Jati Journal

Volume X May 2011

Judicial Administration Training Institute

15, College Road, Dhaka-1000 E-mail : jati_dak@yahoo.com

www.jatibd.org

ISSN: 2220-6752

JATI JOURNAL

A collection of writings on various judicial and legal topics

VOLUME X

May 2011

JUDICIAL ADMINISTRATION TRAINING INSTITUTE
15, COLLEGE ROAD, DHAKA-1000
E-mail : jati_dak@yahoo.com
www.jatibd.org
Fax : 88-02-9667012

PUBLICATION COMMITTEE

Board of Advisors :

Mr. Justice Md. Hamidul Haque Director General	Chairman
Mr. Md. Mafizul Islam Director (Training)	Member
Mr. Md. Azizul Islam Director (Administration)	Member

Board of Editors :

Mr. Md. Zakir Hossain Director (Research & Publication)	Editor
Mr. Shaikh Humayun Kabir Deputy Director (Research & Publication)	Assistant Editor
Ms. Maksuda Parvin Research Officer	Member
Mr. Alamgir S. Rahman Assistant Director (Research & Publication)	Member

ISSN: 2220-6752

© JATI. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the institute.

The JATI JOURNAL is published annually and contains articles related to the discipline of law contributed by the resource persons. Brief learned comments on articles published in the JATI JOURNAL, reviews, research papers, reports, features, commentary and other literature on law and law related subjects may also be considered for publication. Manuscripts for publication should be sent to the Editor, JATI JOURNAL, Judicial Administration Training Institute, 15, College Road, Dhaka-1000 and cannot be returned.

Price : Tk. 80. US $ 1.5

Published by Judicial Administration Training Institute, 15, College Road, Dhaka-1000
Printed by Dreamland Advertising, Mobile : 01199011427

CONTENTS

* **Foreword** **5**

* **Problems Regarding Trial, Conviction and Sentence of a Child Offender** **7**
- Justice Md. Hamidul Haque

* **British Judges: Happenings and Mishappenings** **14**
- Md. Golam Mortuza Mozumder

* **Culpable Homicide amounting to Murder and Culpable Homicide not amounting to Murder: A Dilemma under Criminal Justice System** **16**
- Md. Zakir Hossain

* **Delimitation of Maritime Boundaries of Bangladesh : In Quest of a Just and Equitable Solution** **27**
- A.K.M. Emdadul Haque

* **Judicial/Metropolitan Magistracy in the Light of Separation of Judiciary** **41**
- Mir Md. Amtazul Hoque

* **In Quest of Combined Endeavor of Bench and Bar for Justice** **58**
- Gazi Delwar Hosen

* **Combating Corruption in Bangladesh: Towards a Comprehensive Anti-Corruption Legal Regime in Compliance with United Nations Convention against Corruption** **72**
-Ahmed Ehsanul Kabir
-Shuvra Chowdhury

* **Book Review** **105**

CONTRIBUTORS TO THIS ISSUE

- Mr. Justice Md. Hamidul Haque is a former Judge of the Appellate Division of the Supreme Court of Bangladesh and at present Director General of the Judicial Administration Training Institute.
- Mr. Md. Golam Mortuza Mozumder is District & Sessions Judge of Tangail.
- Mr. Md. Zakir Hossain is an Additional District & Sessions Judge, now deputed at JATI as Director (Research & Publication).
- Mr. A.K.M. Emdadul Haque is a Senior Assistant Judge and deputed as Senior Assistant Secretary at Law and Justice Division of Ministry of Law, Justice and Parliamentary Affairs.
- Mr. Mir Md. Amtazul Hoque is Senior Judicial Magistrate at Cox's Bazar
- Mr. Gazi Delwar Hosen is Senior Judicial Magistrate at Manikgonj.
- Mr. Ahmed Ehsanul Kabir is Lecturer of Law at Stamford University.
- Ms. Shuvra Chowdhury is Lecturer of Law at Stamford University.

FOREWORD

Training is an indispensable and integral part of human resource development activities and this applies with equal force in the matter of judicial education and training. The Judicial Administration Training Institute was set up for enhancing the knowledge and professional skill of the judges and others associated with the administration of justice to ensure just, speedy and inexpensive justice to the citizens. The curriculum of training course has been well designed to enable the persons connected with the administration of justice to achieve those objectives and to equip them adequately for discharging their solemn responsibilities. Besides orientation of the law dealt with by the trainees, training on computer literacy and some significant issues are being discussed in the training program so that the trainees may cope with day to day practical problems. A great deal of careful thought is being given to judicial teaching both in matter of its content and presentation of case laws to equip the judicial officers.

JATI has so far organized 104th training programs providing training to Judges and Magistrates. Besides the faculty members of the Institute, resource persons amongst others include Honíble Chief Justice of Bangladesh, Honorable Minister and State Minister for Law, Justice and Parliamentary Affairs, the judges of the Supreme Court, reputed lawyers and subject matter specialists who have proficiency in the relevant subject and other legal luminaries are invited. Their valuable contribution will make the JATI a centre of excellence for judicial education in this region

The present issue of JATI JOURNAL is an attempt 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 welcome and will be kept in view at the time of publishing the next issue.

May 2011 Dhaka

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

Problems Regarding Trial, Conviction and Sentence of a Child Accused

- Justice Md. Hamidul Haque

Under the Children Act, 1974, a person who is under the age of 16 years is considered as a child. Under section 3 of the Act such a child is to be tried by a Juvenile Court which may be established by the Government for any local area by a notification in the official gazette. Sub-section (1) of section 6 of the Act provides that no child shall be charged with, or tried for, any offence together with an adult. See 10 BLD 236, 9 BLD 502 = 42 DLR 89, 14 BLD 266, 45 DLR 643.

Ascertainment of the age of the accused

A confusion arose as to whether the age on the date of commission of the offence or on the date of framing of the charge, shall be taken into consideration to determine whether in respect of a person, provision of sub-section (1) of section 6 shall apply. There is a view that if the person accused of an offence claims to be below 16 years, he can be charged with and tried for that offence, along with an adult only after ascertaining his age. It was held that by making an inquiry, age is to be determined first. See 53 DLR 411.

The confusion has been removed by the High Court Division in the case of Bimal Das Vs. The State reported in 46 DLR 460.

> Accused Bimal Das faced trial under Schedule 4C of the Special Powers Act, 1974. An application was filed for transferring the case to the Juvenile Court on the ground that the accused was only 15 years 11 months 10 days old at the time of occurrence and as such he should be tried by a Juvenile Court. The prayer was rejected by the Tribunal and then an appeal was filed which was dismissed by the High Court Division with the following observations:-
>
> > "The point which has been urged before us by the learned advocate that the appellant, being a child at the time when the offence was committed should have been tried by the Juvenile Court. A close scrutiny of section 6 of the said Act will show that the age referred to in the section relates to the age of the accused when he is 'charged with' or 'tried for', and not to the age when the offence has been committed............ Therefore once a child offender crosses the age of 16 years and then charged with an offence or tried for the

same the requirement of the child being tried by a Juvenile Court comes to an end." Vide 46 DLR 460.

In the case of Mona Vs. The State reported in 9 BLC (AD) 125 = 23 BLD (AD) 187 the Appellate Division held similar view. The Appellate Division has observed that if the offender is not below the age of 16 years at the time of framing charge, his trial can be held together with an adult and no separate trial will be necessary. It was also observed that there was no material to show that the accused petitioner was below 16 years at the time of framing charge against him vis-a-vis; at the time of holding trial.

So, in the above decisions it has been settled that separate trial or trial by a Juvenile Court will be necessary only if the offender is below 16 years at the time of framing the charge. Trial starts only with the framing of charge. So, before starting the trial, the Court is to decide whether charge can be framed, whether holding of inquiry to determine the age of the accused is necessary or not.

There is also confusion as to when the question of determination of the age of the offender will arise. In view of the provisions of section 66, one view is that before framing charge the court at first must determine the age of the offender, specially when the offender claims that he is below 16 years. In the case of Baktiar Vs. The State reported in 14 BLD 381 = 47 DLR 542, the High Court Division observed that when a plea is taken by an accused that he is below 16 years, a duty is cast upon a court to determine the age of the accused. But such a view was not accepted by the Appellate Division in the case of Bimal Das Vs The State reported in 14 BLD (AD) 218. It was argued before the Appellate Division that under section 66(1) of the Children Act it was the duty of the Special Tribunal to find out the age of the petitioner before proceeding with the case. In view of such an argument, the observations of the Appellate Division were as follows:-

> "The said section is applicable when it appears to the Court that a person charged with an offence (or not) is a child. If it does not so appear he has no duty to ascertain the age of that person." See also 47 DLR (AD) 96 - the case of Abdul Munem Chowdhury Vs. State.

The principle laid down in the above case was also followed in the case of Anarul Islam Vs The State reported in 7 BLC 614 = 8 MLR 18 = 23 BLD 46.

Sub-section (1) of section 66 clearly provides that when it appears to the Court that the person brought before it is a child, then the Court shall make an inquiry as to the age of that person. Obviously, if it does not appear to the Court that the person is a child, the Court is not required to hold any inquiry. It is true that determination of age of a person by looking at the appearance may not be accurate because physical growth may differ from person to person. So, at the time of framing charge, if after looking at the appearance of the accused, the court cannot be sure as to whether the accused is below or above the age of 16, it will be proper to hold an inquiry to determine the exact age. However, if an order is passed by the Court presuming or declaring the age of the accused, the same order shall not be invalidated by any subsequent proof that the age of such person was not correctly stated or declared by the court - vide sub-section (2) of section 66. So, it is clear that even if the presumption of the court as to the age of the accused is not correct, that wrong presumption will not invalidate the judgment or an order passed by the Court.

Conviction and sentence of a child accused

Section 51 and 52 of the Act

There is also a confusion as to what sentence can be passed when a child accused is convicted. Some restrictions have been put in section 52 regarding punishment of a child offender. Sub-section (1) of this section provides that notwithstanding anything contained in any other law, no child shall be sentenced to death, transportation or imprisonment.

There are three provisos to this section. Under the first proviso, a court may sentence the child to imprisonment when a child is found to have committed an offence of so serious a nature that the court is of opinion that no punishment which authorizes the court under this Act can be inflicted or when the court is satisfied that the child is of so unruly or of so depraved character that he can not be committed to a certified institute and that none of the other methods in which the case may legally be dealt with, shall be suitable.

The provision of sub-section (1) is subject to the provisos as contained in that sub-section. Sub-section (1) provides that no sentence of imprisonment can be awarded to a child but the first proviso clearly described the circumstances under which the court may sentence the child to imprisonment. The following are those circumstances:-

(i) if the offence is of a serious nature;

(ii) if the child is of very unruly or of depraved character that he cannot be committed to a certified institute; and

(iii) if none of the other methods, is found to be suitable.

> There are conflicting decisions on the question of duration of the period of sentence of imprisonment. In the case of Munna Vs State reported in 7 BLC 409, with reference to first proviso, the High Court Division has observed that in view of the first proviso, if the nature of the offence committed by the child be of serious nature, the court may sentence the child to imprisonment and in that case, an imprisonment for 14 years was awarded.
>
> In the case of Fahima Nasrin Vs. Bangladesh reported in 61 DLR 232, the High Court Division has observed that in order to apply the proviso there must be an opinion of the Judge that the Child was of so unruly or of so depraved character that he could not be committed to a certified institute. In this case, it has been held that if imprisonment is awarded, the priod shall not be more than ten years.

In the first proviso as the word 'opinion' has been used, it is quite natural that the sentence of imprisonment can be awarded only after forming an opinion as provided.

As to the duration of imprisonment, there is no specific provision in the Act. Section 52 provides that if the child is committed to a certified institute for detention, the period of detention shall not be less than two years and not more than ten years. The section also provides that the period of detention cannot be extended beyond the time when the child will attain the age of 18 years.

In the case of Fahima Nasrin Vs. Bangladesh it has been held that if the trial Judge chooses to impose a sentence of imprisonment, the period cannot exceed 10 years. This opinion was given after discussion of the implications of the provisions of section 52 of the Act which provides for detention for maximum period of 10 years. While giving such a decision, the Division Bench referred to the decision given in the case of Munna which was also given by a Division Bench. In that case, the Court awarded sentence of imprisonment for 14 years.

The normal practice is that when a Division Bench fails to agree with any earlier decision given by another Division Bench on a question of law, the matter is sent to the Chief Justice for constituting a larger Bench to decide the question of law. But this was not done in case of the Fahima Nasrin. However, one Division Bench

has every right to differ with the decision given by another Division Bench but any such difference of opinion is also required to be settled either by constituting a larger Bench or if the matter is taken to the Appellate Division, by that Division. On the above point till today, no decision of the Appellate Division could be found.

In the above two cases, there is no discussion as to the meaning of the words 'imprisonment' and 'detention'. In both sections 51 and 52, the words 'imprisonment' and 'detention' have been used. These words have not been defined in the Act. The words 'imprisonment' and 'detention' do not carry the same meaning nor can one be substituted for the other. When in a section, two different words are used it cannot be said that those words carry the same meaning.

From the first proviso to sub-section (1) of section 51 it is clear that when a child cannot be committed to a certified institute for certain reasons, only then he can be sentenced to imprisonment. So, it is obvious that when detention cannot be given by committing a child to a certified institute, imprisonment may be given. Thus it is clear that the words 'imprisonment' and 'detention' have been used to indicate the circumstances as to when an order for imprisonment is to be passed and when an order for detention is to be passed.

The second proviso is applicable if the order of detention is given instead of imprisonment and in such a case, the period of punishment as provided in section 52 shall be applicable. Section 52 fixed the period of detention if a child is committed to a certified institute and in that case the period of detention shall not exceed 10 years. But neither in section 51 nor in section 52, there is any mention as to the duration of the period of imprisonment and that omission was taken into consideration while giving decision in the Munna's case.

From the above two decided cases, this much is clear that in certain circumstances (as narrated in first proviso to sub-section (1) of section 51) sentence of imprisonment may also be awarded to a child accused if found guilty. As regards the sentence, it is also clear that a child accused, if found guilty, cannot be awarded death sentence or imprisonment for life because these sentences have been excluded in sub -section (1) and the first proviso to that sub-section does not contain any circumstances under which imprisonment for life or death sentence can be awarded, sentence of imprisonment may be awarded only if the child offender is found be of unruly or of depraved in nature. As there are basic distinctions between the words 'imprisonment' and 'detention', there is scope of further examining the question of duration of sentence of imprisonment instead of restricting the period of sentence of imprisonment to the period of detention as provided in section 52.

Section 52 also provides that if the punishment is given by detention, the period of detention cannot be extended beyond the time when the child will attain the age of 18 years. So, even if a child is punished by detention for several years not exceeding ten years, the punishment will cease the moment he attains the age of 18 years. For example, if an order of detention for five years is passed, if the child attains 18 years even after six months of the order, the order of detention will cease to operate for any further period. This is not possible if he is sentenced to imprisonment for several years, he will have to suffer the sentence even after attaining 18 years. So, the punishment by way of detention cannot be applicable in case of punishment by imposing sentence of imprisonment.

However, by this time it has been settled that if a child accused tried for any offence of a special law such as Special Powers Act, 1974, Nari-O-Shishu Nirjatan Daman Ain, 2003, Madak Drabbya Niantran Ain, 1990 as amended upto date, if found guilty for an offence of any of those penal laws which provides death sentence or imprisonment for life, then the child offender cannot be awarded such sentences. The reason is that when he is tried after observing the provisions relating to trial of a child offender under the Children Act, the provisions relating to imposition of sentence as contained in the Children Act shall be applicable in his/her case.

The above question as to punishment of a child offender by awarding sentence of imprisonment may be looked into in the background of the present day's society. In a recent report it was found that there are several hundred juvenile offenders in the capital city itself. They are committing very serious offences such as hijacking, robbery, even murder and rape. There was a report that several juvenile offenders caused death of one of their friends by slaughtering. Even there was a report that a boy below the age of 16 killed a minor girl after committing rape. Moreover, it is also found that most of the tender aged boys and girls are drug addicts and for procuring drugs, they are committing different types of offences. Most probably, taking into consideration of the actual condition prevailing in the country, the legislature made an enabling provision of imposing sentence of imprisonment where the child offender is found to be of unruly in nature or of depraved character commits a serious offence.

Of course, for such moral degradation of the tender aged boys and girls, society is to a large extent responsible, parents are also responsible. The society did not properly look into the problems of such children. The malady is so deep that such defects cannot be removed within a short time, a long term plan and programme will be necessary. Till then, to check crimes of serious nature, deterrent

punishment in the form of imprisonment may be considered necessary and for that reason, in the first proviso to section 51, the court has been empowered to pass a sentence of imprisonment specially in a case where detention may not be found suitable. But the confusion as to the duration of such sentence of imprisonment is to be removed. So, considering all these circumstances, there is necessity of suitable amendment of the provisions of section 51 and section 52 of the Children Act.

Section 51(2) provides that a youthful offender if sentenced to imprisonment shall not be associate with adult prisoners. Moreover, it has been settled by this time that even if it is required to impose sentence of imprisonment to a child, such convict in any case should not be sent to the existing jails for suffering the sentence. So, while amending the law, there should also be suitable provision in this regard.

There is a confusion as to whether a child who commits any offence attracted by the Special Powers Act or by Nari-O-Shishu Nirjatan Daman Ain can be tried by the Special Tribunal and Nari-O-Shishu Nirjatan Daman Tribunal respectively. This question arose in view of the provisions of section 26 of the Special Tribunal Act and section 3 of the Nari-O-Shishu Nirjatan Daman Ain. In the above sections there is *non-obstante* clause which provides that the offences under those laws will be triable exclusively by the Tribunals constituted under those two Acts.

Inspite of such *non-obstante* clause in those special laws, as The Children Act provides that a child offender must be tried by the Juvenile Court and the child offender is to be tried by such a court, if such a child offender is the lone accused, even then he is to be tried by a Juvenile Court. See, the case of State Vs. Md. Roushan Mondal reported in 59 DLR at page 72.

There is also a confusion as to whether a child who faces trial can be called an 'accused'. There is a view that a child facing trial cannot be called an accused because in the Children Act instead of the word 'accused' the words 'youthful offender' have been used. But on perusal of the different provisions of the Act, nothing can be found which prohibits the use of the word 'accused' when a child faces trial. For example, in sections 6 and 8 the word 'accused' has been used whereas in sections 51 and 62 the words 'youthful offender' have been used. An accused is a person who is facing trial on a specific charge. Unless he is found guilty by the court, he cannot be called an offender. Under clause (n) of section 2, a 'youthful offender' means any child who has been found to have committed an offence. So, it appears that the word 'accused' is to be used during trial stage and the words 'youthful offender' may be used after a child is found to have committed an offence on trial.

British Judges: Happenings & Mishappenings

Md. Golam Mortuza Mozumder*

(1)

A number of judges in London prefer walking or cycling to the court. The present Chief Justice as well travels to the court by cycling. This is neither to save money nor due to dearth of transport facilities. Because the judges are highly paid and many of them do have Limozine and Rolls-Roys. They do it as a matter of physical exertion.

In 2001 a High Court Judge, while walking to the court from his residence, fell into the grip of a mugger. The mugger proceeding from behind snatched his hand bag away all of a sudden. Interestingly the judge ran after him, fell upon him and recovered the bag. The mugger tried his best to get rid of the judge but failed. The Judge alone succeeded to keep the mugger tied under his arms for a while and then to hand him over to the Police with the assistance of the pedestrians assembled there.

(2)

A Lady Justice of the Royal Courts of England (Most probably she was then the only woman Judge in the High Court) while presiding in court was hurled a stone by an accused in the dock during on-going of his trial. Her spectacle was broken into pieces and she sustained injuries in the face and around the eyes. But she was fortunate enough to have her eyes intact. This was a very alarming incident of the time. The occurrence was the lead news in all the national dailies for a couple of days.

(3)

A Senior Judge and a big contractor were neighbours of each other in an aristocratic residential area. But for reasons best known to them they were not on good terms. As conceived later on, the contractor was extremely furious with the Judge. He was cherishing a lust of vengeance against the Judge and was looking for the chance. In an afternoon, he availed of the chance while the Judge in his car was passing by the house of the contractor. All abruptly the contractor splashed muddy water from a balti from inside his house whereupon the Judge felt seriously affronted. On coming back home he made up his mind to bring action

*District & Sessions Judge, Tangail

against the contractor and accordingly he instituted a case of defamation. But as ill luck would have it, he could not come off with the flying colours. The case was dismissed in the long run.

(4)

In an evening a District Judge (entry position in British Judiciary) entered into a Kebab-House and asked the bar-owner for some kebab. The bar-owner asked him to wait. But the Judge flew into a rage and shouted at the owner. In reciprocation the bar owner as well shouted at the Judge. On the whole there was a serious altercation between the two. At one stage the Judge was about to fall upon the bar-owner wherefore the owner, finding no alternative, called police. While being interrogated by police the Judge scolded them and ultimately he was about to assault one of them in consequence of which they apprehended him and produced him before the magistrate in the following morning. The magistrate, however, set him free on bail on his furnishing bond of 50,000/- Pounds. The Judge quitted the job afterwards.

(5)

The people of United Kingdom are very fond of horse race. A Judge in London during hearing of a civil matter filed by a woman surreptitiously adjourned the hearing saying, "Let us enjoy the race (horse race) today." The lady-plaintiff was shocked at it. She failed to endure the pains of postponement of her matter in this manner and thereupon she convened a press conference and caused an outburst of her pains and furies.

(6)

A few years ago a Presiding Judge in a London Court was found reading a novel while the barristers were making submissions. He was reading so minutely that he forgot he was presiding in the court. There was a huge repercussion in the bar about the matter and in the result the Judge was compelled to give up the job.

(The above informations have been gathered from UK national dailies like the Independent, the Telegraph, BBC television and internet. The incidents numbered 1-5 took place during 2000-2003 and number 6 in 1990.)

Culpable Homicide amounting to Murder and Culpable Homicide not amounting to Murder: A Dilemma under Criminal Justice System

Md. Zakir Hossain*

The unlawful killing of another human being without justification or excuse is called murder. The first offence against human life is that of culpable homicide. The word 'homicide' comes from Latin homa (man) and cide (cut). Killing of a human being by a human being is homicide. The penal code has defined life and death as meaning the life and death of a human being. Causing the death of an animal is not murder or to cruelty to animals under the Cruelty to Animals Act. It might amount to the offence of mischief or cruelty to Animals Act but that, of course, is not the same thing as murder.

Murder is perhaps the single most serious criminal offense. Depending on the circumstances surrounding the killing, a person who is convicted of murder may be sentenced to many years in prison, a prison sentence with no possibility of parole, or death.

The precise definition of murder varies from jurisdiction to jurisdiction. Under the common law, or law made by courts, murder is the unlawful killing of a human being with malice aforethought. The term malice aforethought does not necessarily mean that the killer planned or premeditated on the killing, or that he or she felt malice towards the victim. Generally, malice aforethought refers to a level of intent or recklessness that separated murder from other killings and warranted stiffer punishment.

The definition of murder has evolved over several centuries. Under most modern statutes in the United States, murder comes in four varieties: (1) intentional murder; (2) a killing that resulted from the intent to do serious bodily injury; (3) a killing that resulted from a depraved heart or extreme recklessness; and (4) murder committed by an accomplice during the commission of, attempt of, or flight from certain felonies.

Some jurisdictions still use the term malice aforethought to define intentional murder, but many have changed or elaborated on the term in order to describe more clearly a murderous state of mind. California has retained the malice

*Director (Research & Publication), JATI.

aforethought definition of murder (Cal. Penal Code S. 187 [West 1996]). It also maintains a statute that defines the term malice. Under section 188 of the California Penal Code, malice is divided into two types: express and implied. Express malice exists "when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." Malice may be implied by a judge or jury "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

In *Commonwealth v. LaCava,* 783 N.E.2d 812 (Massection 2003), the defendant, Thomas N. LaCava, was convicted of the deliberate, premeditated murder of his wife. LaCava admitted to the shooting and the killing, but he claimed that due to his diminished mental capacity, he could not form the requisite malice when he committed the killing, so as to be convicted of first degree murder. The Supreme Judicial Court of Massachusetts found that Massachusetts law permits psychiatric evidence to attack the premeditation aspect of murder. However, the judge's instructions to the jury regarding the definition of murder were sufficient to render the error harmless, according to the court.

Many states use the California definition of implied malice to describe an unintentional killing that is charged as murder because the defendant intended to do serious bodily injury, or acted with extreme recklessness. For example, if an aggressor punches a victim in the nose, intending only to injure the victim's face, the aggressor may be charged with murder if the victim dies from the blow. The infliction of serious bodily injury becomes the equivalent of intent to kill when the victim dies. Although the aggressor in such a case did not have the express desire to kill the victim, he or she would not be charged with assault, but with murder. To understand why, it is helpful to consider the alternative: When a person dies at the hands of an aggressor, it does not sit well with the public conscience to preclude a murder charge simply because the aggressor intended only to do serious bodily injury.

Murder is synonym to Arabic *qatl*. Homicide of which Mohammedan Law takes cognizance is of five kinds :

(i) Qatlu L-Amd, or "wilful murder," is where the perpetrator willfully kills a person with a weapon, or something that serves for a weapon, such as a club, a sharp stone, or fire. (ii) Quatle shibhu 'L'-Amd or "manslaughter," or, as Hamilton more correctly renders it, "A semblance of wilful murder is, when the perpetrator strike a man with something which is neither a weapon nor serves as such." (iii) Quatle 'l-Khata, or "homicide by misadventure," is of two kinds: error in

intention, and error in the act.(iv) Quatle gaim maqama, or "homicide of a similar nature to homicide by misadventure," is where, for example, a person walking in his sleep falls upon another, so as to kill him by the fall. It is subject to the same rules with homicide by misadventure. (v) Quatle bi-Sabab, or "homicide by intermediate cause," is where, for instance, a man digs a well, or sets up a stone, and dies. In this case a fine must be paid, but it does not exclude from inheritance, nor does it require expiation .

Murder is the crime of unlawful homicide with malice aforethought; as where death is caused by an unlawful act done with the intention to cause death or bodily harm, or which is commonly known to be likely to cause death or bodily harm. Death must result in a year and a day. The burden of proving malice (either express, or by implication) rests upon the prosecution.

Homicide : Homicide is the killing of a human being by a human being and culpable means criminal. Homicide may be lawful or unlawful. Lawful homicide may be either excusable or justifiable.

Excusable Homicide : Instances of excusable homicide are as follows: (i) Death caused by accident or misfortune without any criminal intention. (sections 80). (ii) Death caused by a child, or by an insane or intoxicated person. (sections 82-85). (iii) Death caused unintentionally by an act done in good faith for the benefit of the person killed, when (a) he or, if a minor or lunatic, his guardian has expressly or impliedly consented to such an act (sections 87, 88); or (b) it is impossible for the person killed to signify his consent or such person is incapable of giving consent and has no guardian from whom it is possible to obtain consent in time for the thing to be done with benefit (section 92).

