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# Journal

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# Contents

# Foreword

It is a matter of great pleasure that the 18th volume of JATI Journal has now been ready for its readers. This law journal is an annual publication of the Institute which seeks to offer an academic platform for the judges and magistrates of the subordinate courts, government law officers and other legal professionals. Therefore, in this volume, an attempt has been made for streamlining the Journal towards achieving more academic standard. It is worth mentioning that this volume has also assimilated different perspectives and dimensions by the contributions of young judges and professionals having international exposure.

As many as 11 (eleven) articles have been published in this issue covering a broad spectrum of legal erudition. The first write up titling *'A Brief Analysis on the Code of Conduct and Ethics of the Judicial Officers'* has constant relevance to the judicial officers and it elaborates the composite ideas and values concerning the subject. In the same trail, the article on *'Curing Institutional and Individual Corruption in Public Offices: Bangladesh Perspective'* outlines suggestive measures for combating the social vices.

A good number of articles have been published on the ever-increasing domain of human rights. In this context, the articles on *'Status of Women Empowerment in Bangladesh: An Equal Rights Perspective', 'Child Marriage in Bangladesh: Causes, Impact and Legal Protection System'* and *'Construction Workers' Rights and Safety: An Unsung Issue in Bangladesh'* focus on various practical issues with prescription of necessary legal and judicial reformation. Similarly, the article on *'Security at the Cost of Liberty: A Critical Evaluation of Trade-off between Liberty and Security through Preventive Detention'* provides critical analysis of the laws governing this area in the international perspective.

On the other hand, the article on *'the Evolution of Crime and Punishment in Bangladesh: Trends and Issues'* sheds light on trends, issues and evolution of criminal justice system of the country. The discussion on *'Global Framework: Addressing the Impact of Climate*

*Change on Coastal Population'* will go a long way to address the issue of protection of environmental rights and obligations of the states at the national level. The deliberation on *'Development and Present Status of Admiralty Jurisdiction in Bangladesh'* will help the readers to gather knowledge on development of the Admiralty Court. The paper titled *`International Tribunal in Resolving International Commercial Disputes and Relation with National Courts: An Overview of the Decision of the Saipem's Case'* strives at drawing a balance between jurisdiction of courts and arbitration tribunals. Lastly, the review of the book of legendary English judge Lord Denning namely 'What Next in Law' will create interest in revisiting this classic legal literature.

So, the range and variety of the contributions necessarily indicate that the Journal has already become a scholarly forum for the legal professionals of various fields and strata. I am confident that the publication of this journal provides a congenial atmosphere among the judges and other legal professionals for sharing their respective knowledge and expertise. I am also assured of the fact that in this fast growing world of information and communication technology, the Institute is not only putting its best effort in providing training to the judicial officers and other legal professionals, but also widening the scope for creativity, innovation and research.

It is needless to say that the contributors of this Journal have paved the way of its excellence by all means. Besides, a highly professional research team charged with indomitable love and affection for the Institute has also been engaged in developing the quality of this Journal. Hence, I extend my felicitation to the authors and also congratulate the editors, officials and staff of JATI involved in the process for their efforts. I expect that the members of the judicial guild will take benefit of this Journal and I request them to contribute to this Journal in its upcoming issues.

I wish success of this publication of JATI Journal.

**Justice Khondker Musa Khaled**
Director General
Judicial Administration Training Institute

June, 2019
Dhaka

# A Brief Analysis on the Code of Conduct and Ethics for the Judicial Officers

Justice Mohammad Anwarul Haque*

*This article attempts to delineate the scope and extents of judicial ethics and code of conduct of the judicial officers. Impartiality, wisdom and high character emanating from conduct, character and inner qualities of a judge epitomises high reverence for judges that ultimately determines the height of civilization in a given society. While emphasising on the highest integrity and rectitude of Judiciary, as one of the ancient institutions, this write-up also weighs on the sanctity of justice and correct judicial behaviour as a part of religious duty. Besides discussing the administration of justice and Code of judicial conduct during the Mughal period and ancient India largely drawn from the saying of the ancient jurists Manu, Katyan, Brihaspati, Kautilya, the article goes on saying about the importance of judicial discipline, a professional character, in the life of the judge of all time. A detailed narrative of canons of judicial ethics and conduct of Judicial Officers follow suit which includes avoidance of impropriety and free mixing, dealing with unprofessional conduct of lawyers, handling kinship or influence, dealing with individual idiosyncrasies and arbitrariness, inconsistent obligations, partisan politics, self-interest, gifts and favours, social relations, injudicious and untenable behaviour. Besides, emphasis is given on essential conduct of judges, promptness in performance, court organization, courtesy and civility, independence, proper intervention in conduct of trial, continuances, and judicial impartiality. Additionally, the article puts forward a summary of judicial obligation in*

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> *line with the utterances of Sir Mathew Hale's rules of judicial conduct. It is expected that judges scrupulously conform the time honoured convention in maintaining the said judicial ethics and their respective conduct both in court and outside the court. Good judges ensure strong, impartial and capable judiciary, which is the greatest need and asset of a State. By sharpening the tools of justice and shaping technology to arm the weaker section of the society, social order can be changed in consequence.*

Judges in common parlance are described as 'honorable' and are addressed in Court as 'Your Honour'. Wherein lies this honour of the Bench? Is it to the office of the Judge? No, in fact, it lies in the conduct, character and inner qualities, required in persons entrusted with the judicial function. Particularly in our society the depth of respect for Judges is second only to the respect of saints and sages. One of the factors, which highlights this reverence for Judges is that whenever any serious accident, disputed happening or the like arise for investigation, there is a popular demand for judicial inquiry as distinguished from an administrative investigation which means peoples have deep-rooted faith in the impartiality, wisdom of Judges and their high character. Keeping the above view in mind it can be said that we are to carry out the great responsibility rest on the Judiciary to sustain this respect which has been gained by precedents set by long line of distinguished Judges. In the language of Chief Justice Mr. Nasirullah Beg of Alabahad 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. The greater the respect, higher the civilization.

So, primary duty of the Judge, as an individual, is to present himself before the public, an image of justice of the nation. As a member of his court that duty is to be brought within the appropriate discipline. In fact, Judiciary is the ancient institution which is gratifying to think that it conforms the high standards of impartiality and good behaviour. Apart from the recorded instances of how they actually function since there are the injunctions about them in the ancient texts. It can thus be inferred that they are the men of the highest integrity and rectitude.

In the Islamic Jurisprudence, great emphasis has been laid on the sanctity of justice and correct judicial behaviour-both being regarded as a part of religious duty. The same are embodied in the Holy Quoran and in the Hadis also. In addition, there are instances of strict judicial behaviour on the part of the first four Khalifas, the immediate successor of our Prophet (SA). Even there are the treatises of Arabic Authors in which this subject has been elaborately discussed. In the Holy Quoran the doctrine of Justice has been vigorously stressed. Therein it is stated that even before the advent of the Prophet (SA) of Islam, Allah had sent Prophet to do justice between man and man which has been explained in the following language of Professor H. K. Serwan "The Apostle of Islam declares that he has been commanded by Allah to be just and Judges are ordered to do justice and not to be led away by personal likes or dislikes, love or hate."

Even our Prophet (SA) asked the people to follow the rule of law and equality between man and man in juristic matter. In deciding dispute our Prophet Hajrat Mohammad (SA) himself made no distinction between friend and foe, high and low, Muslim and non-Muslim. There are many instances in the life of the Prophet (SA) which highlights his deep sense of justice on all occasions, coming before him.

The Arab tradition of judicial conduct reached their zenith during the regime of first four successors of the Prophet namely- Hazrat Abu Bakar (RA), Hazrat Omar (RA), Hazrat Osman (RA) and Hazrat Ali (RA). Their deep sense of judicial rectitude is demonstrated throughout their whole life. Hazrat Ali's instructions to his Governors regarding the appointment of Kazis (Judge) and their conduct are that the Kazi must be a man of trustworthy who shows no self-interest or greed in the execution of his duties and he should not be in no unusual hurry in reaching his decision. Kazi should neither show any temper or misbehaviour when conducting the proceeding nor speak arrogantly. Even when people praise the performance of Kazi, he should not lose his balance and should not go by recommendations.

Apart from precept of the Holy Quoran and standards set by our Prophet (SA) and 4 Khalifas the doctrine of justice occupies a large space in the works of Arabic scholars like Ibne Abi-Rabi, Imam Gazzali and others. Mr. Ibne Abi-Rabi has described in his book 'Saluk-Ul-Malik Fi Tadbiril Mamalik' that justice is the foundation of the Government which is at a

higher plane than other functions. He has described that a Judge should be a God-fearing, and at the same time should have a dignified demeanour having sound commonsense and be conversant with the best of judicial literature. He goes to say that Judge should rarely smile and speak little and will never ask party to do any favour for him. Another great Jurist of the end of 10th Century Mawaraidi the then Chief Justice of Baghdad also recounts the qualification needed for Judge that he should be honest, pious, above suspicion and well versed in the principles of law.

The erudite Islamic Scholar Imam Ghajjali has also urged that the justice on the part of a Judge is possible only when he does not indulge in luxurious fooding and clothings who also should not attempt any conciliation at the expense of justice.

During the Mughal period the system of administration of justice by Kazis was duly recognized. Every Kazi, on appointment, was required by Imperial Deewan as follows:

> *Be just, be honest, be impartial. Hold trials in the presence of the parties and at the court house ..... Do not accept presentation from the people of the places of service, nor attend entertainment, given by anybody or everybody ..... **know poverty (Faqr) and attain your glory (Fakhr).***

In ancient period, India regarded her law (*Dharma*) as sacred in origin. In the days of antiquity, the Court of justice was the most Majestic symbol of the power of the State. In ancient period the King was the source of justice. Dispensation of Justice and the awarding of punishment was one of the attributes of sovereignty. A strict Code of judicial conduct was enjoined on the King. He was required to decide cases in the court-room, his dress and demeanour were to be such not to overawe 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 robe 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 Judge shall salute the guardian of deity (Chair of justice) and then proceed with the trial." In the Supreme Court and High Court tradition of salutation even continue to this day. 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, and leading righteous life and of good family."

According to the Brihaspati:

> *A Judge should decide the cases without any consideration of personal gain or any kind of personal bias. Conversing by the Judge with a litigant in private is regarded as judicial misconduct. A Judge who privately converses with a party before the case has been decided, is to be punished like a corrupt Judge.*

KAUTILYA, one of the famous Jurist of ancient period, in his '*Artha Sastra'* enlists some items as constituting judicial misconduct on the part of the Judge:

> *When the Judge threatens, browbeats, or unjustly silences for anyone of the disputants in his court, he shall first of all be punished with the first amercement and if he defends or abuses anyone of them the punishment shall be doubled.*

He has further added that:

> *When a Judge does not inquire into necessary circumstances, makes unnecessary delay in discharging his duties, postpones work with spite, causes parties to leave the court by tiring them with delay, evades or causes to evade statements that lead to the settlement of the case, helps witnesses, gives them clues, or resume cases already settled or disposed of, he shall be punished with highest amercement. If he repeats the offence he shall both be punished with double fine and be dismissed.*

Centuries ago Justiniun has also said that precept of law are three in number i.e. to live honestly, to give every man his due and to injure none. These also sum up the ethical basis of legal system in modem times. Law in civilized society is intended to promote order, justice and liberty.

Taking the above view of the ancient Muslim Jurist including dictate of the Prophet (SA), Hindu and Roman Jurist into consideration now let us have a short discussion over the Judicial Ethics and Code of Conduct of

Judicial Officers in this independent and democratic country.

There is no doubt that even in the modem society, echoing the views of ancient Jurist, it is said that the service rendered by Judge demands highest qualities of learning, training and character. For ensuring this qualitative standard in the administration of justice, it is utmost important that Judicial Institutions are to be manned by wise and brilliant men of high integrity and character of stem and stuff fibre, unbending before power, economic or political. In fact, judicial power and status by the very nature, outside the court, are non-demonstrative in public. While independence of the Judiciary is the basic principle of justice, its parameters, quality and strength cannot be speculated in isolation rather it depends in learning, personality, manners and stature in the judicial functioning matter. A Judge is as much as respectable as he respected the law, justice, equity and good conscience and above all served and seen to serve the cause of justice.

Next, judicial discipline in the life of the Judge is one of the greatest virtue which is accepted throughout the world. Actually the word 'discipline' in the field of Judiciary has been used in a decorous sense. In fact, the expression 'Judicial discipline' is to be construed as implying trained behaviour of self-control, to be observed by the Judges in the conduct of their Judicial functions which includes training of the mind or moral faculties of the Judges also. In fact, this professional character cannot be built in a day. Character is nothing but a bundle of habits and in order to form this habits from day to day it is necessary that young Judicial Officers should have correct standard of conduct and behaviour, to improve by judicious method, held up before him.

Mr. Justice P. N. 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 therefore, 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 changing

conditions, the never-changing principle of freedom.

Now quoting from Bacon's '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 all the Judges 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".

Now I am going to narrate some more canons of judicial ethics and conduct of Judicial Officer.

1. **Avoidance of the Impropriety:**

   A Judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behaviour, not only upon the Bench and in the performance of judicial duties but also in his daily life, should be beyond reproach. It is to be noted that judicial propriety does not end in the court-room. In private life too, the Judge has to conduct himself in conformity with certain time-honoured standards of a restraining nature. It is expected that a Judge will avoid familiarity arising out of private hospitality, that when in doubt he will abstain from accepting invitation from the person likely to have court cases before him.

2. **Avoid of Free Mixing:**

   A Judge is to avoid mixing freely with the member of the public and going with them on enjoyment or outgoing. A Judge, posted in a district, is not to make or to permit any member of his family to make an investment likely to embarrass him in the discharge of his

judicial functions. Thus private conduct of the Judge and the member of his family also must be virtuous in nature. No suspicion should lurk in the mind of the public about the sound character of the Judicial Officer. The people expect that in the private conduct also the Judge will exemplify the most exerting standards of propriety and virtue.

**3. Essential Conduct:**

On this point of civility and good conduct of Judges the following words of eminent English Jurist Lord Dune Dine may be referred, "In his habit the Judge ought to be grave and decent, in the whole of his deportment, humble, courteous, affable and meek; the whole of his conversation ought to be savoury, wise and edifying."

A Judge should be temperate, attentive, impartial, and since he is to administer the law and apply it to the facts, he should be studious of the principles of law and diligent in endeavouring to ascertain the facts.

**4. Promptness:**

A Judge should be prompt in the performance of his judicial duties, recognizing that the time of litigants, lawyers is of value and that of habitual lack of punctuality on his part justifies dissatisfaction with the administration of the business of the court.

**5. Court Organization:**

A Judge should organize the court with a view to the prompt and convenient despatch of its business and he should not tolerate abuses and neglect by clerks and other assistants who are sometimes prone to presume too much upon his good-natured acquiescence by reason of friendly association with him.

It is desirable too, where the judicial system permits, that he should co-operate with other Judges of the same Judgeship. As a member of a single judicial system he is to promote the more

satisfactory administration of Justice. A Judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal.

**6. Courtesy and Civility :**

A Judge should be courteous to lawyers especially to those who are young and inexperienced and also to all other appearing or concerned in the administration of justice in the court.

**7. Unprofessional Conduct of Lawyers:**

A Judge should utilize his opportunities to criticize and correct the unprofessional conduct of the lawyer, brought to his notice; and, if it is found that his adverse comment is not helpful or insufficient for correction he should bring it to the notice of the appropriate authority to maintain the dignity of the court in the estimation of the public.

**8. Kinship or Influence:**

A Judge should not act in a controversy where a near relative is the party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favour, or that he is affected by kinship, rank, position or influence of any party.

**9. Independence:**

A Judge should not be swayed by partisan demands, public clamour or consideration of personal popularity or a notoriety, nor be apprehensive of unjust criticism.

**10. Interference in Conduct of Trial:**

A Judge may properly intervene in a trial of a case to promote expeditious, and prevent unnecessary waste of time or to clear obscurity. Conversation between the Judge and lawyer in a court is often necessary, but the Judge should be studious to avoid

controversies which are apt to obscure the merits of the dispute between the litigants and lead to its unjust disposition. In addressing lawyer, litigants or witnesses, the Judge should avoid a controversial manner or tone.

**11. Continuances:**

Delay in the administration of justice is a common cause of complaint and withdrawal of the public confidence from the Judiciary for which the lawyers are frequently responsible. A Judge, without being arbitrary, may well-endeavour to hold the lawyer to a proper appreciation of their duties to the cause of public interest.

**12. Idiosyncrasies and Subservience:**

Justice should not be moulded by the individual idiosyncrasies or arbitrariness of those who administer it. A Judge should adopt the usual and expected method of doing justice, and not seek to be extreme or peculiar in his judgment, or spectacular or sensational in the conduct of the court. He must not be subservient in character. In the language of C.J. Murshed, "No tyranny is worse than judicial arbitrariness and no misfortune is worse than judicial subservience".

**13. Inconsistent Obligation:**

A Judge should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official function.

**14. Partisan Politics:**

While entitled to entertain his personal views of political questions and while not required to surrender his rights or opinions as citizen, it is inhabitable that suspicion of being wrapped by political bias will attach to a Judge who becomes the active

promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessment or contribution to party funds, the public endorsement of candidates for political office and participation in party convention.

**15. Self-Interest:**

A Judge should abstain from performing or taking part of any judicial act in which his personal interest are involved. If he has personal litigation in the court of which he is a Judge, he need not resign his Judgeship on that account, but he should, of course refrain, from any judicial act in such controversy.

**16. Gifts & Favours:**

A Judge should not accept any presentation or favours from litigants, or from lawyers, practicing before him or from others whose interests are likely to be submitted to him for judgment.

**17. Social Relations:**

It is not necessary to the proper performance of the judicial duty that a Judge should live in retirement or seclusions; it is desirable that so far as the reasonable attention to the completion of his work will permit, he continues to mingle in social intercourse, and that he should not discontinue his interest in or appearance at meetings of members of the Bar. He should however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships, constitute an element influencing his judicial conduct.

**18. Judicial Impartiality:**

Chief, among the qualities of character which every person must possess who aspires to sit on the Bench is the attitude of impartiality. The Judge must not allow himself to be subjected to

any influence other than influence of the law and justice of the cause. Judge should know nothing about the parties, everything about the cause. He shall do everything for justice; nothing for himself, nothing for his friend, nothing for his patron, nothing for his sovereign.

## 19. Injudicious and Untenable Behaviour:

Now-a-days, more than ever injudicious and untenable behaviour also brings distress to the judicial system which cannot be tolerated merely on the alibi that he who commits it is a Judge. It is to be remembered that "Be you ever so high, if you are delinquent, the law is above you and may not spare you". This message must be preserved in the mind of every judicial officers to repose the public confidence in the Judiciary.

Canons of judicial conduct and professional ethics, codified or not, proceed on the fundamental assumption that a Judge is more than a member of States salariat, but an instrument of justice and, therefore, oblige to observe those norms and to possess those standards which convince the public and repose confidence in him for delivery of unpolluted justice to the people without any fear or favour, affection or ill-will. Each occupation has its nobility which he who sits in that office holds out as binding on him.

## 20. Summary of Judicial Obligation:

In every particular conduct, Judge should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamour, regardless of public praise, and indifferent to private, political or partisan influences, he should administer justice according to law and deal with his appointments as a public trust; he should not allow other affairs or his private interest to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

Last of all, I would like to recollect of those qualities of the Judges as described by Sir MATHEW HALE'S rules of judicial conduct:

i) The Justice is to be done uprightly, deliberately and resolutely.
ii) In the execution of Justice, Judges should carefully lay aside their own passions, and not to give away, however provoked.
iii) Judge should never engage himself in the beginning of any cause, but reserve himself unprejudiced till the whole matter be heard. Judge should not too rigid in matter purely conscientious when all the harm is diversity of Judgment.
iv) Judge should not be biased with compassion to the poor, or favour to the rich, in point of justice.
v) The Judge should be short and sparing at meals, that also may be better for his business.

Summing up the above references a Judge can be defined in the following language:

> *A Judge should be God-fearing, law-abiding, abstemious, truthful in tongue, wise in opinion, cautious, fore-bearing blameless and untouched by greed.*

While dispensing justice, he should be strong without being rough, polite, without being weak, awe-inspiring in his warnings and faithful to his words, always preserving, calmness, balance and complete detachment, for the formation of decision or conclusions in all matters coming before him.

> *In the matter of taking his seat and rising from his seat, he shall be punctual and of his personal behaviour he shall be mindful of the formal courtesies, careful to preserve the dignity of the court, and maintain an equal aspect towards all litigants as well as all lawyers appearing before him.*

I would like to conclude with expectation that Judges scrupulously conform the time honoured convention in maintaining their above judicial ethics and their respective conduct both in court and outside the court. In the language of Chief Justice P. N. Bhagwati I am, last of all, to say that the people accept the decision of a Judge not because his decision is

always correct but because it is rendered by a person, known for his wisdom, integrity, character and impartiality. It is only on account of this quality of a Judge people have faith in the Judiciary. In fact, the litigant people naturally accept the Presiding Judge of the court to be a man of virtue. If there is slightest rumour which will adversely affects his reputation, he ceases to command the respect of the people.

In fine, I am further to add that no nation can be happy if its standards of justice are low. The spirit of justice may prevail in the society on the existence of good Judges. A strong, impartial and capable judiciary is the greatest need and asset of the State. Men can go without other branch of administration, but there can be no civil society without provisions of impartial justice between man and man. Where judicial power becomes corrupt, liberty expires, no security is left of life, reputation and property and no guarantee is left of personal and domestic happiness. In this connection an American renowned Jurist DAVID DUDLEY FIELD has said, "Above all things is justice. Success is a good thing; wealth is good; honour is better, but justice excels them all. It is this which raises man above the brute and brings him into communion with his Maker."

Taking all these into consideration we are to look our people at large, waiting in their tired and tearful eyes and to sharpen our tools of justice and shape our technology to disarm the strong and brute and to arm the weak which would change our social order.

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# The Evolution of Crime and Punishment in Bangladesh: Trends and Issues

H M Fazlul Bari*

*Bangladesh bears the legacy of a system of administration of justice from the British colonial rulers who gradually replaced the Mughal system of administration of justice then prevalent based on the Islamic Law. Over the years, the criminal laws of Bangladesh have undergone numerous peripheral amendments. The adoption of the constitution, international treaty obligation, passing of special laws and malfunctioning of laws also dominate the administration of criminal justice in Bangladesh. It appears that such amending provisions and gradual growth of criminal laws have not been made in a coherent and consistent fashion. It is evident that the overall scenario of administration of criminal justice here may be now depicted as coercive, dilatory, time-consuming and adversarial with acute arrear of cases. This research sheds lights on trends, issues and evolution of criminal justice system in Bangladesh. This article finally argues that a holistic review of criminal law is essentially required.*

***Key words**: Criminal justice, criminal laws, evolution of laws.*

## A. Introduction

Bangladesh inherited a system of administration of justice from the British colonial rulers who gradually replaced the Mughal system of administration of justice then prevalent based on the Islamic Law.[1] Some

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1 Haque (2016) Preface.

elements of pre-Mughal elements of indigenous law also ostensibly permeated the British- imposed legal system in Indian Sub-continent. Colonial legacies including Penal Code, 1860, Police Act, 1861, Evidence Act, 1872, Code of Criminal Procedure, 1898, Jail Code are still in force in Bangladesh with only peripheral amendments.

During Pakistan period (1947-1971) the criminal laws remained almost the same with some sporadic reforms including promulgation of Probation of Offenders Ordinance and the abolition of Jury system. After the glorious independence of 1971, same old laws continue to function in liberated Bangladesh. Following years witnessed enactment of some harsh laws aiming at containment of prejudicial activities. In 1978 and 1982 some half-hearted legislative attempts were made with a view to easing procedural trappings in criminal jurisdiction. In seventies and afterwards, there has been attempt to enact 'special laws' for combating crimes relating to violence against women. In 2007 separate Judicial Magistracy made its debut in compliance of *Masder Hossain case*[2] by the pro-active intervention of the Supreme Court of Bangladesh, with support from military-backed interim regime (2006-2008). Subsequently, some piecemeal attempts were made to legislate on domestic violence, human trafficking, parental maintenance, custodial torture etc. However, such amending provisions have not been developed in a consistent approach. Moreover, popular participation and mass-consultation were mostly missing in the overall law making process in Bangladesh. More so, the fair application of criminal laws has often been hostage to authoritarian mode of justice sector agencies, acute procedural rigidity and mounting backlog of cases.

Over the years, there has been passionate discussion that with the passage of time, advancement of technology and shift in social values, century-old Code of Criminal Procedure requires to be reviewed.[3] The concern for the victims of crime, reforms in criminal investigation, cyber-crime and fair sentencing policy also dominate the dialogue on reforms of criminal justice system in recent times.

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2 *Secretary, Ministry of Finance v Masdar Hossain*[2000]20 BLD 104 (AD) (Arising out of Writ Petition no. 2424 of 1995).

3 Bari (2017), pp. 92-93; *Bangladesh v Bangladesh Legal Aid and Services Trust (BLAST) and others* Civil Appeal no. 53 of 2004 (AD).

Against this backdrop, present article basically makes a pen-picture of the evolution of criminal laws in Bangladesh. It also makes a brief reference to gradual development of criminal justice system during British period and pre-British period. Further developments made during Pakistan period and independent Bangladesh have also been pointed out. In particular, this note reiterates that colonial legacies along with its peripheral reforms made afterwards require to be holistically inquired so that constitutional notion of fair trial becomes more meaningful to the justice seekers.

## B. Evolution, Aims and Elements of Criminal Justice

Dispute between individuals *vis-a-vis* their urge to settle the dispute is quite natural in human society. In the pursuit of better ways of dispute-resolution and fighting crimes, formal judiciary in the body of courts and tribunals was created within the framework of the State or empire.[4] For centuries, formal state judiciary co-existed with the informal way of dispute resolution.[5] The modern criminal justice system has evolved since ancient times, with new forms of punishment, added rights for offenders and victims, and policing reforms. These developments have reflected changing customs, political ideals, and economic conditions. For instance, in ancient times, exile was a common form of punishment. During the Middle Ages, payment to the victim (or the victim's family), known as '*wergild'*, was another common mode of punishment. For those who could not afford to buy their way out of punishment, harsh penalties included various forms of corporal punishment. These included mutilation, branding, flogging and execution.

That is, the societal response to criminal conduct traces back to time immemorial. Actually, organisation of Judiciary is one of the great achievements of human civilisation. Historically, it passed many crude stages and forms of administration of justice, before it acquired the present form as democratic manifestation of theory separation of powers propounded by Montesquieu in 18th century.

4 Alam (2016), p. 54.
5 *Ibid*., p. 55.

In principle, the concept of state sponsored Criminal Justice System (CJS) empowers the state to punish the wrongdoers. In essence, the citizenry delegate their 'natural rights' to use force against those who attack their interests and hand it over to the state, in return of the state's promise to protect them by maintaining law and order.[6] The modern criminal law is based on an assumption that, in absence of evidence to the contrary, people are able to choose whether are to engage in criminal conduct or not, and that a person who chooses to commit a crime is responsible for the resulting wrong and deserves punishment.[7]

In other words, the criminal law is basically concerned with dealing with the persons who committed crime. It is also important that trial of those charged with crimes is just and fair.[8] The ultimate aim of criminal law is protection of right to personal liberty against invasion by others- protection of the weak against the strong, law abiding against the lawless, peaceful against the violent. To protect the rights of the citizens, the State prescribes the rules of conduct, sanctions for their violation, machinery to enforce sanctions and procedure to protect that machinery.

A full-fledged criminal case is a drama in three acts, namely (a) information; (b) investigation or inquiry; and (iii) trial.[9] The first act has two scenes- information or complaint. Section 154 of Code of Criminal Procedure, 1898 prescribes the mode of recording the information received by officer-in- charge of a police station in respect of a cognisable offence. Section 156 of the Code authorises such an officer to investigate it. This is the second scene. Third scene commences with the framing of charge and it advances with turns and twists of evidence taking and finally wraps up with pronouncement of verdict. Accordingly, the police, judges, correction officials, medical officers, social welfare officers play their due roles as part of criminal justice agency.

The object of criminal trial is to determine whether the offender is guilty of the offence he is charged with and to prescribe suitable sanction if he is

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6 Ashworth (2010), p. 74; Kapoor (1997), p. 113-114.
7 Ormerod (2008), p. 4.
8 Haque (2007), p. 47.
9 *Saifuzzaman v State and others* [2004] 56 DLR 324 (HCD).

found guilty on the basis of an elaborate system of substantive and procedural criminal law.[10]

## C. Criminal Laws during Pre-Independence Period

Having identified the evolution and conceptual ideas of criminal justice system in brief, let us now move to the evolution of criminal law in Bangladesh. In essence, the present legal system of Bangladesh owes its origin mainly to about 200-year British rule in Indian Sub-continent, mostly founded on remnants of pre- British period tracing back to Mughal administration and also Hindu regime.[11]

### *Criminal Law during Pre- Mughal Regime:*

From ancient times in Bangladesh there existed local assemblies in villages known as *panchayets. Panchayets,* though not official courts, had played dominant role in the administration of justice. At local level, apart from *panchayets,* the castes and even sub-castes used to exercise somewhat autonomous authority to administer justice.[12]They settled disputes mostly in the form of compromise. By lapse of time, there was transition to centralised rule by King. Tribal customary law and dicta emanating from religion were regarded as major source of law.[13]

Before the conquest of India by the Muslims, the penal law prevailing here was Hindu Criminal Law which was termed as mostly systematic and well- defined.[14] The King protected the subjects and the subjects in return owed him allegiance and paid him revenue. The King or his entrusted Judge administered justice. The punishment of a criminal was mostly considered to be sort of expiation which purified and reformed the character of the offender. Apart from admonition, fine, imprisonment, death penalty, forfeiture of property, branding, banishment, expulsion from caste and corporeal punishments by way of whipping and mutilation,

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[10] Qadri (2005), p. 350.
[11]Halim (2012), p. 42.
[12]Thapar (2004), p. 32.
[13]*Bangladesh v Bangladesh Legal Aid and Services Trust (BLAST) and others* Civil Appeal no. 53 of 2004 (AD), available at <www. supremecourtbd.com> accessed 01 February2018 (*BLAST AD case* in brief hereafter).
[14]Kulshreshtha (2000) pp. 212-234.

the practices of ordeal, blood money, compensation to the victim were also in practice.

