladesh that specially deals with juvenile delinquency. This Act consolidates all the previous laws (The Reformatory School Act, 1887, The Bengal Children Act, 1922) relating to the trial, custody, protection, punishment and treatment of the juvenile delinquency. But it is very important to remember that this Act is passed 34 years ago. This Act is still enforced in Bangladesh without any modification and amendment. Consequently this Act certainly has some limitations which are as mentioned below:

(a) The Act does not specify any where whose duty is to ascertain children age.

Also the definition of child as offered by the Act is not consistent with CRC. According the Act, age limit of children is fixed in 16 years and CRC prescribed below 18 years.

(b) This Act does not provide sufficient procedural direction in dispensing with various classifications of matters such as delinquency, uncontrollability, destitution etc. in order to ensure a non-adversarial process and environment in dealing with all categories of juveniles. Also it has no prescribed definition of torture, cruel, degrading or human, punishment or treatment or provides sanctions against such treatments while in institutional custody or care.

(c) All juvenile delinquents up to their age of 16 years can not be protected by this Act. Some of them are considered under Special Powers Act, Drugs Act, Explosive Substances Act, Arms Act, Control of Oppression of Women and Children Act where children are also not considered differently from adults. Lack of this direction leaves the children without protection when accused under the above mentioned special laws.

(d) The Act does not set time limits for the privilege of juvenile matter at different stages (remand, inquiry, investigation, framing of charge sheet, providing bail, delivery of judgment, removal to certified home etc.) so as to ensure prompt delivery of justice.

(e) In absence of clear cut provisions in the Act, procedure has evolved whereby the rights of a child are greatly prejudiced, particularly in self defense. Children are tried for undefined offences which is also prejudicial to their rights. It is also not clear how a Court becomes empowered to try a juvenile, whether it is through an executive directive or automatically as soon as a juvenile is brought before it.

In 1976, the Children Rules was introduced under authority of section 77 of the Children Act, 1974. The Children Rules provide the treatment of inmates in correctional institution. But yet the provision of forwarding the children's progress report periodically to the Court or appropriate authorities are not mentioned in the Rules. Apart from this Acts, there are some provisions of other laws dealing with the juveniles. But these provisions is scattered in various statutes of Bangladesh. These provisions are highlighted below:

Provisions Relating to Juvenile Delinquency

Legislation	Provisions
The Penal Code, 1860	Sections 82, 83, Age of criminal responsibility, confinement of juvenile prisoners.
The Arms Act, 1878	This Act is related to arrest of children.
The Railway Act, 1890	Sections 126, 127, 128, 129 and 130 deals special provisions in respect of the commission of a crime by children endangering safety of persons traveling in railway is embodied in the Act.
The prisons Act, 1894	Section 27 deals separation of male and female prisoners both for convicted and under trial prisoners.
The Bengal Jail Code, 1894	Section 27 deals juvenile prisoners must be separated from adult prisoners.
The Reformatory School Act, 1887	The Act was applicable to children under 15 years of age and they would not be kept in the reformatory schools after they had attained the age of 18 years.
The Code of Criminal Procedure, 1898	Sections 29B, 399, 562 deals with children and juvenile delinquency up to age of 21 years.
The Juvenile Smoking Act, 1919	The Act provides provisions for prevention of smoking by juvenile, prohibition against sale of tobacco to young person under the age of 16 years.
The Bengal Children's Act, 1922, (now repealed),	The Act describes that the court could order the father or guardian of the child to appear before the court or could issue warrant of arrest to produce the child before the court.
The Bengal Brostal Schools Act, 1928	The Act provides that young persons of 15-21 years age group convicted of certain crimes can be sent to a Brostal School for disciplinary measures and vocational training.
The Suppression of Immoral Traffic Act, 1933	The Act prevents minor girls trafficking including women for immoral purpose.
The Bengal Vagrancy Act, 1943	The Act provides for the training of vagrant children below 14 years age and provides for the confinement of beggars in a Vagrant Home.
The Probation of Offenders Ordinance, 1960	This Act provides correctional services to protect the young offenders and employment of probation officers in the institutions for easy to the probation service in the country.
The Special Powers Act, 1974	Provide for special measures for the prevention of certain prejudicial activities for more speedy trial and effective punishment of certain grave offences and for matters connected therewith.