Justifiable Homicide : Instances of justifiable homicide are as follows: (i) Death caused by a person who by reason of a mistake of fact in good faith believes himself to be bound by law to do it (section 76). (ii) Death caused by a Judge when acting judicially in the exercise of any power which in good faith he believes to be given to him by law. (section 77). (iii) Death caused by a person acting in pursuance of the judgment or order of a court of Justice. (section 78). (iv) Death caused by a person who is justified or who by mistake of fact believes himself to be justified by law in doing it. (section 79). (v) Death caused by a person without any criminal intention to cause harm, and in good faith for the purpose of preventing, or avoiding other harm to person or property. (section 81). (vi) Death caused by a person in exercise of the right of private defence of person or property. (sections 100-103).

Unlawful Homicide : Unlawful homicide includes culpable homicide not amounting to murder, murder, rash or negligent homicide.

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Ingredients of section 299 of the Penal Code:-

1. With the **Intention** to causing death.
2. With the **intention** of causing such **bodily injury** as is **likely to cause death.**
3. With the **knowledge** that the offence **likely by such act** to cause **death.**

Section 299 defined Culpable Homicide in simple way. Culpable homicide is of two kinds:

I. **Culpable homicide amounting to murder**

II. **Culpable homicide not amounting to murder**

Exception 1 to 5 of section 300 of Penal Code defines conditions when Culpable Homicide is not amounting to murder:

I. Grave and sudden provocation-

II. Right of private defense.

III. Public servant exceeding his power.

IV. Sudden fight.

V. Consent.

Culpable homicide turns into murder-

i. If the act by which the death caused is done with the **intention of causing death,**

ii. If an act done with the intention of **causing such bodily injury** as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

iii. If it is done with the intention of causing bodily injury to any person and the **bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death,** or

iv. If the person committing the **act knows that it is so imminently dangerous that it must, in all probability, cause death** or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing deaths or such injury as aforesaid.

For better appreciation and understanding of culpable homicide amounting to muder and culpable homicide not amounting to muder some leading cases of home and abroad are cited herein below :

In the case referred to 3 ADC 355 para 14 it was held : "We have considered the evidence on record and in view of the facts and circumstances it appears to us that accused Aynul Sheikh connection to the offence of murder of the victim Abdul Gafur Sheikh. There is no evidence of any conspiracy or pre plan or pre mediation on the part of neither the two appellants nor it could be proved that they inflicted any injuries upon the deceased nevertheless they joined Aynul Sheikh at the time of occurrence. There is however no evidence that the appellants intended to cause the death of the victim. From the facts and circumstances of the case we think that the acts of the two appellants constitute at best an offence of culpable homicide."

In the case reported in 31 DLR (AD) it was held: "Where the finding is that the accused has the guilty intention of causing such injury as is likely to cause death the offence cannot be converted into one under Part I of section 304 of the Code, unless it is brought to any of the 5 Exceptions of section 300."

In the case of referred to 14 BLD (AD) 127 it is was held : "The difference between mere "Culpable Homicide" and Culpable Homicide amounting to Murder" is mere decree or probability of the death being caused, when death is probable, it is culpable homicide; and when death is most probable, then it is Murder."

In the case of Bandez Ali Vs. The State reported in 40 DLR (AD) 200 it was held: "In the case of murder, the offender has a positive intention to cause the death of the victim. He assaults him with the intention of causing death or with definite knowledge that the bodily injury inflicted by him would cause death or the injury would be sufficient in the ordinary course of nature to cause death, or the injury was so imminently dangerous that is must cause death. In the case of culpable homicide the intention or knowledge is not so positive or definite. The injury caused may or may not cause the death of the victim. To find that the offender is guilty of murder, it must be held that his case falls within any of the four clauses of section 300, otherwise he will be guilty of culpable homicide not amounting to murder. Facts of the case show that death was caused without premeditation."

In the case of The State Vs. Tayeb Ali replied to 40 DLR (AD) 6 it was held: "But reversal of the appellate Court's finding by us will not necessarily bring the case within the ambit of murder punishable under section 302 of the Penal Code. For, the injuries which resulted in the death of the victim in this case may not constitute murder but may constitute culpable homicide and not amounting to murder. Dr. Rafiqur Rahman, learned Advocate for the respondents, has also found it difficult to support the finding of the High Court Division that the criminal act done by the accused-respondents comes within the ambit of "attempt to murder" punishable under section 307 of the Penal Code; but he has tried to argue that the criminal act of causing the injuries in question is "grievous hurt" with sharp weapon which is punishable under section 326 of the Penal Code. Maximum punishment under this section, it may be remembered, is transportation for life. The trial Court of course arrived at a clear finding that these injuries constitute murder. All murders are culpable homicide but all culpable homicides are not murder. Excepting the General Exceptions attached to the definition of murder an act committed either with certain guilty intention or with certain guilty knowledge constitutes culpable homicide amounting to murder. If the criminal act is done with the intention of causing death then it is murder clear and simple. In all other cases of culpable homicide, it is the degree of probability of death from certain injuries which determines whether the injuries constitute murder or culpable homicide not amounting to murder. If death is likely to result from the injuries it is culpable homicide not amounting to murder; and if death is the most likely result, then it is murder. From the facts and circumstances of the case we think that the criminal acts of the accused-respondents which resulted in the death of the victim constitute culpable homicide not amounting to murder punishable under Part-I of the Penal Code."

In Sardar Khan v. State of Assam, 1983 Cr LJ (NOC) 120 (Gau), accused was tried for the offence punishable under section 304 Part I of Indian Panel Court. It was alleged that deceased died due to subdural hemorrhage which was caused due to fall on ground as a result of fist blow given by accused. The Court while holding the accused guilty for the offence punishable under section 323 Indian Panel Court but not under section 304 Part I of Indian Penal Court observed that, "...... That the hemorrhage had not occurred as a result of the fist blow on the abdomen but it was due to impact of the fall on the ground causes by the fist blow on the abdomen of the deceased. Since only one fist blow was given, it cannot be said that the accused can be attributed with the knowledge that it was likely to cause an injury which would cause death."

Shankar v. Sate of Maharashtra, 1995 (1) Mh LJ 416 (DB) (Bom) was a case wherein accused was charged for the death of the deceased by a stab injury over

abdomen which internally punctured the right artery at ileum. The Bombay High Court while altering the conviction of accused from murder to one under section 304, Part II, held that, "In absence of intention of puncturing the artery, case fell under section 299 of the Indian Penal Court and not under section 300 Indian Penal Court."

Where the wife was found sleeping with her paramour on the same cot lent on hearing the footsteps of her husband, the paramour got up and the husband tried to seize him and but he managed to escape and wife prevented husband from seizing him and ultimately husband struck wife with the knife and inflicted many injuries, it was held that the accused acted on grave and sudden provocation and was accordingly held liable under section 304, part I of the Indian Penal Code.

Murder is an aggravated form of culpable homicide. The existence of one of the four conditions as mentioned under section 300 of the Penal Code turns culpable homicide into murder; while the special exceptions reduce the offence of murder again to culpable homicide not amounting to murder. The English Common law made no clear distinction between intention and recklessness, but in Bangladeshi law the foresight of the death must be present. The mental attitude is thus made up of two elements: (a) causing an intentional injury and (b) which injury the offender has the foresight to know would cause death.

As per English law murder is unlawfully causing the death of another with malice aforethought, express or implied. Malice aforethought in murder practically means-

(i) An intent to kill or do grievous bodily harm to the person who is killed.

(ii) An intent to kill or do grievous bodily harm to any one else.

(iii) An intent to do any criminal act which will probably cause death or grievous bodily harm to some one.

(iv) An element to oppose by force any officer of justice who is lawfully arresting or keeping in custody some one whom he is entitled to arrest, or keep in custody, provided the accused knows that he is such officer of justice.

Throughout the web of the English Criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. In every charge of murder if the prosecution had proved homicide, namely, the killing by the accused, the prosecution must prove further that the killing was malicious and

murder, as there is no presumption that the act was malicious, and at no point of time in a criminal trial can a situation arise in which it is incumbent upon the accused to prove his innocence, subject to the defence of insanity and subject also to any statutory exception. Where intent is an ingredient of a crime there is no onus on the accused to prove that the act alleged was accidental.

The distinction between these two offences is very ably set forth by Melvill, J., in Govinda's case and by Sar- karia, J., in Punnaya's case. The Constitution relevant passages from Punnayya's case are reproduced below for the guidance of all concerned.

> "In the scheme of the Penal Code, 'culpable homicide' is genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice versa. Speaking generally 'culpable homicide means 'special characteristics of murder' is culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognizes three degrees of culpable homicide. The first is what may be called, culpable homicide of the first degree. This is the gravest form of culpable homicide which is defined in section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the 1st part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grade section culpable homicide of this degree is punishable under the Second Part of section 304."

Culpable homicide is the Genus, and murder is the Speciesection All murder are culpable homicide but not vice-versa, it has been held in **Nara singh Challan Vs. Sate of Orrisa (1997).** Section 299 cannot be taken to be definition of culpable homicide not amounting to murder. Culpable homicide is the **genus**, section 300 defines murder which means murder is the **species** of culpable homicide. It is to be noted here that culpable homicide not amounting to murder is not defined separately in Penal Code, it is defined as part of Murder in the section 300 of Penal Code.

The distinction between sections 299 (culpable homicide) and 300 (murder) can well be demonstrated with the help of the following chart :

SECTION 299 (Culpable homicide)	SECTION 300 (Murder)
A person commits culpable homicide, if the act by which the death is caused is done	Subject to certain exceptions, culpable homicide is murder, if the act by which the death is caused is done
	INTENTION
(a) With the intention of causing death; [Illustration (a)]	(1) With the intention of causing death; [(Illustration (a)]
	(2) With the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; [(Illustration (b)]
(b) With the intention of causing such bodily injury as is likely to cause death; [Illustration (b)]	(3) With the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. [(Illustration (c)]
	KNOWLEDGE
(c) With the knowledge that ... the act is likely to cause death. [Illustration (c)]	(4) With the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as in likely to cause death. [Illustration (d)]

From the above chart, it becomes clear that—

Clause (a) of section 299 corresponds to clause (1) of section 300.

Clause (b) of section 299 corresponds to clauses (2) and (3) of section 300.

Clause (c) of section 299 corresponds to clauses (4) of section 300.

The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has vexed the Courts for more than a century. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the

legislature in these sections allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be, keeping in focus the key words used in the various clauses of sections 299 and 300.

Justice Md. Hamidul Haque in his book "Trial of Civil suits and Criminal Cases" published in December 2010, at page 245 has stated:

> "Once it is ascertained that the offence is culpable homicide not amounting to murder, it will also be necessary to determine whether part I or part II of section 304 will be attracted.
>
> Part I will be attracted if the act by which the death is caused is done with the intention of causing death or of causing such bodily injury as is likely to cause death. For example, if exception 4 is attracted and then death is caused with the intention of causing death or of causing such bodily injury as is likely to cause death, it will be an offence under section 304 part I.
>
> On the other hand, part II will be attracted if the act is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as likely to cause death".

The distinction has been explained by the Appellate Division in the case reported in 21 BLD (AD) 120 may be cited as follows:

> "Section 304 of the Penal Code, which consists of two parts, does not create any offence, but provides for punishment of culpable homicide not amounting to murder. The first part applies to a case where there is guilty intention and the second part applies where there is no such intention but there is guilty knowledge. In the instant case the appellants ought to have been convicted under part II of section 304 of the Penal Code."

Penal Code recognizes three degrees of culpable homicide for the purpose of fixing punishment of this generic offence of culpable homicide. The first which is the gravest form may be called culpable homicide of the first degree which is defined in section 300 as murder. The second degree of culpable homicide is punishable under Part I of section 304 and the third degree of culpable homicide is punishable under Part II of section 304 of the Penal Code. *In Bachan Singh v. State of Punjab* AIR 1980 SC 898 it was held that the death sentence is constitutional is prescribed as an alternative sentence for the offence of murder and if the normal sentence prescribed for it is imprisonment for life. Wherein it was decided that death sentence can be imposed in very exceptional class of

cases- "the rarest of the rare cases". Sir James Stephen criticized the drafting of these sections thus: "The definitions of culpable homicide and murder are, I think, the weakest part of the Code. They are obscure, and it is obvious to me that the subject has not been fully thought out when they were drawn." The Bangladesh Law Commission should reexamine the definition of culpable homicide and murder to remove the obscurities.

On dissection of section 299 and 300 of the Penal Code we find that section 299 lays down 3 definitions of culpable homicide with 3 illustrations while section 300 states 4 definitions of murder with 5 exceptions. Exception 1 is subject to 3 proviso having 6 illustrationsection Exception 2 and 5 has 1 illustration each while exception 4 has 1 explanation. To be well acquainted with the concept of culpable homicide and murder one should read those provisions meticulously, patiently especially with the annotations and connotations as well as judicial pronouncements of home and abroad. If the exceptions are carefully perused along with the illustrations, the conception as to what act will constitute culpable homicide not amounting murder will be crystal clear.

Whenever a court is confronted with the question whether the offence is murder or culpable homicide not amounting to murder, it will be convenient for it to approach the problem in three stage. At the first stage the question to be considered is whether the accused has done an act by doing which he caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for consideration whether that act amounts to culpable homicide as defined in section 299. If the answer to this question is, prima facie, in the affirmative, the third stage for considering the operation of section 300 is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four classes of the definition of murder. If the answer would be negative the offence would be culpable homicide not amounting to murder under the first or the second part of section304 depending respectively on whether the second or third clauses of section 299 is applicable. If the question is answered in the affirmative but the case comes within any of the exceptions of section 300, the offence would still be culpable homicide punishment under the Part I of section 304, Indian Penal Code A.I.R. 1977 S.C.45.

'Delimitation of Maritime Boundaries of BANGLADESH : In quest of a just and equitable solution.'

A.K.M. EMDADUL HAQUE*

Abstract

Delimitation of Maritime boundary is one of those subjects of international law which has been gaining in importance during the last decades. Among the marine areas, the Bay of Bengal is one of the most important sea zones of the world. The political, economic and strategic importance of the Bay of Bengal has been recognized by many nations throughout history. As there are huge Hydrocarbon reserves in the Bay of Bengal, maritime delimitation and delimitating the marine boundaries between the littoral States are necessary precondition for exploitation of these resources. But, lack of defined boundaries, presence of numerous deltas, islands and existence of trans-boundary oil-gas deposits makes the delimitation process very complicated. The maritime boundaries of the Bangladesh, as the only littoral State in the north of the Bay of Bengal facing with all of the other 2 littoral States India and Myanmar, need to be delimited just and equitably. But a long-standing dispute over maritime boundary delimitation with India and Myanmar remains a major stumbling block in exploration of these resources. The overlapping claims of these three countries over the maritime zones in the Bay of Bengal need to be settled for peaceful exploration of natural resources. While India and Myanmar want to delimit their maritime boundary on the basis of the equidistance principle, Bangladesh demands that delimitation should be based on the equitable method. The special geographical circumstances of the coastal zones of these countries warrant that any delimitation, whether agreed or determined by a third party, must result in an equitable solution. The decisions of the international courts and tribunals, state practice, and the Law of the Sea Convention clearly demonstrate that there has been a shift from the equidistance principle to the equitable principle of delimitation and strongly indicate that the equitable principle is the preferred method of delimitation.

Keywords: Bangladesh; India; Myanmar; Bay of Bengal; South Talpatty Island; equitable principle; delimitation; equidistance principle; maritime boundary

---

*Senior Assistant Secretary, Law and Justice Division
Ministry of Law, Justice and Parliamentary Affairs
Bangladesh Secretariat, Dhaka.

Introduction:

Law of the sea is as old as nations, and the modern law of the sea is virtually as old as modern international law. For three hundred years it was probably the most stable and least controversial branch of international law.[1]

Maritime delimitation process is a complicated subject, because of both the number of real and potential situations throughout the world, and the complexities of the delimitation process. The delimitation process itself involves several types of issues. One concern is the source of authority. A second issue involves the principal methods by which delimitation is carried out, and finally there are technical questions regarding the determination of the actual lines in space.[2] However, Maritime boundary delimitation can arguably be viewed as an essential precursor to the full realization of the resources potential of national maritime zones and the peaceful management of the oceans and seas. With regard to the seabed resources, which could prove crucial to the well-being and political stability of coastal States, extensive overlapping claims forestall development while maritime boundaries remain unsettled.[3] In delimiting the sea zones the United Nationís Convention on the Law of The Sea,1982 (hereinafter referred to as UNCLOS III) considered each zone separately and the provisions of delimiting the sea zones have no uniformity. But it recognizes agreement as an inevitable form to effect delimitation between two coastal states with opposite or adjacent coast and thereby the coastal states have the opportunity to delimit their sea zones having regard to the zones individually or collectively.

The sea areas of Bangladesh are reportedly rich in straddling fish stocks and mineral resources, including hydrocarbons. As Bangladesh's dependence on hydrocarbons and marine fisheries for energy and food security will further increase in the future, sovereignty over maritime zones should clearly be established for protection, conservation and rational exploitation of these marine resources.[4] Bangladesh needs to exercise a lawful claim to gain access to these resources in order to accelerate its economic development. But a long-standing dispute over maritime boundary delimitation with India and Myanmar remains a major stumbling block to exploration of these resources. Several issues arise under the overall problem of delimitation of Bangladesh's maritime zones, such as the issue of sovereignty over South Talpatty Island, and the demarcation of the

---

[1] Henkin. L. How nations behave 212. 2 ed. 1979.

[2] Alexander L. M. The delimitation of maritime boundaries. Political geography quarterly 5, 1986. PP. 1-2.

[3] Prescott V and Schofield C. The maritime political boundaries of the world . 2005. P. 216.

[4] See generally on the importance of maritime boundary delimitation in accessing offshore hydrocarbons, G. Blake, M. Pratt, C. Schofield and J. Brown (eds.) Boundaries and Energy: Problems and Prospects, Kluwer Law International, London (1998).

territorial sea, the Exclusive Economic Zone (EEZ) and the continental shelf, all of which need to be examined to obtain a clear picture of the disputes. The overlapping claims of these three countries to the maritime zones in the Bay of Bengal need to be settled in order to permit the peaceful exploration for hydrocarbons. Bangladesh has been deprived of her legitimate claim over maritime resources for a long time due to the uncertainty created by the absence of an agreed boundary. When there is no agreed boundary, exploration for hydrocarbon reserves can be delayed throughout a considerable area in and around the disputed maritime zones[5]. With the adoption of the United Nations Convention on the Law of the Sea (hereinafter referred to as UNCLOS) in 1982,[6] Bangladesh received a unique opportunity to exploit a vast sea area beyond her coastal waters.

It is claimed that the total area of the sea under the resource jurisdiction of Bangladesh would be approximately 207,000 skm, which is about 1.4 times greater than the total land area of Bangladesh if her maritime boundaries were delimited as set out under the UNCLOS.[7]

The legal concept of the international maritime boundary is firmly established in international law. But the process by which these boundaries are determined in concrete situations will always have a sui generis character.[8] As such, in their search for an appropriate solution, states are not obliged to reach their outcome by subjecting them to purely legal considerations.[9] Rather, many relevant circumstances should be taken into account in delimiting a maritime boundary.

Disputes amongst Bangladesh, India and Myanmar in delimiting maritime boundaries in the Bay of Bengal:

Background:

The Bay of Bengal has become very important, especially after India's discovery of 100 trillion cubic feet (tcf) of gas in 2005-2006 and Myanmar's discovery of 7 tcf gas at the same time.[10] According to various sources, two main basins in the

---

[5] G. Blake and R. Swarbrick, 'Hydrocarbons and International Boundaries: A Global Overview', in: Blake et al., op. cit. supra note 1, pp. 3–28.

[6] United Nations Convention on the Law of the Sea (done at Montego Bay), 10 December 1982, in force 16 November 1994, 21 International Legal Materials 1261 (1982).

[7] Commodore Md. Khurshed Alam, 'Delineation of outer limits of the continental shelf', The Daily Star, 15 September 2006, available at: http://www.thedailystar.net/strategic/2006/09/02/ strategic.htm.

[8] G. Tanja, The Legal Determination of International Maritime Boundaries, Kluwer Law and Taxation Publishers, Deventer (1990), p. 306.

[9] ibid

[10] See report, 'Sea border talks start today after 28 years: Energy-rich Bay of Bengal makes Dhaka-Delhi talks crucial', The Daily Star, 15 September 2008, p.1, available at: http://www .thedailystar.net/story.php?nid=54877

Bay of Bengal, namely the Krishna-Godavari and the Mahanadi basins, both located in the Indian maritime zone, have shown a potential of nearly 18 billion barrels of oilequivalent gas in place. Bangladesh opened bids for exploration for hydrocarbons in the offshore areas. On 7 May 2008, in Bangladesh, seven oil and gas companies submitted their bids for 15 offshore blocks out of a total of 28 blocks. However, this bidding was postponed due to vehement opposition from India and Myanmar. It must be remembered that in view of the massive exploration activities conducted by India and Myanmar in close proximity to the coastal zones of Bangladesh, including many disputed zones amongst them, it has become imperative for Bangladesh to conduct her own exploration work, with or without foreign companies. This will improve her claims over these zones and strengthen her negotiating position in the effort to resolve the disputes with India and Myanmar.

The issues of conflict arose mainly with India when in 1974 when Bangladesh allocated a few off-shore blocks of the Bay of Bengal to a foreign oil company, India vigorously objected to the Bangladesh government because the sea boundary had yet to be drawn between the two countries.[11]However, Bangladesh and India commenced negotiations on delimitation of maritime boundary in 1974. The sea-boundary line could not be settled because in this regard the Bangladesh line moved towards the south from north, while the Indian line took a south-easterly direction creating an angle within which lies thousands of square miles of the bay claimed by each country as EEZ.[12] . The proposed boundary would leave little maritime area for Bangladesh in the Bay of Bengal, turning Bangladesh into a "sea-locked country." Several meetings took place between 1974 and 1982 on the subject, but India reportedly remained firm in its position that was not only contrary to international law but also ignored the geo-morphological features, including the indented nature of coastal belt of Bangladesh and concavity of its coasts. Bangladesh's case is straightforward and simple. Looking at the map of Bangladesh, its land domain is rectangular in shape and since the Bay of Bengal is located on the south of the land territory of Bangladesh, it gives Bangladesh the right to claim marine areas in rectangular orientation extending 200 nautical miles to the south in the Bay of Bengal from the extremities of its land territory. Geographical position plays an important part in delimitation of sea boundary and equitable principles come into play in the case of adjacent states. The method of delimitation (equidistant method) between two opposite states does not apply between adjacent states because it grossly distorts the boundary, contrary to the principles of fairness and justice (equity).[13]

---

[11] Demarcating maritime zones in the Bay of Bengal ,Harun ur Rashid, The Daily Star, September 25, 2007.
[12] The Bangladesh Observer (Dhaka), May 8, 1977.
[13] Is India taking advantage?, Harun ur Rashid, The Daily Star, May 17, 2006.

India's claim of South Talpatty Island complicated the negotiations on sea boundary. This dispute, in turn, has raised an important question as to the exact boundary line on the Hariabhanga river that separates Bangladesh and India in the west.Bangladesh, at one stage during negotiations, proposed a joint Bangladesh-India marine survey on the Hariabhanga river to come up with a report on the exact position of deep water navigable channel of the river so as to demarcate the river boundary and also to ascertain the existence of another low-tide elevation. However India remained silent to proposed survey although it agreed in principle in 1979. Later, Bangladesh provided to India data including satellite imageries of the flow of the river. Since 1974, regrettably India has not accorded any priority to implement Bangladesh's proposal to resolve the issue.[14] However it is now reported that New Moore Island/South Talpetty Island has disappeared.[15]

The issue of delimitation of maritime zones with Myanmar came into the forefront when, on 1 November 2008, four drilling ships from Myanmar started exploration for oil and gas reserves within 50 nm southwest of St. Martin, an island territory of Bangladesh. The government of Bangladesh claimed that Myanmar's unilateral action to explore for hydrocarbons in these disputed waters is a clear violation of the LOS Convention. A Korean oil company deployed a drilling rig in disputed waters under the watchful eye of three warships of Myanmar. A tense standoff ensued, with Bangladesh deploying five warships of its own. The rig was finally withdrawn after intense diplomatic parleys involving Bangladesh, Myanmar and South Korea.[16]

However, Bangladesh, being failed to reach any positive agreement with India and Myanmar instituted arbitral proceedings against both the Myanmar and India on 8 October 2009 pursuant to Annex VII of UNCLOS. India consented to arbitration with Bangladesh under Annex VII (the default option under UNCLOS). Myanmar proposed that its dispute with Bangladesh be submitted to ITLOS. On 4November2009, Myanmar transmitted a declaration consenting to the jurisdiction of ITLOS. On 12 December2009, Bangladesh reciprocated this declaration. This dispute between Bangladesh and Myanmar is the first maritime delimitation case to be heard by ITLOS.[17]

---

[14] Ibid.

[15] Controversy in the Bay of Bengal: Issues surrounding the Delimitation of Bangladeshís Maritime Boundaries with India and Myanmar, ABLOS Conference 2010, Monaco, Stephen Fietta, Partner,Public International Law Group

[16] Sayed Zain Al-Mahmood, ëTroubled Watersí, The Daily Star Weekend Magazine, Vol. 8, Issue 94, 13 November 2009, p. 4, available at: http://www.thedailystar.net/magazine/2009/11/02/ current_affairs.htm.

[17] Controversy in the Bay of Bengal: Issues surrounding the Delimitation of Bangladeshís Maritime Boundaries with India and Myanmar, ABLOS Conference 2010, Monaco, Stephen Fietta, Partner,Public International Law Group

Area of problem:

1. Bangladesh claims straight baselines based on depth criteria, selecting eight base points following a 10 fathom (60 feet) line which has been challenged by both India and Myanmar.
2. While India and Myanmar want to delimit their maritime boundary on the basis of the equidistance principle, Bangladesh demands that delimitation should be based on the equitable method. The special geographical circumstances of the coastal zones of these countries warrant that any delimitation, whether agreed or determined by a third party, must result in an equitable solution.