Though some principles of restorative justice, reformation and retribution were amalgamated, by and large, the major theory of sentence was deterrent.[15] However, capital punishment and severe corporeal punishments were rarely inflicted.[16]Admonition, severe reproof, fine and corporal punishment were in vogue in early Bengal. This system prevailed until the end of twelfth century.[17]However, the severity of punishment varied on caste in the sense that there was sentencing disparity for the offenders depending on the respective castes of the offenders and the victims.[18] In general, a Brahmin was exempt from death penalty and corporeal punishments. Another principle was that the lower the caste, the more severe the corporeal punishments.[19] Commentators observed that Hindu Criminal Law sometime offered a system of despotism and 'priest craft' that did not put all persons on equal footing and even provided occasional discriminatory punishments.[20] However, unbridled sentencing disparity on the basis of caste was not so rigid in the then Bengal where caste-hierarchy was not so acutely felt.[21]

The judicial proceedings were inquisitorial in true sense that provided more pro-active role of the judges. Lawyers' role was not recognized, though sometimes the opinion of neutral experts was sought to clarify some facts or exposition of laws. The proceedings were public hearings, attended by people of all strata of the society. Hindu Law relied on limited number of crimes as *mala in se* as opposed to *mala probitia.* During that time crimes and sins are interchangeably synonymous.[22] Further, the victims of crimes took the responsibility of prosecutorial role as neither society nor the state took role in this regard. *Danda, prayaschitta* and

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15 Doongaji (1986), pp. 241-243.
16 Roy (1989), p. 4.
17 *BLAST ADcase*, *Supra* note 13.
18 For instance, if a *Brahmin* was killed by a person of lower caste, the murderer would get death penalty and his property confiscated. If a *Brahmin* was killed by another *Brahmin*, the murdered would be banished.
19 Rahman (2017), p. 81.
20 Ranchhoddas and Thakore (1999), p. iii.
21 Rahman, *Supra* note 19, p. 82.
22 *Ibid*., p. 77.

ordeal were the major modes of punishment. For instance, different modes of corporeal and severe punishments were in place and execution of punishment was invariably a matter of public display.[23]

### *Criminal Law during Muslim Era:*

Before the advent of the British, Muslim Criminal Law prevailed in this locality. During Sultanate period (1100-1526) the Sultan or the King was the supreme authority to administer justice. When the foundation of Muslim dominion was laid towards the beginning of the thirteenth century, the earlier system of customary laws based on Hindu religious dicta remained operative in this country with some sporadic modifications until the Mughals established their rule in this part of sub-continent in the sixteenth century.[24]

During Mughal period (1526-1857) the Mughal emperor was considered the fountain of justice.[25] In particular, Mughals applied Muslim Criminal Law on its subjects irrespective of their religious beliefs. *Quran, Sunna, Ijma* and *Qyias* would regulate the principles and practice of penal laws. In principle, rulers were not absolutely free to criminalise any act at their wills; rather they could legislate in the form of imperial regulations within the ambit of *sharia* that could supplement *sharia*.

Besides these holy sources, there were secular elements including ancient customs also played an important role in the legal system of the Mughals. Further, there was scope for the Judges to apply dictum of equity, good conscience and justice as at times *Isthsan* was applied to arrive at a just decision.[26] In essence, Judges used to exercise wide discretionary powers in their own spheres.[27] Royal pronouncements of the emperor were the explicit legislations. *Qisas, Diya*, *Hadd* and *Tazir* were modes of punishments permitted in Islamic Law. The basis of Islamic sentencing principles were clearly depicted by a scholar:[28]

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23 Menski (1991), pp. 314-316.
24 *BLAST AD case*, *Supra* note 13.
25 Halim, *Supra* note 11, p. 50.
26 *BLAST AD case*, *Supra*note 13.
27 Khosla (1976), p. 33.
28 Rahman, *Supra* note 19, p. 86.

> *Sharia prescribed hadd (fixed punishments) for drinking wine (shrub al kamar), theft (sharika), bandity (haraba), extra-marital intercourse (zina), false accusation of zinaand apostasy (ridda). For shrub al kamar and kahf, an offender deserved 80 and 40 lashes respectively. While the death penalty was prescribed for haraba and ridda, it is amputation of one hand for sharika. An offender liable for zina should be stoned to death if married, or given 100 lashes, if unmarried. For intentional murder and bodily injuries, sharia prescribes qisas (retaliation) wherein punishment follows the simple rule of an eye for eye. However, the victims could claim blood money (diyat) from the offenders by relinquishing their right to retaliation (qisas). For all other offences, sharia prescribed tazir (discretionary punishment).*

Though only few offences were criminalised with *sharia*-based principles, *hadd, qisas, diyat* and *tazir end to* resemble deterrent, retributive, reformative theories respectively. As the rulers did not disturb grass-roots institution of justice, principles of crime and punishment of Hindu law were also in unofficial application at local levels as both the landlords and the tenants mostly belong to the majority Hindu population in Bengal.[29]

The hallmark of Muslim Jurisprudence was that with little exceptions, the crime was considered to be a wrong done to the injured party alone, not an offence against the state and the punishment was regarded as the private right of the aggrieved party.[30] In principle, Muslim law of evidence was highly technical. For instance, no Muslim could be convicted with capital punishment on the evidence of an infidel. Further, a Muslim's depositions were equivalent to those of two infidels. Evidence of two females were being equal to that of one male. The testimony of ocular witnesses was of paramount importance. Though examining the witnesses were adversarial in nature with rare presence of lawyers in court proceedings, the judges used to exercise inquisitorial power with a view to ascertain the real controversy.

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29 Menski, *Supra* note 23.
30 Banarjee (1997), p. 62.

Judicial administration was sporadic and little bit vague in the sense that Muslim Criminal Law was not always certain and uniform. Further, criminal law was regarded as a branch of private law. In many cases, murderer could escape simply by paying money to the dependents of the deceased. Too much discretion was given to the judges.[31]It is true that though there was no check on arbitrary powers of the Mughal Emperors, the people were left undisturbed in their traditional village life and their life, liberty and property were most of the part safe in the days of Great Mughals.[32] In essence, Mughals were credited for introducing and developing a well-organised system of law.[33]

Mughal retained the ancient system of village *panchayets* that used to settle the petty dispute in mostly the form of compromise. In town, there was a regular Town Court presided over by a *Quazi* known as *Quazi-e-Parganah*. Town Courts had jurisdiction over both civil and criminal matters. There were also *Fauzders* who tried petty criminal cases. There was existence of *Kotwal* who functioned as chief of town police. He performed the functions of Police Magistrate and tried petty criminal cases. The principal judicial authorities in district level were the District *Quazi* who exercised appellate power against the decisions of *Quazi-e-Parganah* and *Kotwals*. At province-level, there existed Provincial Governor's Court namely, *Adalat-e- Nizam-e-Subah*, presided over by the Governor or *Subadar*. *Adalat-e-Nizam-e-Subah* had original and appellate jurisdiction. Its original jurisdiction included trial of serious offences like murder while its appellate jurisdiction included hearing of appeal preferred against the judgments of the District *Quazi* and *Fauzders*. Appeals from and against the decision by this Court would lie to the Emperor's Court or to the Court of Chief Justice.

### *Reforms by English Administrators:*

The common law system[34] came to this area with the British East India Company. The Company was granted charter by King George I in 1726 to

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31 Halim, *Supra* note 11, pp. 52-56.

32 Haque, *Supra* note 1, p. 1.

33 *BLAST AD case*, *Supra* note 13.

34 Common law is that part of English law which is not the result of legislation i.e. the law which originated in the custom of the people and was justified and developed by the

establish Mayor's Court in Madras, Bombay and Calcutta (now Chennai, Mumbai and Kolkata respectively). Judicial functions of the company expanded substantially after its victory in Battle of Plassey in 1757. In 1765 company obtained the charge of both civil and criminal administration of justice in Bengal.

By 1772 company's courts expanded out from the three major cities and new structure of criminal courts was created with *Sadar Nizamat Adalat* at the top and *Mufassil Nizamat Adalat* in each District. In the process, the company slowly replaced the existing Mughal legal system in those parts. In 1790, a circuit court was established in each division in place of district level *Mufassil Nizamat* Adalat and introduced Magistrates with jurisdiction over petty criminal cases. During this time, some measures were introduced to reform principles of *hadd* and *qisas*. From 1793, large number of convicts were transported to Port Blair and Andaman and Nicobar islands. Further, some excessively harsh sentencing measures like presumptive conviction on approver's evidence, enslavement of family members and fining of whole community and adverse presumption were framed with a view to containing robbery.[35]

The process of introducing reforms in the Islamic law continued till 1832 when the application of Muslim Law as a general law was totally abolished. Various piecemeal reforms made during 1797 to 1832 also did not bring about consistency in application of Muslim Law; rather the result was utter chaos and confusion in the administration of criminal justice.[36]

***Regulation of 1832:***

The most significant change took place in 1832 when application of Muslim Criminal Law as a general law to all persons was stopped. Regulation VI of 1832 played a very prominent role in shaping the future course of criminal law in India and Non-Muslim were allowed to free themselves from the jurisdiction of Muslim Criminal Law. For the first time, jury were appointed under this regulation.

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decisions and rulings of the judges. For details see generally Cross & Jones, *Introduction to Criminal Law* (Butterworth1980) 7.

35 Malik (1994), pp. 237-238.

36 Kulshreshtha (2005), p. 113.

### *First Law Commission and Lord Macaulay:*

Before the enactment of Charter Act, 1833, there existed many discrepancies in the existing Regulations which often resulted in chaos and inconsistency in the application of criminal laws. In 1834, the first Law Commission of India was constituted under the chairmanship of Lord Thomas Babington Macaulay. The Commission were directed to prepare a Penal Code for India. In 1837, the Commission submitted its report. It was to supersede British Criminal Law in presidency towns and Muslim and other penal laws in other parts of India. The draft Code underwent careful revision at the members of the legislature. Sir Barnes Peacock revised the Macaulay's draft. Finally, the Penal Code was passed into law on 6 October 1860.

It may be noted that in preparing the Penal Code, the Commission drew not only upon the English laws and regulations, but also upon Livingstone's Louisiana Code and Napoleon Code.[37] Nevertheless, one may essentially find principles of local element of justice in it.[38] The Code of Criminal Procedure was also drafted by the same Commission. Host of other statutes and codes like Evidence Act, 1872 followed the course. Enacted in 1860, the Penal Code is the longest serving and one of the most influential criminal codes in the common law world including India, Pakistan and Bangladesh. It may be noted that during colonial era, Penal Code underwent amendments on 39 occasions.

It may be pointed out that following the '*Great Independence Movement'* in 1857, the control of company territories in India passed to the British Crown. Being part of the empire saw the next big shift in the legal system of Indian Sub-continent. Supreme courts were established replacing the existing mayoral courts. These courts were converted to the first High Courts through Letters of Patents authorized by the Indian High Courts Act passed by the British parliament in 1862. Superintendence of lower courts and enrolment of law practitioners were deputed to the respective High Courts.

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37 Ratanlal et al, *Supra* note 20, p. iv.
38 Banerjee (1991), p. 226.

During the *Raj*, the Privy Council acted as the highest court of appeal. Cases before the council were adjudicated by the law-lords of the House of Lords. The State sued and was sued in the name of the British sovereign in her capacity as Empress of India.

It may be specifically mentioned that initially company officials and local *zeminders* would use private places for whimsical trials of poor peasants. The courts, being situated far flung districts and Calcutta, were used as real hardships for the rural peasantry. The religious dicta of *sharia* were replaced with state-imposed secular legal norms. The state became the complainant in the prosecution of an offender. And the actual victims of crime were relegated to the status of mere witnesses. Acutely adversarial procedure with passive role of judges, excessive advocacy of lawyers, authoritarian mode of law enforcing agency and imposition of excessive imprisonment was introduced. Abolition of blood money was a step in this reform.

In courts and prisons the European convicts received soft treatment while growing unrest and mass uprising of peasants and political workers, dissidents, writers were governed through criminal laws. Though mutilation was replaced with capital punishments and imprisonment was replaced with transportation in apparently just legal system, the application of criminal laws was excessively harsh, disproportionate and even racial.[39] Capital punishment of Raja Nana Kumar is a classic example of judicial killings among series of punishments to many nationalists and poor natives. In particular, the preferential treatment of the Europeans in court left plethora of tyranny, misdeeds, oppressions and serious crimes committed to Bengali peasants in the name of indigo plantation and managing law and order in most cases virtually unpunished during colonial era. Though criminal justice agencies including police, courts and prisons were employed to further colonial dominance, mass-uprising and nationalist movements during later part of *raj* virtually defied and ridiculed legal system as ‘trial as festivals, prisons as temple’.

Obviously, newly imposed legal regime, standard court structure, the Penal Code and the value system of justice, though not applied equally, are

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39 Tharoor (2017), p. 114.

salutary legacies. In the process, the British have saddled Indian subcontinent with colonial prejudices, pecuniary greed, and brutal coercion.[40] For instance, draconian concept of sedition was enacted as an offence in 1870 to suppress any criticism of British policies. The 'race-conscious justice system' was installed by a foreign race and imposed upon a conquered people who had never been consulted in its creation.[41] Sentences handed down by the British judges showed marked disparity as '(not)-blind justice' either imposed less sentence or exonerated for defence plea in case a European was rarely found guilty. Among series of incidents of brutal assault, physical injury and murder committed to the servants and peasants by the British during two hundred years' rule, only two were reportedly awarded capital punishment in Bengal.[42]

### *Criminal Law during Pakistan Era:*

British colonial rule ultimately came to an end in August 1947 and British Indian territory divided into two independent States, namely- India and Pakistan.[43] Eastern part of Bengal after partition formed the province of East Bengal and became the part of Pakistan. The province of East Bengal was renamed as East Pakistan under the Constitution of Pakistan, 1956.[44] In particular, right to fair trial and protection against *ex post facto* penal law were enshrined in this document.

During Pakistan period (1947-1971), all laws enacted during colonial British rule remained operative with minor amendments and modifications.[45] During this period, Penal Code was amended on fourteen occasions. For instance, section 123A was added to the effect that condemnation of the creation of the State was made punishable offence. Interestingly, inciting the students to take part in political activity was made a penal offence.[46]

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40 *Ibid*, p. 110.
41 *Ibid.*
42 John Rudd case (1861); George Nairns case (1880).
43 Independence Act, 1947.
44 Government of India Act, 1939.
45 Patwary (1991), p. 8.
46 Pakistan Penal Code (Second Amendment) Ordinance, 1962.

It may be noted that martial law was imposed in 1958. Martial Law Regulations, 1958 contained 26 penal provisions. Preventive detention and public safety laws were frequently used against dissident political activist as the operation of the penal laws was mostly contingent upon political consideration of ruling elites.[47]One significant shift in the administration of justice in Pakistan was abolition of jury system in Sessions trial with effect from 22 June 1959.[48] In 1960 Probation of Offenders Ordinance was promulgated with a view to having therapeutic approach to offenders convicted of minor offences.[49] Criminal Law (Amendment) Act, 1958 was passed that paved the way to try offences under Prevention of Corruption Act, 1947. A purposeful deterrent law titled Elective Bodies (Disqualification) Order, 1958 virtually aimed at political emasculation of the freedom loving Bangali nationalists.

Though successive constitutions were adopted in Pakistan in 1956, 1962, acute discrimination towards Bengali people, successive military interventions in 1958, 1969, curtailment of fundamental rights, imposition of deterrent laws, harsh treatment of political opponents and mass uprising in East Pakistan were hallmarks of 23 years' long authoritative regime in Pakistan.

## D. Criminal Laws in Independent Bangladesh

### *Colonial Remnants Continue to Function:*

Pakistani forces' denial to hand over power to Bangabadhu Sheikh Mujibur Rahman along with brutal mass-killing and oppression prompted the declaration of independence of Bangladesh on 26 March 1971. On 10 April 1971, the elected representatives assembled in Mujibnagar and formally declared Bangladesh to be a sovereign Republic. Acting President Syed Nazrul Islam promulgated the Laws Continuance Enforcement Order, 1971.[50] In fact, Bangladesh did not immediately achieve a *de jure* position as a country, and on 16 December 1971 Bangladesh attained real statehood. The Constitution would follow

47 Rahman, *Supra* note 19, pp. 118, 120.
48 Haque, Supra note 1, p. 23.
49 Probation of Offenders Ordinance, 1960.
50 Laws Continuance Enforcement Order, 1971.

afterwards and until then the law making process was characterised by Presidential Orders emanating from the President or Acting President in the exercise of powers conferred on them by the Proclamation of Independence of 10 April 1971.[51] Accordingly, the constitution was adopted on 4 November 1972 and it came into force on 16 December 1972. After independence, all laws inherited from British and Pakistan-era necessarily continued to function in Bangladesh.

Reference may be made to provisions of our Constitution that made a catalog of fundamental rights that include right to fair trial and protection against arrest and detention.[52] In fact, constitutional recognition of right to fair trial bears an overarching effect on all criminal laws.

***Major Reforms in Criminal Laws:***

On January 1972, Bangladesh Collaborators (Special Tribunals) Order, 1972 was promulgated for the trial of those who were collaborators during liberation war. As newly independent state became hostage to decline in law and order, food autarky, natural disaster, black marketing, hoarding and other prejudicial activities, enactment of Scheduled Offences (Special Tribunals) Order, 1972 followed. In 1973 International Crimes (Tribunal) Act, 1973 was set in motion with a view to book the perpetrators of killing, arson, rape etc. during liberation war. In the meantime, Constitution (Second Amendment) Act, 1973 was passed that contained preventive detention and emergency power to the President. In combating a series of prejudicial activities Special Powers Act, 1974 was passed. On 28 December 1974, President imposed emergency that suspended enforcement of major fundamental rights. In the meantime, the fundamentals of standard Juvenile Justice System were initiated with the passing of Children Act, 1974. Ultimately, the Constitution (Fourth Amendment) Act, 1975 was passed with drastic change in the constitutionalism.

Following brutal killing of Bangabandhu Sheikh Mujibur Rahman along with his family members by some army officials, Martial Law was

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51 Awal, Kabir and Murphy (2004), pp. 3-6.

52 The Constitution 1972, arts 33, 35.

imposed in 1975. Martial Law Regulations, 1975 provided for summary trial in martial law courts for trial of possession of illegal arms, corruption etc. During Zia regime, martial law underwent some amendments and another Martial Law Regulations, 1976 followed. In 1980 Dowry Prohibition Act was passed with a view to containing dowry-related offences in Bangladesh. During Zia regime, Special Martial Law Regulation, 1976 was used to hold clandestine trial of army officials and political activists *en masse*.

By virtue of Law Reforms Ordinance, 1978, committal proceedings before the Magistrates in Sessions triable cases were abolished with effect from 1 June 1979. Sessions trial with the aid of assessors was also abolished in 1978.[53] In 1978 a provision for separate sentence hearing was inserted in sections 265K(2) of Code of Criminal Procedure, 1898 (Code) for trial in Sessions Courts.[54] Another similar provision was also introduced for trial in Magistrate Courts.[55]

On 24 January 1982, General Ershad effected a coup and came to the power. During Ershad regime, Penal Code was amended on five occasions. However, the sentence hearing provisions in criminal trial were repealed in 1982.[56] In 1982 Code was amended to provide for specific time limit to complete the investigation and failing which to stop further investigation and to release of the accused.[57] The demarcation between summons case and warrant case was also made.[58] Sentencing powers of the Magistrates were enhanced in 1982.[59] Further, section 339B of the Code provided for trial of the accused *in absentia* after publication of notices in national dailies. Section 339C of the Code provided for

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53 Law Reforms Ordinance, 1978.

54 *'If the accused is convicted, the Court shall unless it proceeds in accordance with the provisions of section 562, hear the accused on question of sentence, and then pass sentence on him according to law.* Such provision was inserted by Law Reforms Ordinance, 1978 (XLIX of 1978).

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

56 Ordinance XXIV of 1982.

57 Law Reforms Ordinance, 1982, s 167(5)-(7A).

58 Ordinance XXIV of 1982.

59 Ordinance XXIV of 1982, s 32.

concluding trial of criminal cases within specific time. During Ershad era, Cruelty to Women (Deterrent Punishment) Ordinance, 1983 and Narcotics Control Act, 1990 were enacted.

After fall of Ershad, democratic transition followed in 1991 with the premiership of Khaleda Zia. In 1992 in response to deteriorating law and order situation, President Promulgated Suppression of Terrorist Offences Ordinances, 1992. In 1992 provision for stopping of further investigation and further proceeding were abolished.[60] In 1995 Repression of Cruelty to Women and Children Tribunal Act, 1995 was passed. In 2003 provision was made for deduction of imprisonment of previous custody from the period of sentence was made.[61]

In 1996 Sheikh Hasina led-government assumed the power. During Hasina regime, Public Safety (Special Provisions) Act, 2000 and Suppression of Cruelty to Women and Children 2000 were major laws that were passed. In 2001 Khaleda-led government retained power and Law and Order Disruption (Special Provisions) was passed in 2002. Act for Control of Acid, 2002[62], Acid Offences Act, 2002[63] were major special laws enacted at that time.

In 2006, a caretaker government assumed power. On 11 January 2007 President proclaimed emergency and military-backed interim government took the office for a prolonged period. Accordingly, Emergency Power Ordinance, 2007 and Emergency Power Rules, 2007 virtually curtailed the enjoyment of civil and political rights and harsh treatments of politicians and officials at the caprice of those who were at the helm. Anti-terrorism Ordinance, 2008 intensified the course. Nevertheless, this neutral government took genuine effort for creation of separate Judicial Magistracy in 2007.

After assuming power in 2008, Hasina led-regime amended International Crime (Tribunals) Act, 1973 thereby paving the trial of local collaborators and perpetrators of serious crimes committed at the time of liberation war.

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60 Act XLII of 1992.
61 Act XIX of 2003, s 35A.
62 Act II of 2002.
63 Act I of 2002.

Prevention of Human Trafficking Act[64], Prevention and Protection of Domestic Violence Act[65] may be listed few of such Statutes that provide for special legal framework for combating crimes and violence against women and girls.

It may be specifically noted that in 1998 Bangladesh ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984. However, there was no attempt to adopt domestic legislation for long to comply with obligation under this Convention. In furtherance of adherence of Bangladesh to CAT, death and torture in custody is made punishable under Torture and Custodial Death (Prevention) Act, 2013.[66] Viewing the torture as serious infringement of fundamental human rights, Torture and Custodial Death (Prevention) Act creates two core offences: firstly, torture by a law enforcement officer, and secondly, custodial death due to torture. The Act applies to all law enforcement agencies and renders all kinds of torture as cognizable, non-compoundable and non-bailable offences.[67] The Act also provides for easy avenues of complaint and investigation against custodial torture and death.

***Creation of Separate Judicial Magistracy:***

The twin functions of the Magistrates (viz. executive *vis-a-vis* judicial) and also the dependency of the judiciary upon the executive has been a colonial legacy.[68] After independence in 1947, Pakistan government enacted East Pakistan Act No. XXIII of 1957 which provided for separation of judiciary from the executive. However, that law has never been effective for want of a simple gazette notification. The Constitution in unequivocal term states that 'the state shall ensure the separation of the Judiciary from the Executive organs of the State.[69] Nevertheless, as one of the fundamental principles of state policy, art 22 was not readily judicially enforceable.

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64 Act III of 2012.
65 Act XXI of 2010.
66 Act L of 2013.
67 Torture and Custodial Death (Prevention) Act, 2013, s 10.
68 Bari (2004).
69 The Constitution 1972, art 22.

There was undercurrent of demand of implementation of constitutional obligation from the very inception of Bangladesh. The subsequent upheavals of politics rather by-passed it. In 1976 Law Commission recommended that subordinate judiciary on the criminal side should be separated from the executive. In 1987 initiatives were taken to separate the magistracy by amending Code of Criminal Procedure, 1898. For unknown reason the Bill could not be placed before the Parliament. After the fall of autocratic rule in 1990, expectation was high to ensure separation of judiciary. Successive governments did no tangible step in this regard. Successive governments may be blamed for delaying with implementation of such constitutional obligation. In 1999 the Supreme Court issued 12 point directives in *Masdar Hossain case*[70] to ensure separation of lower judiciary from the executive. In 2007 in line with such directives of *Masder Hossain case*, Military-backed interim government ultimately effected the amendment of Code of Criminal Procedure thereby separating the lower judiciary from the executive.[71]

### *Mobile Court:*

Though Code of Criminal Procedure provided for summary procedure for trial of some petty offences[72], Mobile Court Ordinance, 2007[73] specifically empowered the Executive Magistrates to try and punish criminal offences. Though over the years 110 laws have been included in the schedule of the Mobile Court Act, such massive cognizance, summary trial, disparate sentencing powers and laconic procedure may arguably be called into question from jurisprudential point of view. However, High Court Division declares the Mobile Court, being run by Executive Magistrates, illegal.[74]

### *A New Paradigm in Juvenile Justice System:*

In 2013 Bangladesh enacted Children Act (CA in brief) in view of Convention on the Rights of the Child, 1989 (CRC in brief). Beijing

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70 Masdar Hossain case*, Supra* note 2.
71 Ordinance nos. II & IV of 2007.
72 Code of Criminal Procedure, 1898, s 260.
73 Mobile Court Act, 2009.
74 *The Daily Star* (13 May 2017).

Rules, Riyadh Guidelines, Havana Rules and the directives of the High Court Division (HCD in brief) also appear to have sporadically permeated the provisions of the new statue. It is an epoch-making legislation for the protection and care of the juveniles involving law. This law offers a standard legal regime and institutional framework for juvenile justice in Bangladesh. It sets out a child-friendly approach in the adjudication and disposition of matters in the best interest of children. CA 2013 repealed the Children Act, 1974. It appears that a new statute with clear aims, objectives, underlying philosophy and thematic issues proposes a new horizon in our system. However, procedural and functional challenges in disposing of pre-trial issues during investigation, absence of child- friendly Court infrastructure, *ad hoc* Children Court, confusion over jurisdiction of Judicial Magistracy on investigation issues, overlapping of jurisdiction of Children Court and Tribunal for Suppression of Cruelty to Woman and Children, ill-equipped Child Desk in Police Station, additional duties of the Probation Officers, lack of facilities in scare child development centres, paucity of budgetary allocation for juvenile justice sectors and lack of awareness among the common people are few major challenges that tend to encumber the proper application of CA 2013.

## E. Evaluative Reflections

As depicted above, most of the criminal laws, procedures, institutions and principles that evolved during the British period (1757-1947) still govern the functioning of the Criminal Justice System. It is often argued that the law-making process in colonial Bengal was erratic and norms were often enacted randomly.[75] The fact is that the legal system of Bangladesh, a complex hybrid of pre-colonial indigenous legal cultures, received Anglo-Indian legal tradition, and post-independence developments is pluralistic in nature. [76]Alongside the steady growth of series of special laws in 1980s and afterwards, some half-hearted palliative reforms have also been initiated with a view to easing the strain in criminal procedure. The contemporary law of Bangladesh is still largely colonial in nature and in spirit and the colonial legacy of power-facilitative, command-based and top-down law making continues to haunt the country's legislative history,

75 Malik, *Supra* note 35, p. 2.
76 Hoque (2011), p. 99.

thereby marginalising the people's participation in law making and their chance of getting better justice.[77]

Though in course of its journey Bangladesh is heading towards some economic acceleration, it has still become hostage of many governance issues relating to yawning economic disparity, fairness and effectiveness of state institutions. All these issues have been allegedly accentuated the highly authoritative attitude of law enforcing agency. In fact, the overall scenario of administration of criminal justice here may be now depicted as coercive, dilatory, time-consuming and adversarial with acute arrear of cases at different tiers of courts.

The reality is that the common people suffer from a torturing sense of socio-economic and even physical insecurity. This has been the result of years of mal-governance, mismanagement of the affairs of the state and poor socio-economic development of the society. The politics and ideology are confrontational which breeds continual social and political unrest.[78] In essence, various social, economic and political forces have, in conflicting ways, operated and influenced the course of governance in Bangladesh. Though over the years, some indifferent and half-hearted endeavours have been made to remove the procedural trappings and ensure effective justice, crisis in the system of justice is infinitely complicated given the decline in social values.[79] Lawlessness in the forms of impunity and abuses of the coercive authority of the state is not only widespread but also systematic within state-centric formal justice arrangements. More so, abuses of the coercive authority of the state not only unjustifiably subject dissidents and marginalised sections of people to face the ordeals of the formal justice but also undermine the sanctity of this authority.[80]

It has to be borne in mind that the judges, lawyers, police, prison officials, social welfare officials are major components of Criminal Justice System. Therefore, the society, politics and the governance are also intrinsically related to the overall challenges and prospects of the Criminal Justice System of a country like Bangladesh. Practically speaking, leaving aside

77 Hoque, *Supra* note 76, p. 100.
78 Alam, *Supra* note 4, p. 2.
79 Ahmed (1995), p. 279.
80 Rahman, *Supra* note 19, p. 228.

the colonial legacies, it creates a lot of continuing pain and injustice because even post-colonial government that rule in the name of the people have been constantly tempted to abuse power (Menski, 2011: Preface (in Hoque, 2011). This is more pertinent for a country like Bangladesh that has been ravaged by colonial rulers and post-colonial political upheavals, decline in values and acute mal-governance for long. In particular, inherited colonial mentality, corruption, too much reliance on confession of the accused rather than evidence oriented way of investigation, discourteous attitude towards public, use of the incumbent for political purpose are major causes for lack of confidence in police force which in turn, undermines the process of criminal justice.[81] The upshot is that the dictate of good law and precedents are somehow in many instances by-passed or technically avoided. It is also clear that a finest law without its proper application may turn into a 'carpet knight'.