Most of these laws are of British era. Some are of Pakistan period and a few passed after the independence of Bangladesh. As mentioned earlier, in 1990 Bangladesh singed and ratified the Convention on the Rights of the Child (CRC). But Bangladesh still faces different drawbacks to ensure the rights of the juveniles due to lack of effective laws and its appropriate uses. The main problems are the age limit and laws of delinquents are not uniformed in Bangladesh.

On Procedural Pathway

Law enforcement agencies, courts, and correctional institutes (Kishor Unnayan Kendre) are major component to deal with juvenile delinquency. At first the role of police officer is vital factor to create child-friendly justice system. Police officers are determined whether the child should be produced before the court or should be released. Often they do not maintain the legal procedure which is very critical to promote and enforce of juvenile rights. As per law, police officer should inform the probation officer and the child's parents or guardian immediately after arresting the child. But practically police officers do not follow the rules. Even in many cases, physical abuse, force and torture are applied during the arrest and interrogation. The Children Act does provide for a separate trial for adult and child when they are involved in the criminal case. This provision is rarely applied in practice. Unfortunately, the police themselves do not do separate trials, invoking the complexity of the procedures. According to the Act the police officer has the authority to release a child on bail, even for non-bailable offences. Also the court may release the child on bail or order them to be detained in a remand home or place of safety. But in practice there are no limitations on the duration of detention.

Secondly Court decides whether the child should be sent correctional center or be released under probation or bail bond. At present there are three Juvenile Courts in Tongi, Jessore and Konabari KUKs in Bangladesh. There are no other Juvenile Courts in divisions or districts of Bangladesh. Juvenile Courts in KUKs sit for trial in twice a week. Due to insufficient number of juvenile courts throughout the country, children are tried in regular criminal Courts together with adults. Most of the police cases send to KUKs arrived thereafter trial. Very few cases are sending directly to KUKs for trail from the police station or by the Judicial Magistrate Court after taking cognizance of the case. Only less serious cases like theft are tried in juvenile courts of KUKs. As a result it is not possible to justice all juvenile cases in Juvenile Courts. Another problem is sentences of 33 years, 30 years and 8 years reflect the fact that children and more specifically juveniles are treated like adults.

Thirdly, Kishor Unnayan Kendra as correctional institutions plays a vital role for rehabilitation and reintegration into the society for the juveniles. According to the Children Act Government established three Kishor Unnayan Kendra (KUK) at

Tongi (1978), Pulerhat, Jessore (1995) and Konabari, Gazipur (2003) in Bangladesh. It is the only institution in Bangladesh which specifically covers juvenile delinquents cases. The objectives of the KUK are custody, protection, treatment and reformation of the juvenile delinquents under 16 years of age. In addition, a guardian may also file a suit, under section 33 of the Act against uncontrollable children. However, Tongi KUKs has been serving for above 30 years and other two institutions serving above 20 years but it has not been able so far to show success on rehabilitation and social reintegration of juveniles. The main problem exists in length of confinement and release of the inmates. KUKs have no authority to release juveniles after attaining 18 years of age.

Remarks on Comprehensive Legal Reform to Prevent Juvenile Delinquency

It is clear that the legal framework on juvenile delinquency in Bangladesh is not unified and it is scattered in various laws which affect juveniles. After 39 years of liberation of Bangladesh, the law has not substantially changed to protect juveniles. Also there are many loopholes in the very old laws itself regarding the definition of a child as well as the age limit.[6] Moreover there was no proper practice of the Children Act before 1990. In 1993, the first major case on juvenile delinquent was *State vs. Deputy Commissioner, Satkhira.*[7] After ten years, in 2003, a Division Bench of High Court Division of the Supreme Court of Bangladesh gave a *suo motu* order.[8] According to this order High Court instructed the government to take specific steps for system-wide improvement as mandated by the Children Act. Thereafter, in 2007, a Division Bench of the High Court Division of the Supreme Court issued a *suo motu* rule on the government to take appropriate measures in accordance with the *suo motu* rules of 2003.[9] Beside judicial intervention, GOs and some NGOs conducted an assessment of the training needs of police, judicial magistrates and judges in partnership with concerned ministries, training institutes and relevant partner organizations. But there has not yet to implement a fully comprehensive justice system for juvenile delinquents. The following recommendations can help for a better environment for prevent and protect juvenile delinquency in Bangladesh.