The Law of the Sea Convention vis-à-vis the Position of Bangladesh

Baseline:

The law of the Sea Convention (UNCLOS) basically defines two kinds of baseline. Normal and Straight. Ae per Article 5 of UNCLOS is the normal baseline for measuring the breadth of the territorial sea is the lowtide waterline along the coast. According to UNCLOS Art. 7, a straight baseline can be drawn in two situations: first, where the coastline is deeply indented or if there is a fringe of islands along the coast in its immediate vicinity; second, where because of the presence of a delta and other natural conditions, the coastline is highly unstable. In both cases, the appropriate points may be selected along the furthest seaward extent of the low-water line for the purpose of drawing the straight baseline. But according to the Territorial Waters and Maritime Zones Act, 1974 Bangladesh (hereinafter referred to as 1974 Act), as a deltaic state with an unstable coastline, adopted this method of drawing the baseline from the straight lines drawn by joining certain outer points at a depth of 60 feet (10 fathoms). Because of the deltaic and unstable nature of the coast, the application of the normal baseline seems to be most disadvantageous for Bangladesh. This 'depth methodí of drawing baselines had been opposed vehemently by India and Myanmar from the very beginning.

But this 'depth method' of measuring the baseline is not wholly inconsistent with the provisions of UNCLOS Art. 7, because UNCLOS Art. 7(2) makes an exception from a normal baseline (low-water mark) where the coastline is highly unstable because of the presence of a delta and 'other natural conditions.'[18] The

[18] UNCLOS Art. 7(2) provides that 'where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line.'

'depth method' (as from the depth of 10 fathoms) adopted by Bangladesh conforms to the expression, 'other natural conditions'. International law also does not prohibit delimitation of a sea area by taking into account the 'local requirements'. Bangladesh's depth method is neither 'normal' nor 'straight', but it is somewhat an isomer of a straight-baseline method that is not prohibited by international law, even if it is not expressly mentioned in UNCLOS Article 7(2).[19] The term 'other natural conditions' refers to the processes affecting the size and configuration of deltas. The coastline of Bangladesh is highly unstable due to the cumulative effects of river floods, monsoon rainfall, cyclonic storms and tidal surges which have contributed to a continuous process of erosion and shoaling.[20]

It can be proposed that Bangladesh can claim straight baselines joining low-water marks from St. Martinís Island to Kutubdia Island and then from Kutubdia Island to South Talpatty Island to form a baseline. From these baselines, Bangladesh can claim 12 nm as territorial waters according to UNCLOS Art. 7, para. 2.

Continental Shelf and Exclusive Economic Zone:

Articles 74 and 83 of the LOS Convention, which provide mechanisms for the delimitation of the EEZ and continental shelf, respectively, use identical language, in that delimitation of boundaries with opposite or adjacent states should be effected by agreement on the basis of international law in order to achieve an equitable solution. Bangladesh claimed the breadth of her EEZ as 200 nm from the straight baseline under the 1974 Act.

The LOS Convention introduced both geographical criteria (natural prolongation) and distance criteria (legal) into the definition of the continental shelf. Article 76 of the UNCLOS defines the continental shelf as:

> the sea bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

According to the first part of paragraph 1, the natural prolongation of the land territory is the main criterion. In the second part of that paragraph, the distance of 200 nm is in certain circumstances the basis of the delimitation of the continental

---

[19] M. Shah Alam and A. Al Faruque The International Journal of Marine and Coastal Law 25 (2010) 405-423
[20] See R. Platzoeder, Third United Nations Conference on the Law of the Sea: Documents, Oceania, New York, vols. 3 and 4 (1984).

shelf. According to the 1974 Act Bangladesh has claimed a continental shelf up to he last point of the continental margin, which exceeds 200 nm Much of the continental shelf of Bangladesh is the result of silt deposits from the rivers running through her. The continental shelf is not steep but runs in a steady and gradual slope from the coast of Bangladesh. Therefore, the continental shelf is arguably a natural prolongation of the landmass of Bangladesh in the southeast direction.[21] The natural prolongation of the landmass of Bangladesh, i.e., her continental margin, is known as the Bengal Fan; its orientation is perfectly north-south. Bangladesh ratified the UNCLOS in 2001. One of the implications of ratification is that Bangladesh is required to revise and amend her existing laws in order to make them consistent with the UNCLOS.

Special Geographical Features of the Maritime Zone of Bangladesh

Bangladesh is a geographically disadvantaged state. Comparing the character of the coasts of the world, the coastal character of Bangladesh is one of the most peculiar and complex one. Its peculiarity is not only with the concave configuration of the coast but also with the presence of deltas in the estuaries and islands in the coastal bay.[22] The Bay of Bengal occupies an area of about 879375 squire miles;[23]and its mean depth is 2586 metres.[24] The continental slope terminates at less than 3000 metres depth.[25]. The Bay of Bengal lies at the mouth of the Bengal Delta, which forms c. 60% of the Bangladesh coastline.[26]

The southern half of Bangladesh is the joint delta of three major rivers, namely the anges, the Brahmaputra and the Meghna. These rivers run from the Himalayan Ranges to the Bay of Bengal through Bangladesh. Bangladeshís coastline is 310 nm long, allowing seawater to pour into the country; tidal surges range from 2.5 to 5.5 meters.

Bangladesh is virtually the midpoint of two inverted funnels. One inverse funnel drains millions of tons of silt through the rivers on the mainland from the top, and the other funnel pushes all the cyclones from the Bay of Bengal onto the deeply indented, concave coast of Bangladesh. All these features have made Bangladesh a geographically disadvantaged country. The geomophological features of

[21] Harun Ur Rashid, 'Law of maritime delimitation', The Daily Star, 10 May 2008; available at: http://www.thedailystar.net/pf_story.php?nid=35825.

[22] M. Habibur Rahman, Whose is South TalpattyIsland ?15/5 1(1987) 4Asian 4Profile 437-444

[23] Rhodes W. Fairbridge (ed),The Encyclopedia of Oceanography, 1(1966)110-118.

[24] Rhodes W. Fairbridge (ed),The Encyclopedia of Oceanography, 1(1998)186.

[25] ibid.

[26] Controversy in the Bay of Bengal: Issues surrounding the Delimitation of Bangladesh's Maritime Boundaries with India and Myanmar, ABLOS Conference 2010, Monaco, Stephen Fietta, Partner,Public International Law Group

Bangladesh's coastline create difficulties in fixing the baseline from which the maritime zones can be measured. The coastline of Bangladesh has the following geographical characteristics:

- Deltaic coastline, which is deeply indented.
- Erosion and sedimentation continuously affect adjacent coastal waters.
- A highly unstable coastline is evident at low tide.
- Navigable channels in the coastline change continuously, requiring frequent surveys and demarcation.

In practice, in determining maritime boundaries, geographical considerations play a predominant role. Other factors, such as economic, ecological, security and geomophological factors, are taken into account, but are given relatively less weight. Articles 74 and 83 of the LOSC contain no reference to the equidistance principle, which may be applied only insofar as it leads to an equitable solution. A boundary that might be equitable for EEZ purposes may not be equitable for continental shelf purposes. Because of the different considerations that are relevant to achieving an equitable solution in each case. Bangladesh has a concave coast. Countries with concave coasts require unconventional solutions. Therefore rules for special circumstances, as per LOSC Art. 15, should be applied for delimitation of a maritime boundary. The special geographical circumstances warrant that any delimitation, whether agreed or determined by a third party, must result in an equitable solution.

Geographically Bangladesh is in such a position where she is facing adjacency with India and Burma and at the same time India and Burma are opposite to each other in respect of their coastal area. The configuration of the coast of Bangladesh is concave but the configuration of India and Burma considering the delimitation of maritime boundaries with Bangladesh is convex. The peculiar situations existing geographically, geologically and geomorphologically have resulted in problems for Bangladesh to delineate the sea zones individually as well as to determine the boundary of the zones with its neighbors. If the dual claims of both India and Myanmar are implemented as per the equidistance method, then Bangladesh will lose two-thirds of her total EEZ and will lose virtually all of her continental shelf.[27]

Each maritime boundary dispute is unique. The existing maritime dispute between Bangladesh and her neighbours is also unique and requires solution on the basis of application of equitable principles, taking into consideration a variety of

[27] M. Shah Alam and A. Al Faruque The International Journal of Marine and Coastal Law 25 (2010) 405-423

factors. Therefore, the phenomenon of delimitation of maritime boundaries between Bangladesh and India falls under 'special circumstances.'[28]

Principles and methods of delimitation:
The Equidistance vs. the Equitable Approach

It is well settled that application of the principle of equidistance, which is more formal and mechanical in nature, does not always ensure justice. A median line based on the equidistance principle can be drawn on the basis of coastal geography and is controlled by the relevant points on the territorial sea baseline. On the other hand, the equitable principle is more flexible and openended.

The definition of equitable principles is closely related to the idea of unicum[29], which means that geographical features of each delimitation case varied so greatly that it is difficult, if not impossible, to posit any fixed principles applicable for the establishment of maritime boundaries between States. The idea of the uniqueness of each boundary finds significant support in the jurisprudence of the ICJ and arbitral tribunals. The Truman proclamation inspired the Court during the 1969 North Sea case, when the Court stated that 'delimitation is to be effected by agreement in accordance with equitable principles, and taking into account all the relevant circumstances.'[30] This idea became doctrine and was reiterated and confirmed by the ICJ and arbitral tribunals in subsequent cases.

It seems that there is no equitable principle in maritime delimitation which is applicable for all cases; but rather an equitable result must be sought for each case. It is the idea that Judge Jimenes de Arechaga had in mind when he noted that 'the judicial application of equitable principles means that a court should render justice in the concrete case.'[31] The search for universally applicable principles becomes otiose; the particularity of each case effectively impedes the formation of such principles. Judge Waldock also made this point quite clear and stated that ìthe difficulty is that the problem of delimiting continental shelf is apt to vary from case to case in response to an almost infinite variety of geographical circumstances.'[32]

Indeed, there were cases when the Court cited several equitable principles, such as the principle of non-encroachment; the principle not to refashion the geography; and not to seek to make equal what nature has made unequal.[33] Even the use of

[28] F.P. Shepard, Submarine Geology (1973), Third edition, 175-178,293
[29] 1985 Guinea/Guinea-Bissau case. Par. 89.
[30] 1969 North Sea Case. Par. 101.
[31] Seperate opinion of the Judge Jimenes de Arechaga. 1982 Tunisia/Libya case. Par. 24.
[32] Nelson L.D.M. Op. cit. P. 839.
[33] 1969 North Sea cases. Par.91. Also see: 1985 Libya/Malta case. Par. 46.

those principles is not obligatory for the Courts and arbitral tribunals, because of their highly variable adaptability to each specific case.[34] Such as the Court is now considering Socio-economic condition,[35] conduct of the coastal states,[36] interest of third party[37] and security and political condition [38] in deciding cases on delimitation. However, The international community and the Courts, in spite of their endeavor, find it difficult to produce a general principle applicable to all maritime delimitation processes. The 1982 LOS Convention sets forth only the goal to achieve maritime delimitation, and says nothing about the principles and methods for the achievement of equitable result. It is the Court and Tribunals[39] which in several cases established the equitable principle.

Suggested Settlement of Dispute Measures:

According to the article 287 of the United Nations Convention, one state has the right to choose one or more of following means for settlement their disputes concerning the interpretation and application of this Convention:

- The International Tribunal for the Law of the Sea -ITLOS
- The International Court of Justice -ICJ
- An Arbitral Tribunal constituted in accordance with Annex VII
- A Special Arbitral Tribunal constituted in accordance with Annex VIII.

But nothing impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.[40]

As mentioned above Bangladesh, being failed to reach any positive agreement with India and Myanmar instituted arbitral proceedings against both the Myanmar and India on 8 October 2009 pursuant to Annex VII of UNCLOS. Bangladesh has submitted sufficient evidence in favour of her claim on 25 February to the Commission on the Limits of the Continental Shelf (CLCS).[41] The CLCS is responsible for examining the claims by individual states to an outer continental shelf. India and Myanmar filed their claim with the CLCS in 2009 pursuant to the LOSC. However, claims submitted by any country would not be accepted for final

---

[34] 1984 Gulf of Maine case. Par. 157.
[35] 1993 Greenland/Jan Mayen case
[36] 1982 Tunisia/Libya case
[37] ibid
[38] President Truman proclamation No.2667, 28th September, 1945. 'Policy of the United States with respect to the natural resources of the subsoil and the seabed of the continental shelf
[39] International Court of Justice and Arbitration Tribunals established under the LOS Convention.
[40] UNCLOS Art.280
[41] http://www.un.org/Depts/los/clcs_new/commission_submissions.htm

consideration before settling the objection raised by a neighbouring country which might have overlapping claims.

Bangladesh always tried to reach an positive agreement with India and Myanmar for delimitation of its maritime boundaries. But the option of negotiation is still open before the conflicting coastal states though they have instituted legal actions as per Art. 287 of UNCLOS.

It is obvious that delimitation by agreement remains the primary rule of international law. The negotiating process is very important for achieving agreement.[42] The delimitation process must be effected by agreement between parties on the basis of international law as it is recognized by 1982 LOS Convention. The delimitation of the exclusive economic zone/continental shelf with the opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.[43] The principle constitutes a special application of the general principle of peaceful settlement of international disputes and puts emphasis on a State obligation to negotiate in good faith with a view to conclude agreement. Therefore the the negotiation process between States is very important for the achievement of positive results.[44]

Bangladesh is a small, weak and poor coastal state having dense population of the world. The economy of Bangladesh somehow dependable upon the living and non-living resources of its offshore and this dependency is increasing day by day. One fourth of its population somehow dependent on the sea for their livelihood. It has no mineral resource except natural gas. Its power generating system almost dependable on its natural gas and reserve of the gas is at very low level at present. The economical growth of Bangladesh is fully dependent on its capacity of power supply. If new gas field could not be explore, adequate power could not be produced and thereby its economical growth may stopped. On the other hand India and Myanmar posses strong economy than. India is one of the states with the largest economic zone in the world. In delineating the sea zones amongst these three states which measure will be equitable for India and Myanmar that may not be just for Bangladesh. Being a small country, Bangladesh neither has any ability to go for any confrontation nor in a position to bargain with a big and powerful state like India for its just and equitable claim in delineating its sea zones. On the

[42] Nugzar Dundua, Delimitation of maritime boundaries between adjacent States, United Nations - The Nippon Foundation Fellow, 2006-2007, P. 3.

[43] Articles 74 and 83 of the 1982 LOS Convention.

[44] Nugzar Dundua, Delimitation of maritime boundaries between adjacent States, United Nations - The Nippon Foundation Fellow, 2006-2007, P. 83. www.un.org/Depts/los/nippon/.../dundua_0607_georgia.

other hand, being a big and powerful state India also has some state responsibilities to protect the interest of its poor and weak neighbor state. They can consider the depth method and equitable principle as guiding force in delimiting their maritime zones with Bangladesh. The main purpose of the UNCLOS is to achieve a just and equitable international economic order taking into account the special interests and needs of developing countries whether coastal or land locked. Hence, Bangladesh should continue its negotiations with India and Myanmar regarding delimitation of maritime boundaries through its proper diplomatic channel so that they could reach an agreed position regarding their disputed issues in delimiting their respected sea zones.

Conclusion

Delimitation of maritime boundaries necessarily involves cooperation by coastal states to accommodate their shared interests and goals. A bilateral agreement remains the most important strategy and framework for such cooperation. In fact, most maritime boundaries so far have been settled by agreement rather than by a judicial or arbitral body. The existing dispute regarding the delimitation of maritime boundaries of Bangladesh with India and Myanmar also should be resolved through constructive engagement with each other in the light of principles established under the LOS Convention and by concluding bilateral agreements to channel the conflicting claims over maritime boundaries. The decisions of the international courts and tribunals, state practice, and the LOS Convention clearly demonstrate that there has been a shift from the equidistance principle to the equitable principle of delimitation and strongly indicate that the equitable principle is the preferred method of delimitation.

Since all three countries have ratified the LOS Convention, the legal framework for dispute settlement is already agreed. What is needed is to transform the legal consent into a strong political will to resolve this issue by peaceful means. This is necessary because 'political considerations are fundamental to the maritime boundary delimitation, as this process deals with the highly sensitive issues of sovereignty and sovereign rights which touch on core national concerns of security, vital economic interests, and integrity and legitimacy for the states concerned.'[45]

Bangladesh has consistently argued for application of the equitable principle as the basis of the delimitation, while India and Myanmar insist that equidistance should be the guiding principle. Failing to reach an agreement through negotiations, Bangladesh has recently gone for arbitration under the LOS

[45] Prescott and Schofield, op. cit., supra note 16, p. 246

Convention for the resolution of the dispute.[46] Bangladesh argues that both her neighbours have extended their respective maritime boundaries into her offshore areas, depriving her of her legitimate right to the sea. Bangladesh has opted for this dispute settlement by arbitration because the problem of unsettled maritime boundaries has hampered her efforts to explore for marine resources for a long time, due to extensive and overlapping claims by her neighbors.

References :

1. President Truman proclamation No.2667, 28th September, 1945. 'Policy of the United States with respect to the natural resources of the subsoil and the seabed of the continental shelf.' Repr. www.oceanlaw.net.
2. Alexander L. M. The delimitation of maritime boundaries. Political geography quarterly 5, 1986.
3. Prescott V and Schofield C. The maritime political boundaries of the world . 2005.
4. Nugzar Dundua, Delimitation of maritime boundaries between adjacent States,United Nations - The Nippon Foundation Fellow, 2006-2007, P. 83. www.un.org / Depts / los / nippon /... / dundua_0607_georgia.
5. M. Habibur Rahman, Delimitation of Maritime Boundaries, First Edition-1991, Published from Rajshahi, Bangladesh.
6. Edward Collins, Jr. and Martin A.Rogoff. The international law of maritime boundary elimitation. Maine law review 34, 1982.
6. Impact on delimitation of maritime boundaries of other Member States, and so will the ..... Maritime boundary delimitation within CARICOM will be influenced ... www.caricom-fisheries.com/.../Delimitation_of_Maritime_Boundaries
7. www.gmat.unsw.edu.au/ablos/ABLOS01Folder/LEAHY.PDF
8. www.csc.noaa.gov/mbwg/htm/outreach/collier.pdf
9. Barry Hart Dubner, The Law of Territorial waters of Mid Ocean Archipelagos and Arhipelagic States (1969), Martinus Nijthoff
10. F.P. Shepard, Submarine Geology (1973), Third edition
11. The United Nation's Law of the Sea Convention, 1982
12. Statute of the International Court of Justice.

---

[46] Badrul Imam, op. cit., supra note 29; Sayed Zain Al-Mahmood, 'Troubled Waters', The Daily Star Weekend Magazine, Vol. 8, Issue 94, 13 November 2009.

Judicial/Metropolitan Magistracy In The Light Of Separation Of Judiciary

Mir Md. Amtazul Hoque*

Abstract

It is interesting to observe how the judicial/metropolitan magistracy works after the separation of judiciary has formally come into existence. The aim of this paper is to present an objective evaluation on the performance of the judicial / metropolitan magistracy of Bangladesh in the aftermath of the separation of judiciary. A glimpse into the set up of the judicial / metropolitan magistracy is also attempted, which is preceded by a brief history of the separation of judiciary in Bangladesh. I have also briefly discussed the conceptual side of the separation of judiciary. Additionally, I have tried to shed some light on the developments hitherto made and challenges of the judicial / metropolitan magistracy. In doing so, I have observed the functioning of a unit of judiciall magistracy, i.e. the Cox's Bazar Judicial Magistracy and I have presented in this paper the statistical data of my observation. Finally, I have forwarded several specific recommendations for the sake of effective functioning of the judicial/metropolitan magistracy and for the ends of making the separation of judiciary meaningful.

Introduction

Even though there is no universally accepted definition of 'democracy' the bottom-line principles of a democratic society are that all citizens belong to it are equal before law, all have equal access to powers and their rights and liberties are generally protected by a constitution. For the purpose of governance, a democratic state may adopt several models suitable to its objectives and goals. One of the such models is 'sepration of powers', which divides a state into three branches, i.e., an executive, a legislature and a judiciary. Among these three, the executive has exclusive authority and responsibility for the daily administration of state bureaucracy. On the other hand, the legislature possesses the sole power to pass, amend and repeal laws. The third one, the judiciary[1] (also known as judicature) interprets or applies those laws. In doing so, the judiciary ensures equal justice

*Senior Judicial Magistrate, Cox's Bazar, e-mail: amtazul_hoque@yahoo.com

[1] The term 'Judiciary' is also used to refer collectively to the personnel, such as judges, magistrates and other adjudicators, who form the core of a Judiciary. *See* http://en.wikipedia.org/wiki/Judiciary , as retrieved on 9.2.2010.

under law. The philosophy that works behind the model of the 'separaton of powers'[2] is chiefly to distribute authority away from the executive branch keeping an eye to the precise role of the said organ which permits it (the executive) to enforce the law as written by the legislature and interpreted by the judicial system. To guargantee effective and smooth functioning of such a democratic society, the rule of law[3] must hold sway. It is none but an independent judiciary[4] that performs the delicate tasks of ensuring the rule of law in ensuring the rule of law in the society.

As a democratic state,[5] the judiciary of Bangladesh in general and the criminal administration of justice in particular, has got a new paradigm shift after the separation of judiciary from the executive branch on 1 November 2007. The move stablishes the supremacy of the Constitution of the Peoples Republic of Bangladesh (henceforward, the Constitution) once again. Since the historic sepration, already nearly three years have elapsed and the people of Bangladesh have started evaluating the developments and challenges of a separated judiciary.

---

[2] Montesquieu, a Frensh scholar, observed the tyrannical behaviour of a person or a group of persons that ensued from the concentration of power. To check such arbitrariness, he advocated the need for divide the power of the government into three branches, the legislature, the executive, and the judiciary. The division denotes that each organ should be independent of the other and that no branch should perform functions that belong to the other.

[3] In the *Black's Law Dictionary* page 1196 (Fifth Edition, 1979), the rule of law has been defined as follows:

> A legal principle, of general application, sanctioned by the recognition of authorities, and usually expressed in the form of a maxim or logical proposition. Called a "rule," because in doubtful or unforeseen case it is a guide or norm for their decision. The rule of law, sometimes called "the supremacy of law", provides that decision should be made by the application of known principles or laws without the intervention of discretion in their application.

[4] Despite numerous studies there is no consensus even on a common definition of 'judicial independence'. *See* United Nations, " Basic principles on the independence of the judiciary" (1985). The "Beijing Statement of Principles of the Independence of the Judiciary" (a statment arising out of the concentrated views of thirty-two Asian and Pacific Chief Justices) has crystallized three characteristics as constituent elements of judicial independence. The judiciary is (i) impartial, (ii) its decisions are accepted by the parties and the public, and (iii)it is free from undue interference. The explanation by Justice Naim Uddin Ahmed, a formal honourable Justice of the Supreme Court of Bangladesh on independence of Judiciary is also worth mentioning here:

> Judges are, first of all, 'constrained by, and follow, existing rules and procedures;' secondly, 'by less tangible requirements, such as, those of courtesy, fairness (audi alteram partem, etc.), cultural traditions, the etiquette of the law court and the profession;' thirdly, 'a judge or magistrate is not free to act perversely, unfairly or for ulterior motives;' fourthly, ëthe judge must rightly be influenced by others in performance of his/her judicial duties. ... there is no point in advocacy or pleading if it does not affect judicial decisions;í and lastly, ëthe judge must be sensitive to guidance and directions reasonably given my those of superior rank to him/her, i.e. his/her appellate authorities or superintending authorities.í Subject to the above constraints, judicial independence has been defined as ëprotection or immunity from unlawful or improper influences, direct or indirect, on the way in which the judicial officer carries out his/her judicial functions.í It has also been argued that judicial independence can never be absolute but is relative and subject to the above constraints.

See, *Independence of Judiciary: Role of Supreme Court*, the New Age, 4th Unniversary special.

[5] Democracy is one of the four fundamental principles of state policy of Bangladesh as enshrined in Article 8 of the Constitution of the country.

The Chequered Route Of A Separated Judiciary In Bangladesh

The standing of the Constitution, the supreme law of the country, is direct, unequivocal and unquestionable regarding the separation of judiciary and it has clearly declared that 'The State shall ensure the separation of the judiciary from the executive organs of the State.'[6] Ensuring independence being one of the fundamental principles of state policy, it is not readily judicially enforceable. Nonetheless, it does not connote that people of this soil have to wait for ages to see it coming to a realism. However, the Constitution shows progressiveness, to a great extent, in safeguarding the independence of higher judiciary.[7] The Constitution emphatically announces that 'Subject to the provisions of this Constitution the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions.'[8] Hopefully, the Constitution adequately ensures independence of the lower judiciary, which comprises the learned District and Sessions Judge's Courts, judicial/matropolitan magistracy, tribunals etc. Article 116A has mentioned that 'Subject to provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions.' Such a solemn perception regarding an independent judiciary, as enshrined in the carefully chosen wordings of a solemn Constitution has not come up at one go. It is earned through a chequered and painful history of struggle and conceptualisation, which dates back from the starting of the British subjugation in the then Indian sub-continent comprising Bangladesh, India, Pakistan and parts of the then Burma (presently Myanmar). In the case of Bangladesh, separation of judiciary simply connotes separation of the administration of criminal justice from the clutch of the executive branch. To be frank, the administration of civil justice is outside the purview of my present discussion, as this part of the judiciary has been enjoying all along comparative independence under the direct aegies, control and supervision of the Honourable Supreme Court of Bangladesh. Especially, the magistracy was the bone of contention.

The executive used to exercise its most notorious interference over the lower judiciary through the appointment of judges and executive control over the magistrates. Those magistrates exercising judicial functions in the lower criminal judiciary were members of the country's administrative cadre, which was responsible for the general administration of its territories. It was not the judiciary, but the executive through Ministry of Establishment who controlled them. This was made possible by the full administrative control through the president in terms of the appointments to and control and discipline of the subordinate courts

[6] Article 22 of the Constitution of the Peoples Republic of Bangladesh.

[7] Higher Judiciary denotes Honourable Supreme Court comprising the Appellate Division and the High Court Division.

[8] *See* Article 94(4) of the Constitution.

and two specific articles of the Constitution (Article 115[9] & Article 116[10]) provided the tools. Magistrate judges are typically transferred to their magisterial posts for 3-10 years during the course of their employment with the government, thereafter are reverted back to their old administrative positions.[11] That sort of situation was dead against the concepts of judicial independence and rule of law. Control of the kind reminded us the legacy of the British period.

It is the British who introduced the concept of magistracy in the then Indian-subcontinent including Bangladesh, which registered a false-start with the revenue collectors empowering with the judiciary authority. The motive was ulterior eb initio and it was simply to ensure direct control over the megistracy by the then colonial government. Since the beginning of the British colonial rule, the question of separation of judiciary from the executive had been a continuing debate. As I have mentioned earlier, in order to put an end to this long-standing contention, the concept of separation of judiciary has duly been reflected in the Constitution. Unfortunately, no constructive efforts were made for a long time in order to implement the directive of the Constitution. Ultimately, it is the famous Masder Hossain Case[12] wherein the Honourable Appellate Division directed the government to implement its 12 point directives, including for formation of separate Judicial Service Commission (JSC) and Judicial Service Pay Commission to separate the judiciary from the control of the executive, a long cherished desire of the people of Bangladesh. At last, people saw the historic separation on 1 November 2007.[13] Immeidately after the separation of judiciary, judicial officers in the rank ranging from learned assistant judges to the learned additional district judges were deputed in the judicial/metropolitan magistracy to perform the function of the judicial magistrates of different categories under the

---

[9]Article 115 of the Constitution reads thus 'Appointments of persons to offices in the judicial service or as magistrates exercising judicial functions shall be made by the President in accordance with rules made by him in that behalf.'