The upshot is that colonial legacies along with some sporadic reforms and pieces of special legislation made from time to time still dominate the Criminal Justice System of Bangladesh. It also follows that the subsequent amendments to antiquated penal laws have not also been revised in a consistent manner; rather they are imposed to settle some incoherent behaviour of the members of the society.

I am in agreement with Shahdeen Malik and Shashi Tharoor who are highly critical of the rationale and objectives of the British-imposed criminal laws. They have essentially unmasked the imperial *raison d'etre* and *modus operandi* of colonial due process and rule of law.[82] While echoing the genuine concerns of those scholars, it may be added that British colonial rulers are genuinely credited for developing a systematic and standard Criminal Justice System in this region. In fact, the modern court system, the penal code, the respect for jurisprudence and the value system of justice- even if they were not applied fairly to natives in the colonial era- are all worthy legacies; however in the process the Britain has saddled us with an acutely adversarial legal system that is excessively encumbered with never-ending procedural formalities.[83] Colonial authority

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81 Faruque (2007), pp. 30-32.
82 Malik, *Supra* note 35; Tharoor, *Supra* note 39.
83 Tharoor, *Supra* note 39.

exercised their power that criminalised some malpractices including *sati*, infanticide, child marriage etc., skin sensitive justice governance generated landlessness, pauperism, prostitution and decline in moral values *vis-a-vis* peaceful rural life.

Today there is no denying that the core philosophy, morale and aims of colonial rulers can in no way be squarely applicable for a democratic nation in this age of human rights, due process and rule of law. Further, with the passage of time and proliferation of easy communication and access to technology alongside the shift in the mindset of people, the reforms of existing criminal justice system are essentially required.

More importantly, colonial enactments including Police Act, Police Regulation of Bengal, Code of Criminal Procedure, Prisons Act, Jail Code and Evidence Act require a holistic review so that constitutional notion of due process and fair trial is meaningful to the justice-seekers. It has also been advocated that any reforms in the criminal justice should be initiated first with the reforms in criminal investigation. It is also important to include victim protection in the agenda of criminal justice reforms. Non-custodial sentences including community service order, forfeiture, fine, economic sanction should dominate mainstream sentencing instead of recurrent death penalty and long custodial sentence. Most importantly, permanent and well-equipped prosecution office will help develop the professionalism and ultimately ensure quality of criminal justice. Finally, the development of infrastructure of criminal courts with the innovative exploration of modern technology on case management is indispensable for proper functioning of the administration of justice.

In fine, the observations of Appellate Division on its stance for framing a new Criminal Code may be reproduced:[84]

> *The present Code [of Criminal Procedure] was promulgated by the colonial rulers to consolidate their imperial power through the exercise of abusive powers by the police. There was no constitution at that time and the fundamental rights was a far cry which was being not at*

[84] BLAST AD case, *Supra* note 13.

*all recognised. After driving out colonial rulers, we cannot detain and prosecute an offender under draconian provisions of law. The object of the Code for which it was implemented on this soil is non-existent. The present Code is not at all suitable for the administration of criminal justice after so many changes made in the meantime and it is high time to promulgate a new Code.*

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# Global Framework: Addressing the Impact of Climate Change on Coastal Populations

Lipika Bhadra*

## Introduction

The aim of this research is to address the gradual development of international law and policy for the eradication of climate change-induced abuses of coastal fishing populations. Therefore, this article firstly, discusses existing instruments of international law; treaties, declarations, and consensus regarding adaptation to climate change and human rights. Secondly, this article also discusses existing coastal and climate change mitigation activities and strategies that mainly focus on the role of the international community and the United Nations in responding to climate-induced impacts on coastal fishing people. At the same time, an attempt has been made to explore the current international approaches for evaluating said climate-induced impacts. Finally, this article endeavours to review the present enforcement mechanism of international law to protect human rights and obligations at the national level particularly on the approach taken by Fijian institutions, its laws, strategies, and policies on dealing with the livelihood of coastal fishing people.

## Framework: Relevant International Institutions

After the eye-opening impact of World War II, to ensure peace and tranquillity in the post-war world, the international community adopted the Charter of the United Nations. The United Nations, in turn while addressing environmental issues has not only been successful in the creation of a legal framework for the fight against climate change, but also in the establishments of specialized agencies that deal with the effects of

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climate change. While the following section of this paper will go over the most important pieces of legislation in the fight against climate change, we will for now, focus on the specialised institutional body created during the development of international environmental law.

**Intergovernmental Panel on Climate Change (IPCC)**

In the year of 1988, the Intergovernmental Panel on Climate Change (IPCC) was set up by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) with the aim of providing an objective source of scientific information regarding climate change and environmental security.

In 1988, IPCC was organised into three Working Groups with different task assignments:[1] Working Group I examined the scientific aspects of climate change; Working Group II was tasked with the research of impacts and vulnerabilities brought by climate change, as well as adaptation strategies to the phenomenon; and Working Group III was exploring mitigation strategies to fight the effects of climate chance. This body, in its Fifth Assessment Report provided a comprehensive assessment of sea level rise and its causes over the past few decades; as well as estimations of cumulative CO2 emissions since pre-industrial times, establishing a 'CO2 budget' for future emissions in order to limit global warming to less than 2°C above pre-industrial levels during the twenty-first century. Unfortunately, about half of the maximum allocated emissions have been emitted to the atmosphere by 2011.

**Food and Agriculture Organization of the United Nations (FAO)**

The Food and Agriculture Organization is a specialized body of the United Nations in charge of leading the fight against hunger. FAO's focus is to achieve food security globally. With 194 Member States, FAO carries out projects and research in over 130 countries throughout the world. According to FAO the impact of climate change on Earth is already

[1] IPCC, *Report of the First Session of the WMO/UNEP Intergovernmental Panel on Climate Change (IPCC),* (World Meteorological Organization, 1988) <https://www.ipcc.ch/meetings/session01/first-final-report.pdf>.

noticeable, especially on the world's oceans, something which will severely affect the hundreds of millions of people who depend on fishing for their livelihood.[2]

FAO as an international organization deals with many of the issues that coastal fishing peoples will continue to face because of climate change, which makes it especially relevant for the purposes of this paper. In order to achieve its mission, FAO has created numerous specialised departments, focusing on different aspects of FAO's mission. Such as:

**Climate, Biodiversity, Land and Water Department (FAO)**

This department of FAO aims to support countries in achieving food security and sustainability; aiming to create a world in which food and agriculture are able to endure the impacts of climate change. It advocates for large-scale climate finance to support changes in the agricultural sector as the key to the creation of a more sustainable future. This department focuses on addressing natural resources issues related to agriculture, crops, livestock, forestry, fisheries, and aquaculture utilising a holistic multi-sector approach and providing technical support to the operational field.

**Climate and Environment (CBC) (FAO)**

The Climate and Environment Division (CBC) assists member countries in the development of policies, plans and responses for the challenges of climate change. This includes the promotion of adaptation and climate resilience measures, as well as climate change mitigation strategies in the agricultural sector. It guarantees FAO's internal coordination and quality enhancement of climate change work across the organization and its Strategic Programmes. The Division also serves as the focal point for the management of the Green Climate Fund (GCF) and Global Environment Facility (GEF) portfolios at FAO, as well as a multidisciplinary and global approach to bio-energy. CB promotes, coordinates and takes the lead in developing concepts

[2] UN News, *Climate change will have major impact on fishing industry, says UN agency* (10th July 2008) UN News <https://news.un.org/en/story/2008/07/265842-climate-change-will-have-major-impact-fishing-industry-says-un-agency>.

and methods for the sustainable management of natural resources in the context of climate change.[3] CB also supports the implementation of policies and commitments under the Sustainable development agenda, the Rio Conventions, the Paris Agreement, with an emphasis on the sustainable management of land, soils, energy, water, biodiversity and genetic resources.[4] Finally this Division is tasked with providing member states with assistance to planning.

**Fisheries and Aquaculture Department (FAO)**

The Fisheries and Aquaculture Department of FAO has the mission to support development of the fisheries sector in a regulated and environmentally sensitive manner, to contribute to the improvement of well-being and living conditions of poor and disadvantaged communities in developing countries. It envisions a world in which the responsible and sustainable use of fisheries and living marine resources makes a noticeable contribution to wellbeing, food security, the reduction of poverty.[5] Its mission is to reinforce global governance, management and technical capabilities and consensus-building in the sustainable development of the sector and the resources it utilises.

## Framework: Relevant International Climate Change Law

This section of the research will go over some of the most important pieces of international legislation regarding climate change and ocean governance.

### United Nations Framework Convention on Climate Change (1992)

IPCC's First Assessment Report was published in 1990, negotiations for a climate change convention sprawled. On December 1990, the United Nations General Assembly passed Resolution 45/212, by which the Intergovernmental Negotiating Committee for a Framework

[3] FAO, *FAO's work on Climate Change,* FAO <http://www.fao.org/climate-change/en/>.
[4] FAO, *Mandate of FAO,* FAO <http://www.fao.org/about/who-we-are/departments/climate-biodiversity-land-water/en/>.
[5] Fisheries and Aquaculture Department, *About Us*, FAO <http://www.fao.org/fishery/about/en>.

Convention on Climate Change (INC) was established as 'a single intergovernmental negotiating process under the auspices of the General Assembly.' This body would meet on five occasions during 1991 and 1992, and on May 9th, 1992, it finalised its draft for the Framework Convention on Climate Change. In 1992, 154 states signed the United Nations Framework Convention on Climate Change (UNFCCC) and it came into force in March 1994, with the required 50 states having ratified the convention in the first one and half years.[6] As of now, it is, ratified, by 197 states suggesting and overwhelming acceptance of the most relevant piece of international climate change legislation aiming at the prevention of 'dangerous' human interference with the climate system.

## Rio Declaration

The Rio Declaration placed a strong emphasis on the environmental aspects of development, upsetting the balance 'between the sovereign use of natural resources and duty to care for the environment.'[7]

## Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998)

After the ratification of the UNFCCC the parties decided to negotiate a protocol containing binding, quantified emissions reduction commitments for the industrialized countries because of three main reasons: (i) During the FCCC negotiations, several European Community members had pushed for these commitments, but were unable to bring the two main hegemons of the time, the United States and the Union of Soviet Socialist Republics (USSR) to participate[8]; (ii) the IPCC's (1995) report established fairly that human activities were significantly affecting the climate; and (iii) there had been little concrete action to reduce greenhouse gas

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6 Stein von Jana, 'The International Law and Politics of Climate Change Ratification of the United Nations Framework Convention and the Kyoto Protocol' (2008) 52:2 *Journal of Conflict Resolution*, 243-268.

7 *Rio Declaration*, UN Doc A/CONF.151/26/Rev.1 (Vol.1) (14 June 1992).

8 Porter, Gareth and Janet Welsh Brown, *Global environmental politics* (Boulder, CO: Westview Press, 2nd edition, 1996).

emissions since 1992.[9] One hundred fifty-nine States signed the Protocol in Kyoto on December 11, 1997.[10]

The Kyoto Protocol is one of the foremost international environmental law agreements**,** resting under the umbrella of the United Nations Framework Convention on Climate Change, committing its parties to reduce emissions by setting internationally binding targets. The object of this Protocol is to fight global warming by reducing the presence of greenhouse-effect causing emissions in the atmosphere to 'a level that would prevent dangerous anthropogenic interference with the climate system'.[11] The signatory 184 countries philosophically took into account the consequences of global warming, making a commitment to reduce its effect, which would ultimately affect coastal peoples, especially fishermen.

## Paris Agreement

Parties to the UNFCCC on its 21st Conference of the Parties in Paris (COP21) reached a landmark agreement to combat climate change, aiming to strengthen the actions and investments required for a sustainable future with low carbon emissions. The Paris Agreement for the first time brings all nations together for a common cause: to undertake ambitious efforts in the fight against climate change and in adapting to its effects, offering support to developing countries in reaching their goals. The Parris Agreement, which main goal is to keep temperature rise below 2 degrees by 2050, going as far as pursuing efforts to limit it even further to only 1.5 degrees was signed on Earth Day, April 22nd, 2016, by 175 world leaders at the United Nations headquarters in New York.

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9 Pobert Repetto, 'The clean development mechanism: Institutional breakthrough or institutional nightmare?' (2001) 34:3 *Policy Sciences* 243-268.

10 Neil Adger, et al., 'Climate Change 2007: Impacts, Adaptation and Vulnerability' in Parry M, Canziani O, Palutikof J, van der Linden P, Hanson C (eds), *Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2006) 717–743.

11 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 148 (entered into force 16 February 2005), article 2.

## United Nations Convention on the Law of the Seas

The United Nations Convention on the Law of the Sea (UNCLOS) took shape during the third United Nations Conference on the Law of the Sea (UNCLOS III). The Law of the Sea Convention established the rights and responsibilities of States with regard to the oceans, creating a framework for businesses, environment, and management of marine resources. UNCLOS came into force in 1994 after the ratification of sixty States. Albeit the implementation of the Convention is under numerous scholarly debates, it cannot be debated that it constitutes one of the most important documents for the protection and preservation of marine resources.

## Dealing with the Effects of Climate Change: Adaptation Strategies

In IPCC's 4th assessment report, Working Group II stated, with very high confidence that climate change and subsequent sea-level rise will cause coasts to be increasingly exposed to risks such as coastal erosion. Sea level rise is also expected to cause other hazards to grow, such as floods or storm surges, posing a risk to population and essential infrastructure to support the livelihood of fishing communities. Other hazards that may be caused by sea level rise are salinization of irrigation and drinking water systems, a decreased availability of fresh water.

However, adaptation will be necessary to reduce the impact of climate change, especially in coastal areas. The concept of adaptation is used by many climate researchers to describe 'adjustments in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities.'[12]The IPCC, on the other hand, defines adaption as changes in ecological and social systems aimed at weathering the impacts of climate change in a context of interacting non-climatic changes. Adaptation strategies range from short-term actions to those focused on the longer-term, deeper transformations, aimed at achieving

[12] Janet L. Ivey, John Smithers, Rob C. De Loe, Reid D. Kreutzwiser, 'Community Capacity for Adaptation to Climate-Induced Water Shortages: Linking Institutional Complexity and Local Actors' (2004) 33:*1 Environmental Management* 36–47.

more than specified climate change targets.[13] There are different adaption measures that could prove very useful in the fight against climate-change such as population relocation or the construction of seawalls, storm surge barriers, dune reinforcements, and other methods such as the creation of marshlands, to act as a buffer against sea level rise and possible floods. The protection of already existing natural barriers is also essential. Policy frameworks such as national legislation on climate-change matters, land-use, building policy, or insurance are necessary in order to these additional adaption measures.[14]

In the 5th Assessment report, Working Group II was very highly confident to state that future sea level rise will have negative impacts in coastal and low-lying areas, namely submergence, coastal flooding, and coastal erosion. Not only that, coastal risks will have adverse impacts on population and assets due to existing human pressures like population growth, development, and urbanization of coastal ecosystems. The 5th assessment report included adaptation measures adopted by different States that could prove useful to other countries in the fight against the adverse impacts of sea level rise. The measures collected showed the development of adaption measures in all levels of government, and focused on water resource management, protection of the environment, land planning and disaster risk management. The measures included speaking to the improvement of adjustment strategy over all levels of government concentrating on incorporated beach front water assets administration, natural insurance and land arranging, and calamity chance administration. Other fruitful adaptation measures included changes in infrastructure and technological advancements, ecology-based methodologies, basic healthcare measures, diversification of income sources for the population, early warning systems, agroforestry, and reforestation of coastal mangroves.

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**13** Susanne C. Mosera and Julia A. Ekstromc, 'A framework to diagnose barriers to climate change adaptation' (2010) 107:51 *Proceedings of the National Academy of Sciences of the United States of America.*

**14** IPCC, *Climate Change 2007: Synthesis Report, Summary for Policymakers,* IPCC (17 November 2007) <http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf>.

Ecosystem-based adjustment, such as the creation of protected areas, the signing of conservation agreements at a regional level, and community-administered natural areas have been put in place being embraced inside the farming part in a few regions, together with the development of highly resistant crops, climate predictions, and coordinated water-resource management. Artic communities, in particular, can help small islands and other coastal States through their experience in the implementation of co-management adaptation strategies that combine traditional and scientific knowledge.[15] The impact that these assessment reports had on the global mind set was huge, so much so that numerous actors, both municipal and international, raised their voices in favour of international cooperation on the issue.[16]

The Club of Madrid, Global Leadership for Climate Action (GLCA), made up of former mandatories, and relevant figures from the business world, public sphere, and civil society from more than 20 countries published, in 2007, a 'Framework for a Post-2012 Agreement on Climate Change', which called for the establishing of four separate negotiation channels, focused, individually, on mitigation, adaptation, technology, and finance. As indicated by GLCA, climate change will severely impact development, the fight against poverty, and the accomplishment of the Millennium Development Goals (MDGs). In this manner, States and Regions that fail in the implementation of adaptation policies will add to worldwide instability through the spread of disease, resource-based conflicts and the degradation of economic systems. In the opinion of GLCA, adaption does not simply consist of

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**15** A. Villamizar, 2014 et al., 'Adaptation needs and options' in C.B Field., V.R. Barros, D.J. Dokken, K.J. Mach, M.D. Mastrandrea, T.E. Bilir, M. Chatterjee, K.L. Ebi, Y.O. Estrada, R.C. Genova, B. Girma, E.S. Kissel, A.N. Levy, S. MacCracken, P.R. Mastrandrea, and L.L. White (eds), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014) 833-868.

**16** Stein von Jana, 'The International Law and Politics of Climate Change Ratification of the United Nations Framework Convention and the Kyoto Protocol' (2008) 52:2 *Journal of Conflict Resolution*, 243-268.

project-design or measure lists, rather aims at resilience-building and reduction of vulnerability. Furthermore, it is based on national policy on prevention rather than reaction. National Adaptation Programmes of Action (NAPAs), according to GLCA, constitute a primordial first step for countries to identify priority sectors that require immediate adaptation to climate change. Therefore, they recommended that all developing nations faced with climate change related risks should work on their own NAPAs and Poverty Reduction Strategy papers into their economic and social development plans.

**International Fisheries Law**

During the last thirty years, the number of fishing people, worldwide, grew at a faster pace than the world's population itself. [17] In 2006, an estimated 35 million people worked in the fishing industry, mostly in Asia, Africa, and Latin America.[18] International fisheries law, a subfield of the law of the sea, is an emerging area of public international law that seeks to regulate fisheries management in areas within and beyond national jurisdictions. It should be remarked that most of the principle regarding fisheries law is derived from customary international law. All states must respect the principles of international customary laws regardless of conflicting treaty obligations. The work carried out by UNCLOS in their effort to codify many of these rules is to be commended. In this part of this paper, the laws, agreements and adopted principles and strategies that have moved the development of international fisheries law and those which have taken into consideration the wellbeing of the coastal fishermen will be discussed.

On top of this, there are numerous international law instruments relevant to the study of fisheries' regulation. Some of them are (i) the Declaration of the UN Conference on the Human Environment, 1972 (the Stockholm Declaration) (ii) Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1973 (iii) Convention on the

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17 Sarah Coulthard, Derek Johnson, J. Allister McGregor 'Poverty, sustainability and human wellbeing: A social wellbeing approach to the global fisheries crisis' (2011) 21:2 *Global Environmental Change* 11.

18 FAO*, The State of World Fisheries and Aquaculture* (FAO, 2009).

Conservation of Migratory Species (CMS), 1979 (iv) Rio Declaration on Environment and Development, 1992 (v) Convention on the Conservation of Biological Diversity (CBD), 1992 (vi) Millennium Development Goals (MDGs), 2000 (vii) Sustainable Development Goals (SDGs), 2015.

In the same way, focusing on the rights of countries in the coastal belt and promoting the rights of the coastal fishing populations, there were conventions, treaties and agreements adopted by international community. Some of the most relevant international instruments on fisheries regulations are:- (i) International Convention for the Regulation of Whaling (ICRW), 1946 (ii) Geneva Conventions on the Law of the Sea, 1958 (iii) The Convention on the Conservation of Antarctic Marine Living Resources (CALMR Convention), 1980 (iv) Law of the Sea Convention, 1982 (v) Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993 (vi) The UN Fish Stocks Agreement, 1995 and (vii) FAO Code of Conduct for Responsible Fisheries, 1995.

Moreover, there are multiple International Organizations focused on the regulation, management and research and development programs of fisheries, for instance: (i) Fisheries and Aquaculture Department of FAO, (ii) Greenpeace, (iii) International Institute for Environment and Development, (iv) IUCN Fisheries and Aquaculture, (v) The Division for Ocean Affairs and the Law of the Sea, and (vi) World Fish and (vii) the International Council for the Exploration of the Sea (ICES).

But the most essential document when talking, specifically, about the wellbeing of fishing people is to be found on FAO Conference resolution 15/93, paragraph 3, which constitutes the Code of Conduct for Responsible Fisheries. In this document, the obligations of States towards fishing peoples read as follows:

a. *States should ensure that only fishing operations allowed by them are conducted within waters under their jurisdiction and that these operations are carried out in a responsible manner.*

*b. States should maintain a record, updated at regular intervals, on all authorizations to fish issued by them.*

*c. States should maintain, in accordance with recognized international standards and practices, statistical data, updated at regular intervals, on all fishing operations allowed by them.*

*d. States should, in accordance with international law, within the framework of sub-regional or regional fisheries management organizations or arrangements, cooperate to establish systems for monitoring, control, surveillance and enforcement of applicable measures with respect to fishing operations and related activities in waters outside their national jurisdiction.*

*e. States should ensure that health and safety standards are adopted for everyone employed in fishing operations. Such standards should be not less than the minimum requirements of relevant international agreements on conditions of work and service.*

*f. States should make arrangements individually, together with other States or with the appropriate international organization to integrate fishing operations into maritime search and rescue systems.*

*g. States should enhance through education and training programmes the education and skills of fishers and, where appropriate, their professional qualifications. Such programmes should consider agreed international standards and guidelines.*

*h. States should, as appropriate, maintain records of fishers which should, whenever possible, contain information on their service and qualifications, including certificates of competency, in accordance with their national laws.*

*i. States should ensure that measures applicable in respect of masters and other officers charged with an offense relating*

*to the operation of fishing vessels should include provisions which may permit, inter alia, refusal, withdrawal or suspension of authorizations to serve as masters or officers of a fishing vessel.*

*j. States, with the assistance of relevant international organizations, should endeavor to ensure through education and training that all those engaged in fishing operations be given information on the most important provisions of this Code, as well as provisions of relevant international conventions and applicable environmental and other standards that are essential to ensure responsible fishing operations.*[19]

It is also worth mentioning the Asia Pacific Fisheries Commission Agreement, 1948[20] through which parties to the treaty (all of them in the Asia Pacific region) unanimously agreed to the creation of a commission with the objective of promoting full and proper utilization of living marine assets through the development and administration of fishing and aquaculture operations and all the posterior processing and marketing in line with the interests of the parties.[21] The Agreement for the Establishment of the General Fisheries Commission for the Mediterranean, 1949 and later it ended up acting as a forum of discussion for the adoption, by signatory states, of multiple international legal instruments for the regulation of fisheries,[22] namely:- (i) Code of Conduct of Fisheries adopted by FAO, (ii) United Nations Convention on the Law of the Sea (UNCLOS), (iii) Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and (iv) the Agreement to Promote Compliance with

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19 FAO, *Code of Conduct for Responsible Fisheries,* (FAO, 1995).

20 *Asia Pacific Fisheries Commission Agreement (APFC*), opened for signature 26 February 1948 (entered into force 9 November 1948), art.4.

21 APFC Agreement as amended by the Commission at its Seventeenth, Twenty-Fourth and Twenty-Fifth Sessions in 1976, 1993 and 1996 and approved by the FAO Council at its Seventy-Second, Hundred and Seventh and Hundred and Twelfth Sessions in 1977, 1994 and 1997.

22 *Agreement for the establishment of the General Fisheries Commission for the Mediterranean*, opened for signature 24 September 1949 (entered into force 20 February 1952),

International Conservation and Management Measures by Fishing Vessels on the High Seas.

Lastly the agreement for Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995), which has the objective of creating a framework of cooperation in conservation and managerial areas of said resources. However extensive, this body of law has not always addressed the problems suffered by fishing communities. In the next section, we will be looking as some of these problems.

## Human Rights and Labour Related Concerns in Coastal Fishing Communities

It is estimated that nearly 58.3 million people work in the capture of fisheries and aquaculture sector contributing some $135 billion in export revenues each year.[23] In spite of its huge contribution to the economy, the sector is beset by human rights concerns, such as child forced labor, slavery, human trafficking, and gender-based discrimination, more so than any other sectors.[24]

Small-scale fishermen often come under threat, being arrested and facing years of trial-less detention after crossing maritime boundaries between states in pursuit of migratory fish stocks, despite said *maritime boundary delimitation*[25] remaining under dispute;[26] children are often exposed to malnutrition, bacterial infections, physical abuse, and

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[23] José Graziano da Silva, *The violation of human rights within the fishing sector and Illegal,Unreported and Unregulated (IUU) fishing* (21 November 2016) FAO <http://www.fao.org/about/who-we-are/director-gen/faodg-statements/detail/en/c/454123/>.

[24] FAO, The violation of human rights within the fishing sector and illegal, unreported and unregulated (IUU) fishing, FAO (21 November 2016) <http://www.fao.org/about/meetings/world-fisheries-day-event/en/>.

[25] Maritime boundary delimitation means demarcation of maritime boundaries between neighboring States, to exercise sovereignty over said area. Under the UNCLOS regime, maritime boundaries must be specified if two States are within 400 nautical miles of one another. Maritime boundary delimitation has been the cause of several disputes between States, with determination of fisheries jurisdiction rising as a key issue.

[26] International Collective in Support of Fishworkers (ICSF), *Arrest and detention of fishers,* ICSF < https://arrests-fishers.icsf.net/en/page/762-Background.html>.

occupational hazards, including shark attacks and injuries resulting from use of explosives, as well as suspension of schooling and psychological sequels due to separation from their family.[27] Women and girls, the most vulnerable group in coastal fishing communities, are often subject to sexual violence and gender-based discrimination in their working areas, even being excluded from fishing through cultural norms in some parts of the world, as a source of income.[28] But these are not the only issues facing coastal fishing people, and as climate change-induced issues such as coastal erosion and sea-level rise start to become more apparent, so will the problems endured by fishing communities.

There exist, however, different international legal instruments that aim to address the impact of climate change on coastal people, focusing on the impacts of climate change on fishing people and ways to prevent these. These national and international legal instruments put emphasis on specific activities and strategies aimed at the mitigation of this impact, and they will be addressed and analysed in this section.

The fishing industry employs an estimated 10–12% of the world population and is one of the most important sectors of employment in the economies of developing states[29]. According to the International Labour Organization, as a result of the use of dangerous machinery to in the capture and in the processing of fish, rates for fatalities and injuries are prevalent in the fishing sector when compared to national averages for all workers.[30] Taking this into account, the International Labour Organization incorporated fundamental working rights of coastal fishing people in numerous conventions: (i) the Forced Labour

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27 Oscar Godoy, *El Salvador: Trabajo Infantil en la Pesca: Una Evaluación Rápida* (ILO, 2002) <http://www.ilo.org/public/libdoc/ilo/2002/102B09_107_span.pdf>.

28 N Weeratunge, KA Snyder, PS Choo, 'Gleaner, fisher, trader, processor: understanding gendered employment in fisheries and aquaculture'(2010)*Fish Fish*. 11 (4) 405-420.

29 Food and Agriculture Organization, *The State of World Fisheries and Aquaculture: Opportunities and Challenges*(FAO, 2014) <http://www.fao.org/3/a-i3720e.pdf>.

30 International Labour Organization, *Labour Standards on Fishers*, ILO<http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/fishers/lang--en/index.htm>.

Convention, 1930[31] (ii) the Freedom of Association and Protection of the Right to Organise Convention, 1948[32] (iii) the Right to Organise and Collective Bargaining Convention, 1949[33] (iv) the Equal Remuneration Convention, 1951[34] (v) the Abolition of Forced Labour Convention, 1957[35] and (vi) the Discrimination (Employment and Occupation) Convention, 1958.[36]

Moreover, having noted the distance separating fishing people from healthcare facilities, the International Labour Organization incorporated provisions for the protection of these workers in (i) the Occupational Safety and Health Convention[37] and Recommendation[38], 1981; and (ii) the Occupational Health Services Convention[39] and Recommendation[40], 1985. In addition, for the protection of the extended members of the fishing community, those that do not necessarily go out to sea in the

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31 *Convention concerning Forced or Compulsory Labour*, opened for signature 28 June 1930 ILO C29 (entered into force 01 May 1932).

32 Convention concerning Freedom of Association and Protection of the Right to Organise, opened for signature 9 July 1948 ILO C087 (entered into force 04 July 1950).

33 Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, opened for signature 1 July 1949 ILO C098 (entered into force 18 July 1951).

34 *Equal Remuneration Convention*, opened for signature 29 June 1951 ILO C100 (No. 100) (entered into force 23 May 1953).