6 K. M. Subhan, *Juvenile Justice Administration in Bangladesh: Laws and their Implementation*, Edited by Wali-ur Rahman and Mohammad Shahabuddin, Judicial Training in the New Millennium: An Anatomy of BILIA Judicial Training with Difference (Dhaka: Bangladesh Institute of Law and International Affairs BILIA, 2005) p. 215.

7 45 DLR (1993) 643.

8 *Suo Motu Order No.248, 2003;* 11 BLT, HCD, 281.

9 Borhan Uddin Khan and Muhammad Mahbubur Rahman, *Protection of Children in Conflict with the Law in Bangladesh*, (Dhaka: Save the Children, UK, 2008), p. 23.

- Cancel obsolete and conflicting laws which deal with juveniles and create confusion in application.
- Comprehensive amendment in the Children's Act 1974 and other supplementary laws to bring it in consistency with better interest of the children in perspective of Bangladesh and the guideline of the CRC.
- The definition of child must be uniformed and a full-proof method of age determination should be set-up.
- Children under age of 18 years should be out of strict implementation of any law. But in case of murder, rape, explosive related offences, crimes against state, etc. it has become urgent to re-fix the age limit of the juvenile.
- Age of children should be mentioned compulsory in all legal dealings.
- Make a specific juvenile welfare Rules with special protection, rehabilitation and reintegration in the society.
- Formulate a separate policy guideline for use of institutions.
- Establish separate Juvenile Court in each divisional city. The Juvenile Court should be sovereign and simple procedure, flexible approach and homely atmosphere should be maintained during the trial. The main responsibility of these courts should be to provide adequate attention and security to the juvenile delinquents and should guarantee for them proper education and training.
- Juvenile bail system should be imposed in juvenile justice system.
- Arrest of children under the preventive law should statutorily be prohibited.
- Juvenile should get legal support from the state lawyer.
- The jurisdiction of the Special Tribunal established under the Special Powers Act Prohibits for juveniles.
- Police should stop sending children to court on petty offences.
- Separate prison cells should be provided for children in *thanas*. Adequate number of remand homes and places of safety in the vicinity of police stations should be constructed.
- Establish KUKs for both boys and girls children in each division. At present there are three KUKs in Bangladesh. According to Gazette of 1999, Dhaka, Chittagong and Shylet divisions under the Tongi KUK and Khulna, Rajshahi and Barishal divisions under the Jessore KUK. It is not possible to communicate form Cox's Bazar to Tongi or Dinajpur to Jessore smoothly. Besides there are only one girl's KUK in Konabari in

our country which is not sufficient.

- KUKs should be modernized and provide legal assistance to children directly. In addition, clinical program should provide in all KUKs for better treatment of juvenile.
- Ensure the responsibility of the probation officers and social caseworkers as a counselor as per law.
- Improve and increase logistic support for transferring children from Police Stations to other places. Juveniles should not be kept with adult offenders even in the transportation vehicles and court lock- ups.
- Quality of education with national curriculum imparted in KUKs should be improved and scope of higher education of the KUKs inmates should be ensured.
- Justice system should give more emphasis on correction rather than punishment. Several correction systems include motivational counseling approach, basic trainings, academic orientation; religious activities should be practiced by the juvenile.
- Provide training for judicial magistrates, police officer and probation officers on the international standards on juvenile justice and child friendly behavior.
- Make the supervisory or monitoring committee in Upazilla levels for preserve the record of juvenile delinquency in yearly.
- Ensure the legal rights and build up the strategy for juvenile's rehabilitation and reintegration into the society.