[10] Article 116 of the Constitution runs thus ëThe control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and magistrates exercising judicial functions shall vest in the President and shall be exercised by him in consultation with the Supreme Court.'

[11] Judicial Independence Overview and Country-level Summaries. Asian Development Bank, 2003. See http://www.adb.org/Documents/Events/2003/RETA5987/Final_overview_Report_pdf, as retrieved on 9 February 2010.

[12]reported in 52 DLR 82.

[13] 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 Dirertives 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

direct subordination of the learned Sessions Judge as well as learned Chief Judicial Magistrates/Chief Metropolitan Magistrates. The Code of Criminal Procedure 1898 elaborates the structure and powers of the criminal courts spread all over the country. On 1st November 2007, the journey of the Judicial Magistracy of Bangladesh begins with 563344 criminal cases.[14]

A Brief Discussion On The Courts Of Magistrates

In order to give effect to the constitutional obligations and to the directives given by the Honourable Appellate Division of the Supreme Court relating to the separation of judiciary from the executive in civil appeal no. 79/1999, the Code of Criminal Procedure has been amended in 2007.[15] According to section 6 of the amended CrPC, in addition to the Supreme Court, there are two classes of Criminal Courts in Bangladesh, namely-

* Courts of Sessions; and

* Courts of Magistrates.

The Code of Criminal Procedure recognizes two classes of Magistrate, namely: Judicial Magistrate and Executive Magistrate. The tires of Judicial Magistrates are as follows:

- Chief Metropolitan Magistrate in Metropolitan Area and Chief Judicial Magistrate to other areas;
- Magistrate of the first class, who shall in Metropolitan Area, be known as Metropolitan Magistrate;
- Magistrate of the second class; and
- Magistrate of the third class.

In every Metropolitan area, the Chief Metropolitan Magistrate, Additional Chief Metropolitan Magistrate and other Metropolitan Magistrates are appointed from among the persons employed in the Bangladesh Judicial Service.[16]

In every district outside a Metropolitan Area, the Chief Judicial Magistrates, Additional Chief Judicial Magistrates and other Judicial Magistrates are appointed from the persons employed in the Bangladesh Judicial service.[17]

---

[14] see page 92, *Annual Report on the Judiciary, 2007*.

[15]For the salient Features of the Code of Criminal Procedure (Amendment) Ordinance, 2007 see page 18 of the *Annual Report on the Judiciary, 2007*.

[16]Section 18(1) of the Code of Criminal Procedure 1898 which reads thus '18.(1) In every Metropolitan Area, the Chief Metropolitan Magistrate, Additional Chief Metropolitan Magistrate and other Metropolitan Magistrates shall be appointed from among the persons employed in the Bangladesh judicial Service.'

[17] Section 11 (1) of the Code which reads thus:

> 11. (1) In every district outside a Metropolitan Area, the Chief Judicial Magistrates, Additional Chief Judicial Magistrate] and other Judicial Magistrates shall be appointed from the persons employed in the Bangladesh Judicial service in accordance with the rules framed by the president under the proviso to Article 133 of the constitution.

The Code also provides for Special Magistrates.[18]

All Judicial Magistrates including the Chief Judicial Magistrate shall be subordinate to the Sessions Judge and all Metropolitan Magistrates including the Chief Metropolitan Magistrate shall be subordinate to the Metropolitan Sessions Judge.[19]

The functions of the Judicial/Metropolitan Magistracy have been going on in full swing all over the country. Unfortunately, there is still dearth of comprehensive statistical data or study on various aspects of the functions of the said magistracy even after elapsing more than three years of historic separation. At this juncture, it will not surely be out of place to present statistical information regarding the function of an unit of the Judicial Magistracy. Let us take the Judicial Magistracy of Cox's Bazar as an example (henceforth, the CBJM meaning Cox's Bazar Judicial Magistracy).

Statistics On The Institution And Disposal Of Criminal Cases In A Unit Of Judicial Magistracy (the CBJM)

The Cox's Bazar Judicial Magistracy (CBJM) exercises its criminal jurisdiction over eight upazillas of Cox's Bazar, namely, Sadar, Ramu, Ukhya, Teknaf, Chakaria, Pekua, Moheshkhali and Kutubdia.

Statement showing opening balance of the CBJM as on 01.11.2007

Types of cases	Number of cases
GR/NGR	7503
CR	2655
FOREST	4058
CRIMINAL APPEAL	22
SPEEDY TRIAL	1
TOTAL RECEIVED	14,239

Source: Annual statement of the CBJM, 2007

[18] The Government may in consultation with the Honourable High Court Division confer upon any magistrate all or any of the Powers conferred or conferrable by or under the Code on a Judicial Magistrate in respect of particular cases or a particular class or classes of cases or in regard to cases generally in any local area outside a Metropolitan Area. See Section 12 of the Code.

[19] Section 17(4) of the Code of Criminal Procedure 1898.

Statement showing institution and disposal of criminal cases in the CBJM during the year of 2007

Opening balance	Instituted during 2007	Total	Disposed	Pending for disposal
14,239	861	15,100	628	14,472

Source: Annual statement of the CBJM, 2007

Statement showing institution and disposal of criminal cases in the CBJM during the year of 2008

Opening balance	Instituted during 2008	Total	Disposed	Pending for disposal
14,472	13,084	27,556	9,657	17,899

Source: Annual statement of the CBJM, 2008

Statement showing institution and disposal of criminal cases in the CBJM during the year of 2009

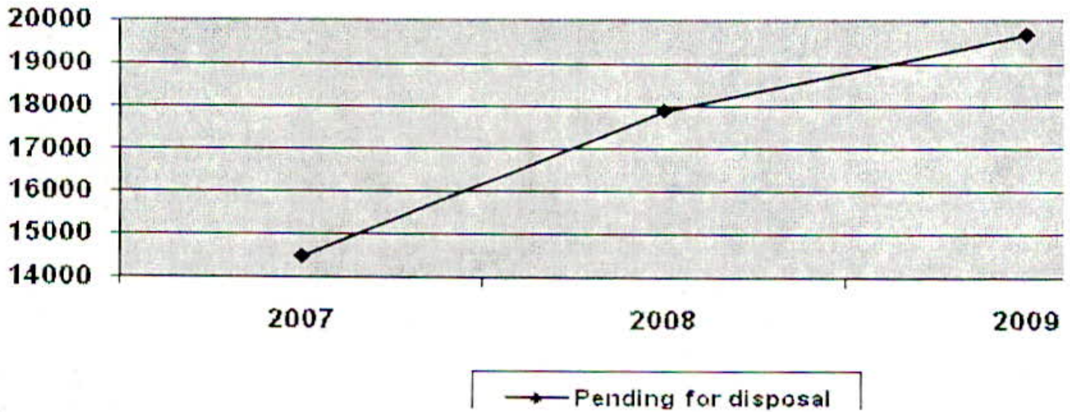
Opening balance	Instituted during 2009	Total	Disposed	Pending for disposal
19,496	1095	20,591	895	19,696

Source: Annual statement of the CBJM, 2009

Now, let us consider some visible trend of the ciminal cases of the CBJM on the basis of the above-mentioned statistical data.

Trend of pending criminal cases for disposal in CBJM after the separation of Judiciary

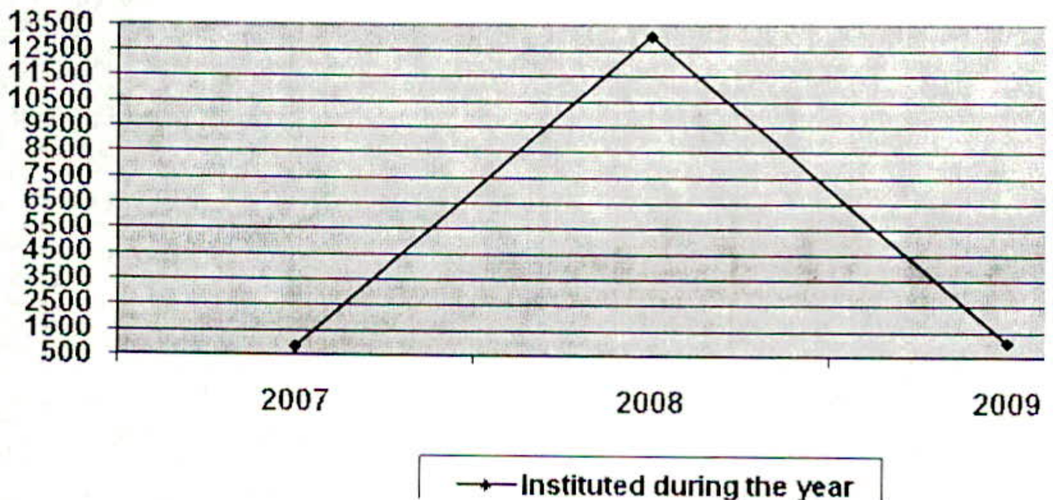
Period	**Pending for disposal**
2007	14472
2008	17910
2009	19696



From the line graph of pending criminal cases of the CBJM, it is observed that the trend is rising upward from December 2007 to December 2009.

Trend of criminal cases instituted since the separation of Judiciary

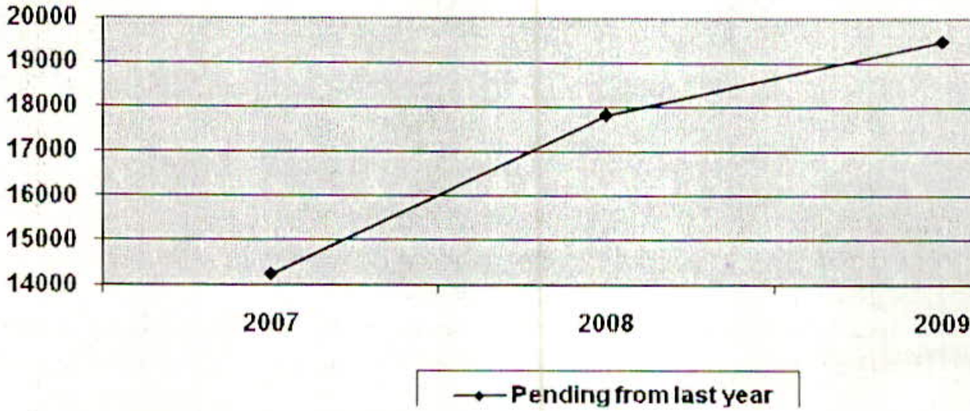
Period	Instituted
2007	861
2008	13084
2009	1095



From the line graph of instituted criminal cases of the CBJM during the given three years, it is observed that the number of institution of criminal cases in the CBJM has increased by more than 15 times in 2008 and then again it sharply fell back to nearly catch the number of cases instituted in 2007.

Trend of the criminal cases of CBJM pending from the last year

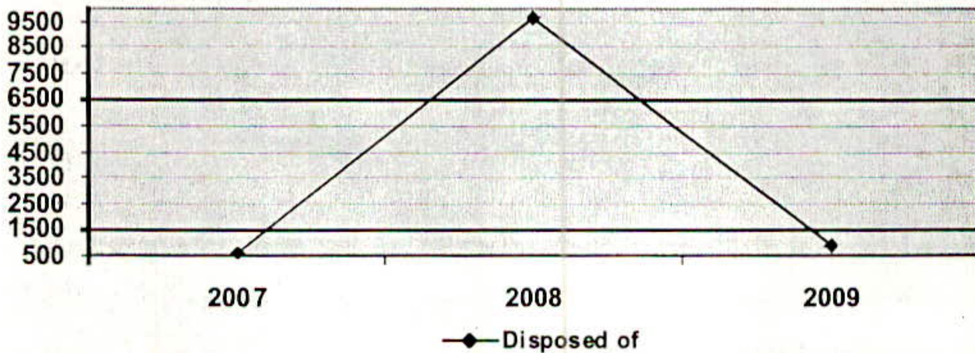
Period	Pending from the last year
2007	14239
2008	17828
2009	19496



Analysis of trend: From the line graph of pending criminal cases from last year of the CBJM, it is observed that the trend is rising upward from December 2007 to December 2009.

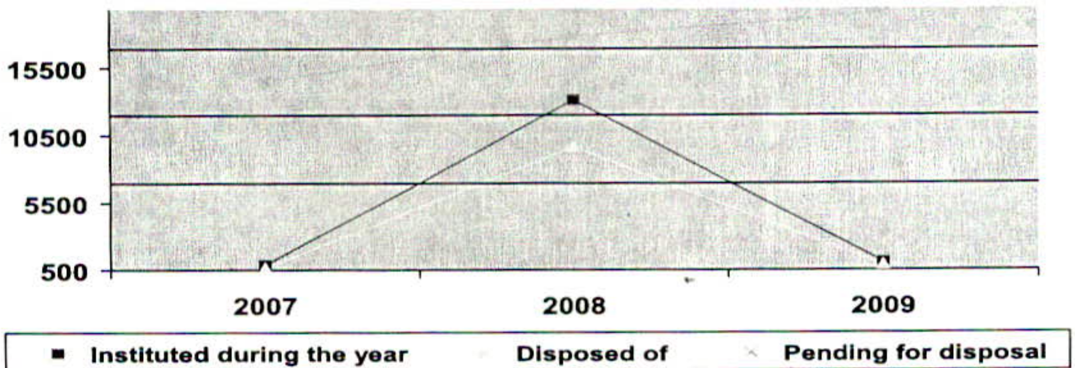
Trend of criminal cases of the CBJM disposed of during the given period

Period	Disposed of
2007	628
2008	9657
2009	895



The scenario of disposal of criminal cases during the given period virtually followed the trend of the cases instituted during the said period. That is to say, From the line graph of disposed criminal cases of the CBJM during the given three years, it is observed that the number of disposal of criminal cases in the CBJM has increased by more than 15 times in 2008 and then again it sharply fell back to nearly catch the number of cases disposed in 2007.

Comparative study of institution, disposal and pending of criminal cases of the CBJM during the given period:



The comparative study of institution, disposal and pending of criminal cases in the CBJM during the given period reveals that both the numbers of instituted and disposed criminal cases in the CBJM has increased somewhat sharply up to 2008 and again decreased in 2009. However, the number of pending criminal cases has kept rising though in slight margin.

Percentage of yearly increases & Disposal

Period	Filing & Received	Disposed	Increase per year	% increase of filing & received cases	%disposal of filing & received
	(f)	(d)	I= f-d	(I X 100)/f	(d X 100)/f
December, 2007	14472	628	13844	95.66%	4.34%
December, 2008	17910	9657	8253	46.08%	53.92%
December, 2009	19696	895	18801	95.46%	4.54%

It is not claimed that the above-mentioned analysis is the common picture of the entire judicial/metropolitan magistracy of the country. Even though there is dearth of adequate statistical data, noticeable developments have taken place in criminal judiciary.

Developments

The developments hitherto registered in the separated judiciary is remarkable.

The separation of Judiciary has brought about a paradigm shift in the judiciary of Bangladesh. This is undoubtedly a positive initiative en route to empowering the judiciary of the country. In effect, it is a big leap in search of quality democracy. It is a long stride towards that assurance that the courts and judicial/metropolitan magistrates can now establish rule of law without interferece of the executives.

Now on, the learned Judicial/metropolitan magistrates have been enshouldered with the heavy responsibility of upholding justice and contributing to good governance as envisaged by the Constitution. Now it is as true as daylight that no way is left any longer to unsettle afresh this settled issue of separation of judiciary. The judicial/metropolitan magistrates with robust legal background are delving deep into the cases with nitty-gritty of law, setting aside any political interference and nepotism. Such welcome indicators about the separation of judiciary would ensure good governance in the near future and not a single victim would thus be left in the lurch without a remedy. The changed judiciary has substantially put a stop to pursue any hidden desire to use criminal judiciary to suppress and oppress different political opinions. The expectation of people has increased significantly. Adequate appointment of judicial/metropolitan magistrates has brought about sufficient dynamism and efficiency in the dispensation of criminal justice. Additionally, adequate staffs for the judicial/metropolitan magistracy have already been appointed. Ostensibly, now minimum political interference can be experienced at present which was a major impediment to the proper justice. From pragmatic experience it is seen that the interference is at its minimal level now-a-days. To the great satisfaction of the criminal judiciary, the much talked about Criminal Rules and Orders (CRRO) has already been published and copies have been sent to all judicial/matropolitan magistracies of the country. Office manuals would be developed documenting the new procedures and standard forms. Due to the appointment of a huge numbers of young and promising judicial magistrates, a remarkable extention of judicial mind in the dispensation of justice can easily be noticed. Side by side, continuing training opportunities accommodated by Judicial Administration Training Institute (JATI) have been providing advequate professional skill development. Over all, the stage is well set to ensure fair trial in the administration of criminal justice for the poeple of this country.

Challenges

Judiciary is the last resort of justice for the people of this country. Still, the Judiciary itself has to go a long way to ensure its meaningful independence. Since the independence of Bangladesh in 1971, the process of implementing an independent judiciary have been vigorously attacked many times. The original Constitution of Bangladesh, that came into force on 16 December, 1972, contained fairly stringent safeguards for the independence of the judiciary in Article 95 (Appointment of Judges), Article 96 (Removal of Judges), and Article 99 (Prohibition on Further Employment of Judges), although the formal separation of powers is not emphatically articulated. Over the years, its safeguards

for judicial independence, rather than being strengthened and consolidated, have been diluted through a number of constitutional amendments. In the past, the people painfully observed the malafide use of criminal justice power. The whole nation is still carrying the bitter and dark history of illegality and miscarriage of justice, left by the executive magistrates in criminal cases in the name of justice. The sufferers have not forgotten how the then executive magistrates haggled on their order behind the curtain. Readymade orders were given in court where natural justice was set at naught. As a sequel, the entire institution of criminal justice became questionable, losing its acceptability to the countrymen.[20] This power had been overtly and covertly used to harass the different political entities. Those vested interest groups opposing an independent judiciary were desparate to put a stop to the process at any rate. Their audacity knew no bounds.[21] The standing of those people against the materialisation of a separated Judiciary was devoid of pragmatism and was purported for preserving their domain of power that can be used to maximize corruption. The fight of the protagonists of a separated Judiciary against those people opposing it was also painstaking and relentless. Besides the members of the lower judiciary, the distinguished learned advocates of supreme courts fighted relentlessly to bring the dream down to a realism. Their combined efforts has outrun all controversies, and eventually it culminated in the realisation of a separated judiciary.

However, the fight is not end there. Still there have been numerous challenges faced by the judicial/metropolitan magistracy now. Some of them may be cited cagegorically here:

1) Even though the said vested interest groups have not succeeded in materializing their plot as mentioned above, they have not given up the hope of reverting back the process of a separated judiciary. It is glaringly evident in varigated ways. As for example, they are still fighting to have a share on taking cognizance. Cognizance is an important, salient stage of the proceedings of criminal case where a

---

[20] See http://www.thefinancialexpress-bd.com/2009/03/25/62143.html.

[21] At a seminar on "Independence of the judiciary for good governance" on 21 October 2007, Rokan-ud-Dowla, the then Metropolitan magistrate of Dhaka involved in the anti-adulteration drive, made several controversial comments as he demanded a halt to the separation of the judiciary from the executive branch until 2021. He urged executive branch officials to stop work from Nov 1 if the government did not clearly state that it would halt the separation process by that date. The magistrate's stance on the proposed judiciary separation was enthusiastically received by administrative officials at the seminar, organized by the Bangladesh Institute of Administration Management. The magistrate said the separation of the judiciary would not bring an iota of benefit to the people. Mentioning that a committee had been formed to resist anarchy in the judiciary, Rokan-ud-dowla said that if executive magistrates' demands were not met, executive branch work would be halted. *See No separation of judiciary until 2021: Rukan-ud-dawla*, 22 October 2007 in bdnews.com; url: http://www.bdnews24.com/details.php?id=78997&cid=2.

higher degree of care and caution is a must. A criminal case with flawed cognizance, made ready for trial, would aggravate sufferings of the people as it is quite explicit in the Bangladesh perspective having "as many tables and so much corruption". Moreover, the executive magistrates devoid of legal background do not understand the nuances of legal phraseology.[22] So, continuous attack from outside negative forces poses a great challenge for the new-born judicial/metropolitan magistracy.

2) It is principally through the article 115[23] and article 116[24] of the Constitution that the executive branch has been able to gradually intrude upon and influence the judiciary in Bangladesh, creating enormous problems regarding the quality of jurisdiction and the extent of judicial independence.

3) Independence of judiciary may be constrained in criminal cases with serious political overtones. Lack of acumen of efficient and skillful handling of these political cases may pose serious threat to the efficiency and integrity of the presiding officers in particular and the entire Judiciary in general.

4) The civil society of the country also has a lot of things to do, especially creating awareness among the common people regarding the judicial independence and checking the effectiveness of the separated judiciary. Unfortunately, lack of such a strong civil society is also a considerable challenge for a separated judiciary.

5) The judicial/metropolitan magistrates have been engaged in punishing the bad elements of the society. So, there is every possiblities of their becoming victimized by those criminals affected by the orders of the presiding officers. To mitigate such threat, proper security measures have not been ensured for the judicial/metropolitan magistrates. Hence, insecurity of the judicial/metropolitan magistrates has come up as a big challenge.

---

[22] Barristar Amir-Ul Islam, one of the distinguished learned advocates of supreme courts fighted relentlessly to bring the dream down to a realism, has said that empowering executive magistrates to take cognizance of offences for trial in any case is against the spirit of the constitution and separation of judiciary from the executive. *See Separation of judiciary spirit at stake*, at bangladeshnews.com.bd, march 23rd 2009; url http://www.bangladeshnews.com.bd/2009/03/23/separation-of-judiciary-spirit-at-stake/)Bangladeshnews.com.bd, as retrieved on 9.2.10.

[23] Above *n* 9.

[24] Above *n* 10.

6) There is little or no infrastructure for caseload management and, hence, there is no available statistical data on litigation rates and caseloads.

7) The judicial/metropolitan magistrates have to study on various books on law, regulations etc constantly to come to decision regarding their cases and it is a necessity to come to such a decision which will in turn uphold the principles of fair, effective and impartial administration of criminal justice. Disappointingly, lack of enriched library is putting a bar to that end.

8) There should have had an appropriate understanding between the two protagonists (the learned judicial/metropolitan magistrates and the learned advocates) of the criminal magistracy for proper adjudication of cases. In reality, there exists huge communication gap between the bar and the bench.

9) There also exists huge communication gap among the judicial/metropolitan magistracy and the police department and other organisations whose particiapation is necessary for the effective and fair disposal of the criminal justice.

10) Various stage-wise factors causing delay in criminal administration of justice are still there which are required to be addressed step-by-step. Some of those delaying factors have been mentioned in later portion of this paper.

Recommendations

1) Even though, the judicial/metropolitan magistracy have been at its initial stage of a long journey, in near future backlog of criminal cases may come up as a big problem for it. The number of criminal cases pending for hearing after being set down for trial is huge. Notwithstanding the fact that the Criminal Procedure Code 1898 has unequivocally set the time frame for the disposal of the every criminal case,[25] the reality shows otherwise chiefly because of the reasons beyond the control of the presiding officers of the criminal courts

---

[25]First two sub-sections of the Section 339C of the Code of Criminal Procedure reads thus:

Time for disposal of cases- (1) A magistrate shall conclude the trial of a case within one hundred and eighty days from the date on which the case is received by him for trial. (2) A Sessions Judge, an Additional Sessions Judge or an Assistant Sessions Judge shall conclude the trial of a case within three hundred and sixty days from the date on which the case is received by him for trial.

(Some reasons may be attributable to our social set up). Unless the disposal rate improves, the backlog will keep mounting. To ensure fair and impartial justice to all and thereby to ensure rule of law, the arrears of cases will have to be reduced.

2) In the course of clearing the backlog of cases, positive approaches can be adopted in order to minimize the backlog of cases. They are as follows:-

I) Effective case management by the judicial magistrates: This simply means that the judicial magistrates must be in control of all cases as soon as they are filed in their respective courts and to continuously monitored them until disposed off. However, this sounds a bit difficult especially when judicial magistrates are busy hearing criminal cases daily. Nevertheless, we are constraint to unsolder the duty and responsibility so long as the computerized system to filing and monitoring criminal cases is substantially supplanted by the prevailing age-old manual filing and monitoring system. If the judicial magistrates check the status of their cases on regular basis, this practice may aid a lot to leave a good impact on their monitoring acumen over the respective criminal cases. The motto must be kept in mind that this is not a matter of just routine work, but a matter of ensuring fair and impartial justice to the common people.

II) Keeping an eye over the trial process. Not permitting any dilatory tactics by any of the parties of the cases without any cogent and strongly reasonable ground. Due to some leniency especially in the Code of Criminal Procedure1898 and Evidence Act 1872, the courts proceedings are sometimes slow and tedious. It does not help when counsel appearing for their client maximizes the advantages of the weaknesses in these statutory provisions.

3) The strict demand for Judges and Magistrates to be in their chambers even when they are not having hearings does affect their performance in writing judgments. Inspiration is essential in judgment writing and environmental surrounding is vital for it.

4) Adjournments and limiting number of part-heard cases. One of the contributing factors in the backlog of cases is the frequent applications by parties for adjournments. Various reasons are being given to the courts on the day of hearing. Strict guideline in granting adjournment within the purview of law of the country should therefore be devised.

5) Judicial as well as administrative ability of each of the judicial officers of the judicial/metropolitan magistracy have to be enhanced adequately.

6) The judicial officers should also adequately know the process of addressing the latches and lacunas found in both judicial and administrative matters.

7) The judicial officers need to recognize the factors behind the arrears of pending cases.

8) Ensuring speedy justice. Speedy justice is an assurance extended to a citizen and declared as one of the fundamental rights assured by the Constitution of Bangladesh.[26]

9) Though the Judiciary may not have any direct concern with the increase of the crime-rate, it has its concern with the disposal of criminal justice and how delay in that area contributes to the increase in the crime rate. The delay in the disposal of criminal cases becomes in a way the negative contribution of the Judiciary to the increase in the crime-rate.

10) There exists a necessity for setting a statistical standard regarding the functions of the judicial/metropolitan magistracy.

11) The citizenry and government must have more respect for judicial decisions.

12) Creating parameters of accountability is also necessary.

13) Introduction/development of computer technology is required for the sake of efficiency.

14) Good court administration should be ensured.