35 *Convention concerning the Abolition of Forced Labour*, opened for signature 25 June 1957 ILO C105 (entered into force 17 January 1959).

36 *Convention concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, ILO C111 (entered into force 15 June 1960).

37 *Convention concerning Occupational Safety and Health and the Working Environment*, opened for signature 22 June 1981 ILO C155 (entered into force 11 August 1983).

38 *Occupational Safety and Health Recommendation*, opened for signature 1981,ILOR164 <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0:::55:P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REC,en,R164,/Document>.

39 *Convention concerning Occupational Health Services,* opened for signature 25 June 1985 ILO C161 (entered into force 17 February 1988).

40 R171 - *Occupational Health Services Recommendation*, 1985 (No. 171)*Recommendation concerning Occupational Health Services*, opened for signature 26 June 1985 ILO R171 <http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:::NO:12100:P12100_INSTRUMENT_ID:312509>.

exercise of their functions, the ILO incorporated a provision in the Social Security (Minimum Standards) Convention, 1952 (No. 102).[41]

Furthermore, in 1998, ILO adopted the Declaration on Fundamental Principles and Rights in order to respect and promote the right to freedom of association and the right to collective bargaining, to eliminate forced labour, and to abolish child labour and discrimination on the basis of employment.[42] This declaration explicitly states that the aforementioned rights are universal in nature, and that they are applicable to all people, regardless of their state of origin or the level of economic development in their home nations. It also makes it clear that economic development is not enough, on its own to eradicate poverty and ensure equality and social progress. A Follow-up procedure came into place after the Declaration. Member States who are yet to ratify any of the core Conventions are asked, on a yearly basis, for reports on the status of the relevant rights and principles in their territory, making note of obstacles that have impeded ratification, and of areas in which they may need assistance. These reports are reviewed by the Committee of Independent Expert Advisers, who in turn submits their results to the ILO's Governing Body.[43]

The ILO has also revised certain Conventions with the aim of maximizing the benefits they provide for the world's fishers. Some of these conventions are the following: (i) the Minimum Age (Fishermen) Convention 1959,[44]; (ii) the Medical Examination (Fishermen) Convention 1959,[45]; (iii) the Fishermen's Articles of Agreement

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41 *Convention concerning Minimum Standards of Social Security,* opened for signature 28 June 1952 ILO C102 (entered into force 27 April 1955).

42 ILO *Declaration on Fundamental Principles and Rights at Work*, ILO <http://blue.lim.ilo.org/cariblex/pdfs/ILO_Declaration_Work.pdf >.

43 *Ibid*.

44 *Convention concerning the Minimum Age for Admission to Employment as Fishermen*, opened for signature 19 June 1959 ILO C112 (entered into force 07 November 1961).

45 *Convention concerning the Medical Examination of Fishermen* opened for signature 19 June 1959 ILO C113 (entered into force 07 November 1961).

Convention 1959,[46] and (iv) the Accommodation of Crews (Fishermen) Convention, 1966 (No. 126).[47]

In the fishing sector, there are two main types of payment, the flat wage system and the share system. The flat wage system is more alike that of other sectors in developed economies, as there is a fixed salary for the work carried out during a specific period of time. On the other hand, under a share system, workers earn a percentage of the gross revenue of every fishing trip. There are also instances on which a hybrid system is used, with a minimum wage in place to which a share of the catch is added. There are some into the category of 'self-employed'.

With the objective of responding to the specific needs of workers in the sector, the ILO has created a set of standards aimed at protecting said workers. Considering the importance of the fishing industry in the world economy and the development of international fisheries law since the adoption of fishing standards in 1959 and 1966 (and taking into consideration that fishing vessels were excluded from the Maritime Labour Convention, 2006), the ILO adopted the Work in Fishing Convention, 2007[48] and Work in Fishing Recommendation, 2007 (No. 199)[49] during its 97th session, both of which are aimed to become comprehensive guides to addressing the living and working conditions of people employed in the fishing sector.[50] Their objective is to assure that fishers experience decent working conditions aboard fishing vessels and addressed concerns regarding minimum requirements to work aboard the ships, conditions of service, food and accommodation,

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**46** *Convention concerning Fishermen's Articles of Agreement* opened for signature 19 June 1959 ILO C114 (entered into force 07 November 1961).

**47** C126 - Accommodation of Crews (Fishermen) Convention, 1966 (No. 126) *Convention concerning Accommodation on Board Fishing Vessels,* opened for signature 21 June 1966 ILO C126 (entered into force 06 Novemeber 1968).

**48** *Convention concerning work in the fishing sector,* opened for signature 14 June 2007, ILO C188 (entered into force 16 November 2017).

**49** Recommendation concerning the work in the fishing sector, opened for signature 14 June 2007, ILO R199.

**50** International Labour Organization, *International Labour Standards on Fishers*, International LabourOrganisation<http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/fishers/lang--en/index.htm>.

work safety, healthcare and social security. In this manner, the minimum age for being permitted to work aboard a fishing vessel was raised to 16, the maximum period that a medical certificate would be valid for was set at 2 years and the implementation of legislation maximum and minimum levels of crewing and rest periods both daily and weekly of vessels which remain at sea for more than 3 days was required. It also established that workers aboard vessels were entitled to repatriation at the expense of the vessel's owner and incorporated control provisions for ports akin to those in the shipping industry.

There are about 129 million children involved, in one way or another, in the fishing industry, as well as in related industries, such as boat building and net-making. Children also perform household duties in most fishing families and communities. Child labour is often used to cut back on expense, and it is not only harmful to those children, but it may as well bring about negative effects on the sustainability of the fishing industry. Child laboris, particularly widespread in small and medium-scale fishing operations within submerged economy, in which work regulations are poorly implemented or, simply, absent. Although there is a great amount of international legal instruments that try to address child labour, laws are effective only as far as they are enforced. The fight against child labor is not regularly a priority within national legislation, institutions or social dialogue. Its elimination is a complex issue, as it is of production systems and is very closely embedded in contexts of poverty and social injustice.

Awareness building on the subject of child labour must be done through making information more available. A critical first step towards this elimination of this phenomenon is to build understanding about what lines of work are hazardous, and which ones should be acceptable. It should be noted that not all activities that children perform are considered child labor. The Minimum Age Convention 1973,[51] and the Worst Forms of Child Labour Convention 1999[52] define

[51] *Convention concerning Minimum Age for Admission to Employment*, ILO C138 opened for signature 26 June 1973 (entered into force 19 June 1976).

child labour through a number of variables: a child's age, work conditions and hours, and activities and hazards involved in the performance of a specific activity. In order to effectively fight against child-labour, there must be a communal effort to promote stakeholder participation, involving public actors such as government institutions, NGOs, and other actors such as worker's unions and employer associations. The application of participatory, feasible multi-level initiatives, could guarantee a better life for millions of children worldwide.

The United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) concluded that, in developing economies, women, who constitute about two-thirds of the work force in all sectors, including the fishing sector, will suffer the effects of climate change more than men.[53] Furthermore, the traditional structure of many fishing communities does not tend to promote the access of women to meaningful roles and even in cases where access to them is available, social and cultural norms limit their access.[54] As a result of this, women lack representation in policy and regulatory considerations, lacking most access to any labour-related entitlements. The Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSF Guidelines) recognize the issue and urge states to recognize and implement the rights of all active or dependant women on small-scale fisheries and to value their input to the industry at all stages of production in the fisheries value chain. The SSF Guidelines also ask all parties to challenge discriminatory traditional practices and in those states in which legal and constitutional reforms protect women's right, to the necessary step to align customary norms and practices with such reforms. Like other existing legal instruments, such as the Convention on the Elimination of

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52 (No. 182) Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, ILO C182 opened for signature 17 June 1999 (entered into force 19 November 2000).

53 UN Women,*Fact Sheet, "Women, Gender Equality, and Climate Change"*(UN Women, 2009) http://www.un.org/womenwatch/feature/climate_change/factsheet.html.

54 FAO, Report of Tenure and Fishing Rights 2015: A global forum on rights-based approaches for fisheries, (FAO, 2015).

All Forms of Discrimination against Women (CEDAW)[55] and the Beijing Declaration and Platform for Action, the SSF guidelines point towards the introduction of gender policy for women in small-scale fisheries, consulting with women able to represent the small-scale fisheries sector across the full value chain.[56]

## Wellbeing in Coastal Fishing Populations: Beyond Adaptation

In order to foster greater understanding about the meaning of 'wellbeing' when we are talking about coastal fishing people, there needs to exist an understanding of how the term has been approached in development policy, and how it has been put in practice in the past. The Stiglitz Commission, for example, was very critical of the use of economic factors being the only one taken into account in the measurement of development, asking for a 'shift in emphasis towards measuring people's wellbeing'.

There are, mainly, three factors to be taken into account: (i) that a person's needs are being met, (ii) that a person's personally valued freedoms are being achieved, and that (iii) a person is experiencing a good quality of life,[57] These three conditions are paramount to the wellbeing of a person, and the failure in any of them will severely undermine a person's overall wellbeing. The allure of this definition of well-being, even though it combines objective and subjective approaches,[58] is that it is applicable to all nations, not being constrained

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55 *Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),* opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>.

56 Nilanjana Biswas, Towards gender-equitable small-scale fisheries governance and development: A handbook In support of the implementation of the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication, Food And Agriculture Organization Of The United Nations (FAO, 2017) <http://www.fao.org/3/a-i7419e.pdf>.

57 I Gough., JA McGregor., L Camfield, 'Theorising wellbeing in international development' in I Gough, JA McGregor (eds) *Wellbeing in Developing Countries: from Theory to Research* (Cambridge University Press, 2007).

58 Subjective wellbeing refers to an individual's views, how they think and feel about their situation, paying attention to how values affect those views. Some authors place the

by societal, geographical or cultural considerations.[59] In this manner, policy makers need to look at wellbeing through two different perspective: the objective and the relational.[60] This means for example, from an objective point of view, that even if a fisher experiences happiness, they cannot be described as living in a state of wellbeing if they are malnourished.[61] From a relational perspective, on the other hand, policy makers must take into account that there are social and psychological needs on top of basic ones that must be fulfilled in order to attain wellbeing.[62]

Even though wellbeing has traditionally been seen as a luxurious concept by many environmental and development policy professionals, the idea itself is easily identifiable by the population of most of the world's societies, even by the poor.[63] There are four key observations that must be taken into consideration when talking about wellbeing in the fisheries sector: (i) there is more to a person's live than their livelihood,[64] (ii) heterogeneity matters in the achievement of wellbeing, (iii) the main role of public policy and governments in the achievement of wellbeing in the provision of adequate social structures that allow the fishing community to live together in harmony[65] and (iv) wellbeing

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subjective at the top of the wellbeing pyramids, as it defines the meanings of the other dimensions.

59 JA McGregor, L Camfield, A Woodcock, 'Needs, wants and goals: wellbeing, quality of life and public policy', 4 *Applied Research Quality of Life*, 135–154.

60 JA McGregor, A Sumner 'Beyond business as usual: what might 3-D wellbeing contribute to MDG momentum?' (2010) 41(1) *IDS Bulletin* 104–112.

61 Relational wellbeing refers to how individuals interact with each other to meet their needs. This includes every type of relationship, from romantic ones to those with state and social institutions. In this thesis, we are especially concerned about the way in social interactions affect the relationship between people and marine resources.

62 S Coulthard et al, 'Poverty, sustainability and human wellbeing: A social wellbeing approach to the global fisheries crisis' (2011) 21(2) *Global Environmental Change*.

63 R Biswas-Diener, E Diener, 'The subjective well-being of the homeless, and lessons for happiness' (2006) 76 *Social Indicators Research* 185–205.

64 Material wellbeing refers to what people have, including food, income, shelter, employment, etcetera. It also considers basic welfare through the assessment of a person's 'basic human needs' and whether they are achieved or denied.

65 S Deneulin, JA McGregor, 'The capability approach and the politics of a social conception of wellbeing' (2010) 13(4) *European Journal of Social Theory* 501- 519.

is extremely relevant to public policy analysis because it is intimately tied to decision-making processes and behaviours.[66]

In the OECD's 'How's Life' Framework from 2013. This framework outlines 11 criteria to be used when measuring wellbeing.[67] Another example, this time in the United Kingdom, is Oxfam's Human Kind Index,[68] currently utilised in Scotland as a way to measure its population's prosperity by way of consulting the people about what factors are the most important in guaranteeing their quality of life. As a last example, the Millennium Ecosystem Assessment establishes a framework through which to study the way in which ecosystem services are related to wellbeing in the population. It does so through five criteria: (i) security, (ii) basic material needs, (iii) health, (iv) social relations and (v) freedom.[69]

Analysing many challenges presented by resource management in our day through a holistic perspective of wellbeing can foster a different, and potentially superior approach to how we do things. A three-dimensional approach to wellbeing can shed lights on the social nature of wellbeing in fishing communities, opening up potential new areas of importance in development policy, as well as deeper understanding of human behaviour, both in and out of the world's fishing communities.[70]

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66 D Kahneman, E Diener, N Schwarz, *Well-Being: The Foundations of Hedonic Psychology* (Russell Sage Foundation, 1999).

67 Namely: health, work-life balance, education and skills, social connections, civic engagement and governance, environmental quality, personal security, subjective wellbeing, income and wealth, jobs and earnings, and housing.

68 The second report of the Oxfam Humankind Index for Scotland, following publication of the first results in April 2012, https://policy-practice.oxfam.org.uk/publications/oxfam-humankind-index-the-new-measure-of-scotlands-prosperity-second-results-293743.

69 Michael Woolcock, Deepa Narayan, 'Social Capital: Implications for Development Theory, Research, and Policy' (2000) 15 (2)*The World Bank Research Observer*225-249.

70 S Coulthard,N Paranamana, L Sandaruwan'Exploring wellbeing in fishing communities (South Asia), Methods handbook' (2015) *Online open access publication*<https://www.researchgate.net/profile/Sarah_Coulthard>.

## Adaptation Moving Forward: Recommendations

The lessons learned from past implementation of adaptation measures and their failure or successes are invaluable[71] to the achievement of the expected importance of adaptation as a coping strategy against the negative impacts of climate change.[72] To be able to extract said lessons, more documentation is needed on the subject. There is a need for the creation of an identification framework that points out gaps in current knowledge, the success or failure of implemented policies, as well as the limits and risks they have faced, gathering institutional memory to be able to provide long term assistance which will culminate to new adaptation measures.

IPCC's Fifth Assessment Report, published in 2014, shifted the focus of their adaptation policies framing to a wider perspective that took into account the social and economic aspects of the development of vulnerability and people's ability to respond to it. Previously, since the publication of the Fourth Assessment Report, the connection between adaptation and disaster risk management had been strengthened, building on the findings of IPCC's *Special Report on Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation* (SREX).[73] Guaranteeing the safety of services and ecosystems requires further research on adaptation needs, the gap between what will happen as a result of climate change and the most desirable outcome for human populations. Although needs are often looked at through a risk-based approach, focusing on impact moderation, there is a necessity to deal with the underlying drivers of human vulnerability, taking factors such as

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71 KE Mills et al, (2013). 'Fisheries management in a changing climate lessons from the 2012 ocean heat wave in the Northwest Atlantic' (2013) 26 *Oceanography* 191-195.

72 IR Noble et al, 'Adaptation needs and options' in CB Field., VR Barros, DJ Dokken, KJ Mach, MD Mastrandrea, TE Bilir, M Chatterjee, KL Ebi, YO Estrada, RC Genova, B Girma, ES Kissel, AN Levy, S MacCracken, PR Mastrandrea, and LL White (eds), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014) 833-868.

73 IPCC's Working Group I and Working Group II, Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation: A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change (Cambridge University Press, 2012).

information, capacity, financial, institutional and technological needs.[74] Technological adaptation measures have traditionally been the most widely implemented adaptation policies. But now it requires to include eco-system based, institutional and social considerations and their implementation. In the face of the uncertainty about the impact that climate change will have on human society, the IPCC is currently focused on the development of appropriate adaptive responses bases on no-regret, low-regret and win-win strategies.[75]

IPCC also considers that public institutions (both on the national and local scale), private sector organizations, NGOs and civil society can be of great importance to promote a healthy, strong, top-down flow of information and financial capabilities and a bottom-up communicative effort from communities and families about the implementation of relevant measures. In addition, especially in developing nations, private individuals and small to medium enterprises (SMEs) can play a vital role in the implementation of adaptation measures through their motivation to protect and enhance their production systems. Furthermore, future adaptation measures should take into account implementation and evaluation of policies in place, rather than simply looking into impacts, vulnerability and adaptation planning, as has been the case for most measures implemented so far. Bottom-up flows of information are, in this manner, essential to the effective implementation of adaption measures on the local level.

Lastly, as per IPCC's 5th Assessment Report short-term and poorly planned adaptation strategies failed to address the full range of interactions that will arise as a result of the policies tend to increase vulnerability rather than reduce it. In this manner, in order to tackle

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74 Ministry of Environment and Forest Government of the People's Republic of Bangladesh,*National Adaptation Programme of Action (NAPA) Final Report*(UNFCC, 2005)<https://unfccc.int/resource/docs/napa/ban01.pdf>.

75 IR Noble et al, 'Adaptation needs and options' in CB Field., VR Barros, DJ Dokken, KJ Mach, MD Mastrandrea, TE Bilir, M Chatterjee, KL Ebi, YO Estrada, RC Genova, B Girma, ES Kissel, AN Levy, S MacCracken, PR Mastrandrea, and LL White (eds), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014) 833-868.

vulnerabilities effectively in target groups, policies implemented should focus on well planned long-term outcomes.[76]

Institutions, such as government agencies and NGOs, in coastal communities in developing nations, especially those in the tropics, have attempted to build adaptive capabilities in the communities, but the lack of monitoring mechanisms have increased the difficulty of assessing the success or failure of initiatives.[77]

The fight against the climate-induced violations of human rights in coastal fishing communities needs to be prioritized, and several factors are required in order for this fight to be successful: (i) reinforcing documentation capacities, (ii) increased awareness towards violations, (iii) ensuring a response to specific incidents, (iv) utilising a human rights approach to address underlying issues in communities and (v) promoting human rights as a driver in fisheries reform.[78]

Additionally, when talking specifically about grievances in fishing communities, cases of forced evictions and human rights violations such as child labour were often not addressed properly by domestic courts. As such, there is a need for improvements in access to justice. It should also be noted that the capabilities of civil society advocacy groups can be of great help in achieving results within the justice system. A great example of this is the Bangladesh Environmental Lawyers Association, whose efforts have been instrumental in the improvement of living-conditions in fishing communities, recognition

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**76** *Ibid*.

77 Adaptive capacity refers to the conditions that allow people to foresee dangers and change to minimize impacts, recover, and take advantage of new opportunities. Recent evidence points to adaptive capacity as more than the possession of having necessary resources at hand, also taking into account the willingness and capacity to convert them into action.

**78** Blake D.Ratner, Björn Åsgård, Edward H.Allison, 'Fishing for justice: Human rights, development, and fisheries sector reform' (2014) 27*Global Environmental Change* 120-130.

of legal rights for women and the improvement of landless households' management in fishing communities.[79]

It's important to note that the existence of underlying, systemic grievances in fishing communities, such as the poor access of women and children to the decision-making processes, making it essential for adaptation strategies to cover issues beyond the elimination of poverty and the safe-guarding of resources.[80] The promotion of awareness around the interconnected issues of gender equality and climate change will promote an increase in the adaptation capabilities of disadvantaged groups, women most of all. The use of technologies, as well as accessibility to said technologies, acceptable to both male and female stake-holders, the introduction of adaptation measures that build on traditional and indigenous knowledge, the integration of equality indicators in climate change programs to be able to pin-point specific vulnerabilities in fishing communities.[81] In the same manner, advocacy of human rights issues in fishing communities can constitute a driver for the modernisation of fishing communities in developing countries.[82]

## Fiji Case-Study: Legal and Institutional Framework for the Wellbeing of Fishing Populations

Fiji is an island-country composed of 14 provinces and located in the south-west Pacific Ocean. Gaining its independence from Great Britain in 1970, the country has been an active defender of the rights of fishing communities, having approved numerous initiatives to those effects. Since the approval of 2007's national initiative to 'Build a Better Fiji

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79 J Thompson, JM Scott 'Environmental entrepreneurship: The sustainability challenge', Institute of small business and entrepreneurship conference (November 2010) ISBE <http://www.isbe.org.uk/conferenceProceedings>.

80 FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (FAO, 2012).

81 Canadian International Development Agency (CIDA), *Gender equality and climate change: Why consider gender equality when taking action on climate change?* OECD <https://www.oecd.org/dac/gender-development/44896501.pdf>.

82 BD Ratner, 'Common-pool Resources, Livelihoods, and Resilience: Critical Challenges for Governance in Cambodia' (2011) IFPRI Discussion Paper Series number 1149*International Food Policy Research Institute*.

for All' under the People's Charter for Change, Peace and Progress (PCCPP), Fiji's identity as a independent nation has solidified, as a national mindset of development through equal citizenry has been widely accepted as the only pillar upon which a modern, democratic Fiji can be built and developed over time.[83]

Early Fijians were great navigators, known to have travelled long distances using the firmament as their only guide. Their main occupations were farming and fishing, and most of the population had experience with fishing in one way or another, as everyone traditionally fished for their own consumption, even though certain individuals did it professionally for communal or special occasions. At present, Fiji's economy is greatly dependent on fishing and fisheries, as it constitutes one of the biggest sectors of its economy.

Sustenance fishing, and traditional fisheries, the produce of which is usually sold on markets or on the streets, constitute an important boost to the subsistence of the island's poor, while offshore fisheries, with access to major tuna species (albacore, big eye, yellow fin and skipjack), represent a big boost to the country's economy. Most fishing people in Fiji have attended primary education, and most encourage their children to pursue secondary and higher education. The protection of marine areas in order to safeguard cultural diversity and heritage is essential, especially in Fiji, where traditional village governance institutions and customary marine spaces are highly interconnected.

The Fijian government has been vital in the improvement of quality of life in fishing populations, as they are considered to be a great asset for the country. Since its independence in 1970, Fiji has approved a number of acts, regulations and strategies to guarantee the wellbeing of fishing populations, with around 54 ministerial acts managed by different bodies in environmental or resource management, and at least 23 international conventions and treaties listed in the National Environment Strategy as

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[83] LitiaMawi, 'Fiji's Emerging Brand of Pacific Diplomacy: A Fiji government perspective' in Greg Fry, Sandra Tarte (eds) *The New Pacific Diplomacy* (Australian National University Press, 2015) 101.

ratified by the island country. Some of these pieces of legislation, the study of which will be essential for the implementation of measures in other countries, are as follows:

**Constitution of Fiji:** As stated in section 40 of the Fijian Constitution, every person has the right to a clean, healthy environment. This includes an obligation of the state to protect the environment through appropriate measures to ensure its enjoyment by future generations.[84]

**Fisheries Act:** The Fisheries Act, 1942 (Chapter 158) is the main piece of legislation concerning fisheries management. It has been implemented through a permit and licensing scheme and the main agency in charge of its implementation is the Department of Fisheries.

**Fiji Department of Fisheries:** This Department is tasked with guaranteeing the sustainable development and management of the country's living marine resources, aiming to create employment, increase foreign direct investment in the sectors and improve the livelihoods of rural fishing populations through the modernisation of the sector and the introduction of an extensive government support scheme.

**Minister of Fisheries and Forestry and Forestry Act:** The Ministry is the overreaching agency of the fisheries and forestry sectors, as well as their main policy-maker. Its main objective is to ensure that legislation remains relevant for the creation of sustainable economic growth and able to face the future challenge of growing issues like climate change and sea-level rise.[85]

**Fiji offshore fisheries management Decree 2012 (No. 74 of 2012):** This Decree regulates the management and sustainability of offshore fishing facilities and fisheries. It provides the Fisheries Department with further competences in regulatory control and enforcement capabilities and contains provision for the future creation of (i) a Fisheries Management Plan and (ii) protected marine areas, both under

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84 *Constitution of the Republic of Fiji*, [Constitution] art 4.

85 Ministry of Fisheries and Forestry, *Welcome to the Ministry of Fisheries and Forestry (MFF),* MFF<http://www.mff.gov.fj/>.

the recommendation of the country's Director of Fisheries and the Permanent Secretary of Fisheries.

**Integrated Coastal Management Framework:** The Integrated Coastal Management Framework launched in 2011 and is intended to submit policy recommendations for sustainable coastal resource management.

**National Biodiversity Strategic and Action Plan (NBSAP):** Fiji's National Biodiversity Strategic Action Plan was written in 2003 but it was only put in place in 2007. Its objective is the conservation and sustainable utilization of Fiji's terrestrial and aquatic resources, as well as the protection of naturally-occurring ecological processes that benefit the country.

Other relevant pieces of legislation are the following: (i) Marine (Amendment) Act, 1999 (no.18 of 1999); (ii) the Environment Management Act, 2005; (iii) Fiji Fisheries (Amendment) Regulation, 2004 (l.n.no.78); (iv) Fiji Offshore Fisheries Management Regulation, 2014 (l.n.no.18 of 2014) and (v) Fiji Fisheries (Marine Reserve) Regulations, 2015 (l.n.no.40 of 2015). Moreover, the existence of a native Fishery Commission tasked with the defence of fishing rights and coastal fishing populations. The implementation of projects such as the Rural Community Climate Change Adaptation project and the Pacific Adaptation to Climate Change (PACC) projects is also worth mentioning.

In addition, Fiji is party to several regional and international treaties regarding fisheries management and the wellbeing of fishing populations. Some of these treaties are: (i) the Law of the Sea Convention, (ii) the Rio Declaration and Agenda 21, (iii) the Biodiversity Convention, (iv) the Climate Change Convention, (v) the Agreement on Forest Principles, (vi) the Convention on the Conservation of Nature (Apia Convention), (vi) the Convention for the Protection of Natural Resources and Environment in the South Pacific Region and related Protocols (SPREP Convention), (vii) the Waigani Convention, and (viii) the South Pacific Nuclear Free Zone Treaty.

Finally, we must look at bilateral cooperation agreements in which Fiji participates, receiving donations from a number of states and international organizations including Japan, Australia, New Zealand, the United Kingdom, the European Union, FAO and other United Nation agencies in the field of aquaculture, fisheries, community management, rural service centers, turtle conservation, tuna data management, and marine biodiversity conservation. Furthermore, regional organizations in the South Pacific Islands region, such as the Forum Fisheries Agency, the Secretariat of the Pacific Community, the South Pacific Regional Environment Programme, the Forum Secretariat, and the South Pacific Applied Geoscience Commission have been active supporters of the Fijian fisheries sector.

The Fijian case constitutes a great example and should be taken into account by other states looking to protect their living marine resources and the people involved in their capture and processing.

## Conclusion

In conclusion, the input of the international organizations to the fight against climate change and its adverse effect on coastal fishing populations and their wellbeing is commendable. However, despite the significant developments regarding climate change in the international policy-making arena, the issues faced by fishing communities are still not receiving sufficient attention. Effective dialogue and negotiation, on both the national and international scale, will be essential to address the concerns of fishing populations regarding climate change.

Bangladesh is, at the moment, not capable of facing the challenges posed by climate change on its own. Developing countries, including Bangladesh itself should prioritise the improvement of the socio-economic conditions of fishing populations in their territories, and the financial and technological cooperation of developed countries will prove instrumental in this endeavour. If Bangladesh is unable to guarantee the rights of fishing populations within its territory, it should seek dialogues with other States and organizations via long-term or short-term agreements that will allow it to tackle the otherwise unsurmountable obstacles that it faces.

Approaches with a focus on the implementation of specific initiatives, as well as the implementation of holistic legal frameworks are essential for the effectiveness of initiatives aimed at the fulfillment of the rights of fishing populations. In this manner, Bangladesh should aim to improve and develop their current body of law in order to effectively enforce the enjoyment of human rights in fishing populations, as well as their wellbeing.

# Curing Institutional and Individual Corruption in Public Offices: Bangladesh Perspective

Maruf Ahmed*

*Any organization funded by public revenue is considered as public office. Public offices or departments include the judiciary, the parliament, police, land offices etc. These are the machineries that carry out the functions and activities of government and the state. But most of the institutions in Bangladesh are suffering for widespread corruption and public service is not up to the mark. Institutional conception that is distinct from the individualist approaches focused on quid pro quo exchanges have been developed by the normative theorists. Corruption is shaped by the nature of the institution and is patronized with or without motive. This article examines what is the difference between individual and institutional corruption and what is their impact over a state like Bangladesh. I also critically reviewed six leading causes of corruptions in the public offices and the curing or healing process.*

***Keywords:*** *corruption, Bangladesh, institutional corruption, individual corruption, government organizations, police corruption, judiciary, public office.*

## 1. Introduction

Complete eradication of corruption is quite impossible and no country in the whole world succeeded to bring down corruption at zero percent. The varieties of corruption are so wide-ranging that it can be brought down to level zero only theoretically but not practically. All the people within a state or an organization are not of same mentality and attitude and their

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growing up, intelligence and analytical power are not the same. Again their conception about morality and ethics and the minimum standard of morality are not identical. As a result, religious conceptions and morality failed to prevent this indomitable corruption all over the world and the states were forced to promulgate stricter laws to prevent corruption. On the other hand, this is the age of free trade and in a free trade economy demand is the most important element of business. Therefore products are presented in such a fascinating way so that it can create an urge to buy to the human being though they have no actual necessity. Consequently desire has become boundless in the present human society and in the developed countries there is a consistency between supply and demand and they prospered to keep economic discrimination at a minimum level. Moreover, since there is an agreed opinion against corruption in developed countries, they did well to keep corruption at a very low level. But the countries which are on the road of development, they are the worst victim of rampant corruption. Bangladesh is one of the glare examples of that situation and individual corruptions along with institutional corruption in public offices is the mother of all problems in our society.