Conclusion

Children are not born as delinquent. Most of the children become delinquent by force of circumstance and not by choice. But in Bangladesh, laws regarding juvenile rights and protection are not contained in specific Statue rather various laws, statues and executive orders are followed for their justice which is not ensured the dignity of children and reintegration into the community. At present, protection and care of juvenile delinquency by the separate legal framework is a great challenge for Bangladesh. In order to save the future generation from destructive consequence of delinquency, a comprehensive legal reform is needed.

RIGHT OF THE PERSON WITH DISABILITIES : TOWARDS RIGHT BASED APPROACH LEGISLATION

Mohammed Ziaul Hoque
Farzana Faruq

INTRODUCTION

People with disabilities are undoubtedly disadvantaged segment of a society and are subjected to negative attitudes particularly for their disabilities despite the fact that Bangladesh is one of those twenty countries that have given their full support to the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol and agree to be penalized if it does not enforce the rights. The people with disabilities are also subject of discrimination due to the conception of the society that they are not asset but the liability. As a result, they are deprived of their basic rights and even their fundamental rights guaranteed by the constitution.

The Convention on the Rights of Persons with Disabilities and its Optional Protocol were adopted by the United Nations General Assembly in December 2006 with an object to ensure that persons with disabilities enjoy human rights on an equal basis with others. World Health Organization (WHO) estimates for the rate of disability in Bangladesh which range from a low of 0.47 per cent to ten per cent[1].

WHAT IS DISABILITY

In fact, there is no universally accepted definition for disability in the CRPD. The reason is it was felt that any definition might become outdated and this could weaken the treaty in the future. It was recognized that States Parties would need to develop different definitions for different purposes at the national level. However, preambular paragraph (e) states that: "disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others." Article 1 state that "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." As A result, the CRPD adopts a broad and wider approach, and does not restrict the States Parties' ability and initiative to recognize other groups of disable people not covered by the Convention.

1 The Prevalence Survey by Handicap International and the National Forum of Organizations Working with the Disabled (NFOWD) recorded the differently challenged as constituting about 5.6 per cent of the population.

In the CRPD, it was recognized that state parties would develop their national legislation and definition for different purposes at the national level. In Bangladesh an Act was made namely Bangladesh Persons with Disability Welfare Act-2001. In this Act, Disability" means any person who, a. is physically crippled either congenitally or as result of disease or being a victim of accident, or due to improper or maltreatment or for any other reasons became physically incapacitated or mentally imbalanced, and b. as a result of such crippledness or mental impairedness:- i) has become incapacitated, either partially or fully; and ii) is unable to lead a normal life. It further provides that Any person having disability described hereunder shall be included in the meaning and scope of the definition under subsection (I) of this section. a. "Visual impaired" means any person who has i) No vision in any single eye, or ii) in both the eyes, or iii) visual acuity not exceeding 6/60 or 20/200 (Snellen) in the better eye even with correcting lenses; or iv) limitation of the 'field of vision' subtending an angle of 20¡ (degree) or worse. In this Act, Physically handicapped refers to person who has i) lost either one or both the hands, or ii) lost sensation, partly or wholly, of either hand, or it is so weaker in normal condition that the situations stated under subsection I (a) and (b) are applicable to his case; or iii) lost either one or both the feet, or iv) lost sensation, partly or wholly, of either or both the feet, or it is so weaker in normal condition that the situations stated under subsection I (a) and (b) are applicable to his case; or v) has physical deformity and abnormality, or vi) has permanently lost physical equilibrium owing to neuro-disequilibrium. "Hearing impairment" means one's loss of hearing capacity in better ear in the conversation range of frequencies at 40 decibles (hearing unit) or more, or damaged or ineffective otherwise; "speech impairment" meaning loss of one's capacity to utter/ pronounce meaningful vocabulary sounds, or damaged, partly or wholly, or dysfunctional; "mental disability" means i.) One whose mental development is not at par with his chronological age or who's IQ (Intelligent Quotient) is far below the normal range or ii) has lost mental balance or is damaged, partly or wholly.