"Good court administration has been defined and described in many different ways. In simple terms it may be described to imply:

(a) good record-keeping and systematic filing of the cases;

(b) subject wise classification of the cases;

(c) good monitoring so as to classify the cases on the basis of the stages they have reached;

[26] Article 35(3) of the Constitution has unequivocally declared that every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial Court or tribunal established by law. It is worthy of mentioning here that right to speedy trial is an important right even in the UK and US. The Sixth Amendment to the US Constitution guarantees all persons accused of criminal wrongdoing the right to a speedy trial. The US had enacted the Speedy Trial Act of 1974 which had fixed standard time requirements for timely prosecution and disposal of criminal cases in district courts.

(d) to identify and to rid the docket of "dead" or moot matters in order to prevent them from clogging the schedules;

(e) monitoring and case-flow tracking in such a way as to know the status of each case, to know its procedural position, to locate documents and records more easily and to reflect everything in transparency plate.[27]

15) The horizontal and vertical avenue of higher education, various training, scholarship, intellectual publications, participation in workshop, seminar etc. should be ventilated for the judicial officers working in judicial/metropolitan magistracies.

16) Patriotism, self sanction and accountability of the judicial officers to the citizens are condition precedent to retain the prolific of renaissance of the judiciary.

17) The civil society, non-government organizations (NGOs) and other stakeholders should come forward with their strong advocacy to frustrate attempts by the vested interests to jeopardize the smooth functioning of a judicial system that is ensured through separation of power.

Conclusion

This paper may act as guidance for smooth functioning of the judicial/metropolitan magistracy. This is just a starter of the kind. And the attempt will be fruitful for those interested in having an overall idea about the administration of justice in the judicial/metropolitan magistracy. It is to some extent true that the time, already elapsed after separation of judiciary is very negligible to come to a conclusion regarding the future of the judicial/metropolitan magistracy in particular and the separated judiciary in general. Still, the necessity to self-evaluation cannot be ruled out altogether. To me, this is the time to plan and implement for a bright future and thereby to ensure fair justice at the grass root level. Hence is the effort, which has tried to shed some light on several aspects of the judicial/metropolitan magistracy . The criminal judiciary with its new-found entity, duties and responsibilities must work hard in order to get back the trust of the public upon the judiciary. There is no denying the fact that trust of the justice seekers act as building blocks for a strong judiciary. And, strengthening the judiciary means strengthening the rule of law.

---

[27] *See A Possible Way out Backlog in Our Judiciary*, Professor M Shah Alam, The Daily Star, Dhaka, 16 April 2000. url: http://ruchichowdhury.tripod.com/a_possible_way_out_of_backlog_in_our_judiciary.htm.

In quest of combined endeavor of Bench and Bar for Justice

Gazi Delwar Hosen*

Extraction

It is known to all and sundry that mutual co-operation between the Bench and the Bar is a since qua non for attainment of win win justice. The Bench and the Bar are the two wings of the same bird which cannot fly with one wing. In ensuring the rule of law a most significant part is played by the lawyers in adversarial legal system whereof judges are substantially mute to play the role of umpire. It is said that judges most often shine with the reflected glory of lawyers. Down trodden and poverty stricken, justice seekers are in melancholy mode at present court atmosphere as justice has been turned into a far cry and mirage for multifaceted causes whereof lack of co-operation between bar and bench takes place a big role. To retain confidence on judiciary is a mammoth challenge for civilized existence. The legal profession and the judiciary now stand at a crossroad of history after partial separation of judiciary to bury the whisper that "the court is dead; rest in peace and to prevent crying justice in silence."

Prelude

Right to justice is one of the rudimentary and core aspects of human rights. Unfortunately, justice is fettered for multifarious impediments in Bangladesh whereof lack of expected co-operation between Bar and Bench though antithesis of "adversarial legal system" takes place substantial role. The relationship between the Bench and the Bar has to be made so harmonious that the Courtís atmosphere becomes sublime. Justice can be advanced to the teeming millions of the nation by the harmonious relationship between the two limbs of judicial system. Regular interaction between the judges and lawyers to dispel the misconceptions resulting out of lack of communication is a must. There is antique and classical observation that "as members of the bench and bar, there would be joint commitment to the pursuit of justice.[1]

---

* Senior Judicial Magistrate,E-mail:Kohinoorgazi@yahoo.com.

[1]See, for example, Raj Anand and Steven Nicoletta, "Fostering Pro Bono Service in the Legal Profession: Challenges Facing the Pro Bono Ethic," prepared for the Chief Justice of Ontarioís Advisory Committee on Professionalism's *Ninth Colloquium on the Legal Profession* (19 October 2007) online:<http://www.lsuc.on.ca/media/ninth_colloquium_ pro_ bono_services.pdf > at pp. 4-5 [hereinafter, "*Anand and Nicoletta*"]; *Sossin, supra* note 21, at p. 132; *Judicial Council Statement of Principles*, *supra* note 4, at p. 1 (noting responsibility of bar to ensure that self-represented persons are provided with fair access and equal treatment by the court); *Joint Conference on Professional Responsibility*, *supra* note 24 (noting that moral position of the advocate is at stake and clear moral obligation of the profession to assist); Timothy P. Terrell & James H. Wildman, "Rethinking 'Professionalism," (1992) 41 *Emory L.J.* 403 at pp. 422-23 (arguing that special position of law in society dictates special obligations for the legal profession.

Jurisprudence of bar and bench relation

Bar means a group (association) of Lawyers. When used in relation to court, it means lawyers, lawyer or where lawyers sit in court. Bench mean judges, the judge in court or where the judge sits in court. For our purposes, it means the judge in court.

According to Murshed CJ "Lawyers as they are, they are the very limbos of the administration of justice. The standard of case as owed by them to the Court and to the unhampered administration of justice is very much higher than that expected from the lay man. They are not mere conduit-pipes for passing on to Court whatever is whispered in their cars by their lay clients wishfully, to further their cause."[2] The administration of law and justice is a matter of vital importance to any civilized society. The machinery by which law is enforced has been crystallized by centuries of wisdom and experience. The Bench and the Bar, in this behalf, constitute one unit and each is the complement of the other. The relationship between the Bench and the Bar called for a balanced exercise patience and reasonable indulgence. It is a relationship which must be tempered by tolerance and restraint which the wisdom of experience teaches us. It is observed in Re Tofazzal Hossain that "lawyers are expected to show due respect to a Court and the Court, on its part is required to be reasonably indulgent to a lawyer and to exercise such caution and patience as are calculated to promote the calm and unruffled climate of a Court of law".[3] The Judiciary cannot be expected to play its due role unless the lawyers come forward with crusading zeal to extend your unflinching co-operation with able assistance and co-operation to the court. Simultaneously, it is a historical fact that "there is no alternative of Bar to appraise and judge the Bench.[4]

Expectation from the Judiciary

The courts have right to exist and function as an institution only if they can enjoy public confidence. The public can have confidence on courts only if the process of resolving the dispute is fair, impartial, expedient, efficient and the judges are honest and upright having independence of mind.[5] In a democratic polity like ours, the judiciary plays a vital role. Today, the judiciary is called upon to enforce the fundamental rights and basic human rights of the poor and deprived section of

---

[2] Aziza Khatun vs State 19 DLR 1967.

[3] Tofazzal Hossain vs. Prov. of East Pakistan 19 DLR 1967.

[4]See, farewell addresses by outgoing Chief justice Mr. Justice K. M Hasan on 24.0.2004 on the eve of his retirement in Court Room No.1, "Search of justice, rule of law and independence of judiciary- guiding principles", BLD Journal p.26.

[5] M. A. Mutaleb, Advocate (Mymensingh), "Public Accountability of Judges"p.25

the people and this new development has made the judiciary a more dynamic and important institution of the State than ever before. The Judiciary is the last resort for obtaining redress of one's grievances whereof lawyer is prima facie entrusted with lives and properties of the individual. 170 millions people of Bangladesh nourish the dream of judiciary with justice seems to be manifestly done, speedy disposal with quality, accountability, transparency and cost effective which would be devoid of corruption, undue influence, profligacy, rampancy of illegal money/ bribe, unnecessary delay, pettifoggers, humiliation of humanity and crying of the illegally deprived. But the pertinent question is to what extent judiciary is avail of retaining public confidence as it is usually said in folk lore "lodge a case in court if you want to ruin some one."

The judiciary is one of the institutions on which rests the noble edifice of democracy and the rule of law. It is the judiciary that is entrusted with the task of keeping every organ of the state within the limits of the power conferred upon it by the Constitution and the laws. In democratic polity governed by the rule of law the judiciary stands as a bulwark against abuse or misuse or excess of power on the part of the citizen against Government lawlessness.[6] Law is for the people, the poor, the uneducated, the disadvantaged, farmers, factory workers, women and children. Justice must be accessible to all, particularly the poor, the disadvantaged and women.[7] The judges have to be of stern stuff and tough fiber unbending before power, economic or political, and they must uphold the core principle of the rule of law which says: "Be you every so high, the law is above you". This is the principle of the independence of the judiciary which is vital of the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community.[8]

Qualities and responsibilities of judicial officer

It is quite difficult and challenging to draw a stereotypical parallelogram of qualities of a good judge/justice as it varies in multitudes of time, place and circumstances. But from time immemorial in the zigzag path of justice in human civilization, we discover some common parlance to appraise the qualities of a good judge. In the Holy Quran the doctrine of Justice has been vigorously stressed.

---

[6] M Habibur Rahman, Professor of law, Rajshahi University "March to Rule of Law through the judiciary" 48 DLR(1996)Journal p.7

[7] Chief justice Latifur Rahman, "Bar Council is to see corrupt people do not crowd the Bar",53 DLR(2001)p.22

[8] Professor Dr M Habibur Rahman, "Democracy, Rule of Law and Accountability"53 DLR(2001) p.5

Article 2.02 of the Universal Declaration of the Independence of justice[9] reaffirmed this universal principle as follows: Judges individually shall be free, and it shall be their duty to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

The Judges exercise the judicial power on trust. Normally when one sits in the seat of justice one is expected to be honest, trustworthy, truthful and a highly responsible person.

The public perception of a Judge is very important as Marshal, Chief Justice of the United States Supreme Court said, " we must never forget that the only real source of power we as judges can tap is the respect of the people. " It is undeniable that the Courts are acting for the people who have reposed confidence in them. That is why Lord Denning said, "Justice is rooted in confidence, and confidence is destroyed when the right-minded go away thinking that the Judge is biased".

More than any one else, a judge is a responsible person. His first accountability is, of course, to his own conscience. But that in itself is not enough, because conscience is not always invulnerable. What is also needed is accountability to the constitution, which, in reality, means accountability to public opinion, for the constitution is the ultimate analysis an embodiment of public opinion prevailing in a country. Lord Denning aptly said, "Every Judge, in a sense, is on trial to see that he does his job honestly and properly." An independent Judge must remain immune from political controversies. Today, Judges have got judicial immunity subject to correction of their judgment in appeal and revision. This doctrine of absolute judicial immunity has become entrenched in the common law world, yet, the Judges are accountable to conscience, to good sense and to the people at large. Justice Pn Bagawati, Chief Justice of India, reminds the Judges that to perpetuate an error is no heroism. To rectify is the compulsion of judicial conscience. In order to purify the character of Judges and making the life disciplined he has asked the Judges to recollect the inspiring words of Justice Bronson who has stated- "A Judge ought to be wise enough to know that he is fallible and there fore, ever ready to learn; great and honest enough to discard all mere pride of opinion, and follow truth wherever it may lead, and courageous enough to acknowledge his errors". It is the duty of the Judge to know how to use his knowledge in the dispensation of justice and how to apply the law to change ever

---

[9]Adopted at 1st World Conference of the independence of Justice held at Montreal on 10 June, 1983

changing conditions, the never-changing principle of freedom. Now quoting from Baconís Essay of Judicature "Judge ought to be more learned than witty, more reverend than plausible and more advised than confident. "Above all things, integrity is their portion and proper virtue. Moreover, patience and gravity of hearing is also an essential part of justice, and an over speaking Judge is known as well tuned cymbal. It is the duty of the entire Judge to follow the law who cannot do anything whatever he likes. In the language of Benjamin N. Cardozo: "The Judge even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles." In ancient period the King was the source of justice. A strict code of judicial conduct was enjoined on the King. He was required to decide cases in the courtroom, his dress and demeanor were to be such not to over-awe the suitors or the accused. The King had to take oath of impartiality and to decide the cases without bias or attachment. On the importance of the judicial rode and preservation of mental equilibrium, the ancient Jurist Manu says "Having occupied the chair of justice with his body well- attired and mind composed, the Judges shall salute the guardian of deity (chair of justice) and then proceed with the trial. In the language of Katyan, the famous ancient Jurist, "a Judge should be austere and restrained, impartial in temperament, steadfast, God-fearing, assiduous in his duties, free from anger, leading righteous life and of good family." A judge as an individual must maintain the principle of judicial independence and dispose of a case with the principle of fair play. The main feature of the judicial function is to provide judicial independence. This impartiality in the context of judicial independence means freedom of the judges to decide matters before them in accordance with their impartial assessment of the facts and their understanding of the law without improper influence of any quarters, direct or indirect, visible or invisible. In all acts of judgment, the Judges should be transparent so that not only the lawyers but also the litigants can easily predict the outcome of a case. Transparency and predictability are essential for the judiciary as an institution of public credibility. After all, the judiciary is manned by human begins living in an orderly society. Setting aside his personal inclinations and prejudices, he must endeavor to achieve as much objectivity, as he can. Delay in pronouncement of judgment can also become a cause of suspicion in the mind of a litigant and, as such, inordinate delay in delivering judgment must be avoided lack of transparency of activities of a Judge may give rise to doubts and misgivings in the mind of a litigant. A Judge should not show favor to any particular lawyer. The judge is "the pillar of our entire justice system," and the public has a right to demand "virtually irreproachable conduct from anyone performing a judicial function". Judges must strive for the highest

standards of integrity in both their professional and personal lives. They should be knowledgeable about the law, willing to undertake in-depth legal research, and able to write decisions that are clear and cogent. Their judgment should be sound and they should be able to make informed decisions that will stand up to close scrutiny. Judges should be fair and open-minded, and should appear to be fair and open-minded. They should be good listeners but should be able, when required, to ask questions that get to the heart of the issue before the court. They should be courteous in the courtroom but firm when it is necessary to rein in a rambling lawyer, a disrespectful litigant or an unruly spectator. Finally it could be wrapped by saying that a good judge should possess the following qualities-

- Integrity - honest, upright and committed to the rule of law.
- Professional competence - keen intellect, extensive legal knowledge and strong writing abilities.
- Judicial temperament - neutral, decisive, respectful and composed.
- Experience - strong record of professional excellence.
- Service - committed to public service and the administration of justice.

Noble and solemn duties of lawyer

Advocacy is an art of persuasion. The skill is to be acquired consistently by a preparation through study of the relevant law coupled with marshalling of facts towards an accurate perception for an onward neat presentation in the Court of law. According to Justice Amirul Kabir Chowdhury "An Advocate should be by nature a gentleman first and a gentleman last, just to be fit nay, quite befitting in the Profession but the contrary may be undoing for him to prove him to be a misfit.[10]

As a social engineer and reformer, the Lawyer's duties to the court, to other lawyers and to the society at large are very important and unparallel. In below, it would be tried to sketch out some of the core and rudimentary aspect of vertical and horizontal matrix of lawyer's duties and responsibilities. Such as---

1. A lawyer should act in a manner consistent with the fair, efficient and humane system of justice and treat all participants in the legal process in a civil, professional and courteous manner at all times. These principles apply to the lawyer's conduct in the courtroom, in office practice and in the course of litigation.

---

[10] Justice Amirul Kabir Chowdhury to the felicitation accorded to him on 29.02.2004 at Court Room No. 1 on the occasion of his elevation to the Appellate Division of the Supreme Court of Bangladesh, BLD, Journal P.32

2. A lawyer should speak and write in a civil and respectful manner in all communications with the court, court personnel, and other lawyers.

3. A lawyer should not engage in any conduct that diminishes the dignity or decorum of the courtroom.

4. A lawyer should advise clients and witnesses of the proper dress and conduct expected of them when appearing in court and should, to the best of his or her ability, prevent clients and witnesses from creating disorder and disruption in the courtroom.

5. A lawyer should abstain from making disparaging personal remarks or engaging in acrimonious speech or conduct toward opposing counsel or any participants in the legal process and shall treat everyone involved with fair consideration.

6. A lawyer should not bring the profession into disrepute by making unfounded accusations of impropriety or personal attacks upon counsel and, absent good cause, should not attribute improper motive or conduct to other counsel.

7. A lawyer should refrain from acting upon or manifesting racial, gender or other bias or prejudice toward any participant in the legal process.

8. A lawyer should not misrepresent, mischaracterize, misquote or miscite facts or authorities in any oral or written communication to the court.

9. A lawyer should be punctual and prepared for all court appearances.

10. A lawyer should avoid ex parte communications with the court, including the judge's staff, on pending matters in person, by telephone or in letters and other forms of written communication unless authorized. Communication with the judge on any matter pending before the judge, without notice to opposing counsel, is strictly prohibited.

11. A lawyer should be considerate of the time constraints and pressures on the court in the court's effort to administer justice and make every effort to comply with schedules set by the court.

12. A lawyer, when in the courtroom, should make all remarks only to the judge and never to opposing counsel. When in the courtroom a lawyer should refer to opposing counsel by surname preceded by the preferred title (Mr., Mrs., Ms. or Miss) or the professional title of attorney or counselor.

13. A lawyer should show respect for the court by proper demeanor and decorum. In the courtroom a lawyer should address the judge as "Your Honor" or "the Court" or by other formal designation. A lawyer should begin an argument by saying "May it please the court" and identify himself/herself, the firm and the client.

14. A lawyer should deliver to all counsel involved in a proceeding any written communication that a lawyer sends to the court. Said copies should be delivered at substantially the same time and by the same means as the written communication to the court.

15. A lawyer should attempt to verify the availability of necessary participants and witnesses before hearing and trial dates are set or, if that is not feasible, immediately after such dates have been set and promptly notify the court of any anticipated problems.

16. A lawyer should understand that court personnel are an integral part of the justice system and should treat them with courtesy and respect at all times.

17. A lawyer should demonstrate respect for other lawyers, which requires that counsel be punctual in meeting appointments with other lawyers and considerate of the schedules of other participants in the legal process; adhere to commitments, whether made orally or in writing; and respond promptly to communications from other lawyers.

18. A lawyer should strive to protect the dignity and independence of the judiciary, particularly from unjust criticism and attack.

19. A lawyer should be cognizant of the standing of the legal profession and should bring these principles to the attention of other lawyers when appropriate.

20. Lawyers should speak and write civilly and respectfully in all communications with the court and court personnel.

21. Lawyers should use their best efforts to dissuade clients and witnesses from causing disorder or disruption in the courtroom.

22. Lawyers should not engage in conduct intended primarily to harass or humiliate witnesses.

23. Lawyers should be punctual and prepared for all court appearances; if delayed, the lawyer should notify the court and counsel whenever possible.

The role of lawyers is not confined to courts alone or advising clients in business deals. It extends to being an integral part of our system of administration of justice, and justice not just in the legal sense but justice that's social, economic and political as set out in the preamble of our Constitution.

Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders[11] specifically stated the Duties and responsibilities of lawyers in the following Articles --

---

[11] Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990)

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

13. The duties of lawyers towards their clients shall include:

(a) Advising clients as to their legal rights and obligations and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;

(b) Assisting clients in every appropriate way, and taking legal action to protect their interests;

(c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.

14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

15. Lawyers shall always loyally respect the interests of their clients.

Challenges between Bar and bench

The increasing gap between judges and lawyers is obviously weakening the whole institution of justice. This mammoth communication gap between the Bar and the Bench while there is no formal and informal steps to minimize the misunderstandings. It is very unpleasant, nowadays due to improper advice and inefficient performance of the members of the bar particularly the new comers who having not been attached with a senior counsel for a required period and properly trained up start independent practice, the sufferings of the litigant people have ineffably been increased. Deliberations in our Courts marred and frayed by temper and loss of patience on either side is an unfortunate recent development happily confined to a few, but the odor it spreads bears an alarming message for the future generation of lawyers and judges. Increasing corrupt practices and abuse of judicial safeguard by judges are accusations made by lawyers. Judges are still adamant to recognize that there is corruption in the judiciary.

Vested, partisan, unjustified and malicious criticism about the court by the vested group will melt down and disparage the image of whole judiciary culminated in distrust on it and frustration of justice. The culture of strike or boycotting of courts is a daily menace and this is antithesis to practice in the court, and is a professional misconduct. There is mammoth communication gap between the Bar and the Bench while there are no formal and informal steps to minimize the misunderstanding.

When delay becomes the order of the day, the public will lose confidence. Justice Kemaluddin Hossain rightly observed that "The formidable criticism against common law system is that its procedure is dilatory and expensive."[12] People begin to resort to extra-legal methods of resolving their problems. Then, the value of the legal system comes down. Confidence in the law is the foundation of an effective legal system. When that confidence is eroded by delays the very structure of law is in danger. Eventually, it may destroy the system itself. It is also often said justice delayed is justice denied.[13] Today, the political atmosphere outside is not very congenial for the growth of democracy and the effect of that is gradually corroding the Court arena which indeed is a very unhappy thing to happen.[14] The use or abuse of procedural delay depends upon how the Bench and the Bar behave. An earnest desire on the part of both with an understanding, will curtail the procedural delays. It is abuse that causes delay. So, all the blame of delay cannot be imposed at the door of procedure or the lawyers. In most of the countries inadequacy of the number of judges is the chief cause of accumulation and delay. The problem of delay, though endemic, is not incurable.[15] Legal education in Bangladesh has been experiencing a downward trend for a long time. Are our law schools ready to meet the emerging demand at all? We have been producing a large number of law graduates every year. But the majority of them are under-qualified or non-qualified in terms of their legal knowledge and skills in research, analysis, language, and presentation.

In many cases, the Bar Associations are ruled by 'numbers' not 'wisdom, learning and experience', resulting in a highly political bar. They are ruled by loud and half-baked lawyers from spurious law colleges who are not trained to develop respect for the Rule of Law principles and prevent the real Bar members to vote for the right decisions. The role of the Bar is not perceived to be central in the legal system and the tendency is to focus on the judiciary as keepers of the legal system, which can provide solutions to problems in court administration, delays, corruption and legal reform.

The Bar has failed to function as a guardian of the legal system and is rather seen to exist to protect the interest of the lawyer community only. Law is being treated merely as yet another lucrative career.

The insufficiencies in our professional code of ethics fail to meet the demands of the complexities of today's profession. Deliberations on issues of ethics are

---

[12] Mr. Justice Kemaluddin Hossain, "Independent judiciary in developing countries," BLD 1981, V.1, p.5.

[13] Justice Latifur Rahman, "Legal professioní48 DLR (1996)Journal p.6

[14] Supra, note 8.

[15] Supra, note 13.

negligent at the Bar. Often, we indulge in farcical enquiries, secret enquiry reports and silly excuses for inaction against allegations of corruption in our failure to adopt a zero-tolerance-to-corruption attitude.

We do not have a grievance redressal mechanism to deal with Bar and Bench issues. When a judge suffers from too much of 'Robe-itis' (as the Americans call it) we have no mechanism to let him know that it is affecting the litigant and adding to the pressures of the justice delivery system. The result of the lack of a mechanism for a constructive dialogue between the Bar and the Bench is that different Bar Associations call for boycotts of courts as their default method of negotiation.

Getting a law degree is one of the easiest things in our country. There are several spurious colleges that do not test for eligibility, do not insist on attendance, have no library or infrastructure and worse, hardly have any teachers. The Bar does not have an entry level exam to maintain minimum standards of knowledge or ethics in the profession. Courts. The Bar does not have institutionalised post-qualification learning programs to expose lawyers to new developments in law or the use of technology to improve efficiencies. We do not have a category of lawyers in research and development of legal thought and policy.

Improper or intemperate criticism of judges stemming from dissatisfaction with the decision given by them, constitutes a serious inroad into the independence of the judiciary and whatever be the form or shape which such criticism takes, it has the inevitable effect of eroding or even corroding the independence of the judiciary: Adverse publicity embarrassing accusations in public and populist pressure to deflect the judiciary from its appointed role are the factors which we must recognize and proclaim, which affect the impartiality and independence of judges. Each attack on a judge for a decision given by him, not by pointing out legal infirmity but imputing an imputation of motive, is an attack on the independence of the judiciary because it represents an attempt on the part of those who indulge in such criticism to coerce judicial conformity with their own preconceptions and thereby influence the decision- making process.[16]

Recommendations

It is classical truth that that judges and lawyers can do an outstanding job and protect the interest of not only of the high and mighty but also of the most poor, the most deprived and the most down trodden.[17] There has to be mutuality of trust

---

[16]Supra, note 9.

[17]Khondaker Md. Abu Bakar, "Separation of the judiciary: a landmark achievement"12 MLR2007 (journal), p.26.

and respect between the bar and the bench otherwise the judiciary can not exercise effectively. The judges and lawyers should always remain united to maintain the sanctity of the courts and should not be divided for any sort of political affiliation when they are engaged in the process of dispensation of justice and put best of their efforts in raising the standard and quality of judicial performance and overall the justice delivery system through dedications and commitments so that the noble profession is not tainted and the Supreme Court does not turn into a den of politics and controversies. By all means the prestige and honour of the courts from top to bottom must be preserved, protected and enhanced commanding the trust and confidence of the people in the days ahead for which the lawyers and judges must work together in harmony and cooperation.[18] It is its duty to see to it that inefficient and corrupt people do not crowd the Bar to the detriment of the judicial system.[19]

The Bar should consider building a 'citizens' lawyer' initiative within each Bar Association to encourage lawyers to stay engaged with community needs and movements. Involve young lawyers in such initiatives to raise the consciousness and sensibilities of the Bar. Young lawyers are full of spirit and ability. Only thing they need is to know how to unlock the ability and use then for the advancement of their profession. A little help from the bench will provide them with insight in law and take them a long way.[20]

The regulatory functions of the Bar need greater visibility for adoption of stringent disciplinary norms and proactive measures, in the absence of which even good lawyers are being touted as 'hooligans'. Asad Hossain Chowdhury rightly observed that "In the days of sophistication, the introduction of computer in the Bar Library of the Supreme Court of Bangladesh is a must through catching on the facility of the Interned System."[21]

In fact, it is an independent Bar that can greatly contribute to the independence of the judiciary. And democracy cannot successfully function in any country if the Bench and Bar are subservient to the Executive. Both are responsibly for protecting the Constitution. The lawyers have to perform the main function in this connection as their area of activities is much wider than that of the judges. Justice Latifur Rahman opined that "the lawyers have a great burden to discharge; and

---

[18] Ibid, note 18, p2.

[19] Supra, note 8.

[20] Mr. Justice K. M Hasan on 24.0.2004 on the eve of his retirement in Court Room No.1, "Search of justice, rule of law and independence of judiciary- guiding principles", BLD Journal p.25-26.