## 2. Concept of corruption

Corruption is one of the most important topics facing the world today, yet despite its importance, there is no consensus of opinion about exactly what corruption is and a multitude of definitions have been advanced. But all the efforts to offer an authoritative definition remained unsuccessful due to the diversity of corruption. Thus definitions vary according to approaches, aims and needs of analysts and recognizing the complexity, there are several approaches to defining corruption.

The word 'corruption' derived from Latin word '*corrumpere'* meaning 'mar, bribe, destroy etc.' The Oxford Dictionary of Current English defines corruption as dishonest or fraudulent conduct by those in power, typically involving bribery.[1] On the other hand Transparency International defined corruption as 'the abuse of entrusted power for private gain.'[2] To the moralists 'corruption as an immoral and unethical phenomenon that

[1] https://en.oxforddictionaries.com/definition/corruption.
[2] https://www.transparency.org/what-is-corruption.

contains a set of moral aberrations from moral standards of society, causing loss of respect for and confidence in duly constituted authority'[3].

As per Wikipedia:

> In general, corruption is a form of dishonesty or criminal activity undertaken by a person or organization entrusted with a position of authority, often to acquire illicit benefit. Corruption may include many activities including bribery and embezzlement, though it may also involve practices that are legal in many countries.[4]

So, Wikipedia also used the words 'in general' because they as well know that their definition of corruption is not exclusive rather a general conception. Even the UN Convention against Corruption (UNCAC) does not prescribe any definition of corruption. Thus defining corruption is a single sentence is an overwhelming task and overall we can say that the term 'corruption' refers to the abuse of resources or power for private gain. Though this definition of corruption is not all inclusive, but it is effective to give a simplified concept of corruption.

## 3. Types of corruption

Corruptions are of numerous forms and categories. With the advent of modern technologies new types of corruptions are also taking part every day. But in a broader sense Transparency International categorized corruptions into three major forms:[5]

1. **Grand Corruption**: It includes all acts done by the high level officials of government those distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public money.

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[3] Gould, D.J. (1991). "Administrative Corruption: Incidence, Causes, and Remedial Strategies in A. Farazmand ed. Handbook of Comparative and Development Public Administration. New York: Marcel Dekker, Inc., pp.467-480.

[4] https://en.wikipedia.org/wiki/Corruption#cite_note-1(last visited 26-03-2019).

[5] https://www.transparency.org/what-is-corruption? (last visited 26-03-2019).

2. **Petty Corruption**: Petty corruptions are the daily abuse of entrusted power by low- and mid-level public officials in their service to the ordinary citizens, who often are trying to access basic goods or services in public offices.

3. **Political Corruption**: This is an illegal change of policies, institutions and rules of procedure in the distribution of resources and financing by politicians, who abuse their position to uphold their status.

In contrast, corruption can be categorized from different perspectives. Corruption can be classified according to:

1. How it was carried out in relation to conventional rules of administration?
   - Bribery
   - Embezzlement
   - Facilitation payment
   - Fraud
   - Collusion
   - Extortion
   - Patronage
   - Nepotism etc.

2. What is the scale of corruptions?

   - Petty or Survival corruptions, and
   - Grand corruptions.

3. Where it took place?

   - Public offices like hospital, land office, Court, school etc.
   - Commercial places
   - Company offices
   - Industries

Again, corruptions based on institutional location are of two types- 'upper-level' and 'lower-level' corruptions. First one involves with presidents,

ministers, parliamentarians and other high-ranking officials, whereas lower-level corruption relates to civil servants. Even in public offices corruption may be individual of institutional. So, forms of corruption varies relating to the situation and scale, but most of the time those includes bribery, extortion, cronyism, nepotism, parochialism, patronage, influence peddling, graft, and embezzlement.

## 4. Individual Corruption vs. Institutional Corruption

Government institutions are closely related with state services. They are considered as the hard disk of a state. Corruption is like viruses. Viruses damage the hard disk and when the hard disk is mal functioning, the whole computer fails to give output. Like computer corruptions ruin the institutions and the institutions fail to serve the purposes. But modern normative theorists separated institutional corruption from individual corruption on the basis of characteristics of corruption in the government establishments and one of the pioneers of that proposition is Dennis Thomson[6] who tried to define institutional corruption distinctly from individual corruption.

According to Dennis Thompson, Alfred North Whitehead Professor of Political Philosophy at Harvard University and Director Emeritus of the Edmond J. Safra Center for Ethics, individual corruption is the personal gain of individuals performing duties within an institution in exchange for nurturing private interests focused on quid pro quo exchanges, while institutional corruption occurs, an institution or its agent receives a benefit that is directly associated with institutional function, and systematically provides a service to the patron under conditions that tend to undermine legitimate procedures of the institution.[7] Institutional corruption is linked to the failure of the institution in directing the individual's behaviour towards the achievement of the institution's primary goal.

In 2010, Lawrence Lessig launched the Edmond J. Safra Research Lab[8] to address the fundamental problems of government institutions and he

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6 https://en.wikipedia.org/wiki/Dennis_F._Thompson(last visited 24-03-2019).

7 https://ethics.harvard.edu/dennis-thompson-two-concepts-corruption (last visited 24-03-2019).

8 https://ethics.harvard.edu/lab (last visited 11-03-2019).

defined institutional corruption as 'the consequence of an influence within an economy of influence that illegitimately weakens the effectiveness of an institution specifically by weakening the public task of the inspection.'[9]

The article titling 'A typology of Police corruption. Social addresses deviance, role conflicts, and institutional corruption. The author held the view that:

> *Police corruption is best understood, not as the exclusive deviant behavior of individual officers, but as group behavior guided by contradictory sets of norms linked to the organization to which the erring individuals belong, i.e., organizational deviance… a thoroughly deviant organization (one in which the power structure and/or a number of its members are corrupt) attempts to prevent investigation through cover-up tactics.*[10]

Lastly, Lawrence Lessig after a thorough research held the view that:

> *Institutional corruption is manifest when there is a systemic and strategic influence which is legal, or even currently ethical, that undermines the institution's effectiveness by diverting it from its purpose or weakening its ability to achieve its purpose, including, to the extent relevant to its purpose, weakening either the public's trust in that institution or the institution's inherent trustworthiness.*[11]

So, individual corruption is an illegitimate process in which economic influence spoils the individual which ultimately affects the organization whereas institutional corruption is an apparently legitimate or illegitimate process in which economic influence spoils the organization and makes it malfunctioning and the institution fails to serve its purpose and loses public trust. It is an ongoing process which operates within the institution and makes impacts on public.

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[9] https://wiki.lessig.org/Institutional Corruption (last visited 11-03-2019).

[10] Roebuck, J.B., & Barker, T. (1974) A typology of police corruption. Social Problems, 21(3), 423-437.

[11] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295067 (last visited 11-03-2019).

## 5. Causes of Individual and Institutional Corruptions

All the institutions basically the public offices create the super structure of a State. If the edifice of the institutions is weak, the State fails to show its glory. To strengthen the institutions it is necessary to eliminate corruption to make it fully working and public oriented. If we can sort out the real causes behind the corruptions within the organizations then it will be easier to solve those issues. If we observe the institutions closely we can find out the following reasons for corruption:

### A. Lenience

Leniency is the first cause of corruption. Generally the person who is holding the administrative post is the key person pampering corruption. Some administrators try to pretend that he is seeing no corruption and others consider corruption as incentives for smooth run of the institution. The main problem with this nursing is that the administrator may be honest and of good moral character even then the institution may not be out of corruption. Some administrators also get involved in corruptions and promote the corrupted officers and staffs. All of them show lenient views regarding corruption and they do not want to find a way out from this situation. Most of the office leaders try to conceal the real fact and do not want to make public admission. They try to concentrate on other matters like disposal, target fill-up, task completion, carrying out orders, manners etc. They think that these are the most important jobs of an administrator and when those tasks are accomplished, they feel satisfied. These administrators are task oriented and they have no attention to how the task was conducted. Their avoiding tendency creates public anxiety and sufferings and though they think that they have done a tremendous job for the public and the society, public perception regarding the institution does not change. In the meantime the service of the institution goes from bad to worse, corrupts become more arrogant and public dissatisfaction reaches its optimum level.

### B. Lack of Leadership

Generally an officer does not occupy an administrative post automatically. He has to go through several tiers to achieve the administrative post. But in most of the cases it appears that the person who was successful in his previous managerial duties, fails to uphold the leadership during his administrative post. Because management and administration are not the same thing and administration is not only related to academic knowledge but also depends on some basic instincts as well as nursing. Therefore it cannot be said that an officer will be successful in his administrative post since he is well educated and has performed well in his previous posts. In the absence of leadership quality of the administrator the institution fails to serve its ultimate job and the decaying process continues though it appears that everything is okay and there is no change in the nature and feature of the institution. Even though the predecessor in the leadership post might obtained a success to bring substantial changes in the organization by keeping corruption at a minimum level; the organization might again revert to its rotting process due to the failure of the present leader. In most of the organizations in Bangladesh we can see the same trend of temporary success and continuous failure.

### C. Ineffective Laws and Regulations

Recently, the Legislature has enacted several laws to fight against corruption and to empower the Anti-corruption Commission (Anti-Corruption Commission (Amendment) Act, 2016). As per the Amendment Act, 2016, Section 408, 420, 462A, 462B, 466,467,468, 479, 471 and 477A of Penal Code, 1860, shall not be applicable under Section 28 of the ACC Act, 2004 except in cases, where the alleged property is a government property, or alleged person is a government official while discharging his official duty. This law is also unrelated to bank-employees or employers, employees or employers of any financial institute while discharging his official duty. In addition to this, the Code of Criminal Procedure, the Prevention of Corruption Act, the Penal

Code, the Money Laundering Prevention Act and The Government Servant (Conduct) Rules are also applied to fight against individual and institutional corruption.

These laws are mostly for preventing large corruptions and Anti-corruption Commission is already very busy with those corruption probes. On the other hand The Government Servant (Conduct) Rules already failed to fight corruption and in most of the public offices corruptions taking part on a daily basis without any interference. Those corruptions may be very little in amount on monetary sense, but it is taking part with thousands of people every day. For instance, to move a normal file in any government organization people have to go through harassments and they are forced to spend money which they should have obtained totally free of cost. These harassments are spreading like infectious disease and government rules and regulations are failing to protect people. Without new specific and effective research based laws and regulations for government institutions huge number of petty corruptions which work as the learning process for big corruptions cannot be stopped.

**D. Unbending Office Management System**

If we closely observe the government organizations in Bangladesh we can easily sort out that the colonial office management system is running without almost any changes in all the institutions. But the most interesting fact is that even in Britain that management system is already abandoned. In most of the cases our administrators don't want to bring changes in the ongoing process without any intervention from the outer forces. They are very much keen to adhere to the conventional method to keep their position safe and intact. The main problem with the unbending office management system is that century-old corruption is nurtured without any kind of intervention and though the institution's service system does not improve, the style of corruption takes new forms and parameters.

### E. Ego Problem and Lack of Coordination

Coordination is a major issue to eliminate corruption. If there is a lack of coordination among the public offices, corruptions take place in every junction. With an example we can make it more specific- during the trial a case execution of processes like summon, warrant of arrest or notice is a very important step. In this course the collective effort of police and court is necessary. The general procedure is that a process will be issued from the court to the court police office and court police office will channel this process to the police station through Superintendent of police. Throughout this travel many processes get lost or even expire. That is not the end of the story- sometimes forged processes evolve out of nowhere and becomes the cause of sufferings and harassments for people who is not a party of any case. Due to the lack of coordination just between two departments these wrongs are continuing year after year. Ambiguity in separation of power and egoistic approach of the departments is also worsening the situation. The staffs who are involved in corruption are taking full advantage of this situation.

### F. Bureaucracy and Deprivation

Bureaucracy is an extremely complicated administrative procedure of government in which most of the important decisions are taken by state officials rather than by elected representatives and bureaucracy includes both a body of non-elective government officials and an administrative policy-making group. In all the countries all over the world bureaucracy is a bar against strengthening the institutions. But the first world countries almost succeeded to manage bureaucracy. In spite of economic development Bangladesh has failed to get rid of bureaucracy and in contrast bureaucracy is increasing and contaminating the whole system. For nepotism and red tapism deprivation takes place within the institution or institution to institution. Though the economy of Bangladesh is booming for the last two decades, Bangladesh is still not capable to fulfill the fundamental needs of the people. So, it is common that there will be some difference

between demand and attainment and that difference should be equally applicable to all the institutions. But when for bureaucratic intervention one institution receives every type of facilities and other institutions are deprived of those facilities, then aversion takes place. Aversion normally affects the office leaders who create impact over other employees of the office. Due to the aversion and unenthusiastic approach of the administrator other staffs indulge in corruption without any deterrence.

## 6. Impact of Individual and Institutional Corruptions

Public offices are the representatives of a State and they are directly involved with the citizens. State operates its welfare activities through the institutions and with the service of the institutions the quality of a welfare state is measured. Schmid, A. Allan expressed a very nice view regarding institutions:

> *Institutions are human relationships that structure opportunities via constraints and enablement. A constraint on one person is an enablement for another. Institutions enable individuals to do what they cannot do alone. They structure incentives used in calculating individual advantage. They also affect beliefs and preferences and provide cues to uncalculated action. They provide order and predictability to human interaction.*[12]

When the government departments fail to serve the people, the state is also considered as a failed state. Again when the institutions make change to their services with benefits and deprive the righteous person then it creates anxiety among the citizens. Corruption is such a thing which when get a place in any institution, it gradually destroys the whole institution and creates direct effect upon the public. Among the influences of the individual and institutional corruptions some of the significant impacts are-

- misuse of working hours

[12] Schmid, A. Allan. (2004). Conflict and cooperation: Institutional and behavioral economics. Malden, MA: Blackwell Publishing. page-1.

- public sufferings
- deprivation from legitimate right
- inspiring corporate corruptions
- lack of accountability
- lack of confidence to the government departments
- disparity in service etc.

Another by product of the personal and institutional corruption is that it creates impact over international standards of a particular country. Even for foreign investment the effectiveness and the settings of the government organizations also come into consideration. When the government fail to convince the foreign investors that the government institutions are very much effective and of international standard, the targeted amount of foreign investments cannot be assured. Without the assurance of 'fair and equitable treatment' foreign investments will not come.[13] To keep the economic growth running foreign investment is desperately essential for Bangladesh. Therefore Bangladesh has no other option than strengthening the government institutions by eliminating corruption.

## 7. Cures

It is a well-established principle that prevention is better than cure. But when the institutions are already affected by corruption then immediate cure is necessary. Those curative efforts may also prevent it from coming back again. By applying the following steps we can treat an institution both for individual and institutional format of corruption and by applying the last step we can avoid it from coming back again.

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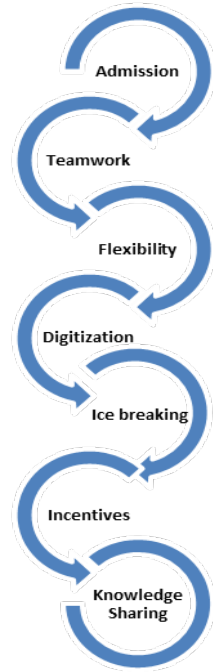
[13] https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf(last visited 24-03-2019) OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435.
"The obligation to provide 'fair and equitable treatment' is often stated, together with other standards, as part of the protection due to foreign direct investment by host countries. It is an 'absolute', 'non-contingent' standard of treatment, i.e. a standard that states the treatment to be accorded in terms whose exact meaning has to be determined, by reference to specific circumstances of application, as opposed to the 'relative' standards embodied in 'national treatment' and 'most favoured nation' principles which define the required treatment by reference to the treatment accorded to other investment".

## 1. Admission




It is an age old problem that most of the government departments do not want to admit that there is corruption within their system. But admission of corruption is the first step to make visible changes. If we conceal corruption then we will not be able to make public awareness about it. After admitting corruption the administrator has to publicize it and he should inform the people what their rights are and how to obtain them. Again they must be educated about what illegal ways they should avoid and if any illegal mean is applied over their rights then what should be their remedies. Admission is the first step toward abolition of corruption and significant changes. It is the beginning for improvement of the quality of service.

## 2. Teamwork

Scarnati defined teamwork 'as a cooperative process that allows ordinary people to achieve extraordinary results.[14] Teamwork is often a crucial part of any office management system, as it is frequently necessary for colleagues to work well together, trying their best in any circumstance. Teamwork relies upon entities working together in a supportive environment to achieve common team goals through sharing knowledge and skills. Some of the significant attributes required for successful teamwork are commitment to team success and shared goals, interdependence, interpersonal skills, open communication and positive feedback, appropriate team composition, commitment to team processes, leadership and accountability, etc.[15]

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[14] James T. Scarnati. 2001. On becoming a team player. p.5.

[15] http://www.unice.fr/crookall-cours/teams/docs/team%20Successful%20teamwork.pdf (last visited 27.03.2019).

For eradication of corruption in any institution, team work is also essential. After informing people the due process the administrator has to find out other officers who are true leaders and of strong moral standard. Without a truly effective team it is impossible for the administrator to sweep away all type of corruptions from every corner of the institution. So this team will be his right hand to satisfy his purpose. If any of the officer under him is found corrupted, then he should be kept out of the team and the important tasks should be taken away from his office and he should be monitored whether he is still engaged in corruption or not. The administrator have to tell all the cogs in the wheel of that institution that from now on this institution will be free from every type of corruption and his team will take substantive action to monitor the organization and they will report to the administrator periodically. On the basis of those reports administrator and his team will take necessary steps against the corrupted employees. Team meetings as well as meeting with the staffs should be carried out regularly to monitor the development of the situation.

### 3. Flexibility

Institutional flexibility or rescaling is the characteristic of a formal or informal institution that permits individual choice.[16] Modern institutional theory promotes individual entrepreneurship within the organization.[17] In a rescaled institution preservation and protection of choice leads to entrepreneurial behaviors which present individuals with opportunities to choose new ways of experimenting and recombines ideas regarding that institution. So, flexibility or rescaling is necessary to welcome innovations and to apply changes to eliminate corruption. It is also essential to increase the productivity of the organization.

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[16] https://globalpoverty.stanford.edu/sites/default/files/publications/543wp.pdf page-3 (last visited- 13.03.2019).

[17] Holm, P. 1995. The dynamics of institutionalization: Transformation processes in Norwegian fisheries. Adm. Sci. Q. 398-422.

## 4. Innovation

Innovation is necessary to keep the organization up-to-date. It is also essential to break down the conventional way of delivering service and to make visible changes. Flexibility or rescaling creates the way for innovation and it is an outcome of team effort. Innovation may come from the team of the administrator or from any other employee. Every innovation should be deeply analyzed and researched before applying. Though innovation is beneficial, at the same time it is to some extend risky. Sometimes applying innovation seems troublesome due to the change in the conventional way of delivering service. Initially it may create disorder and dissatisfaction. But with team work and proper training before applying can save an office from those hazards.

Innovation may also be handy to reduce corruption. By changing the working process, applying new method of monitoring or curtailing the lengthy procedure any organization may bring noticeable changes. Digitization and automation may also be a good way of innovation for abolishment of corruption. A state has different types of departments and the serving procedure, working environment and office management system are also different. So, one successful idea of a department may not be effective for another department. Therefore department specific innovation should be emphasized to fight against corruption.

## 5. Digitization and Digitalization

Digitization is the best weapon to fight against corruption. Digitization is a collective effort where information is converted into digital format. We already have some examples in our hand where digitization improved situation. Such as, online cause list management system in the Supreme Court of Bangladesh reduced fraud and forgery regarding the order of the higher Court. Digitization in subordinate Courts is also necessary to reduce the sufferings of common people. As for example, if the online process (summon, notice, warrant of arrest etc.) issue service can be implicated, the concerned police station will get the information immediately after issuance and there will be no chance of duplicate or forged process.

Alternatively, digitalization efforts have traditionally been carried out by individual departments within each institution trying to become more efficient by automating existing processes. For instance e-tendering system in public works department flourished to make remarkable improvement. Thus digitalization is an innovative project where the intention is to simplify the process through automation. But it should be kept in mind that total computerization has the risk of cyber security, data loss or digital fraud and therefore improving security of the system is essential to reduce potential threats both from external and internal elements. Dual information storing system (both in analog and digital format) can also safeguard the public offices from data loss. Thus through innovation, flexibility and by improving cyber security every department can be benefited by digitization and digitalization.

## 6. Ice Breaking

Generally the administrator and officers carry the institutional ego and for their attitudes their institutions develop that ego- a self-image that narrows their focus and separates them from their core responsibilities and core functions. It creates hindrance to the congenial relationship among the departments and it hinders them from doing better design of work on tasks and services. So, ice breaking among the institutions can create a congenial relationship amongst the officers and may be helpful to remove institutional ego. Long term and short term policies should be taken for ice breaking and elimination of egoistic approach. Regular friendly visits to the departments connected by tasks, periodical inter-departmental meetings, clear separation of power, international standard warrant of precedent, specific code of conduct and equal treatment to all the departments – all together can be a strong hammer for ice breaking. Along with ice breaking, making the system strait forward and flawless is also necessary for better design of service.

## 7. Incentives

According to Palmer incentives are the external temptations and encouraging factors that lead the individual to work harder and they

are issued due to the individual's brilliant performance since he will work harder and serve more effectively when he feels satisfied in the institution.[18] Incentives are also necessary to motivate changes. Instead, this impact has to do with motivation, the rewards and incentives work for higher efficiency and productivity. Incentives may be in the form of acknowledgement, award, extra payment, special bonus, promotion, free vacation trip etc. However, rewards should go beyond all those benefits and they should translate into things that are truly fundamental to all employees i.e. a great work environment. it acts as a great culture in its own motivation and the reality is that people who love what they do and are surrounded by an environment that stimulates them daily is as vital as tangible rewards.[19]

## 8. Sharing knowledge

Knowledge is power and knowledge sharing is very important to communicate the end result. Knowledge sharing can be done by the department itself or by the government through printed booklets or web publication, circular, workshops and seminars. Physical training by successful team members can be another good effort, so that other officers will be able to make query to them directly and they will be able to enrich themselves with experience sharing. Training institutes and anti-corruption commission can work hand in hand to preserve the achieved knowledge and they can also apply intensive research on the collected information. Along with incentives the structural development and proper training regarding service and moral standard will also be the leading priority of the government to prevent corruption.

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[18] Palmer, W. 2012. Incentive and Disincentive: Will They Affect Performance?.

[19] Jose Costa, Incentives: The Importance of Rewarding Your Employees https://www.huffingtonpost.com/jose-costa/incentives-the-importance_b_10972834.html (last visited 03.17.2019).

## 8. Conclusion

It is noteworthy that to bring substantive changes to the government institutions reformation must have to come from within the institution and government has to support those changes to make tangible development. Here, the performance of an administrator is the key to success in this mission and hence 'Adminstratorship' should not be a granted post for everybody. A bad administrator or even an ordinary administrator brings humiliation for any institution. A successful administrator desired to be both a strong leader and manager to get their team on board to follow them towards their vision of achievement. The administrator must be a great team player to motivate and lead his team. Selection of team members is another important task which the administrator has to do himself applying his prudence, expertise and foresight.

Thus the state should be more selective about the administrative posts. Special criteria and scrutiny should be applied before offering any leadership post to any officer. A special committee of mentors may be appointed who will examine the potential candidates through practical task oriented problems and they will compare their leadership quality along with team effort and moral standard. Lastly, they will evaluate candidates' leadership quality individually and will rank them as per the total score. Then they will report to the concern authority about their nominations. Only from the nominated officers the government or state has to select leaders for public offices and constitutional departments to ensure positive outcomes.

Checking corruption is a crying need and at the same time, it is understood that total extinction of corruption is not possible. But that does not mean in any way that corruption cannot be effectively controlled. Experiences of third world countries have clearly indicated that corruption networks are extensive and cover within the realms of public servants of all types. The root of corruption in Bangladesh runs unfathomable in history. The presence of a patron-client relationship reinforces corrupt practices in all spheres of public dealing and with strong political will and the establishment of appropriate anti-corruption mechanisms incidence of corruption can only be drastically contained.

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# Development and Present Status of the Admiralty Jurisdiction in Bangladesh

Md. Abu Hanif*

*Admiralty justice system in Bangladesh bears a colonial legacy and developed by the legislative steps and judicial pronouncements. Basically the English settings of admiralty laws and practices were reproduced in this sub-continent vesting the courts same powers of the High Court of England. Such system was continued till enacting new legislation in Bangladesh. The present study attempted to outline the development of admiralty adjudication in this country and analysed the present jurisdictional settings of admiralty practice in Bangladesh. The legal provisions and case laws are also analysed to examine the present jurisdictional status of admiralty court providing necessary comparative assessments with some leading and popular jurisdictions. The paper recommends for enhancement of admiralty jurisdiction inserting some claims or issues in the legislation and some necessary changes of existing provisions to make it clarified and specific. It also suggests framing of new rules of procedure for the Court of Admiralty so that the court can effectively exercise its jurisdiction providing justice to the people.*

**Keywords:** action *in rem*, admiralty jurisdiction, court of admiralty, maritime claims.

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## Introduction

Admiralty jurisdiction has been developed as *sui generis* having its own jurisprudential aspects. History traced back of the practice of customary admiralty rules among the merchants in the Mediterranean areas, but admiralty jurisdiction as a separate set of adjudication was mostly shaped in the hands of the English Admirals.[1] The exercise of admiralty jurisdiction gradually developed in its own fashion having features distinct from ordinary procedures. Later the English admiralty justice system was extended to British colonies. Unlike other branches of adjudication the admiralty jurisdiction of England was directly arrived in the former 'British possession' with all the same powers and functions of the English court.[2] The English form of admiralty justice system had been directly practised for a long time in this Sub-continent which was continued as a legacy in Bangladesh. In spite of having new statute Bangladeshi court often considers English laws and authorities in exercising its admiralty jurisdiction. Even the present statutory provisions of admiralty jurisdiction maintain close similarities with the contemporary British law. But there are divergences in individual state's practice. To have a proper insight of admiralty justice system in Bangladesh, it is required to quest for the jurisdictional development and to analyse the present jurisdictional setup of the maritime adjudication in Bangladesh.

## Objective of the Study

The general purpose of the study is to outline the admiralty jurisdiction and its present status in Bangladesh. The specific aim is to portray the legal and historical background of the development of admiralty practice and to analyse the jurisdictional basis and legal settings as well as the present setup of admiralty jurisdiction in Bangladesh.

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[1] Lionel H. Lain, 'Historic Origins of Admiralty Jurisdiction in England' (1946) 45(1) MLR 166 <http://www.jstor.org/stable/1283556 > accessed 20 December 2018.

[2] Colonial Courts of Admiralty Act 1890, s 2(2).

## Methodology

The study is based on descriptive and mostly analytical approach of research. Though the focus of the study is concentrated on admiralty jurisdiction of Bangladesh, some necessary legal provisions and principles as well as the judicial decisions of England, India, Singapore and South Africa are compared with the same of our jurisdiction. Data are collected from both primary and secondary sources. Primary sources of data are the statutes, by laws, case laws, reports etc. whereas the secondary sources are books, commentaries, dissertations, articles, online materials etc. Some empirical data are collected by the researcher through in-depth interviews and some are collected by applying document analysis method. Therefore a mixed research approach comprising of descriptive, analytical, comparative and empirical methods is applied in the study.

## Development of Admiralty Jurisdiction in Bangladesh

The admiralty practice in Indian sub-continent is considered as the English colonial legacy. However before European expedition, there was practice of maritime trade and navigation in the Indian Ocean. Kautilya, in about 300 BC described the shipping and associated matters in *Arthasastra*. Chapter XXVIII of Book II of *Kautiliya's Arthasastra* contains some rules of navigation and merchant shipping like laws relating to port charges, aid for the distressed foreign mariners, destruction of pirate ships etc. The rule of the use of ports by the foreign merchants indicates the merchant shipping activities in the Indian Sub-continent.[3] It is presumed that in first century there were several naval routes between Rome and other coastal states of Indian Ocean. The Arabs had emerged as a monopoly in the maritime trade in the Indian coast states which continued till fifteenth century. But the 'navigational culture' of Arabs was mostly developed by their merchants and there was

[3] R. Shamasastry (trs), *Kautiliya's Arthaśāstra* (5th edn, Sri Raghuveer printing Press 1956) 139- 42 <https:// archive.org/details/in.ernet.dli.2015.276669/page/ n179> accessed 12 November 2018.

no state policy on maritime control.[4] Thereafter the European merchants started their maritime adventures towards India and established settlements in some coastal areas but the substantial contribution to legal and judicial sectors commenced by the arrival of the British. And the British settlement originated from the activities of a merchants' organisation known as the East India Company.

## Development of Admiralty Jurisdiction in the Company Period

Admiralty justice system, as a separate branch of adjudication in Bangladesh, traced its history back from the emergence of the East India Company in this sub-continent. Queen Elizabeth, on 31st December, 1600, granted a charter authorising the London East India Company (hereafter referred to as Company) 'to trade into and from' Indian Sub-continent and other parts of Asia and Africa. The Charter delegated some legislative powers to the Company for 'the good government of the Company and its servants' and empowered to punish the offences against the Company people.[5]

Although the Charter of 1600 ensured a limited power of framing and administering laws applicable only for Company people, a new Charter issued by the King Charles II on 3rd April 1661, provided an extensive power to the Governor and Council to try the civil and criminal matters of the Company people and the inhabitants of the settlement.[6] The Charter of 1661 prescribed the application of the laws of England for administering justice at the British possession in India.[7] Though the

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[4] R.P. Anand, *International Law and Developing Countries* (Banyan Publications 1986) 56-58.