In essence, Disability can be said as a condition/situation lesser than usual standard of an individual which includes physical impairment, sensory impairment, cognitive impairment, intellectual impairment etc. In a case, Andra pradesh High Court, India observed that every small defect cannot be treated as a disability unless the deficiency or disability is to such an extent that it would differentiate him from people with ordinary faculties[2].

2 Rasala Gopal Vs Andra Bank and Others 2003 ILJ 916

DISABILITY WELFARE ACT 2001

An Act namely Bangladesh Person With Disability Welfare Act 2001 was passed with a view to protect and safeguard the rights and dignity of the person with disability, to ensure their participation in the national and social programmes and their general welfare. The Act in its schedule list some specific priority area which are disability prevention, identification, curative treatment, education, health care, rehabilitation and employment, transport and communication etc.

Section 3 of this Act deals with definition. Section 4 deals with Constitution of National Coordination Committee. Section 5 and 6 deal with disqualification of membership and responsibilities and function of national coordination committee. The responsibilities of the committee are a) To review the existing policies of the Government to protect and safeguard the rights and dignity of the persons with disabilities, to ensure full participation of the disabled community in accordance to their capacity /ability in the national and social programmes, and to recommend corrective measures; or if needed be, put suggestion(s) for formulation of a newer policy to this effect, in consideration of the prevailing realistic situations related to the issues; b) to advise the Government to undertake various projects and programmes for implementing the policies on disability issues c) to review and coordinate the activities of the Executive Committee, the District Committees and other concerned Government and Non-Government agencies, engaged in the acts of welfare for the disabled community under the purview of this Act or other laws so applicable, and to pass on necessary directives, if deemed expedient, to that effect d) to advise the Government on matters to protect the rights of the disabled Community/ population and motivate other agencies/organizations to that effect e) to arrange Skill Development Training for persons working in disability sector programmes to raise their work efficiency f) to establish a Disability Information Centre and to provide information to various mass media and arrange dissemination/media-coverage of those information for the welfare of the persons with disability g) to advise the Government to initiate proper steps to up-grade National policies and up-date concerned laws related to disability issues to keep pace in line with the development on the agenda that are taking place in the International arena and suggest for their implementation h) to recommend to the Government for reviewing of the existing laws and effect amendment, if so needed, from time to time, the laws in force i) to collect statistical data related to disability issues and arrange preservation of those data j) to undertake appropriately related steps/actions to implement the activities stated in this sub-section etc.

Section 8 and 9 deals with constitution and responsibilities of the Executive committee. The Responsibilities of the executive committee are i) To implement the decisions adopted by the Coordination Committee properly 2) To place appropriate recommendations to the Coordination Committee for implementing actions in line with the provisions of this Act and the National Policy on disability issues 3) To prepare necessary project proposals to ensure education, training, rehabilitation and other general welfare of the Persons with Disability and place them to the Coordination Committee for approval thereto 4) To monitor the activities of the District Committees and supervise and give necessary directives to the them, subject to approval from the

Coordination Committee (5) To take all associated actions to execute the programmes detailed in this sub-section. Section 12 and 13 deals with constitution and responsibilities District Committee. The responsibilities are a) To implement the projects and programmes and execute and carry out the policy-decisions, directives and orders of the National Coordination Committee, Executive Committee or of the Government at the district level b) Registration and issuance of Identify Cards to the persons with disabilities of the district c) To submit report, at least once in a year; on the activities undertaken for the welfare of the persons with disabilities of the district to the Executive Committee d) To carry out any other special duties delegated/assigned to it by the Executive Committee e) Any other duties assigned under these regulations f) To perform such other duties/activities so required for fulfilling the responsibilities vested under this Act.