[21] Asad Hossain Chowdhury,Advocate, Supreme Court,Computer & the Legal profession,48 DLR (1996) Journal p.13

every fresh entrant into the profession must also be prepared (in addition to his routine Court work) to perform this dignified role."[22]

The judges are certainly, accountable but they are accountable to their conscience and people's confidence. As observed by Lord Atkin: "Justice is not a cloistered virtue and she must be allowed to suffer the criticism and respectful, though outspoken, comments of ordinary men."

We need far more elaborate codes of ethics to raise our collective consciousness against unethical practices or violations of professional responsibility. Since the main thrust of the legal profession is learning, there should be opportunities for post-qualification 'organised learning'. Lawyers and judges also can benefit from participating together in mentoring efforts for newer lawyers. With the increasing specialization of law practices, many lawyers have little contact with those who practice in different subject areas. By joining with judges in small, informal group settings, such as lunches or workshops, lawyers and judges can enjoy one another's company and advance the professional skills of our newer lawyers. One by one, these personal relationships that are established will add to the collective strength of our profession. The exposure of judges to public opinion through the normal means of communication such as press articles, demonstrations or parliamentary questions and debate should not be viewed with a hostile eye in terms of social cost benefit analysis.[23] The court has also a reciprocal duty to perform and should not only not be discourteous to a lawyer but should also try to maintain respect in the eyes of his clients and the general public with whom he has to deal in his professional capacity. Hypersensitiveness on the one side or rudeness on the other must be avoided at all costs.

Devoid of due role played by bar, civilized existence shall be at stake. The lawyers being part of the Court, in the dispensation of justice, let urge them to thresh out the traditional approach and instead to see sincerely that the cases are really disposed of avoiding the prayers for frequent adjournments and thus strive to wipe out the tears from the eyes of the oppressed. Let us not forget that on the tears and miseries of the oppressed none can build castle of peace or thrive. If we fail, the social fabrics would be at stake.[24]

---

[22] Supra, note 14, Journal p.7.

[23] M. A. Mutaleb, Advocate (Mymensingh), "Public Accountability of Judges"p.27

[24] Supra, note 11, I P.28.

Concluding remarks

In the language of Chief Justice Mr Nasirullah Beg of Allahabad High Court it can be further said that best test for determining the height of civilization in a society is to be found in the extent of honour, respect and regard paid in that society to the Judiciary. It is high time to shift the paradigm of traditional taboo as prevailing between the Bar and Bench for endeavoring to ensure justice for all strata in the society. Our common task should, therefore, be to uphold the rule of law and serve the needs of the people and to voice their aspirations enshrined in the Constitution.[25] Both the Bench and the Bar are the two arms of the same machinery and unless they work harmoniously, justice cannot be properly administered. The need for mutual understanding and respect between the Bench and the Bar was emphasized by many a writer on the subject. Oswald rightly mentioned: "An over subservient Bar would be one of the greatest misfortunes that could happen to the administration of justice."[26] At the same time Warvelle observed: "A lawyer is under obligation to do nothing that shall detract from the dignity of the Court, of which he is himself a sworn officer and assistant. He should at all times pay deferential respect to the Judge, and scrupulously observe the decorum of the court room."[27] When we consider the role of lawyers in the administration of justice, we ought to remember that the profession of law is not a mere trade or business. Following the separation, the Supreme Court will have enormous responsibility to control and supervise the judiciary which presupposes the high expectation of the nation to have a sound judiciary free from corruption and all sorts of aberrations. The judiciary now need to be redesigned in such a manner to be rejuvenated with new pulsating and dynamism ensuring free, fair and speedy dispensation of justice in all the tiers and must be adequately capable to cater to the need of the nation keeping pace with the time.[28] Finally, Legal profession must cherish and nurture, all human values.[29] Let us all work together with the objective of ensuring meaningful, expeditious and inexpensive justice to the people of our country.

---

[25] Mr. justice Bimalendu Bikash Roy Chowdhury "I extend invitation to high ideals" 48 DLR(1996) p.33

[26] Oswald rightly, Contempt of Court, (3rd Edn.) at p. 54

[27] Warvelle, Legal Ethics at p. 182

[28] Supra, note 7.

[29] Supra, note 23.

Combating Corruption in Bangladesh: Towards a Comprehensive Anti-Corruption Legal Regime in Compliance with United Nations Convention against Corruption (UNCAC)

- **Ahmed Ehsanul Kabir**[*]

- **Shuvra Chowdhury**[**]

1. Introduction

"*To give a bribe to a government servant has been considered a usual thing to do in the sub-continent for centuries and it is also extremely difficult to produce independent evidence of the payment of bribe because bribes are always paid secretly. The judges have therefore been asked again and again to relax the rules for the corroboration of the evidence of accomplices in order to ensure that the corrupt do not go unpunished.*"

- Mr. Justice Dorab Patel has remarked in the case of *Zulfiqur Ali Bhutto v. State.*[1]

Corruption is one of the most crucial social problems that developing countries are confronting today. It is plaguing all development efforts and is creating stumbling block to the realization of basic human rights, and has corrosive effects on delivering basic needs to the people in these countries. Corruption undermines good governance, erodes the rule of law and hampers economic growth and efforts for poverty reduction. Moreover, globalization and the changing structure of trade, finance, communications and information has generated an environment in which corruption is no more confined to national boundaries. It has become transnational and international in character.[2] A number of international instruments aimed at preventing and combating corruption have been developed from 1995 onwards.[3] The international anti-corruption instruments contain measures to encourage countries to develop and adopt domestic anti-corruption

---

[*] Lecturer, Department of Law, Stamford University Bangladesh.

[**] Lecturer, Department of Law, Stamford University Bangladesh.

[1] PLD 1979 SC p.419.

[2] Md. Akteruzzaman, "Combating Corruption in Bangladesh: A Legal Study", Mizanur Rahman, ed., *Human Rights and Corruption* (Dhaka: ELCOP, 2007), p.109.

[3] For example, *United Nations Declaration against Corruption and Bribery in International Commercial Transactions*, 1996, *Convention on Combating Bribery of Foreign Public Officials in International Business Transaction*, 1997.

programmes.[4] The most important international development regarding anti-corruption measures occurred when the UN adopted Convention against Corruption in 2003, which is a comprehensive multinational treaty covering anti-corruption strategies. The preamble of the convention recognizes that corruption can pose instability and securities of societies, jeopardise sustainable development, the rule of law, damage to democratic institutions. It also recognises that prevention of corruption is a responsibility of states, with the support of and involvement of individuals and groups outside the public sector, such as civil society, NGOs and community-based organisations. Article 1 of the Convention spells out its purpose in the following words: to promote measures to prevent and combat corruption more efficiently and effectively; to facilitate international cooperation and technical assistance and to promote integrity, accountability and proper management of public affairs and public property. The Convention deals with anti-corruption measures for corruption of both public and private sector and transnational offences such money laundering and corruption in international transaction.[5] The accession to the *United Nations Convention against Corruption (UNCAC)* by the Government of the People's Republic of Bangladesh in February 2007 has been a significant and symbolic step, expressing swift and effective reform measures necessary to promote good governance and fight corruption in compliance with international standards.[6] The UNCAC provides an excellent benchmark for the Government of Bangladesh to advance and measure its progress in fighting corruption. The object of this article is to provide a comprehensive understanding of the current status of Bangladesh's anti-corruption system vis-à-vis compatibility between UNCAC and domestic anti-corruption legal regime. This article also identifies a number of weaknesses with regard to anti-corruption laws, institutions and mechanism where further clarification and modification is necessary. Finally, recommendations are given to take systematic steps toward identifying legislative reforms, strengthening internal capacity needs for effective law enforcement and formulating anti-corruption strategies for the implementation of the UNCAC.

2. Definition of Corruption

Corruption is generally known as evil, some call it cancer and recently it is called

---

[4] Shafiqur Rahman Khan, "International Law against Corruption", Mizanur Rahman, ed., *Human Rights and Corruption*, (Dhaka: ELCOP, 2007), p.24.

[5] Abdullah Al Faruque, "Instrumentalities of Good Governance, Human Rights in Combating Corruption: Perspective of Developing Countries in Human Rights and Good Governance", Mizanur Rahman, ed., *Human Rights and Corruption*, (Dhaka: ELCOP, 2007), p.87.

[6] *UNCAC A Bangladesh Compliance & Gap Analysis*, The Government of the Peopleís Republic of Bangladesh, July 2008, 2nd ed, p.3.

'AIDS of Democracy'.[7] It is not confined to bribery, but can assume a number of other forms such as nepotism, patronage, pillaging of organisational assets, distortion of organisational expenditure, cronyism etc.[8] Corruption is affecting the legitimate rights of the citizens and creating a large gap between rulers and citizens. Defining corruption is not an easy task. The easy and artistic meaning of corruption may be an act against ethics, disobedience of a virtue or sanctity. Professor Robert Cliguard of South Africa gave the definition of corruption on the basis of equation: Corruption = Monopoly + Discretion - Accountability - Salary.[9] From the above quotation it is said that if monopoly and discretionary power of government is increased and on the other hand if there is no accountability and salary is lower standard, the ultimate effect is the promotion of corruption.

Corruption includes moral perversion; impairing of virtue and moral principles; destroying someone's honesty or loyalty, undermining moral integrity, inducement by improper means to violate duty. So, corruption can be defined as 'perversion of power'.[10] In Bangladesh, not only the people of upper socio-economic class are involved in corruption, the people from top to bottom are practicing this vice, so far corruption, bribery and other malpractices are concerned.[11] A person (acting individually or as a member of a group) is said to be engaged in corruption if he i) enjoys any power or position which has been acquired through explicit contract or through solemn promise (stated or implied) in order that by virtue of them he can best protect or advance the goals of those persons or institutions on whose behalf he is required to act, but, ii) deliberately abuses his power or position to advance his personal or parochial interest.[12] In Bangladesh, corruption stands for 'the misuse of public power for private profit'. There are two separate categories of corruption in the public sector: corruption according to rule, i.e. when a public official is receiving private gain illegally for doing something which he or she is required to do by law and corruption against the rule, i.e. when a public official is receiving private gain illegally for doing something which he or she is prohibited for doing.[13] Corruption refers to the exchange activity, process or behaviour which

---

[7] Mohammad Johurul Islam & Syed Sarfaraj Hamid, "Alleviating Corruption in Bangladesh: An Agenda for Good Governance", Mizanur Rahman, ed., *Human Rights and Corruption,* (Dhaka: ELCOP, 2007), p.95.

[8] A. Morgan, "Corruption, Causes, Consequences and Policy Implication: A Literature Review", Working Paper no. 9, *Working Paper Series*, The Asia Foundation, 1998.

[9] Quoted from Mohammad Shamsur Rahman, *Public Administration Theory and Bangladesh Administration*, (in Bengali) (Dhaka: Khan Brothers & Co. 2003), p.621.

[10] B.A Braz, "The Sociology of Corruption", A.J. Heidenheimer, ed., *Political Corruption: Readings in Comparative Analysis,* (New Burnswick, NJ: Transaction Book, 1978), pp.41-45.

[11] Sheikh Hafizur Rahman Karzon, *Theoretical and Applied Criminology,* (Dhaka: ELCOP & Palal Prokashoni, 2008), p.178.

[12] Harendra Kumar Dey, "Crime, Coercion, Corruption and Voluntary Exchange: Conceptual Issues", prepared for Transparency International, Bangladesh, p.2.

[13] Shafiqur Rahman Khan, *ibid,* p.13.

takes place when the public domain comes into contact with private domain.[14] Finally, we can say that the definition of corruption not only includes abuse of authority, bribery, favouritisms, extortion, fraud, patronage, theft, deceit, malfeasance and illegality, but also refers to use of one's official position for personal and group gain and that includes unethical actions like bribery, nepotism, patronage, conflict of interest, divided loyalty, influence-peddling, moonlighting, misuse or stealing of government property, selling of favours, receiving kickbacks, embezzlement, fraud, extortions, misappropriation, under or over invoicing, court tempering, phoney travel and administrative documents and use of regulation as bureaucratic capital.

3. Anti-Corruption Legal Regime in Bangladesh

According to UNCAC, it is the mandatory duty of the state party to develop and implement or maintain effective, coordinated anti-corruption policies that reflect the principles of the rule of law for ensuring integrity, transparency and accountability in the public affairs and public property[15]. In addition to effective policies, state party shall establish effective practices for the prevention of corruption.[16] Periodical evaluation of relevant legal instruments and administrative measures is another essential responsibility of the state party to determine their adequacy to fight with corruption[17]. For promoting and developing the policies and practices, state parties shall collaborate with each other and with relevant international and regional organisations[18].

In Bangladesh, there are number of legislation policies and practices, in particular, the *Anti-Corruption Commission (ACC) Act*, 2004, the *Anti-Corruption Commission Rules,* 2007, and *the Prevention of Corruption Act (PCA),* 1947. There are other laws which also contain important provisions contributing to the anti-corruption legal framework, such as the *Criminal Law (Amendment) Act*, 1958 (XL of 1958) is significant in the anti-corruption regime as it plays a role in the procedural aspects of the Anti-Corruption Commission. The anti-corruption legal system is bolstered by the *Money Laundering Prevention Act*, 2009.

3.1 Constitutional Provisions

Bangladesh Constitution is the solemn expression of the will of the people and it is the supreme law of the country.[19] So, establishing corruption free society is the

---

[14] Almas Zakiuddin, "Corruption in Bangladesh: An Analytical and Sociological Study", prepared for Transparency International, Bangladesh Chapter, p.6.

[15] Article 5(1), *ibid*

[16] Article 5(2), *ibid*

[17] Article 5(3), *ibid*

[18] Article 5(4), *ibid*

[19] Article 7(2), *The Constitution of the Peopleis Republic of Bangladesh*, 1972.

prime concern of this Constitution. The Constitution tells the equal opportunity of its citizens and invites the state to create the scope of work for the people removing social and economic inequality.[20] Simultaneously, the Constitution has given the responsibility to the state for ensuring such conditions that prevents the people to earn unearned income.[21] Side by side the Constitution has imposed the following duties to the citizens as well as the public servants:[22] i) to observe the Constitution and the laws, ii) to maintain discipline, iii) to perform public duties and to protect public property, iv) to strive at all times to serve the people.

3.2 Prevention of Corruption Act (PCA), 1947

The first initiative to prevent bribery and corruption in our country is the *Prevention of Corruption Act (PCA)* 1947[23]. The Preamble of this Act makes it clear that the purpose of this legislation is to provide for the more effective law to eliminate bribery and corruption from amongst the public servants[24]. After Second World War the bribery and corruption of public servants[25] had been enormously increased, as a result Prevention of Corruption Act was enacted to stamp out corrupt practices and possibility of its continuance or extension in future[26]. Section 3 of PCA contains certain offences of bribery and corruption punishable under the *Penal Code,* 1860 and a new offence is created under section 5 of the Act. If a public servant commits or attempts to commit criminal misconduct shall be punished with imprisonment for a term which may extend to Seven years, or with fine, or with both and the pecuniary resources or property to which the criminal misconduct relates may also be confiscated to the state[27]. The corruption of a public servant is termed a 'criminal misconduct' in PCA. A public servant is said to commit the offence of criminal misconduct if he accepts or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification[28] or any valuable thing without consideration or for a consideration which he knows to be inadequate[29], or if he dishonestly or

---

[20] Article 19, *ibid*

[21] Article 20(2), *ibid*

[22] Article 22, *ibid*

[23] *UNCAC A Bangladesh Compliance & Gap Analysis*, The Government of the Peoples Republic of Bangladesh, July 2008, 2nd Edition, p.25

[24] *MLR on Anti-Corruption Laws*, 2nd Edition, p. 97

[25] Section 2 of *the Prevention of Corruption Act*, 1947 provides 'Public Servantí means a Public Servant as defined in Sec.21 of the Penal Code and includes an employee of any Corporation or other body or organisation set up by the Government and includes a Chairman, Vice-Chairman, Member, officer or other employee of a local authority, or a Chairman, Director, Managing Director, Trustee, Member, Officer or other employee of any corporation, or other body or organisation constituted or established under any law.

[26] *The Gazette of India*, 23rd November, 1946, Part V, p.374.

[27] Section 5(2), *Prevention of Corruption Act,* 1947

[28] Section 5(1)(a), *ibid*

[29] Section 5(1)(b), *ibid*

fraudulently misappropriates or otherwise converts any property entrusted to him for his own use[30] or if he by corrupt or illegal means or by otherwise abusing his position as Public servant obtains or attempts to obtain for himself or for any other person any valuable thing or pecuniary advantage[31] or if any his dependents[32] has is in possession of pecuniary resources or of property disproportionate to his known sources of income.

So, in PCA there is a clear guideline and policy to combat corruption practices among government officials. In line with this rich legislative history, the *Anti Corruption Commission Act (ACC)* 2004 was passed to prevent, punish and investigate acts of corruption. In addition it was devised to provide a consolidated framework to prevent corruption and related practices, along with an overall framework both to conduct enquiries and investigations for specific offences and to enact other relevant measures to competition.[33]

3.3 The Criminal Law (Amendment) Act 1958

The *Criminal Law (Amendment) Act* 1958 (XL of 1958) is significant in the anti-corruption regime. The Act contains the procedure of trial of the cases enumerated under its 'Schedule'[34]. The purpose of this Act is to provide for speedy trial and effective punishment through a simplified procedure and certain special rules of evidence. The Government shall, by notification in the official Gazette, appoint as many Special judges as may be necessary to try and punish offences specified in the schedule[35]. A Special judge shall have the qualification to appoint as a judge of the Supreme Court; or is or has been a Sessions Judge or an Additional Sessions Judge or a District magistrate or an Additional District Magistrate and has not retired from Government service or at any time been removed or dismissed from such service.[36] Special Judge shall have exclusive jurisdiction to

---

[30] Section 5(1)(c), *ibid*

[31] Section 5(1)(d), *ibid*

[32] Section 5(1)(e) Explanation provides dependent means wife, children and step-children, parents, sisters and minor brothers residing with and wholly dependent on a public servant, *ibid.*

[33] *UNCAC A Bangladesh Compliance and Gap Analysis*, The Government of Bangladesh, July 2008, 2nd Edition. P. 25

[34] Schedule includes offences under the following laws - (a) Offences punishable under *Anti Corruption Commission Act, 2004 (Act* No. 5 of 2004), (aa) Offences punishable under *Anti-Money Laundering Act*, 2002 (Act No. 7 of 2002), (b) Offences punishable under the *Prevention of Corruption Act,* 1947 (II of 1947), (c) Offences punishable under sections 161-169, 217, 218, 408, 409 and 477A of *the Penal Code* 1860 (XLV of 1860), (d) Abetment described in section 109 including other abetments, conspiracies described in section 120B and attempts described in section 511 of *the Penal Code*, 1860 (XLV of 1860) related to or connected with the offences mentioned in clause (a) to (c) above.

[35] Section 3(1), *The Criminal Law (Amendment) Act,* 1958

[36] Section 3(2), *The Criminal Law (Amendment) Act*, 1958 substituted by *the Criminal Law Amendment (Amendment) Ordinance,* 1987 (Ordinance No. III of 1987)

take cognizance of all offences triable under this Act committed or deemed to have been committed within the territorial limits as fixed by the Government by notification in the official Gazette.[37] When an offence triable under this Act is committed outside Bangladesh, it shall, for the purposes of this Act, be deemed to have been committed within the territorial limits of the jurisdiction of the Special judge in which the person committing the offence is found or was ordinarily residing before he left Bangladesh.[38] A Special Judge may pass any sentence authorised by law, except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years if he is or has been an Assistant Sessions Judge.[39] The provisions of *Code of Criminal Procedure* (V of 1898) shall apply to the proceedings of the Court of a Special Judge in so far as they are not in consistent with this Act.[40] If a Special Judge has reason to believe that an accused person has absconded or in concealing himself so that he cannot be arrested and produced before him for trial, he may, by order notified in the official Gazette, direct such person to appear before him within such period as may be specified in the order, and if such person fails to comply with such direction, he may be tried in his absence.[41]

Presumptions which are to be drawn on the proof of certain facts under section 7 of the *Criminal Law (Amendment) Act*, 1958 are of mandatory nature unless contrary is proved by the accused rebutting such presumption the accused shall be convicted solely on such presumption and the conviction on such presumption will be valid. However, no such presumption shall be drawn in petty matters where no inference of corruption can fairly be made. Trial de novo is barred by this Act. If the Special Judge does not decide otherwise for any special reason, he is not bound to recall, or rehear any witness already examined or re-open the proceedings already held. The Act authorises the Special Judge to proceed with the case from the stage it has already reached on his assumption of the charge thereof.[42] An appeal from the judgement of a Special Judge shall lie to the High Court Division and the same court shall also have powers to revision.[43] The High Court Division shall have the authority to transfer any case from the court of a Special Judge to the court of another Special Judge.[44] Offences triable under this Act shall be deemed to be non-bailable.[45]

[37] Section 4(1) & (2), *The Criminal Law (Amendment) Act*, 1958
[38] Section 4(4), *ibid*
[39] Section 4(5)(a), *ibid*
[40] Section 6(1), *ibid*
[41] Section 6(1A), *ibid*
[42] Section 8, *ibid*
[43] Section 10(1)(1A), *ibid*
[44] Section 10(3), *ibid*
[45] Section 11(1), *ibid*

3.4 The Anti-Corruption Commission Act, 2004

According to UNCAC State Party shall ensure the existence of a body or bodies to prevent corruption by implementing the policies as referred in art. 5 of this Convention.[46] Such body or bodies shall have the responsibility to oversee and coordinate the implementation process of those policies.[47] It is also the duty of anti-corruption body to increase and disseminate knowledge to prevent corruption.[48] State party must grant necessary independence of the body or bodies to carry out it or their functions effectively and free from any undue influence. The body must have necessary material resources and specialised staff. Training should be provided for the staff of such body enable them to carry out their functions efficiently.[49]

In Bangladesh, the *Anti-Corruption Commission Act (ACCA)* 2004 established a Commission which will be known as the Anti-Corruption Commission.[50] The Commission shall be an independent and impartial body which is empower to enforce and implement preventive measures and policies.[51] The principal office of the Commission shall be situated in the capital city of Dhaka[52] and the Commission shall consist of three Commissioners and the President shall appoint one of them as Chairman.[53] The Selection Committee on the basis of decision of at least three members present shall prepare a list of two persons against each post of the commission and send the same to the President with recommendation for appointment.[54] The Commissioners shall be appointed by the President on the recommendation of the Selection Committee and they shall hold their respective office for a period of four years from the date of their appointment.[55]To appoint as a Commissioner, a person must have particular qualifications such as he has at least 20 (twenty) years experience in law, education, administration, judiciary or in disciplined forces.[56] The Act also specified some 'disqualifications'[57] which will

---

[46] Article 6(1), *United Nations Convention against Corruption*, 2003.

[47] Article 6(1)(a), *ibid*

[48] Article 6(1)(b), *ibid*

[49] Article 6(2), *ibid*

[50] Section 3(1), *The Anti-Corruption Commission Act*, 2004

[51] Section 3(2), *ibid*

[52] Section 4, *ibid*

[53] Section 5(1), *ibid*

[54] Section 7(4), *ibid*

[55] Section 6(1), *ibid*

[56] Section 8(1), *ibid*

[57] Section 8(2), *the Anti-Corruption Commission Act, 2004* provides the disqualifications are: a) if a person is not a citizen of Bangladesh; b) has been declared or identified by any bank or any financial institution as defaulter loanee, c) has been declared by the Court as a bankrupt and has not been discharged from the liability, d) has been, on conviction for offence of moral turpitude or corruption, sentenced by court to imprisonment, e) is in the Government service; f) is unable to perform the functions of his office as Commissioner due to physical or mental incapacity; and g) has been imposed major penalty in departmental proceedings.

disable a person to appoint or hold the office of Commissioner of the Anti-corruption Commission. Any Commissioner may resign from his office by sending to the President a written notice of 1 (one) month.[58] A Commissioner shall not be removed from his office except for the grounds and in the manner a judge of the Supreme Court can be removed.[59] The Commissioners shall perform their functions on full time basis.[60] After expiry of the term of 4 (four) years, the Commissioners shall not be eligible for reappointment.[61] According to Sec. 7 of the ACCA, 2004 the Selection Committee shall consist of a Judge of the Appellate Division of the Supreme Court, nominated by the Chief Justice,[62] a Judge of the High Court Division of the Supreme Court nominated by the Chief Justice,[63] Comptroller and Auditor General of Bangladesh,[64] Chairman Public Service Commission[65] and immediate last retired Cabinet Secretary.[66] The quorum of the Selection Committee shall form by the presence of at 4 (four) members.[67]

In compliance with art. 6 of UNCAC the ACC has given the power to appoint staff such as Secretary, number of officers and employees as may be necessary to perform its functions efficiently.[68] The functions of the commission includes the enquiry and investigation of offences and cases filed under the *Anti-Corruption Commission Act* (ACCA), 2004, the *Prevention of Corruption Act (PCA),* 1947, *Money Laundering Prevention Act (MLPA),* 2009, under sections 166-169, 217, 218, 408, 409 and 477A of *the Penal Code,* 1860, offences of abetment, conspiracy, and attempts as defined respectively in section 109, 120B and 511 of the *Penal Code,* 1860 in relation to the offences under ACCA, PCA, MLPA, Penal Code.[69]

The Act empowers the ACC to hold enquiry into allegations of corruption by an aggrieved person,[70] perform function in respect of corruption,[71] review any provisions of any law,[72] and undertake research, prepare plan for prevention of corruption,[73] and submit to the President for their effective implementations, raise

[58] Section 10(1), *ibid*
[59] Section 10(3), *ibid*
[60] Section 6(2), *ibid*
[61] Section 6(4), *ibid*
[62] Section 7(1)(a), *ibid*
[63] Section 7(1)(b), *ibid*
[64] Section 7(1)(c), *ibid*
[65] Section 7(1)(d), *ibid*
[66] Section 7(1)(e), *ibid*
[67] Section 7(5), *ibid*
[68] Section 16(1)(3), *ibid*
[69] Section 17(a)(b) in conjunction with the Schedule, *ibid.*
[70] Section 17(c), *ibid*
[71] Section 17(d), *ibid*
[72] Section 17(e), *ibid*
[73] Section 17(f), *ibid*

awareness and create feeling of honesty and integrity among people with a view to preventing corruption,[74] organise seminar, symposium, workshop etc. on the subjects falling within the functions and duties of the Commission,[75] identify the various causes of corruption in the context of socio-economic conditions of Bangladesh,[76] determine the procedure of enquiry, investigation, filing of cases against corruption,[77] perform any other duty as may be considered necessary for prevention of corruption.[78]

The Act has given special powers to the Commission in matters of enquiry or investigation against corruption.[79] The Commission can exercise these special powers by issuing summons and ensuring attendance of witness and asking questions to witness upon administering oath,[80] detecting and producing any document,[81] taking evidence on oath,[82] calling any public record or copying thereof from any court or office,[83] issuing warrant to witness for interrogation and examination of document[84] and performing any other duties for carrying out the purpose of this Act.[85] The Commission may direct any person to furnish information relevant to enquiry or investigation and the person so directed shall be bound to furnish such information.[86] If any person offers any resistance to a Commissioner or officer duly authorised in the exercise of his power in the above-mentioned situation or wilfully disobeys any direction of the Commission, such act of the person shall be an offence punishable with imprisonment for a term not exceeding 3 (three) years or fine or with both.[87]

The Commission shall have the sole power to investigate the offences mentioned in its schedule[88] but it may, by notification in the official Gazette, empower any of its subordinate officers to investigate the offences,[89] in that case the officer empowered to investigate shall have the powers of an officer-in-charge of a police station in respect of investigation of an offence.[90] The Commissioners also shall

---

[74] Section 17(g), *ibid*
[75] Section 17(h), *ibid*
[76] Section 17(i), *ibid*
[77] Section 17(j), *ibid*
[78] Section 17(k), *ibid*
[79] Section 19, *ibid*
[80] Section 19(1)(a), *ibid*
[81] Section 19(1)(b), *ibid*
[82] Section 19(1)(c), ibid
[83] Section 19(1)(d), *ibid*
[84] Section 19(1)(e), *ibid*
[85] Section 19(1)(f), *ibid*
[86] Section 19(2) *ibid*
[87] Section 19(3) *ibid*
[88] Section 20(1), *ibid*
[89] Section 20(2), *ibid*
[90] Section 20(3), *ibid*

have the powers to investigate into the offences under this Act.[91] An officer of the Commission has special power to arrest a person with the prior approval of the Commission for the purpose of enquiry before lodging any FIR against him if he has reasonable grounds to believe that such person has acquired or is in possession, in his own name or in the name of any other person, of property movable or immovable which is disproportionate to his declared sources of income.[92] The Commissioners shall be independent in the performance of their functions[93] and the commission shall have financial independence to meet up expenditure.[94]

If the Commission on the basis of any information or after necessary investigation is satisfied that a person or any person on his behalf has acquired or is in possession of property disproportionate to his legal sources of income, then the Commission may by order in writing, direct him to submit statement of assets[95] if a person fails to submit written statement or information or submits any books, accounts, record, declaration, return or submits any written statement or information which for sufficient reasons is considered false or baseless, he shall be punishable with imprisonment which may extend to 3 (three) years or with fine or with both.[96] Whoever has in his possession any property, movable or immovable, either in his own name or in the name of any other person on his behalf which there is reason to believe to have been acquired by dishonest means and which is proved to be disproportionate to his known sources of income, shall, if he fails to account for such possession to the satisfaction of the court, he shall be punishable with imprisonment for a term not exceeding 10 (ten) years and not below 3(three) years and with fine, and on such conviction the said property shall be liable to be confiscated.[97] The offences under this Act shall be cognizable and non-bailable.[98] The trial, disposal of appeal in respect of the offences under this Act shall be exclusively triable by the Special Judge in accordance with the provisions of the *Criminal Law Amendment Act,* 1958 (XL of 1958).[99] The Commission shall have under in its own Prosecution Unit consisting of sufficient number of public Prosecutors necessary for conducting the cases to be

[91] Section 20(4), *ibid*

[92] Section 21, ibid, this section has been substituted in place of the former one by *the Anti-Corruption Commission (Amendment) Ordinance,* 2007 (Ord. No. 7 of 2007) with effect from 18th April 2007.