[5] V. D. Kulshreshtha, *Landmarks in Indian Legal and Constitutional History* (B.M. Gandhi ed, 8th rev edn, Eastern Book Company 2005) 30.

[6] M.P. Jain, *Outlines of Indian Legal History* (5th edn, Wadhwa and Company Law Publishers 1990) 7.

[7] Before the advent of the East India Company there were no uniform *lex loci* or any territorial law concept in India. The Hindu and Muslim personal laws were applied for the Hindus and Muslims respectively to deal with the matters like inheritance, marriage, succession. The criminal justice system was entirely based on the Muslim Sharia Law. The British people tried to protect their independent entity tried to being governed by the English law as they assured by the '*firman'* of the Mughal Emperor. But, gradually, they expanded the English legal and judicial system over the Indian people and territory. See Jain, *Indian Legal History* (n 7) 9.

English law was made applicable in adjudication of civil and criminal cases, the admiralty or maritime matters were not specially mentioned in the Charter.

## Court of Admiralty in Madras

Increase in maritime trade and transport by the Company was necessitated the exercise of a proper jurisdiction and control over the sea especially to deal with the maritime trade generated disputes and maritime crimes like piracy. King Charles II, on 9th August 1683, issued a Charter authorising to establish one or more Admiralty Court/s in India and empowered the court to decide maritime matters according to the 'laws and customs' of merchants. It was the first venture of admiralty justice system in India providing a special court to try maritime issues. On 12th April 1686, King James II granted a Charter repealing some provisions of the earlier Charter of 1683 authorised the Company to establish one or more courts as it thought appropriate. On 10th July 1686, a Court of Admiralty at Madras was established by the Company and John Grey was appointed as the first judge of the court to seat with the help of two assistants. Sir John Biggs, a prominent English lawyer, being the first appointed persons from law professionals, was sent as the Judge-Advocate to administer Court of Admiralty at Madras. The Court of Admiralty was successfully administered by Sir Biggs and cessed its functions for three years after the death of him. The Court of Admiralty was gradually decreased its prestigious position though it was continued by the administration of the Governor and Council as a court of original (and later as a court of appeal) jurisdiction on maritime matters in India.[8]

## Supreme Court as the Court of Admiralty in Calcutta

Being recommended by the Committee of Secrecy for necessary reforms in judicial systems the British Parliament enacted the Regulating Act, 1773, which abolished the Mayor's Court and made

[8] The Charter of 1687 constituted Mayor's Court in Madras and authorised the Court of Admiralty to hear appeal. A logical presumption may be held for conferring appellate jurisdiction to the Court of Admiralty is because the same was manned by persons with 'law background'. See Jain, *Indian Legal History* (n 7) 18.

provisions for establishing a Supreme Court instead of the Mayor's Court in Calcutta. On 26th March 1774, King George III being empowered under section 13 of the Regulating Act, 1773 issued a Charter that established the Supreme Court in Calcutta and it was declared as a Court of Admiralty for Bengal, Bihar, Orissa and other adjacent areas and islands.[9] The clause 26 of the Charter conferred the power to the Supreme Court at Fort William in Bengal to 'hear, examine, try and determine' all civil and maritime cases and all matters relating to ships or vessels within the jurisdiction upon the sea or public rivers or ports.[10]

**Development of Admiralty Jurisdiction in British India: High Court at Calcutta**

Aftermath of the Sepoy Mutiny, in 1858, the Company's rule was ceased and India was placed under the direct governance of the British Crown. The change in the political governance in India initiated judicial reforms too. The Indian High Courts Act, 1861 passed by the British Parliament empowered the Crown to establish the High Courts at Calcutta, Bombay and Madras. The Act provided supervisory, appellate and rule making powers to the High Courts and empowered the Crown to enlarge the jurisdiction by granting Letters Patent. Under the authority empowered by the Act of 1861, Queen Victoria, by Letters Patent, established High Court of Judicature at Calcutta. Along with other jurisdictions, the Letters Patent of 1862 conferred the admiralty jurisdiction to the High Court at Calcutta.[11]

British Parliament enacted the Colonial Courts of Admiralty Act, 1890 (hereafter be referred to as CCAA of 1890) and thereby ascertained the admiralty jurisdictions of the courts which were declared as colonial admiralty courts by the Act or 'all courts of law in a British possession' with 'original unlimited civil jurisdiction.' Section 3 authorised the

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9 Kulshreshtha, *Legal History* (n 5) 97-98.

10 Samareshwar Mahanty, *Maritime Jurisdiction and Admiralty Law in India* (2nd edn, LexisNexis 2018) 231.

11 Kulsharashtha, *Legal History* (n 5) 165-66.

legislature to make law declaring any court of 'unlimited civil jurisdiction' as the Colonial Court of Admiralty.[12] Accordingly the Colonial Courts of Admiralty Act (India), 1891 (hereafter be referred to as CCAAI of 1891) was passed and the High Court of Judicature at Fort William in Bengal was declared as the Colonial Court of Admiralty.[13] Section 2 (2) of the CCAA of 1890 empowers the Colonial Courts of Admiralty the same substantive jurisdiction and procedural powers as the then 'High Court in England' was exercising under any 'statute or otherwise.' Thus the Admiralty Court Act, 1861, which was an English enactment providing admiralty 'jurisdiction and practice' for the High Court of England, had travelled to India and circulated the jurisdictional and procedural base to the High Court at Calcutta. Without providing new legislation, CCAA of 1890 and CCAI of 1891 had placed the High Court at Calcutta equipped with the same law and practice that were exercising by the High Court of England as a Court of Admiralty.[14] Basically the legislators had clothed the native courts with British admiralty law and practices, and successfully implanted the English admiralty justice system in this Sub-continent.

## High Court of East Bengal

In 1947, the Indian Independence Act was passed by the British Parliament and the East Bengal (present Bangladesh) was formed part of the Pakistan. The Governor General of India, under the authority conferred by the section 9 of the Indian Independence Act, 1947, promulgated the High Court (Bengal) Order, 1947 and thereby established the High Court of East Bengal at Dhaka. Section 5 of the Order empowers the High Court of East Bengal all powers of the then Calcutta High Court including the original admiralty jurisdiction within the then East Bengal, a newly constituted territory.[15] While the

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[12] Colonial Courts of Admiralty Act 1890 s 3<https://www.legislation. gov.uk/ ukpga/1890/27/pdfs/ukpga_18900027_ en.pdf > accessed 18 December 2018.

[13] Colonial Court of Admiralty Act (India) 1891 s 2 <http:// theindianlawyer.in/ statutesnbareacts/acts/c72.html>accessed 19 December 2018.

[14] S. M. Mohiuddin Hasan, *Admiralty and Maritime Laws of Bangladesh* (7 edn, Shams Publications 2018) 364.

[15] Kazi Ebadul Hoque, 'Law and Society' in Sirajul Islam (eds) *History of Bangladesh (1704-1971): Social and Cultural history*, vol 3 (Asiatic Society 2007) 524; Bangladesh

Constitution of Pakistan was adopted in 1956, along with other specified powers the original admiralty jurisdiction of the High Court at Dhaka was preserved by the constitutional provision.[16]

## Independence of Bangladesh and the High Court Division

The High Court Division was exercising its admiralty jurisdiction as succeeded from the High Court of West Pakistan that was conferred on it (originally to the High Court of East Bengal at Dhaka) by the High Court (Bengal) Order, 1947. The CCAI of 1891 was in force by the Pakistan Adaptation of Existing Laws Order, 1947 substituting the word Pakistan instead of India. The law was remained in force in Bangladesh by the Laws Continuance Enforcement Order, 1971 and the Bangladesh (Adaptation of Existing Laws) Order, 1972 (hereafter referred to as 1972 Order). Section 3 of the 1972 Order recognised the application of 'existing laws' (laws which were in force in the then West Pakistan) from March 26, 1971 substituting Bangladesh instead of Pakistan or East Pakistan.[17] The High Court of Bangladesh Order, 1972 promulgated by the President on 17th January 1972, renamed the High Court of Judicature at Dhaka in East Pakistan as the High Court of Bangladesh deeming to have existed from 26th March 1971. This Order of 1972 retained all the original and other jurisdictions of the High Court of East Pakistan excepting writ jurisdiction.[18]

The Constitution of Bangladesh also protects the continuity of the all 'existing laws' meaning all laws 'in force in, or in any part of, the territory of Bangladesh immediately before the commencement of this [the] Constitution, whether or not it has been brought into operation.'[19] Thereafter the Bangladesh Laws (Revision and Declaration) Act, 1973 (hereafter referred to as 1973 Act) made necessary amendments to the

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Supreme Court, *Annual Report, 2016* <supremecourt .gov.bd/resources/contents/Annual_Report_2016.pdf> accessed 20 December 2018.

16 Kazi Ebadul Hoque, *Administration of Justice in Bangladesh* (Hakkani Publishers, 2012) 32.

17 Bangladesh (Adaptation of Existing Laws) Order 1972 (President's Order No.48 of 1972).

18 Hoque, *Administration of Justice* (n 16*)* 34.

19 Constitution of the People's Republic of Bangladesh, arts 149 and 152.

Colonial Courts of Admiralty (Pakistan), 1891 (hereafter referred to as CCAP of 1891). The amendments renamed the CCAP of 1891 as the Courts of Admiralty Act, 1891 (hereafter referred to as CAA of 1891) and thereby it had become the part of Bangladesh legislation. The CAA of 1891 as amended by the 1973 Act declared the High Court Division of the Supreme Court of Bangladesh as the Court of Admiralty and the CCA remained in force from 1st July 1891.[20] Though the exercise of the admiralty jurisdiction was succeeded from the colonial legislation through Pakistani era, the 1973 Act (amending Act), having a retrospective effect by the section 1(2) the CAA of 1891, placed the High Court Division constituted under the Constitution of Bangladesh as the Court of Admiralty from the very inception of the CAA of 1891.

As the CCAA of 1890 authorised the High Court at Calcutta to exercise the same jurisdiction as was exercised by High Court of England 'in like manner and to as full an extent' which was conferred by 'any statute or otherwise,' the ACA of 1861 being an English statute had come into effect in the territory of Bengal. The High Court (Bengal) Order, 1947 conferring all the powers of High Court at Calcutta to the High Court of East Bengal including power to exercise of British statue the ACA of 1861. Being succeeded from High Court at Calcutta, the High Court of East Bengal (later the High Court of East Pakistan and thereafter the High Court Division of Supreme Court of Bangladesh) was empowered to exercise the jurisdiction to the subject matters as embodied in and procedures prescribed by the ACA of 1861. The ACA of 1861 being a British enactment not directly adopted as the statute of Bangladesh, but historical adoption of the statute giving an extra territorial effect maintained it as a valid law for providing jurisdiction on subject matters and some procedures for exercising admiralty jurisdiction by the High Court Division of the Supreme Court of Bangladesh. In the same way the Admiralty Court Act, 1940 another British statute, was the live law in Bangladesh till enacting the Admiralty Court Act, 2000 (hereafter referred to as ACA).

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20 Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973) s 3 sch 2.

## Present Status of Admiralty Jurisdiction in Bangladesh

The present admiralty jurisdiction of Bangladesh is basically laid down in the ACA. The sub-section (2) of section 3 of the ACA provides a list of maritime claims upon which the jurisdiction to 'hear or determine' can be exercised by the Court of Admiralty. The types of jurisdiction provided in the sub-section (2) can be classified in the following four heads:

a) jurisdiction on some general questions or claims provided in sub-section (2);

b) jurisdiction in relation to any relief prescribed by the Merchant Shipping Ordinance, 1983 as mentioned in clauses (n) and (r) of sub-section (2);

c) jurisdiction connected with aircraft relating to towage or pilotage as mentioned in clauses (j) and (k) or claims arising out of application under the section 12 of the Civil Aviation Ordinance, 1960 (repealed) or claims arising out of any law in relation to salvage to aircraft or its passengers or apparels and cargos as mentioned in clause (i) of sub-section (2); and

d) other admiralty jurisdiction which it had immediately before the commencement of the Act or any other customary jurisdiction exercised by the High Court Division as the Court of Admiralty.

The jurisdictional issues and aspects of Court of Admiralty are discussed in the following paragraphs.

## Admiralty Jurisdiction under the Admiralty Court Act and the Rules

Section 3 (1) of the ACA declares the High Court Division as the Court of Admiralty. Section 3 (2) provides the 'questions or claims' upon which the court may exercise its jurisdiction. The Admiralty Rules, 1912 formulated by the then Calcutta High Court are in force in Bangladesh as

saved by the section 11 of the ACA. The Rules contains the procedural aspects of admiralty jurisdiction. The ACA empowers the Supreme Court with prior approval from the President to frame rules for giving effect to the provisions of the ACA. Until new rules are framed under the ACA, the Rules of 1912 will be applicable subject to being 'conformity with the provisions' of the ACA.[21]

## Admiralty Jurisdiction under Merchant Shipping Ordinance

The Bangladesh Merchant Shipping Ordinance, 1983 (hereafter referred to as BMSO) conferred some powers to the High Court Division. Interestingly in BMSO some powers are entrusted on the Supreme Court like 'power to detain foreign ship that has occasioned damage.'[22] On perusal of the BMSO it is found that the power of the Supreme Court is mentioned almost in five sections of the said Ordinance which includes power to disposal of unclaimed property of deceased seamen, power to detain foreign ships etc.[23] But in practice the Appellate Division of the Supreme Court does not exercise any original jurisdiction except the proceeding of its contempt.[24] Except power to make rules as mentioned in sections 223 and 472, the powers mentioned in sections 171, 472 and 490 of the BMSO are very much linked with the maritime jurisdiction of the High Court Division. While constituting Benches of the High Court Division, the Chief Justice of Bangladesh generally allocates the

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21 Admiralty Court Act, 2000, s 11.

22 Bangladesh Merchant Shipping Ordinance, 1983, s 490.

23 Bangladesh Merchant Shipping Ordinance, 1983, ss 171, 223, 424, 472 and 490. Section 171 deals with the power to hear the application for any claim to the property of deceased seamen, section 223 deals with the power of the Government to make rules 'after consultation with the Supreme Court' in respect of 'litigation against the seamen', section 424 contains the power of the Supreme Court to frame rules for attendance of the witnesses, section 472 prescribes the power of the Supreme Court to consolidate claims against ship-owners, section 490 empowers the Supreme Court to issue order of detention against any foreign ship that has occasioned damage.

24 Article 108 of the Constitution of the People's Republic of Bangladesh declared the Supreme Court as the 'court of record' investing all powers to investigate or punish for contempt of itself. Though it is an inherent and extraordinary power of both the Divisions of the Supreme Court, it is termed as original power of the Appellate Division in a sense that the contempt of Appellate Division can only be dealt with by itself. See the Supreme Court of Bangladesh (Appellate Division) Rules 1988, pt V or XXVII; Mahmudul Islam, *Constitutional Law of Bangladesh* (2nd edn, Mullick Brothers, 2003) 555-56.

jurisdiction to hear the applications under the BMSO to the very 'Single Bench' which also empowered to sit as Court of Admiralty.[25]

High Court Division of the Supreme Court exercises and some powers like disputes concerning money payable to 'salvage' are vested on the High Court Division and the District Judge.[26] But the ACA provides jurisdiction on 'salvage' claims,[27] claims relating to wages of masters or crews of ships[28] to the Court of Admiralty. Section 3 (2) (r) of the ACA also empowers the Court of Admiralty to grant reliefs which are provided by the provisions of the BMSO. While in practice all the judicial remedies prescribed by the BMSO are provided by the High Court Division under its admiralty jurisdiction, the provision for application to the District Judge is become obsolete.[29] Therefore all the adjudicatory powers provided by the various provisions of the BMSO to different forums are merged under the admiralty jurisdiction of the High Court Division.

**Subject Matter of the Jurisdiction**

The jurisdiction as to subject matter of the Court of Admiralty is constituted by the Section 3 of the ACA. It enlisted some maritime claims or questions which the court may 'hear and determine' as the Court of Admiralty. Sub-section (2) of the section 3 includes a long list of questions or claims as the subject matter of admiralty jurisdiction.

The Senior Courts Act, 1981 (hereafter referred to as SCA) provides the admiralty claims for England and Wales. The Section 3 of the ACA incorporated almost all the claims as embodied in the section 20 of the SCA with a little modification. But the SCA provides admiralty

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25 Bangladesh Supreme Court, *Cause List of the High Court Division* (1 August 2018) 347. The constitution of Benches by the Chief Justice is reflected in 'cause list' of the High Court Division. It is found that apart from the jurisdiction under the Admiralty Court Act 2000; the authority to hear the applications under the Merchant Shipping Ordinance 1983 is specially vested to a Single Bench.

26 Merchant Shipping Ordinance, 1983 s 468.

27 Admiralty Court Act, 2000, s 3 (2) (i).

28 *ibid* s 3 (2) (n).

29 Interview with an Advocate of the Supreme Court of Bangladesh (Dhaka, 14 November 2018).

jurisdiction over the claims arising out of marine oil pollution. Sub-section (5) of the section 20 of the SCA extents the meaning and scope of the 'damage done by a ship' to the liabilities incurred under the Chapter III of Part VI of the Merchant Shipping Act, 1995. The Chapter III of Part VI of the said Act specifies the liabilities of the ships, ship-owners and others in marine oil pollution. It also includes the claims of liability falling on the 'international oil pollution compensation fund' etc. as provided in the Merchant Shipping Act 1995 of England.

The clause (d) of section 3 (2) incorporated claims for 'damage done by a ship' but no statutory extensive definition is provided in the ACA. The BMSO of 1983 is also silent about the measurements in respect of marine oil pollution. As about 3.5 million tons of crude and refined oil are carried for Bangladesh by the tankers and thereby responsible for six thousand tons of total four hundred thousand tons oil pollution in the sea area, Bangladesh has an obligation to protect her maritime waters and resources from such pollution.[30] The vessel source oil pollution is a great threat to the maritime ecology and environment. But there is a lack of adequate legislative arrangements in Bangladesh to address the issue and to provide remedial provisions of law for the affected persons or organisations. In absence of adequate statutory provisions in this respect, some experts still find scope for the Court of Admiralty to provide the remedy to the persons affected by the oil pollution providing a liberal interpretation of the term 'damage done by any ships.' [31]

However there is dissenting view that 'damage done by a ship' is another thing related with the collision or like matters. Therefore legislative provisions are needed to include maritime oil pollution under the coverage of maritime claims.[32] There is no provision addressing the marine pollution issues in the BMSO and the same is absent in the list of maritime claims provided by the section 3 of the ACA.

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30 Khairul Hassan, 'Pollution of marine environment in Bangladesh by shipping and the preventive methods' (2010) 10 ICEAB 197 < https://www.*benjapan.org/iceab10/52.pdf*> accessed 2 January 2019.

31 Interview of an Advocate of the Supreme Court of Bangladesh (4 September 2018).

32 Interview of another Advocate of the Supreme Court of Bangladesh (7 January 7 2019).

The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 (hereafter referred to as AJSMCA) of India enriched the jurisdiction of the Courts of Admiralty providing jurisdiction on damage (even threat of damage) caused by any vessel to the environment.[33]India also ensured the protection of maritime environment inserting substantive provisions of law into the Merchant Shipping Act, 1958 (hereafter referred to as MSA) through several amendments in the statute. In India, there are extensive provisions addressing the issues like civil liabilities, compensation fund, prevention and control of sea pollution which provides the substantive arrangements of law against the sea pollution.[34] Some Rules are also framed in accordance with the main statute.[35] Oil pollution from ship also directly included as enforceable maritime claim in the Admiralty Jurisdiction Regulation Act, 1983 (hereafter referred to as AJRA) of South Africa.[36]

Though the High Court (Admiralty Jurisdiction) Act (hereafter referred to as HCAJA) of Singapore has not directly provide the claims relating to the marine oil pollution, the Merchant Shipping (Civil Liability and Compensation for Oil Pollution) Act (hereafter referred to as MSCLCOPA) extended the scope of the High court of Singapore exercising admiralty jurisdiction. Section 16 of the MSCLCOPA enlarge the scope of the court providing oil pollution damage as maritime claims expanding the meaning of 'any claim for damage done by a ship' as stated in the section 3 (1) (d) of the HCAJA.

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33 Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 (India) s 4 (1) (u).

34 Part XB, XC, XIA, XIB of the Merchant Shipping Act, 1958 (India) contains the provisions on Civil Liability for Oil Pollution Damage, International Oil Pollution Compensation Fund, Prevention and Containment of Pollution of the Sea by Oil and Control of Harmful Anti-Fouling Systems on Ships respectively and were inserted by the several amending enactments of 1983, 2002 and 2014 <http://www.dgshipping.gov.in/Content /MerchantShippingAct.aspx> accessed 7 January 2019.

35 Some separate Rules are framed regarding marine oil pollution and associated maters like Merchant Shipping (Prevention of Pollution by Oil from Ships) Rules 2010.

36 Admiralty Jurisdiction Regulation Act 1983 (South Africa), s 1 (z) <www.justice.gov.za/legislation/acts/ 1983-105.pdf> accessed 4 January 2019.

## Territorial Jurisdiction of the Court of Admiralty

As the section 3 (3) of the Territorial Waters and Maritime Zones Act, 1974 confirms the extension of the sovereignty to the territorial waters, the High Court Division shall have its territorial jurisdiction over the territorial waters as like as land territory.[37] The state sovereignty over the territorial waters is also recognised in international law.[38]

But unlike the traditional jurisdiction concept the admiralty jurisdiction may travel beyond the limit of state territory. In *Anwar Hossain Chowdhury*[39] the Appellate Division accepted the English law concept of admiralty jurisdiction on 'high seas' and observed that '...admiralty jurisdiction is not confined to the open sea but extents into foreign ports and navigable waters...' The court adopted the view of spread nature of admiralty jurisdiction 'in relation to all claims, whatsoever arises' expressed in *United Africa Co. Ltd. v Owners of MV Tolten*[40] citing an English treatise on shipping law.[41] In *Tolten* Bucknil LJ adopted the extended definition of 'high sea' as referring the decision of *The Mecca* (1985) in where Lindley LJ observed that 'The expression 'high seas' when used with reference to the jurisdiction of the Court of Admiralty, included all oceans, seas, bays, channels, rivers, creeks waters below low water mark and where great ships go...'[42] The wording 'high sea' is not mentioned in the ACA of 2000, but the concept of jurisdiction over the 'high sea' developed by English admiralty practice is widely accepted in the admiralty justice system of most commonwealth countries. It is well established that the admiralty jurisdiction of the High Court Division

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37 The Government declared 12 (twelve) nautical miles from baseline of coastal water as territorial waters per Section 3 (1) e Territorial Waters and Maritime Zones Act, 1974 (Act XXVI of 1974).

38 The United Nations Convention on the Law of the Sea, 1982 (UNCLOS), art. 2. The Convention assured the state sovereignty over 'territorial sea' (same meaning of territorial waters) and provided 12 (twelve) nautical miles area measuring from low water line of coastal waters of State.

39 [1989] BLD (Spl) 1 AD.

40 [1946] 2 All ER 372.

41 *Anwar Hossain* (n 39) para 153. Badrul Haider Chowdhury CJ adopted the views describing some distinguished jurisdictional characters of the High Court Division citing D. R. Thomas, *Maritime Liens (British Shipping Law Library)* vol 14 (Sweet and Maxwell, 1980) 309-10.

42 Mahanty, Maritime Jurisdiction (n 11) 108, ft. note 4.

extents to the 'high seas' while the court invoking its jurisdiction on 'internal waters' express its views in favour of jurisdiction on the 'high seas' making a reference of having such jurisdiction of High Court of England.[43]

Section 3 (5) of the ACA ascertained the admiralty jurisdiction over any ship or aircraft irrespective of its place of registration or nationality of the owner. Section 20 (7) of the SCA of 1981 ensured its jurisdiction on 'high seas' providing clear expression for application of admiralty jurisdiction over any foreign ship or any claim arises in any extra-territorial area. The section 3 (5) of the ACA of Bangladesh can be treated as the reproduction of the section 20 (7) of the SCA of England.

## (Non) Application of Code of Civil Procedure

In *M/S. Saleh Steel Industries Ltd. v TSS Pacific Abeto and others* [44] the majority decision did not attempted to characterise the admiralty jurisdiction rather searched for a solution to empower the Admiralty Court in case of 'express non application' of some provisions of the Code.[45] Travelling around the Code, considering the admiralty jurisdiction as 'original civil jurisdiction' and finding some 'express non application' provisions in the Code provided the way out Fazle Munim CJ observed that "...I am of the opinion that in the absence of express provisions in the Code of Civil Procedure or Rules of Admiralty Court it may exercise inherent powers to return the plaint if there is no cause of action triable by it or in case it otherwise lacks jurisdiction."[46]

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43 *Bangladesh Inland Water Transport Corporation and others v Al Falah Shipping Lines and other* [1999] 51 DLR(AD) 71.

44 [1983] 35 DLR 195 (AD).

45 In *Pacific Abeto* (n 44), it was misconceived that the clause (a) of the Rule 11 of Order VII is not applicable in admiralty suits, rather it was printed in the Order XLIX, Rule 3 as clauses (d) and (c) of Rule 11 of Order VII of the Code. It was held in *Sadharan Bima Corporation v M. V. BIRBA and others* [1992] 44 DLR 171 (HCD) that a printing mistake was occurred in Rule 3 of Order XLIX in respect of clause (d). Md. Mozammel Hoque J finding the insertion of clause (d) a printing mistake, considered clause (b) as appropriate and ordered for correction of the 'Clause (1) of Rule 3 of Order XLIX of the Code of Civil procedure by inserting clause (b) instead of clause (d)'.

46 Per F .K. M. A. Munim CJ in *Pacific Abeto* (n 44) para 14.

Though in *Pacific Abeto* the Appellate Division finds no difficulty to exercise of the provisions of the Code in admiralty jurisdiction, but there are conflicting decisions on the same point by the High Court Division. In *Multicargo Limited v M. V. Ponl Bercelona and others*[47] re-examining the scope of application of the Code, it is decided that the same is applicable in admiralty matters. After passing about 9 (nine) months of the decision in *Ponl Bercelona*, the High Court Division in *Bangladesh Inland Water Transport Company v M.V. Helal Kamal Cargo Vessel*[48] took the view that the Code is not applicable to the admiralty proceedings. Same view of non-application of the Code in admiralty proceedings is expressed in *Sonali Bank v. Bengal Liner Ltd. and others.*[49] Explaining the laws with reference from historical background and citing various decisions of this subcontinent it is ascertained that the application of the Code in the High Court proceedings referred to in the Order XLIX is the 'Chartered High Court' in Calcutta which had Ordinary Original Civil Jurisdiction within the presidency town of Calcutta and Extra-Ordinary Civil Jurisdiction 'to remove any suit pending before any subordinate court.' Syed Amirul Islam J defined the admiralty jurisdiction as a 'special statutory jurisdiction.'[50]

The decision of the *Pacific Abeto* being the law declared by the apex court has binding effect on the High Court Division. In *Ponl Bercelona* the support for application of the Code is more definitely uttered. But the *Bengal Liner* elaborately discussed the matter and attempted to define the special nature of admiralty jurisdiction distinguished from ordinary civil jurisdiction and provides a significant effort for re-examining the issue holistically.

**(Non) Application of Letters Patent and Original Side Rules**

Originally, Letters Patent of 1862 was issued by the Queen Victoria which was revoked by the Letters Patent of 1865. Clause 31 of the Letters Patent of 1862 empowered the High Court of Ford William in Bengal at Calcutta with admiralty jurisdiction which made continued by

47 [2005] 2 LG 287 (HCD).
48 [2004] 1 LG 401 (HCD).
49 [2005] 10 MLR 209 (HCD).
50 Ibid, para 38.

the clause 32 of the Letters Patent of 1865.[51] The clause 32 of Letters Patent of 1865 provides both civil and 'maritime jurisdiction' containing the clause title 'Civil'. Original Side Rules were framed to 'regulate civil cases including the admiralty proceedings' by the Calcutta High Court under the authority of clause 37 of the Letters Patent of 1865.[52] Though they were applicable to serve the powers and procedures of higher court, the application of the Letters Patent 'in relation to Bangladesh' and in respect of the 'jurisdiction, power, and authority of the Supreme Court' are repealed by the Law Reforms Ordinance, 1978.[53]

This point of abolition of Letters Patent by the Ordinance of 1978 was not referred to in the *Pacific Abeto*. Even the dissenting Judge without any focus in the said repeal supported the application of Original Side Rules, which are bylaws of the Letters Patent.[54] In *Ponl Barcelona* it is decided that some provisions of Original Side Rules which are referred in the Admiralty Rules are applicable in admiralty matters. In *Helal Kamal* it is decided that repealing of letters patent by the Ordinance of 1978 automatically repealed the Original Side Rules as it was framed under the authority of letters patent. A. B. M. Khairul Haque J (as he then was) citing the different authorities applied the principle of 'legislation by reference' and decided that the Original Side Rules are applicable though Letters Patents - the parent law is repealed.

Therefore the law is settled that after the Law Reforms Ordinance, 1978 coming into force, the Letters Patent of 1865 has no application in the proceedings of the High Court Division including the admiralty proceedings. In case of application of Original Side Rules, at present the position of law is conflicting. It creates a little confusion in admiralty practice in Bangladesh as the decisions in *Ponl Barcelona* and in *Helal Kamal* are contradictory in point of application of the Original Side Rules.