This Act has been criticized by the legal experts and the social worker country wide. Mr. Abdullah Al Faruq, Chairman, Faculty of Law, University of Chittagong said, the Act has major deficiencies in terms of lack of accountability, lack of adequate representation of persons with disabilities or their self-organizations in the Committees, immunity from suit, scope of authorities to exercise arbitrary and undue power, and lack of permanent institutional mechanism. According to him, the National Coordination Committee appears to be focal point of action for welfare measures for persons with disabilities. The National Coordination Committee lacks an appropriate mechanism of accountability, as it is not responsible to any body for its activities. Tenure of the members of the Committee nominated from NGOs depends upon the sweet will of the government as the Government can relieve or terminate such membership anytime. The District Committees are required to submit annual reports to the Executive Committee, but the Executive Committee is not required to submit Reports to any body, nor is the National Committee required to submit its report anywhere. There is no provision in this Act, which provides for accountability for non-implementation of any scheme or step taken or not taken by any Ministry, any Committee, or any body authorized under the Act to deal with disability issues[3]. It is also noteworthy that this Act itself does not define what the offences against the disabled person are. It is also silent about the punishment of the offender. There is no clear prohibition specifying the responsibility of the private actors or in other word the law is silent how the government or private actor would be made more responsible rather the Act gives immunity to the government employee.[4]

The Act has been named as welfare Act but the "welfare" has been criticized severely.[5] On the other hand, the Act does not reflect any rights of the disabled. In Srilankan statute, it has been clearly stated that No person with a disability shall be discriminated against on the ground of such disability in recruitment for any

3 Plight of Person with disabilities; Towards effective legal Framework By Abdullah Al Faruq published in "The Daily Star" on April 19, 2008

4 In fact, the law is silent about the implementation procedure which is not in conformity with the Convention

5 The approach is directly against the Convention because Convention speaks about the "right" not the "welfare",

employment or office or admission to any educational institution[6]. It is also noteworthy that there are three committee in this Act i.e. national coordination committee, executive committee and district committee which makes the law weaken.[7] On the other hand, due to lack of responsibilities of the committee, the whole Act becomes a very weak framework. There is no prohibition in this Act which provides accountability of the committee for implementation or non implementation of any scheme. It is also noteworthy that in the Act, there are no sufficient representatives from the disabled person in the said committees. Since, an intellectually disabled person is often unable to work as member of high level committee, there should be scope for theirs interest to be represented by others[8].

WELFARE APPROACH VERSUS RIGHT BASED APPROACH

In the Welfare or medical approach, disabled people are objects of protection, treatment and assistance rather than subjects of rights and emphasize on the medical intervention. As a result, perhaps disabled people were excluded from the mainstream society, and they were provided with special schools, sheltered workshops, and separate housing and transportation with a stigma that they are incapable or disable. They were also denied equal access to basic rights and fundamental freedoms. Welfare approach highlights that the disabled people are sick, helpless and incapable of controlling their lives and disability is as an individual tragedy that requires personal adjustment, medical solutions and rehabilitation. In other words, it can be said that disabled people's problems is nothing but consequence of their impairment. According to this, disabled people means people whose bodies do not work, who look different or act differently, who do productive work or who cannot even cannot think. This approach is used by service provider for disabled people, such as education, health, rehabilitation etc.

On the other hand, the social model of disability provides an understanding that it is substantially different from the traditional view that disability is essentially about physical or mental deficit or abnormality. Social model of disability challenges the stigma attached to disabled people by the other class people of the community and even they hate themselves to be treated as disabled. Within this model, disability is the disadvantage or restriction of activity by the disabled people caused by the other class of people and thus excludes them from participation in the mainstream of social activities. This approach focuses disability as a social disadvantage and obstruction and to acknowledge and account for the differential needs of people with impairments. The model does not reject the notion of impairment, but at the same time provides that disability itself no cause for the socially disadvantaged. The Welfare approach defines the term "impairment" or "handicap" separately but according to the social model, all

6 Protection of the Rights of Persons with Disabilities Act, Srilanka,

7 In some other Act like Aingoto Sohayota Prodhan Ain (Legal Aid Service Act), also various committee has been formed and due to the cumbersome process people usually are less interested to apply for legal aid.