[93] Section 24, ibid

[94] Section 25, *ibid*

[95] Section 26(1), ibid

[96] Section 26(2), *ibid*

[97] Section 27(1), *ibid*

[98] Section 28A, *ibid*

[99] Section 28(1)(2), *ibid*

investigated by the Commission and triable by Special Judge.[100] By this Act Bangladesh Bureau of Anti-Corruption has been abolished and replaced by Anti-corruption commission vesting all the assets, rights, powers and privileges.[101]

3.5 The Anti-Corruption Commission Rules, 2007

The Anti-Corruption Commission Rules, 2007 has made the activities of the sole preventive anti-corruption body of Bangladesh, the ACC, more pro-active to better combat corruption and formulate policies for prevention. Chapter II of the ACC Rules, 2007 deals with the procedure of lodging of complaint, scrutinising the complaint and verification of complaint. Any person may lodge complaint in respect of offences mentioned in the schedule of the ACC Act in the head office, divisional office or in the head office, divisional office or in the district office of the Commission.[102] There shall be no bar to lodge/complaint in the Police Station in respect of offence mentioned in the schedule of the Act, provided that the police station concerned shall upon receipt of the complaint enter it in the Registered and send within 2 working days, the same to the nearest District office for investigation.[103] Complaint received in the head office or in the divisional office of the Commission shall be sent directly to the district office concerned.[104] The principal officer of the district office shall place the complaints in the meeting of the Scrutiny Committee.[105] There shall be one Scrutiny Committee for each district offices of the Commission.[106] Each Scrutiny Committee shall consist of three members, one or more of whom shall be nominated by the Commission from reputedly known honest person of the society and who shall not be officers and employees of the Commission,[107] on such member shall be nominated for a period of three years and may resign his post by letter addressed to the Chairman of the ACC.[108] The Scrutiny Committee shall consider the preliminary supporting materials and information and prepare a list of complaints for which enquiry to be conducted.[109] Such list shall send within 7 (seven) days to the head office of the Commission by the District Office under intimation to the divisional office.[110] The Secretary of the Commission shall within 10 days of the receipt of the list place

---

[100] Section 33(1) &(4), *ibid*
[101] Section 35, *ibid*
[102] Rule 3 sub-rule 1, *Anti-Corruption Commission Rules*, 2007
[103] Rule 4, *ibid*
[104] Rule 3 sub-rule 2, *ibid*
[105] Rule 3 sub-rule 5, *ibid*
[106] Rule 5 sub-rule 2, *ibid*
[107] Rule 5 sub-rule 3, *ibid*
[108] Rule 5 sub-rule 4 & 5, *ibid*
[109] Rule 3 sub-rule 6, *ibid*
[110] Rule 3 sub-rule 7, *ibid*

the complaint before the Commissioner in charge for decision.[111] After approval by the Commission for enquiry, the complaints shall be sent to the officers empowered by the commission with direction for conducting enquiry.[112] The officer in charge shall complete enquiry within fifteen working days from the date of receipt of the order.[113] If the enquiry report can not be submitted within this specified time for any reasonable cause, the officer concerned may apply to the Director in Charge for enquiry for additional time before expiry of the fifteen working days and the Director may extend the time for completion of the enquiry up to fifteen working days, if the application appears to be appropriate.[114] An officer not below the rank of Deputy Director shall be appointed supervisor to supervise the inquiry officer.[115] The inquiry officer shall record briefly the subject of enquiry and shall maintain diary for each case of enquiry on day to day basis.[116] If the Commission or the Commissioner or an officer in-charge is of the opinion that it is necessary to hear the person connected with the complaints the accused person may be given an opportunity to submit his oral or written statement 'personally or accompanied by lawyer in rebuttal of the allegations'[117] within the time specified in the notice.[118] An officer in charge of enquiry and the supervisory officer shall submit detailed report to the Secretary of the commission.[119] The Secretary shall place it before the Commission or the Commission in charge for appraisal.[120]

Chapter IV of the ACC Rules provides investigation[121] procedure, which is very much similar to the enquiry procedure as discussed earlier but here the investigation officer will get 45 (Forty five) working days for investigation and submit investigation report. Investigation procedure includes the following

---

[111] Rule 3 sub-rule 8, *ibid*

[112] Section 2(a) defines enquiry as 'enquiry' means an enquiry conducted by the Commission or person empowered by it with a view to ascertaining the prima-facie truth of the complaint upon receipt thereof or being aware of it, in respect of an offence specified in the schedule of the Act before acceptance and recording the same for investigation by the Commission, *ibid.*

[113] Rule 7 sub-rule 1, *ibid*

[114] Rule 7 sub-rule 2, *ibid*

[115] Rule 7 sub-rule 3, *ibid*

[116] Rule 7 sub-rule 7, *ibid*

[117] Rule 8 sub-rule 2, *ibid*

[118] Rule 8 sub-rule 1, *ibid*

[119] Rule 9 sub-rule 1, *ibid*

[120] Rule 9 sub-rule 2, *ibid*

[121] Rule 2(g) defines investigation as 'investigation' means the investigation proceedings conducted by the Commission or any person empowered by it for the purpose of collecting evidences after acceptance and recording the complaint in a police station or in an office of the Anti-corruption Commission in respect of Commission of offence by any person under section 154 of the Code of Criminal Procedure or in Form - I of the schedule of these Rules for filing the case in the competent court for trial, *ibid*

headings: completion of investigation and submission of report,[122] hearing the accused during investigation,[123] submission of monthly report on investigation.[124]

Chapter V deals with sanction of the Commission to file case for trial in the court and empowering the Commission to conduct the trap operation. To file case with recommendation for trial in the court of competent jurisdiction against any person in respect of an offence specified in the schedule of the Act, after having the allegation found established on conclusion of investigation, it shall be necessary to obtain sanction of the Commission or the Commissioner in charge.[125] The Court shall not take cognizance of the offence for trial if copy of the sanction of the Commission or the Commissioner as the case may be, is not filed in the Court as evidence of sanction.[126] No complaint in respect of an offence specified in the schedule of the Act, shall be filed directly in the court by any person.[127] Provided the court if satisfied that the complaint approached the Commission or any of its office or police station but failed to get the complaint accepted, then it may accept the complaint and direct the Commission for investigation of the case. Rule 16 empowers the Commission in charge for the purpose to catch hold red handed any person or persons connected with the offences specified in the schedule of the Act. Rule 8 provides the concerned Commissioner or the officer may apply to the court of Special Judge having jurisdiction for permission to freeze or for attachment of the movable or immovable property acquired dishonestly disproportionate to the known sources of income and if the Court accords permission, the said properties shall be freezed or attached accordingly. The transfer of such property by sale or otherwise shall be illegal and void.[128]

3.6 The Money Laundering Prevention Act, 2009

The *Money Laundering Prevention Act*, 2009 contains important provisions which enrich the anti-corruption legal regime. Money laundering means by committing predicate offences after attaining money or property to make it conceal transferring, converting, sending to foreign country or bringing into Bangladesh from foreign country or to send money to foreign country which earned either by legal or illegal means.[129] Attempt or assist to money laundering is similar type of offence.[130] Predicate offences under this Act include corruption and bribery[131],

[122] Rule 10, *ibid*
[123] Rule 11, *ibid*
[124] Rule 12, *ibid*
[125] Rule 13 sub-rule 1, *ibid*
[126] Rule 13 sub-rule 2, *ibid*
[127] Rule 13 sub-rule 3, *ibid*
[128] Rule 18 sub-rule 2, *ibid.*
[129] Section 2(k)(a), *The Money Laundering Prevention Act*, 2009
[130] Section 2(k)(c), *ibid*
[131] Section 2(p)(1), *ibid*

forgery of currencies and documents,[132] extortion,[133] fraud,[134] cheating,[135] dealing in illegal arms and drug,[136] smuggling,[137] kidnapping and abduction,[138] murder and grievous injury,[139] trafficking women and children,[140] forgery of foreign currency,[141] larceny or robbery or dacoit,[142] illegal migration,[143] dowry[144]. Moreover, this Act allows the Government of Bangladesh to sign memorandum of understanding, bilateral or multilateral treaty, and convention with foreign countries in accordance with International law by which they can seek necessary information and help to prevent an offence relating to money laundering.[145] The court has power to freeze or attach property of an accused person under the *Money Laundering Prevention Act*.[146] The Court has also the jurisdiction to confiscate the property of a person who has been convicted for committing money laundering.[147] To prevent and suppress money laundering Bangladesh Bank will have responsibility to monitor all suspicious transaction and collect report from Bank, Economic Institution, Insurance Company, Money Changer, Money Transferring Company regarding suspicious transaction.[148] If there is sufficient reason to believe that money deposited in the account of person by committing predicate offence for money laundering then the Bangladesh Bank will order to postpone or stop transaction for thirty days in that particular account.[149] In addition to the above mentioned procedures, to fulfil the purpose of this Act, Bangladesh Bank will establish Financial Intelligence Unit (FIU) to collect information regarding suspicious transaction and to seek information from other countries.[150]

The Government of Bangladesh is in the process of formulating a National Integrity Strategy (NIS) with the participation of a wide range of stakeholders. A NIS is a comprehensive system to initiate realistic efforts in combating corruption

---

[132] Section 2(p)(2) & (3), *ibid*
[133] Section 2(p)(4), *ibid*
[134] Section 2(p)(5), *ibid*
[135] Section 2(p)(6), *ibid*
[136] Section 2(p)(7), *ibid*
[137] Section 2(p)(8), *ibid*
[138] Section 2(p)(9), *ibid*
[139] Section 2(p)(10), *ibid*
[140] Section 2(p)(11), *ibid*
[141] Section 2(p)(12), *ibid*
[142] Section 2(p)(13), *ibid*
[143] Section 2(p)(14), *ibid*
[144] Section 2(p)(15), *ibid*
[145] Section 26(1) & (2), *The Money Laundering Prevention Act*, 2009
[146] Section 14, *ibid*
[147] Section 17(1), *ibid*
[148] Section 23(1)(a), *ibid*
[149] Section 23(1)(b)(c), *ibid*
[150] Section 24(1) & (2), *ibid*

holistically and improve the overall governance situation in the country. Furthermore, the development and implementation of a NIS aids in compliance of Article 5 of UNCAC as it envisages a broad framework for promoting and creating preventive anti-corruption measures and practices in Bangladesh, along with fostering accelerated participation from all sectors of society. NIS will offer a vision for the development and implementation of reforms to promote better governance and combat corruption in Bangladesh. The NIS will highlight the need for public and private sector changes involve public awareness campaign and seek international cooperation. Additionally, the NIS will seek to strengthen internal controls in state owned institutions and aims to induce a cultural shift by encouraging the adoption of citizen-owned accountability mechanism in Bangladesh.[151]

4. Compatibility between UNCAC and Domestic Anti-Corruption Laws

Prevention and eradication of corruption require a comprehensive and multidisciplinary approach. Chapter II of the UNCAC obligates States Parties to criminalise a wide range of acts of corruption (articles 15-27, UNCAC) and to establish a series of procedural measures and mechanisms that support such criminalisation (articles 28-41, UNCAC). Some of these obligations are mandatory while others are non-mandatory. When attributing mandatory obligations to the States Parties, the UNCAC uses the terms "shall adopt", "shall establish", etc. On the other hand, in respect to non-mandatory obligations, the UNCAC uses the terms "shall consider adopting", "may adopt", etc. The UNCAC emphasis on criminalisation and law enforcement indicated that these are essential areas for action in order for Bangladesh to effectively fight corruption.

4.1 Criminalisation of Offences

4.1.1 Bribery

Under articles 15, 16 & 21 of UNCAC obligates States parties to criminalise certain acts of bribery. These are active bribery of national public officials,[152] passive bribery of national public officials,[153] and active bribery of foreign public officials and officials of public international organisations.[154] Criminalisation of these acts is mandatory on the part of a State Party. The UNCAC also requires States Parties to consider criminalization of passive bribery of foreign public

---

[151] *UNCAC A Bangladesh Compliance & Gap Analysis*, The Government of Bangladesh, 2nd Edition, July 2008, p.26

[152] Article 15(a), *United Nations Convention against Corruption*, 2003.

[153] Article 15(b), *ibid*

[154] Article 16.1, *ibid*

officials and officials of public international organisations,[155] active bribery in the private sector,[156] and passive bribery in the private sector.[157]

In Bangladesh, the *Penal Code*, 1860 criminalizes the act of "taking by a public servant of any gratification other than legal remuneration in respect of an official act"[158] the act of "obtaining by a public servant of any valuable thing without consideration from person concerned in proceeding or business transacted by such public servant",[159] and any abetment, i.e., instigating or aiding, by any person of any such taking or obtaining.[160] Moreover, according to the Prevention of Corruption Act, 1947, the act of "accepting or obtaining by a public servant of any gratification other than legal remuneration in respect of an official act,"[161] and the act of "accepting or obtaining by a public servant of any valuable thing without consideration from a person concerned in proceedings or business transacted by such public servant"[162] amount to punishable criminal misconduct. These penal provisions adequately address the UNCAC requirements regarding active and passive bribery of national public officials.

However, there is no domestic law categorically criminalizing active bribery of foreign public officials and officials of public international organisations as required by article 16, paragraph 1 of the UNCAC. Moreover, so far as passive bribery of foreign public officials and officials of public international organisations and bribery (active or passive) in the private sector are concerned, the UNCAC standard is yet to be translated into the domestic laws of Bangladesh.

4.1.2 Embezzlement, misappropriation or other diversion of property

Under articles 17 & 22 provide States Parties have a mandatory obligation to criminalise embezzlement, misappropriation or other diversion of property by a public official[163] and a non-mandatory obligation to criminalize embezzlement of property in the private sector.[164]

Regarding "embezzlement, misappropriation or other diversion of property by a public official", the domestic standards are quite compatible with the UNCAC standard. The Penal Code, 1860 criminalizes the acts of "dishonest

[155] Article 16.2, *ibid*
[156] Article 21(a), *ibid*
[157] Article 21(b), *ibid*
[158] Section 161, *The Penal Code*, 1860
[159] Section 165, *ibid*
[160] Section 165A, *ibid*
[161] Section 5(1)(a), *The Prevention of Corruption Act*, 1947
[162] Section 5(1)(b), *ibid*
[163] Article 17, *United Nations Convention against Corruption*, 2003.
[164] Article 22, *ibid*

misappropriation of property"[165] and "criminal breach of trust by a public servant"[166]. These offences, as their definitions indicate, include embezzlement, misappropriation or other diversion of property by a public official. Moreover, according to the *Prevention of Corruption Act,* 1947, the act of "dishonest or fraudulent misappropriation or conversion by a public servant for his own use of any property entrusted to him or under his control as a public servant or allowing any other person so to do" is punishable criminal misconduct.[167] On the other hand, definitions of the offences of dishonest misappropriation of property[168] and criminal breach of trust[169] as criminalised by the *Penal Code*, 1860, include embezzlement of property by a person directing or working in a private sector entity. Accordingly, embezzlement of property in the private sector is also punishable under the penal laws of Bangladesh.

4.1.3 Trading in influence

The UNCAC prescribes that states Parties consider criminalization of active as well as passive trading in influence.[170] In Bangladesh, the Penal Code, 1860, criminalizes the act of "taking gratification in order to influence a public servant by corrupt or illegal means",[171] the act of "taking gratification for exercise of personal influence with a public servant",[172] the act of "obtaining by a public servant of a valuable thing without consideration from a person concerned in proceedings or business transacted by such public servant"[173] or any abetment, i.e., instigating or aiding, of any of these offences.[174] Moreover, according to the *Prevention of Corruption Act*, 1947, the act of "accepting or obtaining, by a public servant, a valuable thing, without consideration from persons concerned in proceedings or business transacted by such public servant" is punishable criminal misconduct.[175] All these penal provisions adequately address the UNCAC requirements regarding active and passive trading in influence.

4.1.4 Abuse of functions

States Parties are required to consider criminalization of intentional abuse of functions or position in violation of laws by a public official while discharging

---

[165] Section 403, *The Penal Code*, 1860
[166] Section 409, *ibid*
[167] Section 5(1)(c), *The Prevention of Corruption Act*, 1947.
[168] Section 403, *The Penal Code*, 1860
[169] Section 406, *ibid*
[170] Article 18, *United Nations Convention against Corruption*, 2003.
[171] Section 162, *The Penal Code,* 1860
[172] Section 163, *ibid*
[173] Section 165, *ibid*
[174] Section 164 & 165A, *ibid*
[175] Section 5(1)(b), *The Prevention of Corruption Act,* 1947

official functions for the purpose of obtaining an undue advantage for any person or entity.[176] This is a non-mandatory obligation for the States Parties. In Bangladesh, according to the *Prevention of Corruption Act,* 1947, "abuse of position, by corrupt or illegal means or otherwise, by a public servant for obtaining or attempting to obtain for himself or for any other person any valuable thing or pecuniary advantage" is a punishable criminal misconduct.[177] Consequently, Bangladesh has satisfied the UNCAC provision on abuse of functions.

4.1.5 Illicit enrichment

Article 20 provides States Parties are required to consider criminalisation of intentionally committed "illicit enrichment", i.e., a significant increase in the assets of a public official that he/she cannot reasonably explain in relation to his/her lawful income. The *Anti-Corruption Commission Act*, 2004 criminalizes the act of "possession of property in excess of known sources of income".[178] Moreover, according to the *Prevention of Corruption Act,* 1947, "possession of pecuniary resources or of property disproportionate to known sources of income by a public servant or any of his dependents, for which no reasonable explanation is offered" is punishable criminal misconduct.[179] These provisions meet the requirement of article 20 of the UNCAC. Apart from these penal provisions, there is disciplinary framework by which the cases of illicit enrichment by public servants can be dealt with. The *Government Servants (Conduct) Rules*, 1979 require every public servant to submit his/her wealth statement at the time of joining the service and thereafter once every year.[180] Non-compliance with this obligation may lead to disciplinary action against that public servant.

4.1.6 Laundering of proceeds of crime

The UNCAC obligates States Parties to criminalize "laundering of proceeds of crime"[181] This UNCAC offence includes the act of conversion or transfer for the purpose of concealing or disguising the illicit origin of any proceeds of crime, the act of concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to any such property and the act of acquisition, possession or use of any such property. The domestic legal regime on money laundering is relatively new. The *Money Laundering Prevention Act*, 2002 was the first law dealing with the offence of money laundering. Since then,

[176] Article 19, *United Nations Convention against Corruption*, 2003.
[177] Section 5(1)(d), *The Prevention of Corruption Act*, 1947
[178] Section 27, *The Anti-Corruption Commission Act*, 2004.
[179] Section 5(1)(e), *The Prevention of Corruption Act*, 1947.
[180] Rule 13, *The Government Servants (Conduct) Rules*, 1979.
[181] Article 23, *United Nations Convention against Corruption*, 2003.

the criminal courts have tried few offenders under this Act. Because of some substantive as well as procedural lacunas imbedded in the Act, the Government repealed it and enacted the *Money Laundering Prevention Act (MLPA),* 2009. This legislation, because of its extensive definition of "money laundering" and "predicate offence", reflects better compatibility with article 23 of the UNCAC.

4.1.7 Concealment

The UNCAC requires that States Parties consider criminalization of intentional concealment or continued retention of property with the knowledge that such property is the result of any offence established in accordance with the UNCAC, but without having any participation in any such offence.[182]

So far as the domestic penal norms of Bangladesh are concerned, concealment of any property acquired through the commission of any predicate offence amounts to money laundering[183] and as such is punishable in accordance with the MPLA, 2009.[184] Moreover, the *Penal Code,* 1860 criminalizes "dishonest or fraudulent removal or concealment of property",[185] "dishonestly receiving or retaining stolen property"[186] and "assisting in concealment of stolen property".[187] It is relevant here to mention here that under the *Penal Code*, 1860, "stolen property" includes, inter alia, the property in respect of which "dishonest misappropriation" or "criminal breach of trust" has been committed.[188] All these penal provisions adequately address the elements of article 24 of the UNCAC.

4.1.8 Obstruction of Justice

Article 25 of the UNCAC requires the establishment of two offences relating to obstruction of justice. One is related to the use of physical force, intimidation, or the promise and offering of an undue advantage to obtain false testimony in proceedings concerning UNCAC offences.[189] Another provision relates to the use of physical force or intimidation to interfere with the exercise of official duties by a justice or law enforcement official.[190]

In Bangladesh, under the *Penal Code,* 1860, use of criminal force[191] and intimidation or threat[192] are, ipso facto (by that very act), punishable. As such,

---

[182] Article 24, *ibid*
[183] Section 2, *Money Laundering Prevention Act*, 2009.
[184] Section 4, *ibid*
[185] Section 424, *The Penal Code*, 1860
[186] Section 411, *ibid*
[187] Section 414, *ibid*
[188] Section 410, *ibid*
[189] Article 25(a), *United Nations Convention against Corruption*, 2003.
[190] Article 25(b), *ibid*
[191] Section 352, *The Penal Code*, 1860.
[192] Sections 506-507, *ibid*

these penal provisions can be invoked to address both offences described in article 25 of the UNCAC. The *Penal Code*, 1860 also criminalizes the acts of giving false testimony,[193] causing the disappearance of evidence[194] and destruction of a document to prevent its production as evidence.[195] Abetment, i.e., instigating or aiding, of any of the abovementioned offences is also punishable. Furthermore, section 7 of MPLA, 2009 provides that obstruction or refusal to assist an investigating officer for money laundering constitutes an offence. These offences contain the elements of the offence as described in article 25(a) of the UNCAC.

Interference with judicial proceedings can be tried under different penal provisions relating to contempt of lawful authority of public officials and insult or interruption of judicial proceedings by any such official.[196] Moreover, use of criminal force to deter a public servant in discharging his/her duty as criminalised by the same Code[197] can be used to punish a person committing an offence described in article 25(a) of the UNCAC. Furthermore, the Contempt of Courts Ordinance, 2008 defines the terms 'contempt of courts' in such an extensive manner that includes any act interfering with the course of justice administered by the courts[198] and provides punishment for such acts.[199]

4.1.9 Liability of Legal Persons

Article 26 of the UNCAC requires the establishment of criminal, civil or administrative liability for legal entities for the UNCAC offences. This obligation is mandatory, to the extent that it is consistent with domestic legal principles. Domestic standards of Bangladesh comply with the UNCAC requirement. The definition of the term "person" as provided by the Penal Code, 1860, includes legal persons.[200] Accordingly, in Bangladesh, legal persons are amenable to criminal punishment for offences punishable with fines only. Additionally, civil and administrative liability of legal persons is acknowledged by the domestic legal regime.

4.1.10 Participation, attempt and preparation

Under the UNCAC, States Parties are obliged to establish as criminal offence, the participation in any capacity as an accomplice, assistant or instigator in the commissions of any UNCAC offence.[201] This obligation is mandatory. In

[193] Sections 193-196, *ibid*
[194] Section 201, *ibid*
[195] Section 204, *ibid*
[196] Section 175, 178, 179, 180, 228, *ibid*
[197] Section 353, *ibid*
[198] Section 2, *The Contempt of Courts Ordinance,* 2008.
[199] Section 13, *ibid.*
[200] Section 11, *The Penal Code*, 1860.
[201] Article 27(1), *United Nations Convention against Corruption*, 2003.

addition, States Parties may wish to consider the criminalisation of attempts to commit an offence[202] or the preparation of any such offence.[203]

According to the Penal Code, 1860 and the other laws on corruption, such as section 2(k) of MLPA, 2009, participation in and attempt of any offence are generally punishable in Bangladesh. However, preparation to commit an offence is not punishable. Hence, the domestic laws of Bangladesh are fully compatible with the mandatory obligation of the UNCAC and partially compatible with its non-mandatory requirements.