Indian courts supports the application the Original Side Rules and the Code of Civil Procedure along with the Admiralty Rules in the admiralty

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51 Mahanty, *Maritime Jurisdiction* (n 10) 56-57.
52 Letters Patent of 1865, clause 37; see ibid 229.
53 Law Reforms Ordinance 1978 s 3.
54 Per Ruhul Islam J in *Pacific Abeto* (n 44) para 30 and 31.

suits in case of insufficiency of provisions of law. In *M/S. Kimberly-Clarke Liver Private Ltd. v. M.V. Eagle Excellence*[55] a division bench of Bombay High Court citing reference from several decisions of the Supreme Court of India particularly referring the landmark *M. V. Elisabeth*[56] decided in favour of the application of the Original Side Rules.[57]

## Admiralty Jurisdiction and Arbitration Clause

Charter party agreement or contract of carriage often includes 'arbitration clause' in case of any future dispute between the parties. Generally, arbitration agreement excludes the jurisdiction of general courts on the matters of contract between the parties. Such exclusive choice of 'arbitration' as an alternative method of dispute resolution is also acknowledged in Bangladesh.[58] But, in admiralty action in *rem* proceeding, the court have jurisdiction to hear the dispute, when the ship is arrested by the order of the court.[59] The Court of Admiralty generally recognises the ouster of jurisdiction of the court in case of valid arbitration agreement between the parties and stays the original suit maintaining the arrest in support of the arbitration.[60] However the Arbitration Act, 2001 (hereafter referred to as AA) provides some powers to the High Court Division to issue 'interim orders' in some specified matters.[61] Except some matters relating to recognition and enforcement of foreign arbitral awards, the application of the Arbitration Act, 2001 is limited to the arbitration seated in Bangladesh. There are contradictory decisions of the court on the point that whether the court can exercise its power to make interim order when the matter is pending in a foreign arbitration proceeding. In *HRC Shipping Ltd. v MV X-Press Manaslu and others*[62] the High Court Division has taken the view that

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55 The High Court of Bombay in Appeal No. 240 of 2007 arising out of Admiralty Suit No. 12 of 2006 <https:// indiankanoon.org/doc/174551071/> accessed 2 January 2019.

56 *M.V. Elisabeth and Ors v. Harwan Investment and Trading Pvt. Ltd*. [1993] AIR 1014.

57 *M.V. Eagle Excellence* (n 55) para 51.

58 Arbitration Act 2001, s 7.

59 Stanley Onyebuchi Okoli, 'Arrest of Ships: Impact of the Law on Maritime Claimants' (Master's thesis, Lund University 2010) 32.

60 *Ship Arrest in Practice* (11th edn, Shiparrestedcom 2018) 32.

61 Arbitration Act 2001, s 7A.

62 [2007] 12 MLR 265 (HCD).

the section 3 of the AA does not negate its application on any arbitration outside Bangladesh. The court observed that:

> *It is evident that Section 3 (1) provides that 2001 Act would apply where the place of arbitration is Bangladesh. It does not state that it would not apply where the place of arbitration is not in Bangladesh. Neither does it state that the 2001 Act would 'only' apply if the place of arbitration is in Bangladesh.*[63]

The court not finding any difference in the AA between 'international commercial arbitration takes place in Bangladesh' and 'international commercial arbitration takes place outside Bangladesh' has relied on the UNCITRAL Model Law on International Arbitration and construed the intention of the legislators in favour of application of the AA outside of Bangladesh.

In *STX Corporation v Meghna Group of Industries Ltd.*[64] the High Court Division adopting the literal interpretation of the section 3 (1) of the AA decided that the Bangladeshi court has no power to exercise in case of arbitration outside the country. Upholding the view taken by the Appellate Division in *Unicol Bangladesh v Maxwell Engineering Works Limited* [65] and High Court Division in *Uzbekistan Airways v Air Spain Ltd* [66] the court found that the AA is not applicable in any arbitration outside Bangladesh. Same view was expressed in *Canada Shipping and Trading SA v TT Katikaayu and another.* [67]

In *Samchira DMCC v M.T. Alcon ex M.T. Falcon Carrier*,[68] a recently decided case, the High Court Division while exercising its admiralty jurisdiction declined to stay the proceeding in support of a London arbitration agreement. The court held that as the claimant had not abused

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63 Ibid, para 32.
64 [2012] 64 DLR 550 (HCD).
65 [2004] 56 DLR 166 (AD).
66 [2004] 10 BLC 614 (HCD).
67 [2002] 54 DLR 93 (HCD).
68 Admiralty Suit No. 67 of 2013 (HCD).

the process of court, there is nothing to bar the admiralty jurisdiction of the court.[69]

Indian Supreme Court in *Bharat Aluminium Co. Ltd. (BALCO)*[70] case decided that no interim order 'would be maintainable' in support of any arbitration seated outside India. It is criticised that having a 'persuasive effect' of Indian decisions, the *STX Corporation* and the later decisions of the Bangladeshi court demonstrated restrictive approaches refraining to provide interim orders in international commercial arbitration. In such a situation parties to the international arbitration will face challenges to get support from the national courts.[71] Whereas, Singapore High Court exposed liberal approach in *Multi-Code Electronics Industries v Toh Chun Toh and Others* [72] and granted an interim order in favour of an arbitral proceeding seated outside Singapore. International Arbitration Act of Singapore provides a legislative arrangement which includes provisions on interim measures in line with the UNCITRAL Model Law on Arbitration.[73]

## Limits for Exercise of Admiralty Jurisdiction

Generally civil suits or proceedings may be initiated against the State. The aggrieved persons may exercise their civil rights against any department of the government. [74] But the action *in rem* jurisdiction shall not be applicable against the Peoples Republic of Bangladesh. Such immunity of State property had been recognised by the English courts as

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69 Zalal Uddin Ahmed, 'Charter Party Clause for Arbitration Seated Outside of Bangladesh and Jurisdiction of The Admralty Court in Admiralty Dispute: An Analysis'<https://coasttocoastbd.com/.../CHARTER-PARTY-CLA...> accessed 17 January 2019.

70 *Bharat Aluminium Co. Ltd.v Kaiser Aluminium Technical Service, Inc.*,Civil Appeal No.7019 of 2005, SC (India).

71 Sameer Sattar, 'Bangladeshi courts at odds in respect of its powers in relation to arbitrations seated outside of Bangladesh' (2013) 1 IALR 24 <*https://m.ela.law/.../Bangladeshi-courts-at-odds.pdf*> accessed 20 January 20, 2019.

72 [2009] 1 SLR 1000 (HC, Singapore).

73 Sattar, Arbitration seated outside Bangladesh (n 71) 24-25.

74 Code of Civil Procedure 1908, pt IV.

'Crown immunity.'[75] The ACA specifically bars the jurisdiction of the Court of Admiralty in exercising action *in rem* against the Republic and thereby prohibits arresting, detaining or selling any ships or aircraft belonging to Bangladesh Army, Navy, Air Force, Bangladesh Rifles (presently the Border Guards Bangladesh), Bangladesh Police or Coast Guard.[76] In respect of collision and other similar cases the action *in personam* is restricted within state territory only. Admiralty action *in personam* in collision or similar cases is not applicable to a foreigner or where the cause of action is arisen out of territorial limit of Bangladesh.

## Statistical Statements of Admiralty Suits

A substantive number of the admiralty disputes are settled amicably by the parties or by arbitration without taking formal judicial recourse. The numbers of cases in the Court of Admiralty are lower in comparison with the general civil cases of other areas. But, in respect of shipping activities in the country, the cases filed in the Court of Admiralty are not negligible. A five years statistics[77] of admiralty cases are presented below:

**5 (Five) Year's Statistics of Admiralty Suits (From 2014 to 2018)**

| Year | Types of Cases | Preceding Year's Pending | Filing | Total (3+4) | Disposal | Pending |
|---|---|---|---|---|---|---|
| 1 | 2 | 3 | 4 | 5 | 6 | 7 |
| 2014 | Original | 242 | 56 | 298 | 86 | 212 |
| | Execution | 6 | 1 | 7 | 1 | 6 |
| 2015 | Original | 212 | 86 | 298 | 91 | 207 |

[75] David C. Jackson, *Enforcement of Maritime Claims* (4th edn, Informa Professional 2005) s 12.14.

[76] Admiralty Court Act 2001, s 9.

[77] Collected by the researcher from the Statements Section of the High Court Division of Bangladesh Supreme Court.

| | | | | | | |
|---|---|---|---|---|---|---|
| | Execution | 6 | 0 | 6 | 0 | 6 |
| 2016 | Original | 207 | 93 | 300 | 73 | 227 |
| | Execution | 6 | 4 | 10 | 0 | 10 |
| 2017 | Original | 227 | 82 | 309 | 47 | 262 |
| | Execution | 10 | 6 | 16 | 1 | 15 |
| 2018 | Original | 262 | 75 | 335 | 43 | 292 |
| | Execution | 15 | 6 | 21 | 2 | 19 |

## Conclusion

The admiralty justice system of Bangladesh which is mostly traced from the English legal system has undergone some legislative developments. Though it is considered as the outcome of civil law concept but the modern exercise of admiralty jurisdiction heavily indebted the British judges who afforded to develop admiralty court as a special forum for justice. Bangladesh started her journey of admiralty practice with British colonial legislations but enacted new statute earlier than India and specifically defined the maritime claims and jurisdiction of the admiralty court. But in case of marine oil pollution, which is a matter of great concern, the present Admiralty Courts Act is silent whereas the admiralty statutes of England, India, Singapore and South Africa empower the court providing admiralty jurisdiction on the issue. Substantive provisions on maritime pollution should be incorporated by amending the Merchant Shipping Ordinance, 1983 or enacting any other law in this respect. Maritime disputes are rising as the advancement of maritime trade and shipping activities around the world, and it generates new issues to be addressed. To enlarge the admiralty jurisdiction matters like marine insurance premium, brokerage or other fees shipping agents, maritime pollution, arbitration award some of which included in Indian statute and all of which included in South African jurisdiction should be included in Bangladeshi statute as maritime claims. Bangladesh should follow the Indian legislation to specify the maritime lien and its priorities.

There are conflicting decisions on applicability of the Code of Civil Procedure in admiralty proceeding. However the Admiralty Court Act itself provides application of the same in case of institution of the suit. In practice, the admiralty suits are conducted mostly following the procedures of ordinary civil cases as the Admiralty Rules of 1912 approves the trend. As the Rules does not provide specific provisions for interim orders, the court while making such orders follows the principles and procedures enshrined in the Code of Civil Procedure. Conflict and confuse exit in respect of application of Original Side Rules too. Such uncertainty may be removed by framing new Rules as prescribed by the statute addressing the procedural issues more specifically.

Some conflicting provisions of jurisdiction are found in the Merchant Shipping Ordinance, 1983 as it empowers the District Judge jurisdiction to entertain salvage claims which is exclusively under the admiralty jurisdiction of the High Court Division. Some provisions of the Ordinance mentioned the Supreme Court as the judicial forum which should be substituted by High Court Division. Necessary amendment in the Ordinance mentioning the High Court Division as exclusive forum is required in line with the Admiralty Court Act, 2000.

The limitation for application of interim order only within Bangladesh territory as provided by the Arbitration Act, 2001 may create frustrations to the parties engaged in international trade. The scope of stay of admiralty proceedings in support of foreign jurisdiction or international arbitration outside Bangladesh may be re-examined. While exercising *in rem* action, stay of proceeding and keeping the property arrested in support of concurrent foreign jurisdiction or arbitration is still possible by exercising the inherent power of the Court of Admiralty as it is practised by the English admiralty court. A fresh admiralty Rules may incorporate provision providing a solution for the problem.

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# International Tribunal in Resolving International Commercial Disputes and Relation with National Courts: An Overview of the Decision of the Saipem's Case

Farjana Hossain*

*International commercial arbitration has been emerged as a significant and widely accepted method of dispute resolution without the involvement of national courts in the field of international trade, commerce and foreign direct investment. This paper intends to exhibit that the national courts are involved not only in the process of arbitration but also to the enforcement of the arbitral awards which sometimes can be recognized as court interference. The purpose of this article is to focus on the correlation between international commercial tribunal and national courts and also to draw attention to the relationship and the conflict that exists between the two. It argues that unfair interference of national courts over the decision of international tribunal can make a state internationally responsible as the principal of state responsibility could be applied as a check over the supervisory jurisdiction of national courts. In this context, the* Saipem's Case *has been discussed to understand the legal consequence of illegal interference of local courts. Finally, it contends that to execute arbitral award, a competent legal structure having local courts with sound understanding of arbitral process is very important. It is also crucial to keep a balance between the power of judiciary and arbitral tribunals so that no interference appears conflicting with the concept of state sovereignty.*

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## 1. Introduction

International commercial arbitration has been emerged as a significant and widely accepted method of dispute resolution without the involvement of national courts in the field of international trade, commerce and foreign direct investment. It is because of its flexibility, neutrality, finality, and enforceability that international arbitration is outstandingly effective.[1] Furthermore, this process helps to reduce inequalities between parties as it is likely to take place in an organization located in the home country of one or the other party or it is also like to be administered by an arbitration organization located in a third country. More interestingly, there is active competition among leading arbitration organizations to offer their services worldwide. Parties voluntarily choose to arbitrate, agree to waive local remedies and to participate in the proceedings controlled by a neutral and private means of justice.

It is evident that to make an international arbitration effective in terms of proper conduct as well as execution, involvement of national courts is indispensable. The truth is that "*national courts could exist without arbitration, but arbitration could not exist without the courts. The real issue is to define the point where this reliance of arbitration on national courts begins and where ends*."[2] However, there are cases where courts' interference turns into a hindrance before tribunals as the state which is a party to the disputes has too many techniques to influence decisions in its own courts for foreigners to feel uncomfortable.

This paper exhibits that the national courts are involved not only in the process of arbitration but also to the enforcement of the arbitral awards which sometimes can be recognized as court interference. The first part of the essay aims to give a short description of international tribunals, the relevant international conventions and laws. Secondly, it focuses on the relationship of international tribunals and national courts, their coherence

[1] Simon Greenberg, Christopher Kee anw J. RomeshWeeramantry, *International Commercial Arbitration: an Asia-Pacific Perspective* (Cambridge University Press, 2011)1.

[2] Nigel Blackby, Redfen and Hunter, *International Arbitration* (Oxford University Press, 2009).

and conflicts. In this connection it focuses on the landmark decision of *Saipem V Bangladesh* and also discusses how court interference can give rise the issue of state responsibility. Finally, it tells about the reasons of conflicts and the future challenges.

## 2. The Nature of International Commercial Arbitration

Though there is no codified definition of the term International commercial arbitration, but practically there is clear agreement on its constituent elements. It is an alternative form of dispute resolution that encompasses transnational parties relying on one or more arbitrators.[3] By entering into an arbitration agreement the parties agrees to oust or significantly restrict the jurisdiction of the domestic court and authorise a tribunal to decide the dispute.[4]As an alternative adjudication procedure, it leads to a final decision, like litigation in the national courts that will be given execution by the courts. The consequence of the arbitral award is binding on both parties and once an award is rendered it becomes *res judicata* concerning the dispute it resolves.

### 2.1 The law governing international commercial arbitration

The recognition of international arbitration by the legal community is essentially due to the New York Convention, which has been ratified by more than 140 states. *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention)*[5] is an international treaty which affords a globally accepted standard for the recognition and enforcement of foreign arbitration agreement and awards.[6] The Convention inflicts two primary compulsions

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[3] Claudia Priem, 'International Investment treaty Arbitration as a Potential Check for Domestic Courts refusing enforcement of Foreign Arbitration Awards' [2013] 10 *NYU Journal of Law and Business* 192.

[4] Simon Greenberg, Christopher Kee and J. RomeshWeeramantry, *International Commercial Arbitration: an Asia-Pacific Perspective (2011)1* Cambridge University Press

[5] *The United Nations Convention on the Recognition and Enforcement of Foreign ArbitralAwards,* opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

[6] Clyde Croft and Bronwyn Lincoln, 'The role of the Courts: Enforcement of Arbitration Awards and Anti-Arbitration Injunctions' (2010) *International Commercial Litigation and Dispute Resolution 77.*

to its signatories. First, it requires national courts to recognize and enforce the foreign arbitration clauses, and secondly, enforce arbitration awards made in territory of other states, subject to certain limited exceptions.[7] An arbitration award is acceptable to enforcement without the need for any order of any court in the country of origin, provided that it is binding upon the parties. Moreover, the reasons for denying recognition and enforcement do not comprise any authority to review any awards on their merits in any jurisdiction in which recognition or enforcement is sought.

Another significant international legislation to govern international arbitration is the *1985 UNCITRAL Model Law on International Commercial Arbitration*.[8] The *Model Law* is a 'pattern of law' for the domestic jurisdictions to adopt as their own arbitration law. Parties are allowed to use Model law as the basis for their national legislation with or without any modification. This piece of legislation intends to harmonise arbitration law and reflects *'international consensus and aims to modernise and standardise arbitral procedure to best match the 'particular features and needs of international commercial arbitration.'*[9]

## 2.2 Arbitral Institutions

International commercial dispute resolution by arbitration has turned '*a new forensic and commercial industry'* in its own right[10]. The parties have the option of having their arbitration supervised by an arbitral institution, or of conducting an *ad hoc* arbitration, without institutional supervision and support[11].

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7 *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* , opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) art I and II.

8 United Nations Commission on International trade Law (UNCTRAL), Model Law on International Commercial Arbitration1985 (As adopted by UNCITRAL on 21 June 1985).

9 *ibid* at p.4.

10 Michael Kerr, 'Concord and Conflict in International Arbitration' (1997)13(2) *Arbitration International 128*.

11 Ferdinando Emanuele, Molfa M., Steen C., LLP H., "Institutional Arbitration: The Italian Perspective", *Litigation & Dispute Resolution*, at p. 170, at https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/other-pdfs/institutional-arbitration-the-italian-perspective-2012.pdf, last visited on November 20, 2017.

Institutional arbitration recommends parties' some prescribed rules and procedures to resolve their dispute. The purpose of the institutions is not to resolve the dispute itself, but to provide administrative support to the arbitral tribunal, which arbitrates the dispute. By choosing institutional arbitration, the parties also integrate the arbitral rules of that organization in their agreement to arbitrate, which then administer the comportment of the proceedings. There are several arbitral institutions around the world among them some well-known are the International Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).[12] Each arbitration institution runs by its specific model arbitration clause.[13]

## 2.3 *Ad Hoc* Arbitration

Non-administered, or 'ad hoc', arbitration means arbitration conducted by the parties and the arbitrators without the assistance of an administering institution. In ad hoc arbitration parties depend on particular, non-institutional rules to govern the arbitration. The parties may also choose a designated set of rules (such as the UNCITRAL Arbitration Rules, adopted in 1976 by the U.N. Commission on International Trade Law) even without an administering institution. However, Carbonneau observed that:[14]

> *[Ad hoc arbitration] places a substantial burden upon the parties to cooperate in the circumstances of dispute….Moreover, arbitral institutions have a good professional track record and have significant work experience in the administrative aspects of arbitrations. Unless the parties have substantial expertise in the arbitration process, institutional arbitration becomes a virtual necessity.*

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12 United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments adopted in 2006, at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html, last visited on November 20, 2017.

13 Ibid at p. 5

14 TE Carbonneau ., "The exercise of Contract Freedom in the Making of Arbitration Agreements", 36 (2003) *Vanderbilt Journal of Transnational Law* at pp.*1189, 1207.*

Hence, arbitration under the auspices of an experienced institution that scrutinise the award provide the best chances of securing an enforceable award.

## 3. International Commercial Arbitration in Bangladesh

As a part of present globalization, Bangladesh attracts many-multinational companies to invest more in oil, gas and coal businesses or allied services. Moreover, the growing marine resource sector is becoming another striking field for foreign investment in Bangladesh.[15] This presents a constant need to boost commercial activities in Bangladesh and also encourages resolution of international commercial dispute through arbitration. Hence, a number of policies have been adopted by Bangladesh to expedite international trade and investment and thus to settle the cross-border disputes.

Bangladesh has ratified several international Conventions like the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),[16] through which the International Centre for Settlement of Investment Disputes (ICSID or the Center) is established. It has domesticated several international conventions such as the New York Convention[17] and the UNCITRAL Model Law on International Commercial Arbitration 1985 (Amended 2006).[18]

Bangladesh has enacted the Arbitration Act, 2001 which repealed the Arbitration (Protocol and Convention) Act, 1937 and the Arbitration Act 1940. This new enactment has facilitated the country to keep pace with the recent developments in the field of international commercial arbitration

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15 Bhuiya K., Alam M., "Niko Case and the Prospect of Foreign Investment in Bangladesh", *The Daily Star*, November 17, 2014, last modified on March 8, 2015, at https://www.thedailystar.net/niko-case-and-the-prospect-of-foreign-investment-in-bangladesh-50667 last visited on September 11, 2018.

16 International Centre for Settlement of Investment Disputes, ICSID Convention Regulation and Rules, at https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf last visited on September 11, 2018.

17 supra note 12 at p 4.

18 supra note 17 at p 4.

along with the rest of the world.[19] However, the Act, 2001 has several limitations regarding interim measures and enforcement of awards. It is evident from the Act that if the seat of arbitration is outside Bangladesh, the national courts cannot grant any interim remedy.[20] This provision has restricted the power of national courts as it cannot secure the interest of the claimant even in case of extreme necessity.

As regards enforcement of foreign arbitral awards, although attempts have been taken by the Arbitration Act, 2001 in reality, enforcement in Bangladesh is excessively prolonged. According to the law, a foreign arbitral award shall, on the application being made to the appropriate court by any party, be enforced by execution by the Court under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court.[21] Furthermore, a national court can refuse to recognise or execute a foreign arbitral award if it finds the award to be in conflict with any public policy of the country[22]. However, the Act of 2001 did not explain or define the term 'public policy', keeping it open to the national courts to interpret the same, which further makes ways to unreasonable delay in proceedings.

Although, more than a decade has been passed since the enactment of the Arbitration Act, 2001, it appears that smooth enforcement of foreign arbitral awards without court intervention is still a challenge for international arbitration awards in Bangladesh.

## 4. The Relationship and Conflict between International Tribunal and National Courts

### 4.1 Positive Supervisor of National Courts

There is no dispute regarding the issue that '*the support of the court is an integral and indispensable part of the arbitration mechanism, as no arbitration can achieve its aims without the assistance of the domestic*

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19 A.F.M. Maniruzzaman., "The New Law of International Commercial Arbitration Bangladesh: A Comparative Perspective", 1 (2013) *Journal of the Chevening Society of Bangladesh.*

20 Sec 3 of the Arbitration Act, 2001.

21 Sec.45(1)(b) of The Arbitration Act,2001.

22 Sec 46 (1)b of the Arbitration Act,2001.

*judicial system*.'[23] This veracity has also been acknowledged by the devoted scholars of party autonomy[24] and advocates of decolonized arbitrations[25].

In reality, there are three main functions a court can accomplish that is a signatory to the New York Convention and has enacted the model law domestically.

**First**, a court has supervisory power over an international commercial arbitration to which the Model law applies. When the parties try to violate an arbitration agreement, the court is obliged to refer the parties to arbitration by staying the legal proceedings.

The courts have also the authority to grant interim orders like anti-suit injunction. This authority emanates primarily from domestic laws and institutional rules. However, New York Convention affords limited guidance in this respect and states that national courts should not intercede in arbitral proceedings unless the arbitration agreement is 'null and void, inoperative or incapable of being performed'.[26] Moreover, the national courts can also assists the parties to establish the arbitral tribunal.

**Second**, courts are authorised to recognise and enforce a foreign arbitral award (Articles 34-36 of the Model Law and Articles III-VI of the New York Convention). Where the loosing parties do not willingly conform to an arbitral award, the enforcement support of the national court becomes absolute. The New York Convention in Article III states that ' each contracting states shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon'.[27] Hence, courts must recognise and enforce awards unless an exception applies under Article V of the Convention. The

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23 supra note 4 at p. 2.

24 J.D.M. Lew , "Achieving the Dream: Autonomous Arbitration", 22 (2006) *Arab International* 179,181.

25 Jan Paulsson , "Decolonisation of International Commercial Arbitration: When and Why it Matters", 32(1983) *International and Comparative Law Quarterly* 53, 54.

26 *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) art II.

27 This provision is also reflected in art 36 of the Model Law.

exceptions are mostly associated with the jurisdiction, procedural defects, fair or due process violations and contravention of domestic public policy.[28]

**Finally,** subject to the provisions of article 8 of the Model Law and Article II of the New York Convention, the court can assist in enforcement of arbitration agreement '*by referring the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed'*.[29]

Thus, it appears that the national courts have important role to make an international arbitration successful. However, this situation changes when the courts pessimistically interfere with international arbitration specifically to impede the effectiveness of the arbitration proceedings.

### 4.2 Negative Interference

There is 'a fine line between the helpful assistance and unhelpful hindrance'[30] of court intervention on international arbitration, as it has been noted '*whether the court intervention is viewed as supporting or interfering with the arbitral process will depend upon a range of factors including the timing, manner and degree of such intervention.* '[31]

### 4.3 Interference in the Institution of Arbitral Proceedings

This situation arises when the contracting parties refuses to recognize arbitration agreements as binding as required by article 2 of the New York Convention. A number of Indian decisions show a serious confrontation between the arbitration and the courts because of the reliance upon the decision of *Doleman V Osset*,[32] an elderly decision of English court of Appeal.[33] The principle laid down in the case is that if one party brings an

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28 supra note 7 at p. 4.

29 UNCITRAL Model Law on International Commercial Arbitration 1985, art 8.

30 Margaret L. Moses , *The Principles and Practice of International Commercial Arbitration*, (Cambridge University Press, 2008).

31 John Lurie , "Court Intervention in Arbitration: Support or Interference?", 76 (2010)*The International Journal of ARAB ,* at p.447.

32 *Doleman V Osset, 3* [1912] KB 257.

33 supra note 15 at p. 4.

action on a contract containing an arbitration clause, whether before or during the currency of a pending arbitration, then the arbitral tribunal may not continue with the arbitration in any respect so long as the matter is pending before the court. The application of this principle causes inordinate procedural delay and arbitration may be halted for indefinite periods.

### 4.4 Interference in Completion and Enforcement

This section focuses on court interference with ongoing arbitrations and denial to acknowledge or enforce awards.

The most notorious problem in this connection is the anti-suit injunctions which attempts to prevent a party to commence or continue a proceeding in another jurisdiction or forum. Thus in *ONGC V Western* in 1987[34] the losing Indian party instituted proceedings in the Indian Court to set aside a London ICC award of which the governing law was Indian. The Supreme Court of India held that the New York Convention was irrelevant, since it was not dealing with an application to enforce the award but to set it aside and the court has jurisdiction as the governing law was Indian. The court further granted an extra-territorial injunction restraining the successful American party from seeking to enforce the award in the United States so long as an application to set it aside remained pending in the Indian Courts. The action of the court was generally regarded as absolutely inconsistent with established principles of private international law.

Moreover, anti-suit injunctions exist as a substantial anxiety in all cases where arbitration is seated in a jurisdiction which is hostile to arbitration. It is significant that the court should exercise supervisory power cautiously and lawfully to prevent the helpful assistance of courts to turn into illegal interference.

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34 *ONGC V Western* 3[1987] SCC 551.

## 5. The Extent of Court Interference in the Saipem's Case and the Issue of State Responsibility

An arbitration award may be frustrated when a court refuses execution not by reference to any legitimate interpretation of the relevant law but to defend the domestic party[35]. At the same time cases appears in which a state could make responsible for breach of bilateral investment treaty (BIT), for interference of its local courts in the proceedings of an international commercial arbitration.

This chapter tries to concentrate what happens next if the court interferes unlawfully on international arbitration. In this connection the decision of the *Saipem V Bangladesh*[36] would be discussed in detail.

On June 30, 2009, a tribunal of the International Centre for Settlement of Investment Disputes (ICSID) decided in favour of the Italian investor company Saipem by awarding more than 6 million dollars in damages for a claim for expropriation against Bangladesh under the bilateral investment treaty (BIT) between Italy and Bangladesh.

The dispute concerned a contract for the construction of a gas pipeline between Petrobangla, a Bangladeshi state-owned company and Saipem S.p.A ('Saipem') an Italian company. The contract was governed by the laws of Bangladesh and contained a clause indicating Dhaka as the seat of arbitration under the rules of the International Chamber of Commerce (ICC). The completion of the project was significantly delayed and a dispute arose between the parties over the compensation and additional costs. Saipem filed a request for ICC arbitration against Petrobangla and thereafter ICC tribunal was constituted.

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35 *Andrew Stephenson, Lee Carroll L. And* Jonathon Deboos ,"Interference By a Local Court and a Failure To Enforce: Actionable Under a Bilateral Investment Treaty?", < https://www.corrs.com.au/assets/thinking/downloads/Interference-by-a-local-court-and-a-failure-to-enforce-actionable-by-a-bi-lateral-investment-treaty.pdf > last visited on September 11, 2018.

36 *Saipem S p A V The People's Republic of Bangladesh (Award),*[2009]ICSID Arbitral Tribunal case No. ARB/05/07, 30, at pp.49-50,216.

During the arbitral proceedings, the tribunal denied several procedural requests submitted by Petrobangla, which following theses adverse decisions, filed several claims before the first Court of the Subordinate Judge of Dhaka (in violation of article 11 of ICC rules) seeking to revoke the tribunal's mandate for alleged miscarriage of justice and to stay the arbitration. Petrobngla claimed focusing on the ground that the act of arbitrators itself was a misconduct and thus, had breached the procedural rights of the parties when rejecting Petrobangla's procedural requests during the hearing.