8 Dr. Naim Ahmed:Towrds Better laws on Disability Issues; A short Examination of the Suggestion and Recommendations made by the stakeholders published in Disability and Human Rights in Bangladesh published by ADD

disabled people share a common experience of oppression regardless of their race, sex, ethnicity, age and status. The welfare approach while says about the failure of the disabled people, the Welfare approach says about their right and discrimination. For example, whilst the welfare model blames a person for failure to use communication/information networks, transport etc, the social model criticizes the designers, manufacturers and contractors of these structures who at the time of designing, constructing or manufacturing, did not consider disabled people's access. This social models speaks about their rights, eradication of prejudice and discrimination against them.

The welfare approach when says about their treatment and service like education health etc., the social model defines difference and disadvantage thereby indicating what social change needs to take place to ensure equality and justice for all. It also says Human rights are the universal and no indivisible should be discriminated from these rights due to disability.

RIGHT BASED APPROCH LEGISLATION

Bangladesh as a member state of the Optional protocol of the CRPD has a obligation to take legislative steps and legislative measures. CRPD states that States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability and to this end, States Parties undertake (a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention; (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities[9]. CRPD also provides that States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law and States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disability[10].

Right-based-approach legislation actually means legislation which guarantees the rights of persons with disabilities to equality or to be free from discrimination, or which affirms in general terms the human rights and fundamental freedoms of persons with disabilities. However, right-based-approach legislation do not mean "disability discrimination legislation" which mean the legislation that contains provisions which prohibits and intends to eradicate discriminatory policies and right-based-approach are those stated earlier. In fact the main object of right based approach legislation is to form a barrier free legislation. In a case[11] Indian Supreme court observed that true spirit and object of the Act is to create a barrier-free environment for PWDs and to make special provisions for the integration of persons with disabilities into the social mainstream.

9 Article 4, CRPD,

10 Article 5, Ibid,

11 Jabed Abidi versus Union of India (1999) 1 SCC 467

The CRPD embodies a rights-based approach to pursuing equality for persons with disabilities, and recognize the rights of individuals without-discrimination and impose legal duties on the State and others to afford them that treatment, and provide accessible remedies for individual and systemic violations of those rights. The legislation should be drafted in the light of the standards set out in the CRPD and a careful look should be given to the provisions of CRPD and its protocol. The matters should be looked in to whether the Act protects the right of the person with disabilities? and "rights" mean those have been stated in CRPD. This Act should specify that every person with disabilities have equal right to freedom, dignity, non-discrimination and protection from the state against abuse of these rights. The Act should be very much clear and specific provision for making the discrimination unlawful. Bangladesh Constitution guarantees that no citizen would be discriminated due to race colour etc. It also provides that fundamental responsibilities would be to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard leaving of the people with a view to securing the right to social security, that is to say to public assistance in case of undeserved wants arising from unemployment, illness or disablement or suffered by widows or orphan or in old age or in other cases.[12] For the purpose of making discrimination unlawful, criminal law prohibition, Constitutional protections of equality and non-discrimination, and anti-discrimination or civil rights should be discussed. The Act would effectively provide a right not to be discriminated against on the ground of disability, by prohibiting such discrimination and providing an affected person with a channel for complaining about alleged discrimination with a view to affirm the opportunities to participate in social, economic, cultural and all other activities in the society. The legislation should provide clearly for redressing violations of the rights set out in the legislation. The remedies should be affordable and disable friendly.

CONCLUSION

Bangladesh as a member state of the CRPD and its protocol has an obligation to take legislative steps and measures to undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination. Bangladeshi Act deals with Welfare approach instead of right-based-approach and has major deficiencies in terms of lack of accountability. The Act even do not prescribe any right to the person with disability. As a result, the Act is not clear whether the Act gives any punishment for discrimination. Instead of welfare approach legislation, right based-approach legislation is long expected by the different sector and the right-based-approach-legislation is reuired to be drafted in the light of the standards set out in the CRPD and a careful look should be given to the provisions of CRPD and its protocol. The right given by the CRPD should be incorporated in the Act to give effect to the convention and for bringing the law in conformity with the convention. The present Act was drafted we think brushing aside the convention and as such the new amendment should be made in the light of the amendment given by different legal expert and NGOs.

12 Article 15 of the Constitution