4.2 Law Enforcement Measures

4.2.1 Knowledge, intent and purpose as elements of an offence

Article 28 of the UNCAC provides that knowledge, intent or purpose required for the commission of an UNCAC offence be inferred by courts in judicial proceedings from objective factual circumstances. This provision calls for evidentiary provisions in domestic laws.

Generally, the criteria to infer "knowledge", "intent" or "purpose" is not regulated in Bangladesh by any statute. This is left to the courtsí objective judgment. Nevertheless, domestic standards enable the courts to presume certain mental states of a person accused of corruption. For example, the Penal Code, 1860, in sections 161, 162, 163, 165 and 165A, criminalizes taking or obtaining by and giving or offering to any public servant any gratification or any valuable thing provided such acts of taking, obtaining, giving or offering are done with certain specified intention or purposes. In obtaining, giving or offering may presume, unless the contrary is proved, the intention or purposes required to constitute the offence.[204] The *Prevention of Corruption Act*, 1947 also contains similar special rules of evidence.[205] Moreover, the *Criminal Law Amendment Act,* 1958 provides that when any person is charged for corruption, the fact that such person or any other person through him or on his behalf is in possession, for which he cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income, or that such person has, on or about the time of offence with which he is charged, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account may be taken into consideration by the court as a relevant fact in deciding the whether he is guilty.[206] Accordingly, the UNCAC requirement is duly addressed in domestic laws of Bangladesh.

[202] Article 27(2), *ibid*
[203] Article 27(3), *ibid*
[204] Section 7(2)(3), *The Criminal Law Amendment Act,* 1958.
[205] Section 4, *The Prevention of Corruption Act*, 1947.
[206] Section 7(1), *The Criminal Law Amendment Act,* 1958.

4.2.2 Statute of Limitations

The UNCAC requires that States Parties establish a long period of limitations for UNCAC offences.[207] In Bangladesh, there exists no statute of limitations prescribing the time limit for commencement of criminal proceedings. As Such, the domestic standard is more prosecution-friendly than the UNCAC in the sense that criminal proceedings cannot be barred by limitations.

4.2.3 Prosecution, adjudication and sanctions

Article 30 of the UNCAC provides for mandatory and non-mandatory obligations relating to prosecution, adjudication and sanctions. States parties should take into account the gravity of the offence while prescribing punitive measures.[208] Such measures do not preclude any disciplinary action taken by competent authorities against civil servants.[209] They are also required to establish or maintain an appropriate balance between any immunities or privileges accorded to their public officials and the possibility of effectively investigating, prosecuting and adjudicating UNCAC offences.[210] States parties must take appropriate measures to ensure the presence of any defendant released during trial at subsequent criminal proceedings[211] and to take into account the gravity of the offences concerned when considering early release or parole of persons convicted of UNCAC offences.[212] They should also endeavour to ensure that discretionary powers relating to prosecution are exercised to maximize the effectiveness of law enforcement measures[213] and to consider establishing mechanisms through which a public official accused of an UNCAC offence may be removed, suspended or reassigned.[214] States parties should also consider establishing procedures for the disqualification from public office of persons convicted of an UNCAC offence.[215]

In Bangladesh, punishments prescribed for corruption related offences are proportionate to the gravity of those offences. In most cases, offenders liable for offences relating to bribery and trading in influence can be punished with imprisonment for up to three years and/or fines. For commission of similar offences, imprisonment of a public servant may extend to seven years. Generally, offenders liable for embezzlement, misappropriation or other diversion of

---

[207] Article 29, *United Nations Convention against Corruption*, 2003.
[208] Article 30(1), *ibid*
[209] Article 30(8), *ibid*
[210] Article 30(2), *ibid*
[211] Article 30(4), *ibid*
[212] Article 30(5), *ibid*
[213] Article 30(3), *ibid*
[214] Article 30(6), *ibid*
[215] Article 30(7), *ibid*

property can be punished with imprisonment for up to two or three years and/or fines. In case of public servants, the term of imprisonment may extend to imprisonment for life or imprisonment for up to ten years. In all other cases, the amount of fines imposed on an offender liable for corruption shall not be less than the gain illegally derived. These punishments do not affect the initiation or continuation of any disciplinary proceedings against a public servant.[216]

Domestic laws do not prescribe any immunities or jurisdictional privileges for public officials that are disproportionate to the need or efficacy of investigation, prosecution or trial. Until 2004, previous sanction was necessary to prosecute a public servant for corruption cases. With the enactment of the Anti-corruption Commission Act, 2004, this jurisdictional privilege for public servants has been abolished. Most of the offences under the domestic laws corresponding to UNCAC offences are non-bailable. Therefore, the accused is not generally entitled to claim bail as of right. However, the court may, in appropriate cases, grant bail in favour of an accused. Conditions imposed on bail are matters of judicial discretion. According to the *Government Servants (Discipline and Appeal) Rules,* 1985, government servants can be suspended for their alleged involvement in any offences. Moreover, according to the *Public Servants (Dismissal on Conviction) Ordinance,* 1985, a public servant convicted of any offence punishable with death, transportation or imprisonment for a term exceeding six months and/or fined with taka one thousand or above will stand dismissed from service from the date of judgement.[217] The Constitution also disqualifies a person convicted of an offence involving moral turpitude and sentenced to imprisonment for a term of two years and/or above from participating in an election to Parliament a term of five years since release.[218] Similar restriction applies for election to local government bodies such as union parishad[219], paurashava[220], and city corporations[221]. On the whole, it appears that the UNCAC requirement is adequately addressed in the domestic laws of Bangladesh.

4.2.4 Freezing, seizure and confiscation

Article 31 of the UNCAC prescribes measures for confiscation. The substantive obligations of states parties arising out of article 31 are found in paragraphs

---

[216] *The Government Servants (Discipline and Appeal) Rules,* 1985.

[217] Section 3(1) read with schedule, *the Public Servants (Dismissal on Conviction) Ordinance*, 1985.

[218] Article 66, *The Constitution of the Peopleís Republic of Bangladesh*, 1972.

[219] Section 7, *The Local Government (Union Parishads) Ordinance*, 1983.

[220] Section 10, *The Paurashava Ordinance,* 1977.

[221] Section 11, *The Dhaka City Corporation Ordinance,* 1983, Section 11, *The Chittagong City Corporation Ordinance*, 1984, Section 11, *The Khulna City Corporation Ordinance*, 1984, Section 13, *The Rajshahi City Corporation Act*, 1987, Section 8, *The Sylhet City Corporation Act*, 2001, Section 8, *The Barisal City Corporation Act*, 2001.

1,3,4,5 and 6, while procedural powers to trace, locate, gain access to an administer assets are found in the remaining paragraphs. States parties are required to take necessary measures to enable confiscation of proceeds of crime derived from the UNCAC offences[222], property into which proceeds of crime are intermingled by way of transformation or conversion,[223] and income or other benefits derived from proceeds of crime.[224] Additionally, states parties are also obligated to take necessary measures to enable the identification, tracing, freezing or seizure of such property[225] and to regulate the administration of frozen, seized or confiscated property.[226]

Provisions for confiscation of property are contained in several laws of Bangladesh. The *Anti-Corruption Commission Act*, 2004, allows for the confiscation of any property that has been acquired by illegal means or is disproportionate to the legal source of income.[227] This provision is broader in its application than the UNCAC. The *Criminal Law Amendment Act*, 1958 also empowers the courts to confiscate the proceeds of corruption.[228] Moreover, courts can order freezing or attachment of properties allegedly acquired by illegal means or disproportionate to the legal source of income, even before the commencement of trial.[229] Moreover, the *Money Laundering Prevention Act,* 2009 empowers the courts to freeze, attach[230] or confiscate[231] the property of any person accused of money laundering. Generally, administration of frozen or attached property is determined at the discretion of the courts[232] while the duty to administer attached property lies with the Government. However, in case of any property attached, frozen, or confiscated in relation to an offence amounting to money laundering, the concerned court can appoint a receiver for the proper administration of such property.[233]

4.2.5 Protection of witnesses, experts, victims and reporting persons

Unless people feel free to report, testify and communicate their knowledge and experience to the relevant authorities, all objectives of the UNCAC could be

---

[222] Article 31(1), *United Nations Convention against Corruption*, 2003.
[223] Article 31 paragraphs 4 & 5, *ibid.*
[224] Article 31(6), *ibid*
[225] Article 31(2), *ibid*
[226] Article 31(3), *ibid*
[227] Section 27(1), *The Anti-Corruption Commission Act*, 2004.
[228] Section 9, *The Criminal Law Amendment Act*, 1944.
[229] Rule 18, *The Anti-Corruption Commission Rules*, 2007, *The Criminal Law Amendment Ordinance* 1944 also contains a similar provision section 4.
[230] Section 14, *The Money Laundering Prevention Act*, 2009.
[231] Section 17, *ibid*
[232] Section 9, *The Criminal Law Amendment Ordinance*, 1944.
[233] Section 21, *The Money Laundering Prevention Act*, 2009.

undermined. This is why the UNCAC calls for the protection of witnesses, experts, victims[234] and reporting person.[235] While the arrangement for protection of witnesses, experts, and victims is mandatory, that of reporting persons is non-mandatory. States Parties are mandated by the UNCAC to take appropriate measures against potential retaliation or intimidation or witnesses, victims and experts. States are also encouraged to provide procedural and evidentiary rules for strengthening these protective measures as well as extending similar protection to reporting persons. In Bangladesh, there is no specialized legal arrangement for protection of witnesses, experts, and victims.

4.2.6 Consequences of acts of corruption

The UNCAC contains a general obligation for States Parties to take measures, with due regard to the rights of third parties acquired in good faith and in accordance with the fundamental principles of the domestic law, to address the consequences of corruption. In this context, it is suggested that States parties may wish to consider corruption as a relevant factor in legal proceedings to: a) annul or rescind a contract, b) withdraw a concession or other similar instrument; or c) take any other remedial action.[236]

Domestic laws contain many provisions to address the consequences of corruption. *The Contract Act*, 1872 provides that an agreement is void if any part of a single consideration for one or more of its objects is unlawful.[237] As corruption is unlawful, it renders such contracts null and void. Additionally, corruption amounting to mala fide may be a sufficient ground for the withdrawal of any concessions in any contract or similar instrument. Furthermore, according to the Criminal Law Amendment Ordinance, 1944, property procured by means of corruption, even if it is in the possession of a transferee, can be attached or forfeited, unless she/he is a bona fide transferee for value.[238] With regard to bona fide transferees, Section 17(3) of the *Money Laundering Prevention Act*, 2009, also recognizes the right of third parties to property acquired in good faith. This provision states that if a person in good faith and for proper value had purchased the property before the order of forfeiture was passed by the court under section 17 and is able to convince the court that he/she had no knowledge of the property being laundered and had purchased it in good faith, the court may order the convicted person to deposit the sold value of the said property in the government treasury within a timeframe determine by the court, instead of giving a forfeiture order. Accordingly, the domestic laws meet the UNCAC obligation.

---

[234] Article 32, *United Nations Convention against Corruption*, 2003.
[235] Article 33, *ibid*
[236] Article 34, *ibid*
[237] Section 24, *The Contract Act*, 1872.
[238] Sections 4 & 13, *The Criminal Law Amendment Ordinance*. 1944.

4.2.7 Compensation for damages

The UNCAC requires that States Parties take such measures as may be necessary, to ensure that victims of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.[239] This mandatory requirement as outlined in article 35 does not require that victims be guaranteed compensation or restitution, but that legislative or other measures are provided, whereby such compensation can be sought or claimed.

The domestic legal system of Bangladesh recognises the right to claim compensation for any damage in accordance with the law of torts. An aggrieved person, by filing a civil suit, can do so. Victims of corruption are no exception in this regard and they can also be awarded compensation in criminal proceedings.[240] As such, domestic laws meet the requirement of the UNCAC.

4.2.8 Specialized authorities

The UNCAC required that States parties establish a body or bodies specialised in combating corruption through law enforcement. Such a body or bodies must be granted the necessary independence to be able to carry out their functions effectively, without any undue influence, and should have the appropriate training and resources to carry out their tasks.[241]

In Bangladesh, the *Anti-Corruption Commission (ACC)* has been established under the provisions of the *Anti-Corruption Commission Act,* 2004 as the specialised authority for combating corruption. Under the law the ACC has been guaranteed functional independence.[242] Furthermore, the *Money Laundering Prevention Act,* 2009 established the Bangladesh Bank and the Financial Intelligent Unit as the regulatory body for preventing and combating money laundering. Accordingly, the UNCAC requirement is reasonably reflected in the domestic legal standard.

4.2.9 Co-operation with law enforcement authorities

Under article 37 of the UNCAC, States Parties are required to take appropriate measures to encourage person taking part in the commission of an UNCAC offence a) to supply information to competent authorities for investigative and evidentiary purpose, and b) to provide specific facts to help authorities. This obligation is mandatory. Domestic standards comply with the UNCAC requirement. The *Criminal Law Amendment Act,* 1958 provides: "at any stage of

[239] Article 35, *United Nations Convention against Corruption,* 2003.
[240] Section 545, *The Code of Criminal Procedure*, 1898.
[241] Article 36, *United Nations Convention against Corruption*, 2003.
[242] Sections 3 & 24, *The Anti-Corruption Commission Act,* 2004.

investigation, enquiry, and trial the Special Judge, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, may for reasons to be recorded in writing, tender pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof ..."[243] The *Code of Criminal Procedure,* 1898 contains similar provisions.[244] Furthermore, there are provisions under the domestic laws which actually oblige related persons to co-operate with the investigation authorities. For example, section 7 of the MLPA, 2009 has criminalised obstruction or refusal to assist a concerned officer engaged in investigation under the Act, failure to comply without reasonable grounds with a reporting obligation, and failure to supply information relating to money laundering. Moreover, providing false information concerning the source of funds or the identity of any account holder, beneficial owner, or nominee also amounts to a criminal offence under section 8 of the MLPA, 2009. This arrangement, designed by the domestic laws of Bangladesh, is meant to encourage, and in some cases compel, co-operation with law enforcement authorities.

4.2.10 Co-operation between national authorities

According to article 38 of the UNCAC, a state party is required to take necessary measures to encourage, in accordance with its domestic law, cooperation between its public authorities as well as its public officials and its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include: informing the latter authorities, on their own initiative, when there are reasonable grounds to believe that offences of "bribery of national public officials", "bribery in the private sector", or "laundering of proceeds of crime" has been committed[245] or providing, upon request, to the latter authorities all necessary information.[246]

Domestic standards do not, in general, provide obligations for public authorities to inform suo motu (on its own motion) the investigating or prosecuting authorities. However, according to the *Anti-Corruption Commission Act*, 2004 public authorities are duty bound to provide necessary information if the ACC requires.[247] Furthermore, section 23(2) of the MLPA, 2009 obliges the Bangladesh Bank to provide information related to money laundering or suspicious transactions upon request from any investigating organisation unless

---

[243] Section 6(2), *The Criminal Law Amendment Act*, 1958.
[244] Sections 337 & 338, *The Code of Criminal Procedure*, 1898.
[245] Article 38(a), *United Nations Convention against Corruption*, 2003.
[246] Article 38(b), *ibid*
[247] Section 23, *The Anti-Corruption Commission Act*, 2004.

there is any bar under the existing laws or for any other cause. Accordingly, the domestic standard partially meets the UNCAC requirement since it ensures co-operation of public authorities, if such co-operation is sought for.

4.2.11 Corruption between national authorities and the private sector

Article 39 of the UNCAC requires States Parties to take necessary measures to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, particularly financial institutions, relating to matter involving the commission of UNCAC offences.[248] Besides this mandatory obligation, States Parties should consider encouraging their nationals and other persons with a habitual residence in their territory to report to the national investigating and prosecuting authorities the commission of an UNCAC offence.[249]

According to the *Anti-Corruption Commission Act*, 2004, every person is duty-bound to provide necessary information if the ACC requires such information; failure to provide this is a criminal offence.[250] Additionally, according to the *Money Laundering Prevention Act*, 2009, any unreasonable refusal to co-operate with an officer concerned with investigating money laundering is a criminal offence.[251] Moreover, the MPLA, 2009 identifies banks, financial institutions, insurance companies, money changers, companies or organisations remitting or transferring money, and any other organisations which conduct business with the approval of the Bangladesh Bank as "reporting organisations" for the prevention of money laundering. Section 25 obliges the reporting organisations to co-operate with the Bangladesh Bank by keeping the correct and full information of their clients' identity and records of transactions; further, they must provide these records to the Bangladesh Bank on demand. Reporting organisations are also required to inform the Bangladesh Bank proactively and immediately of facts on suspicious, unusual, or doubtful transactions which may likely be related to money laundering. These provisions of domestic laws ensure cooperation, if such co-operation is demanded by national authorities. Thus, the UNCAC requirement is partially complied with.

4.2.12 Secrecy

Bank Secrecy laws may operate as a hurdle in the investigation and prosecution of serious crimes with financial aspects. Therefore, the UNCAC requires that, in

---

[248] Article 39(1), *United Nations Convention against Corruption, 2003.*

[249] Article 39(2), *ibid.*

[250] Section 19, *The Anti- Corruption Commission Act*, 2004.

[251] Section 7, *Money Laundering Prevention Act*, 2009

cases of domestic investigation of UNCAC offences, States Parties have appropriate mechanisms available within their domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.[252]

The *Code of Criminal Procedure*, 1898 empowers the investigating authority to have access to documents or information relating to anything in the custody of a bank or banker, or the bank account of any person. This would enable law enforcement to overcome obstacles arising out of bank secrecy laws in case of investigation; however, this is only possible with an order of the court.[253] Additionally, under section 25 of the MLPA, 2009 reporting organisations are under a duty to provide the Bangladesh Bank with information about their clients and transactions on demand from the Bangladesh Bank. Consequently, domestic laws are compatible with the UNCAC standards.

4.2.13 Criminal Record

The UNCAC suggests that states parties may wish to consider adopting such legislative or other measures or the measures as may be necessary to take into consideration any previous conviction in another state of an alleged offender for the purpose of using such information in criminal proceedings related to an UNCAC offence. However, taking such measures is non-mandatory. According to the *Evidence Act,* 1872, previous conviction of an accused by a foreign court is not, ipso facto (by that very fact), admissible in any judicial proceeding in Bangladesh.[254] As such, this optional guideline of the UNCAC is not reflected in the domestic standards of Bangladesh.

4.2.14 Jurisdiction

The UNCAC requires that States Parties establish jurisdiction with respect to the UNCAC offences committed in their territory or on board aircraft and vessels registered under their laws.[255] States Parties are also required to establish jurisdiction in cases where they cannot extradite a person on the grounds of nationality,[256] or for any other reasons.[257] In addition, States Parties are invited to consider establishing jurisdiction in cases where their nationals are victimized, where the offence is committed by a national or stateless person residing in their territory, where the offence is linked to money laundering planned to be committed in their territory, or the offence is committed against the State.[258]

---

[252] Article 40, *United Nations Convention against Corruption*, 2003.
[253] Section 165, *The Code of Criminal Procedure*, 1898.
[254] Section 43, *The Evidence Act*, 1872.
[255] Article 42(1), *United Nations Convention against Corruption*, 2003.
[256] Article 42(3), *ibid*
[257] Article 42(4), *ibid*
[258] Article 42(2), *ibid*

Mandatory and non-mandatory obligations of the UNCAC as expressed in article 42 are partially complied with by the laws of Bangladesh. According to the Penal Code, 1860, the jurisdiction of the criminal courts of Bangladesh is very extensive. Every person is liable to punishment if he/she commits any offence within the territory of Bangladesh.[259] At the same time, Bangladeshi citizens and persons on any ship or aircraft registered in Bangladesh are liable to be tried and punished by Bangladeshi courts if they commit any offence, even beyond the territory of Bangladesh.[260] However, domestic laws of Bangladesh do not establish jurisdiction in cases where a fugitive offender is not extradited.

In Bangladesh, the extradition regime is governed by the *Extradition Act (EA),* 1974. According to the Extradition Act, 1974 both national and alien fugitive offenders can be extradited. However, to conduct such extradition, the EA, 1974 requires that there be an extradition treaty in place between Bangladesh and the country requesting said extradition.

5. Recommendations

Corruption has permeated the entire social system in our country. So, alleviating corruption is the prime concern for not only the government but also the nation as a whole. A single measure is not sufficient to remove existing corruption and prevent corruption. So the following measures can be adopted in this regard:

i) Since domestic standards do not contain any penal provisions regarding bribery of foreign officials and officials of public international organisations, so, legal provisions must be introduced to address bribery of foreign officials and officials of public international organisations.

ii) Since domestic standards do not contain any penal provisions regarding bribery in the private sector, legal provisions must be introduced to address bribery in the private sector.

iii) Though there are domestic penal provisions for punishing acts of embezzlement, misappropriation and other diversion of property in the private sector but they are rarely put into practice. So, the Government should ensure that more attention is paid to prosecute embezzlement, misappropriation and other diversion of property in the private sector.

iv) The provisions of the Penal Code, 1860 are not efficacious enough to bring all concealments to justice because they require the proof of "dishonesty" or "fraud" as a precondition for punishment, so the newly

[259] Section 2, *The Penal Code*, 1860.
[260] Sections 3 & 4, *ibid.*

enacted Money Laundering Prevention Act, 2009 would be an effective tool to deal with the offence of concealment.

v) Because of a weak domestic legal regime on protection of witnesses, expert, victims and their relatives, the corresponding offences are largely not prosecuted, so, witness protection mechanisms must be strengthened under the existing domestic laws.

vi) Since the domestic laws of Bangladesh do not contain any rule enabling the Courts to presume constructive mens rea of legal persons, corporate bodies can easily avoid prosecution and conviction. As such, legal persons are particularly not amenable to the jurisdiction of criminal courts. Amendment of existing laws should be given a serious thought so that mens rea can be imputed on legal person accused of committing the acts of corruption.

vii) For many years, domestic laws relating to freezing, seizure and confiscation remained virtually dormant. If the present trend of freezing, seizure and confiscation is continued in the long run, that will constitute an effective deterrent and play preventing role in the fight against corruption.

viii) To ensure better access of corruption victims to claim compensation, the amount of court fees should be reduced.

ix) The existence of specialised independent authorities for combating corruption must be ensured. Independence of judiciary must be safeguarded as per the directions of *Masdar Hossain Case*[261]. Office of the Ombudsman must be established. Though we have constitutional arrangement[262] and legislation named *the Ombudsman Act* of 1980 for establishing the office of the Ombudsman, this has not yet been come into light. The ACC can play a great role to remove corruption from the society, so it must be strengthened by ensuring independent budgetary allocation and removing direct or indirect interference.

x) Law enforcement authorities must receive sufficient cooperation from the competent authorities and all corners of the society.

xi) Prosecuting and investigating agencies must receive voluntary cooperation from the public sector and must be encouraged by ensuring better protection.

---

[261] *Secretary, Ministry of Finance and Others vs. Masdar Hossain and Others*, 52 DLR (AD) 82.

[262] Article 77, *The Constitution of the Peopleis Republic of Bangladesh*, 1972.

xii) Since domestic standards do not authorise the courts to consider conviction of an accused in a foreign country, existing laws should be amended so that courts can take into consideration any previous conviction in another State of an alleged offender.

xiii) The extradition regime of Bangladesh must be strengthened and more agreements and arrangements are made with other countries for mutual legal assistance and that relevant domestic laws are amended accordingly.

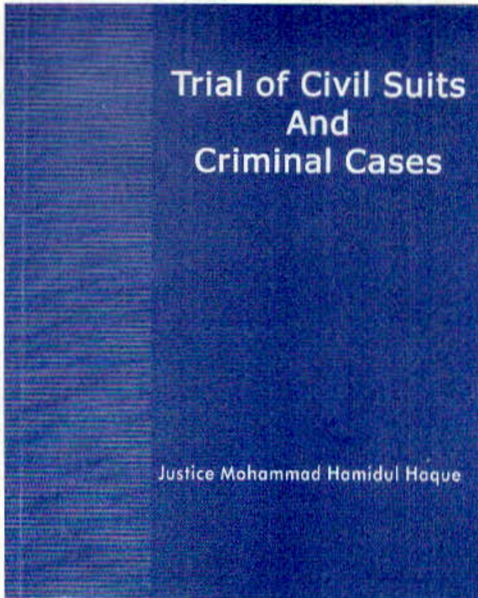
xiv) Departmental accountability of the government servant must be ensured. Coordination between different departments of the Government should be strengthened. National Human Rights Commission can play a role on the work of government officials with its watch do mechanism.

xv) Political commitment is the sine qua non to prevent corruption. Strong democratic environment must be ensured by the active participation of both Government and opposition parties. An effective parliamentary system can play a vital role against corruption by establishing a special parliamentary standing committee on corruption.

6. Conclusion

The legal regime of Bangladesh is largely compatible with the standards and principles of the UNCAC. Recent legislation has increased this compatibility. However, a number of government initiatives in critical areas of governance are necessary to address weaknesses with regard to gaps in law and practice. Consequently, development of a time bound action plan to address challenges and improve practices is recommended. However, legal action in and of itself is not sufficient for successfully combating corruption. By taking common efforts and ensuring wholehearted participation of the citizens of Bangladesh, corruption can be eliminated from the society.

Book Review



Mr. Justice Mohammad Hamidul Haque's dynamic and enlightened idea on law and contemporary jurisprudence is path making source for the present and future judicial system. He handed down many judgments during his tenure as a Judge. Some of his judgments possess an honor of being called "Landmark Judgments". Some of them are famous and strong which were upheld by the Apex Court. The author is of the firm view that nothing can replace hard work in achieving greatness in any walk of life. The key to success, according to him, are hard work and erudite scholarship. He believes that it is only systematic learning that helps one to have erudite scholarship. Like the great scientist Albert Einstein who said "that is the character that makes a good scientist". Author of this book also believes that it is the character that makes a good judge besides knowledge and wisdom.

The second edition of his Book ***"Trial of Civil Suits and Criminal Cases"*** is undoubtedly an improvement over the previous edition, and exhibits the considerable pains taken and careful attention given to make it as compressive and up-to-date as possible. I am taking the privilege to appreciate the style, the contents, and presentation as also the method and planning of the book promising to be a classic, summarizing relevant leading case laws laid down by highest Court of the country.

I hope and believe that this edition will be very useful to the Bar, the Bench, the Law teachers and the Law students and the members of the Law enforcing agencies.

I wish wide readership of this valuable book.

Md. Zakir Hossain
Editor, JATI Journal.