The first subordinate judge of Dhaka issued a decision on 5 April 2000 revoking the authority of the ICC Arbitral Tribunal on the following the grounds that:

> *'....the Arbitral Tribunal has conducted the arbitration proceedings improperly by refusing to determine the question of the admissibility of evidence and the exclusion of certain documents from the record as well as by its failure to direct that information regarding insurance be provided. Moreover, the Tribunal has manifestly been in disregard of the law and as such the Tribunal committed misconduct. Therefore, in the above circumstances, it appears to me that there is a likelihood of miscarriage of justice.'*[37]

Petrobangla further sought an interim injunction pending the hearing of its application which was dismissed by the court. Against this decision it appealed to the high court division which granted the interim injunction in respect of the proceedings of the ICC Tribunal and issued an order restraining Saipem from proceeding with the ICC arbitration and revoked the authority of the arbitral tribunal for miscarriage of justice. Despite the order of restraint by the local courts, the ICC tribunal rendered their final decision stating that Petrobangla had breached its contractual obligations[38]

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[37] SAIPEM S.p.A. Vs The People's Republic Of Bangladesh, ICSID Case No. ARB/05/07 Decision on Jurisdiction and Recommendation on Provisional Measures, at https://www.italaw.com/sites/default/files/case-documents/ita0733.pdf , last visited on 15.09,2018.

[38] *Ibid* at p. 13.

and further decided to resume the proceedings on the basis that in an ICC arbitration, the challenge or replacement of the arbitrators falls within the exclusive jurisdiction of the ICC Court and not of the Bangladeshi courts. Hence, it contended that the revocation of the authority of the ICC Arbitral Tribunal by the Bangladeshi courts was contrary to the general principles governing international arbitration[39].

Afterwards, Petrobangla filed an action before the High Court Division of the Supreme Court to set aside the ICC award. The court rejected the application completely, and observed that[40]:

> *…the Arbitral Tribunal proceeded with the said arbitration case most illegally and without jurisdiction after the pronouncement of the judgment of Arbitration Miscellaneous Case No. 49 of 1997. Moreover, the Arbitral Tribunal was injuncted upon by the High Court Division not to proceed with the said arbitration case any further but in spite of that the Tribunal proceeded with the Arbitration Case and ultimately declared their Award on 9.5.2003. […] The applicable law of the agreement was set out in clause 1.1.1a of the agreement in the following terms: "1.1.1a The contract shall be governed and construed with reference to the law in force in Bangladesh…". Thus it is clear that the Bangladesh Court has jurisdiction to entertain a suit/proceeding if initiated by a party to the Contract. Therefore, the judgment passed by the First Subordinate Judge in Arbitration Miscellaneous Case No. 49 of 1997 and the injunction order dated 2.5.1999 passed by this Court in the Miscellaneous Appeal No. 25 of 1997 were binding upon the Arbitral Tribunal […] It is, thus, clear and obvious that the Award dated 9.5.2003 passed by the Arbitral Tribunal in Arbitration Case No. 7934/CK/AER/ACS/MS is a nullity in the eye of the law and this Award cannot be treated as an Award in the eye of the law as it is clearly illegal and without jurisdiction in as much as the authority*

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39 *Ibid* at p. 13.
40 *Ibid* at P. 13

> *of the Tribunal was revoked as back as on 5.4.2000 by a competent Court of Bangladesh. […] A non-existent award can neither be set aside nor can it be enforced'.*

Following the decision of the Bangladeshi court, Saipem commenced arbitration proceedings before ICSID under Art 5 of the BIT which deals with prohibition on expropriation of investor's rights.

The ICSID tribunal decided that the interference by the Bangladeshi courts in the ICC arbitration was illegal and therefore constituted an expropriation and thus a breach of the relevant BIT[41]. It further contended that the action of Bangladeshi court was contrary to the principle of international law, in particular to the principles of (1) abuse of rights, and (2) the New York Convention.

As regards to the contention of abuse of rights the ICSID tribunal observed that the findings of Dhaka court that the arbitrators 'committed misconduct', had no justification. Finding Dhaka court's decision 'grossly unfair' it held that:

> *The Bangladeshi courts abused their supervisory jurisdiction over the arbitration process. It is true that the revocation of an arbitrator's authority can legitimately be ordered in case of misconduct. It is further true that in making such order national courts do have substantial discretion. However, they cannot use their jurisdiction to revoke arbitrators for reasons wholly unrelated with such misconduct and the risks it carries for the fair resolution of the dispute. Taken together, the standard for revocation used by the Bangladesh courts and the manner in which the judge applied that standard to the facts indeed constituted an abuse of right … In conclusion, the Tribunal is of the opinion that the Bangladeshi courts exercised their supervisory jurisdiction for an end which was different from that for which it was instituted and thus*

41 *Ibid* at p. 13.

> *violated the internationally accepted principle of prohibition of* ***abuse of rights'***.[42]

Moreover, in addition to its finding that the Dhaka Court had violated the principle of abuse of rights, the ICSID Tribunal also held that the Court's decision to revoke the arbitrators' authority amounted to a violation of **Article II of the New York Convention** because it *de facto* prevented or immobilised the arbitration that sought to implement the arbitration agreement, 'thus completely frustrating if not the wording at least the spirit of the Convention'.[43]

From the overall observation of the Saipem's case and the above mentioned decisions made by the courts and tribunals several conflicting situations could be traced which have been discussed as follows:

## A. Expropriation as a Result of the Action of the National Court

In general, expropriation can be defined as the taking of tangible or intangible assets having economic value by the state or an organ of the state.[44] As such, rights conferred by a contract may also be subject to expropriation. The actions of legislative or executive power of a state can results expropriation, such as the enactments of a law or other acts which have the effect of dispossessing an alien of his rights.[45] Nevertheless, the actions of the judiciary can also be responsible for expropriation.

In *the Saipem's case*, Saipem claimed that the undue intervention of Bangladeshi courts in the ICC arbitration, precluding the enforcement of the ICC award constituted expropriation of Saipem's investments without any proper compensation and resulted violation of obligation under the BIT.[46] The ICSID tribunal ruled in favour of Saipem stating that the

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42 *Ibid* at p. 14.

43 *supra* note 7 at p.4.

44 Giulia Carbon ,' The Interference of the Court of the Seat with International Arbitration', (2012) *Journal of Dispute Resolution,* at p.217<https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1128&context=jdr>.

45 *Ibid.*

46 Michael Kerr, ' Concord and Conflict in International Arbitration' (1997) 13(2) *Arbitration International* p.218.

expropriated 'property' consisted of 'Saipem's residual contractual rights under the 'investment' as crystallized in the ICC awards'. It further stated that the actions of the courts were not a direct expropriation but constituted "measures having similar effects" within the meaning of Article 5 (2) of the BIT and thus Saipem was deprived of the benefit of the ICC Award because of such actions.[47] The decision of the court amounted to a substantial deprivation of Saipem's rights.

However, the tribunal accentuated that mere setting aside of an arbitration award does not automatically lead to a claim for expropriation. An additional element of illegality is also required. The tribunal noted that the actions of the courts were contrary to the principle of international law, in particular to the principles of (1) abuse of rights, and (2) the New York Convention under Article II (1) which compels states to recognize foreign arbitral awards.

The decision is significant because it raises the issue of state responsibility for not to enforce an arbitration award between parties in breach of BIT obligations as well as of international law.

**B. Denial of Justice**

Goldhaber states that 'a denial of justice is a form of unfair and inequitable treatment under international law; and a guarantee by the state that foreign investors will not be subjected to unfair and inequitable treatment.'[48]

The refusal of a State to arbitrate in accordance with an arbitration clause in a contract between that States and alien constitutes a denial of justice and this idea was first formulated by Schwebel in the following words:

> *The right of an alien to arbitration of disputes arising under a contract is a valuable right, at times so valuable that the alien will contract only on condition of contractual assurance of that right …. If the alien's right*

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47 *Ibid.*

48 Michael D. Goldhaber, "The Rise Of Arbitral Power Over Domestic Courts' 12 **(**2013) *Stanford Journal Of Complex Litigation, 378.*

> *to arbitration is negated by the contracting state, a wrong under international law ensues.*[49]

A state could be responsible for any action of its judiciary if the courts block access to arbitration through issuance of anti-suit injunction constituting denial of justice.[50] The first and only attempt to affirm the State's responsibility for denial of justice caused by local court's undue interference of arbitration was *Saipem V Bangladesh.* In this case, Saipem filed a claim before ICSID under the Italy-Bangladesh BIT which provided for compensation in case of expropriation only and not for fair and equitable treatment. In addition, Saipem had not attempted to exhaust legal remedies. Hence, the tribunal concluded that the court '*exercised their jurisdiction for an end which was different from that for which it was instituted and thus violated the internationally accepted principle of prohibition of abuse of rights'*.[51] Thus the expression of the tribunal indicates the principle of denial of justice even without mentioning them.

The decision of the court has been proved to be controversial[52]. Moreover, some author argues that the Saipem' s case could have been the first one in which compensation for denial of justice would have been awarded to an investor if the BIT had contained a Fair and Equitable Treatment (FET) clause.

## C. State Responsibility

The implication of *Saipem case* is significant for national courts as it sends a clear warning that illegal interference in the arbitral process may lead to an international law claim for which the state may be held responsible.[53] The principle that the misconduct of domestic courts may lead to an

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49 Stephen M. Schwebel , *International Arbitration: Three Salient Problems,*Cambridge (University Press, 1987).

50 Stephen M. Schwebel., *Anti-suit Injunction in International Arbitration: An overview* (Cambridge University Press, 2005).

51 supra note 47 at p.16.

52 Promod Nair, "State Responsibility for non-enforcement of Arbitral Awards: Revisiting Saipem Two Years on" (2011) *Kluwer ARAB. <http://arbitrationblog.kluwerarbitration.com/2011/08/25/state-responsibility-for-non-enforcement-of-arbitral-awards-revisiting-saipem-two-years-on/>.*

53 supra note 42 at p.8.

international wrong by the state, has been enshrined in Article 4 of International Law Commission's Article on *Responsibility of States for Internationally Wrongful Acts*, which states that *"the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions*."[54] Moreover, the tribunal by referring *Article 3 of ILC Articles* and *Article 27 of the Vienna Convention on the Law of the Treaties, 1969* reminds national courts that 'the characterization of an act of the state is governed by international law and the state's organs cannot rely on its own internal law to justify any failure to fulfil its treaty obligations.'[55]

Thus, the principle of state responsibility could be applied as a check over the supervisory jurisdiction of national courts. In reality, 'Saipem remains a lurking danger for all national courts exercising supervisory jurisdiction over arbitration proceedings'[56].

## 6. Steps to Improve the Situation and the Future Challenges

This essay examines the nature of international commercial arbitration, concordance and conflicting relationship of the national courts and international tribunals and concludes that illegal interference of national courts can make a state internationally responsible. It further observes that one of the reasons of conflicts is the unsatisfactory decisions of national courts. Justice Kerr suggests that in order to counter this problem the following steps are essential[57]. First, correct implementation of the New York Convention by the contracting parties; second, correct and progressive interpretation by national courts; and finally, liberal application in relation to the formalities crucial for recognition and enforcement are indispensable.[58]

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54 *Responsibility of States for Internationally Wrongful Acts,* GA Res 56/83, UN GAOR, 56thsess, 85thplenmtg, Supp No 49, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex ('*Responsibility of States for Internationally Wrongful Acts').*

55 *supra* note 45 at p.16.

56 *Ibid* at p.18.

57 Michael Kerr, Com*mercial Dispute Resolution: The Changing Scene*, Oxford University Press, 1987.

58 *Ibid* at p.20.

Furthermore, in connection with the illegal intervention by courts, there emanates a question whether the arbitrators should comply with the order of the courts or in contrast, be entitled to disregard such orders. In reality, the tribunal can exercise any of the options. It can either decide to suspend or terminate the arbitration proceeding or can pursue the proceeding taking the risk of rendering an unenforceable award.[59]

It was held in *Salini Costruttori S.p.A. V Ethiopia,*[60] that arbitrators have a primary duty towards the parties to ensure that their agreement to arbitration is not frustrated. Hence, if the court's order aims to suspend the arbitral proceedings, tribunals should disregard that. Conversely, it is the duty of an arbitrator to render an enforceable award.[61] Accordingly, arbitrators are bound to respect orders of the courts of the seat of arbitration, if they desire their award to be enforced by those courts. Furthermore, recognition and enforcement of the award may be refused, *inter alia*, when the award 'has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made'.[62]

Regarding the issue of termination of arbitral award it appears that if none of the parties request arbitration to continue after the interference of the courts, it must be suspended or terminated.[63] However, if the tribunal feel it justified to move forward with the arbitration proceedings despite disruptive tactics on the part of the state the outcome may be disappointing. The consequence has been concluded by one author as: '*after all your efforts and success, you are left perplexed with an award that is worth no more than the paper on which it is typed*.'[64]

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59 Richard Boivin, "International Arbitration with States: An Overview of the Risks", (2002) 19(4) *Journal of International Arbitration,* 287.

60 *Salini Costruttori S.p.A. V Ethiopia*, [2001] ICC Arbitration No 10623/AER/ACS.

61 International Chamber of Commerce Rules of Arbitrations (effective January 2012) Article 41.

62 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 UST 2517, article 5.

63 Luca G Radicati di Brozolo; Loretta Malintopp, *Unlawful Interference with International Arbitration by National courts of the seat in the Aftermath of Saipem V Bangladesh*, Madrid (2010).

64 Berg A., "The New York Arbitration Convention and State Immunity", (1997) 41 *Acts of State and Arbitration.*

At this juncture, the importance of selecting an 'arbitration-friendly' place having both an efficient legislative framework and local courts with sound understanding of the arbitral process attracts much attention. It is because, the seat of arbitration though '*cannot guarantee a smooth procedural arbitration*'[65] but can act as '*a baseline of procedural fairness and a safety net of judicial intervention and review of arbitral awards*'[66].

## 7. Conclusion

There is no doubt that the world of international arbitration is still evolving. In such a situation, it is very important to have a competent legal structure to implement the arbitral awards. Besides, understanding of arbitration law by the judges and lawyers is indispensable to guide the clients and to protect both the interest of arbitration policy and national courts. It must be kept in mind that there exists a fine line between the power of judiciary and arbitral tribunals. Keeping a balance between the two is important for the success of international arbitration. Tribunals can play vital role by focusing on and explaining the loopholes of laws and providing effective guidelines through judgments. It has been argued by some authors that 'the *Saipem seems to have opened the door for investment tribunals to acts as supervisory institutions analysing whether domestic courts are correctly obeying the rules of Newyork convention*.'[67] However, it sounds to be conflicting with the concept of state sovereignty.

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65 Adam Samuel , "The Effect of the Place of Arbitration on the enforcement of the Agreement to Arbitrate" (1992) 8 *ARAB International*, 257.

66 Rubins N., "The Arbitral Seat is not Fiction: A Brief Reply to Tatsuya Nakamura's Commentary on "The Place of Arbitration in International Arbitration: Its fictitious Nature and Lex Arbitri", 15(2001) *Mealey's International ARAB* 23.

67 *supra* note 4 at p.3.

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*The Arbitration Act, 2001.*

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*Saipem S p A V The People's Republic of Bangladesh (Award) (2009) ICSID Arbitral Tribunal case No. ARB/05/07.*

*Doleman V Osset, 3 [1912] KB 257.*

*ONGC V Western 3[1987] SCC 551.*

# Security at the Cost of Liberty: A Critical Evaluation of Trade-Off between Liberty and Security through Preventive Detention

Hasan Md. Arifur Rahman*

*The right to life, one of the core human rights values, confers some positive obligations upon the State. Ensuring public safety through taking necessary steps to prevent any threat to public safety is one of them. To discharge such positive obligation, sometimes States invoke preemptive incarceration of individuals who are considered as a risk to state security. On the other hand, the right to liberty of individuals prohibits all forms of arbitrary detention. Such conflicting nature of these rights raises the issue that which one will get preference, liberty or security? Indeed, both of these rights are interrelated and mutually reinforcing. As a result, each of them needs the other to be fully enjoyed. However, in the case of preventive detention on the ground of national security, it is contended that, state security should be given preference over civil liberties and therefore, if required, citizens should Trade-Off civil liberties against security or public safety. But there are a number of theoretical, jurisprudential and practical arguments against the scheme of a Trade-Off between liberty and security. While analyzing the diverse arguments against the concept of striking such a new balance between liberty and security, this article contends that, such Trade-Off is not ideally practicable. Bangladesh has an age old preventive detention legislation which provides wide discretionary power to the executive to impose preventive detention for a number of grounds. In this respect, this article focuses*

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*on how the judiciary of Bangladesh responded against arbitrary preventive detention orders and restores the original balance between liberty and security.*

## 1. Introduction

Modern societies are increasingly concerned with risk and the management of insecurity.[1] As a penal response, preventive detention plays a key role in this regard. Therefore, in recent years, preventive detention laws become a common legislative trend around the globe.[2] In developed countries it is used as a device to run a war against terrorism. On the other hand, in developing countries, it is considered as an effective mechanism to resist political instability and thus, the civil liberties of a targeted group of individuals are often curbed with a view to restrain them from committing any prejudicial act by imposing preventive detention.[3] In support of imposing such kind of restriction on right to liberty through preventive detention it is contended that the State is under an obligation to prevent crime and provide security to its citizen and therefore, the State possesses the right to deny civil liberties of a particular group of individuals to prevent crime that might be committed in the future.[4] But, the issue of so-called just response to the prospective prejudicial act involves a number of moral as well as legal issues. Therefore, at present time, ensuring security at the cost of liberty is a much discussed topic of criminal justice discourse.

However, in order to ensure public security through preventive detention, the right to liberty of suspected individuals is simply ignored. In other words, the right to liberty, which is one of the core human rights values, is often undermined in preventive detention regime by detaining an

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[1] Peter Marshall, 'An Analysis of Preventive Detention for Serious Offenders' (2007) 13 Auckland U L Rev 116,116.

[2] Stephen J Morse, 'Blame and Danger: An Essay on Preventive Detention' (1996) 76 Boston U L Rev 113, 114.

[3] Stephen J. Morse, 'Preventive Confinement of Dangerous Offenders' (2004) 32 J L Med & Ethics 56, 56.

[4] Rinat Kitai-Sangero, 'The Limits of Preventive Detention' (2009) 40 MacGeorge L Rev 903, 924; Justin Engel, 'Constitutional Limitation on the Expansion of Involuntary Civil Commitment for Violent and Dangerous Offenders' (2006) 8 U Pa J Const L 841, 848.

individual only on the basis of apprehension of a crime.[5] In this way, the preventive detention framework introduces a new balance between liberty and security where the security of the State is preferred at the cost of liberty of a certain group of individuals. But detaining an individual ignoring the principle of presumption of innocence, a universally recognized principle of criminal justice, hits the core of the moral justification of preventive detention.

In this backdrop, this paper will particularly focus on the theoretical aspects of striking of a new balance between liberty and security in the context of preventive detention. Besides, how a Trade-Off between liberty and security works in the preventive detention framework will be thoroughly examined. In addition, diverse implications of enhancing security at the cost of liberty will also be discussed. In order to do so, to get a better idea of the nature of Trade-Off between liberty and security in national security detention framework, Jeremy Waldron's theory on 'striking a new balance between liberty and security' will be examined. In addition, a number of theoretical, jurisprudential and practical difficulties of Trade-Off between liberty and security will also be analyzed to show that a Trade-Off of liberty against security is not practicable. The role of judicial review is very much crucial to uphold the right to liberty of individuals. Therefore, how the judiciary of Bangladesh responded with regard to preventive detention and in which manner it upheld civil liberties of individuals detained under preventive detention legislation will also be highlighted in the last section of the present article.

## 2. Understanding Preventive Detention

Prevention of crime is a precondition to ensure public security which in some cases encourages confinement of individuals on the basis of predicted dangerousness without the necessary proof of criminal behaviour.[6] Thus, in general, preventive detention means detaining a person in order to prevent a crime. In other words, it involves the detention of an individual before committing an offence which might negatively affect the society. So, it can be said that it is concerned with the future not

[5] Sangero (n 4) 906.
[6] Morse (n 3) 59.

the past.[7] In this way, preventive detention works on the basis of sustainable probability rather than 'beyond reasonable doubt, which is one of the core principles of criminal jurisprudence.[8]

Jurisprudentially, a crime needs both *mens rea* and *actus reus*. Either of them alone does not constitute a crime. But in the case of preventive detention, a person suffers detention without any *actus reus* from his part. Thus, such kind of detention entails the incarceration of individuals who have not been convicted of a criminal offence yet.[9] In other sense, in such case, the person is detained for his predicted guilty mind only. Thus, preventive detention designed to protect the society form predicted but unconsummated offence.[10]

There is no standard internationally agreed-upon definition of preventive detention. More interestingly, although in most common law countries, it is named as preventive detention, in civil law countries, it is more often termed as administrative detention. But it is important to note that with regard to relevant provisions of international instruments, the term preventive detention and administrative detention are used interchangeably.[11] For the purpose of this article, these terms would carry the same meaning as well.

In practice, preventive detention takes various forms.[12] Thus, observing the practice of preventive detention in various countries, Stella Burch Elias identified three alternative frameworks of preventive detention, namely, pre-trial detention framework, the immigration detention framework and the national security detention framework.[13] However, to understand the nature of the Trade-Off between civil liberties and security, the last type of

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7 Sangero (n 4) 906.

8 Sam J Ervin Jr., 'Foreword: Preventive Detention-A Step backwards for Criminal Justice' (1971) 6 Harv C R-C L L Rev 291, 298.

9 Sangero (n 4) 904 and 915.

10 Kevin F Arthur, 'Preventive Detention: Liberty in the Balance' (1987) 46 Md L Rev 387, 404.

11 Vivian Bose, 'Preventive Detention in India' (1961) 3 J Int'l Comm Jur 87, 89 .

12 U Hla Aung, 'Law of Preventive Detention in Burma' (1961) 3 J Int'l Comm Jur 47, 48.

13 Stella Burch Elias, 'Rethinking Preventive Detention from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects' (2009) 41 Colum Hum Rts L Rev 99, 101-103.

preventive detention is more relevant. Because, under this preventive detention framework, restriction on liberties is allowed to ensure state security or security of citizens. Therefore, this article will be confined to national security preventive detention framework only.

### 2.1 Liberty and Security in International Law and the Position of Preventive Detention

Detention entails complete loss of personal liberty of an individual and therefore, labeling the detention as 'preventive' does not make it any less penal or a punishment to the detainee.[14] There is an insoluble tension between the State's obligation to protect the public from crime and its duty not to interfere with the freedom of the individual.[15] In case of preventive detention, an individual is detained only because of suspicion of committing an offence where the crux of this issue lies.

Various international and regional human rights instruments like Universal Declaration of Human Rights, 1948, International Covenant on Civil and Political Rights, 1966, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988, International Convention for the Protection of All Persons from Enforced Disappearance, 2006, United Nations Standard Minimum Rules for the Treatment of Prisoners(the Nelson Mandela Rules), 2016, American Convention on Human Rights, 1969, African Charter on Human and Peoples' Rights, 1981, Arab Charter on Human Rights, 2004 and European Convention on Human Rights, 1950 emphasis on the right to liberty and also provides rights of a detainee in case of deprivation of liberty for legal grounds.[16] The unequivocal spirit of these human rights instruments suggests that prolonged preventive detention is prohibited in international law.[17]

However, most of these international human rights instruments provide a more general prohibition against arbitrary detention, without elucidating

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14 Arthur R Angel, Eric D Green, Henry R Kaufman, Eric E Van Loon, 'Preventive Detention: An Emperical Analysis' (1971) 6 Harv C R.- C L L Rev 300, 336.
15 Sangero (n 4) 932.
16 Elias (n 13) 118.
17 *ibid*, 119.

an exhaustive list of grounds for detention that would not be considered as arbitrary. Such kind of wording is problematic. Because, it approves that so long certain procedural requirements are complied with, a preventive detention is not deemed as arbitrary and therefore, it becomes a lawful detention.[18] Besides, these provisions remain vague in terms of the definition of arbitrariness.[19] Intriguingly, in this regard, Article 5 of the European Convention on Human Rights, 1950 is quite unique. Because, unlike other international human rights instruments, it does not contain open ended provisions regarding protection of liberty and security.[20] Rather it contains an exhaustive list of grounds only for which deprivation of liberty can be possible, for instance, lawful detention followed by a conviction by a competent court,[21] lawful detention for non-compliance with the lawful order of a court,[22] lawful detention for the purpose of bringing a person before competent legal authority on reasonable suspicion of having committed an offence,[23] lawful detention to prevent spreading of infectious diseases,[24] lawful detention to prevent a person from unauthorized entry in a country.[25] However, despite of the variation in the wording, the common spirit of the above mentioned international instruments suggests a strong presumption in favour of liberty on the basis of which it can be said that arbitrary preventive detention is not warranted.[26] Thus, preventive detention runs counter to the value of international human rights law.[27]

## 2.2 Preventive Detention for National Security

Preventive detention for national security is often defined as detention of an individual by the executive authority as a means of preventing that

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18 Kjetil Mujezinovic Larsen, 'Detention for Protection: Searching for a 'Fair Balance' between the Restrictions on Preventive Detention and the Obligation to Protect Individuals' (2015) 2 Oslo L Rev 1, 4-6.

19 Stefan Trechsel, *Human Rights in Criminal Proceeding* (OUP 2005) 427.

20 Larsen (n 18) 7.

21 European Convention on Human Rights 1950, art 5 (1) (a).

22 *ibid*, art 5 (1) (b).

23 *ibid*, art 5 (1) (c).

24 *ibid*, art 5 (1) (e).

25 *ibid*, art 5 (1) (f).

26 Morse (n 2) 151.

27 Adam Klein and Benjamin Wittes, 'Preventive Detention in American Theory and Practice' (2011) 2 Harv N S J 85, 85.

individual 'from carrying out future acts which are expected to endanger the security of the detaining State and its civilians'.[28] Therefore, the common objective of this kind of preventive detention is to protect the security of the State or to ensure public safety. It is considered as a highly effective tool in negating security threats to the State, in particular, after the incident of September 11, 2001.[29] In simple words, preventive detention for national security can be defined as the compulsory incarceration of an individual 'following upon a perceived threat adjudicated upon by an executive official, without the appearance of the detainee before an ordinary court of law and without any objective finding as to the guilt of the detainee or the correctness of the executive perception'.[30] Thus, there are some basic characteristics of such kind of preventive detention. It has to be inflicted by the executive and it is not necessary to bring the detainee before a court of law. Most importantly, such kind of detention can be imposed before proving the guilt of the suspected.

A close analysis of the present practice of preventive detention to ensure national security in different legal jurisdictions around the globe reveals that it exists in countries with a wide variety in legal, cultural, linguistic, and social traditions.[31] The Constitution of India, Pakistan, Singapore, Malaysia, Malawi, Zimbabwe, and Trinidad and Tobago contain express provision for preventive detention on the ground of national security. However, although many countries like Zambia, Sri Lanka, Bangladesh, Nigeria, Tanzania, Swaziland and the United Kingdom have no express constitutional provision regarding preventive detention, this has not resulted in any relevant legislation being ruled unconstitutional. Thus, preventive detention is practiced in these countries under relevant legislations. Preservation of Public Security Act, 1960 of Zambia, Prevention of Terrorism Act, 1979 of Sri Lanka, Special Powers Act, 1974 of Bangladesh, State Security (Detention of Persons) Act, 1983 of Nigeria, Preventative Detention Act, 1962 of Tanzania are instances of such kind of

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28 Dvir Saar and Ben Wahlhaus, 'Preventive Detention for National Security Purposes in Israel' (2018) 9 J N S L & P 413, 413.

29 ibid; Elias ( n 13) 106 and 203; H Martin Jayne, 'Preventive Detention-Restricting the Freedom to Harm' (2008) 8 J I J I S 166, 172.

30 I. Mahomed, 'Preventive Detention and the Rule of Law' (1989) Lesotho L J 1, 5.

31 Elias (n 13) 179.

legislations. Generally, these legislations are declared as lawful by courts in cases where the procedure set by the concern legislation is met.[32]

However, these legislations have some common features irrespective of the point of time they were adopted or the legal tradition of the respective jurisdiction. For instance, they are often vague, which provide considerable opportunity for abuse of power by executive authorities in imposing detention.[33] Consequently, preventive detention on the ground of national security raises a number of fundamental questions about the basic principles of the criminal justice system. In particular, as preventive detention for national security is an emotive and politically charged matter,[34] there is always a risk that it may be used as a tool to repress the political dissent.[35]

## 3. The Concept of Striking a New Balance between Liberty and Security through Preventive Detention for National Security

It is seen that all international human rights instruments provide highest emphasis on the right to liberty of an individual and also guarantee that the liberty of an individual would not be infringed except on very few legal grounds. In other words, in hierarchy, right to liberty has got a superior status among all other human rights mentioned in various human rights instruments. However, in the case of preventive detention for national security, the right to enjoy liberty of an individual is restricted and instead of liberty, the safety of the State gets preference. In support of this view, it is often argued that some adjustment in the scheme of civil liberties is inevitable to make the State more secure from terrorist attack or any other kinds of prejudicial acts.[36] This adjustment in the scheme of civil liberties

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32 Steven Greer, 'Preventive Detention and Public Security: Law and Practice in Comparative Perspective' (1995) 23 Int'l J Soc L 45, 46.

33 *ibid*, 47.

34 Elizabeth A Faulkner, 'The Right to Habeas Corpus: Only in the Other Americans' (1994) 9 Am U J Int'l L and Pol'y 653, 656; Sangero (n 4) 911.

35 Helena M Cook, 'Preventive Detention- International Standards and the Protection of the Individual' in Stanislaw J Frankowski and Dinah Shelton (eds), *Preventive Detention: A Comparative and International Law Perspective* (Springer 1992) 10-11; Sangero (n 4) 911.

36 Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 J Political Philos 191,191.

offers that citizens should trade some of their liberties for greater security and, in this way, a new balance between liberty and security will be introduced.[37] Jeremy Waldron in his article 'Security and Liberty: The Image of Balance' has identified this new compromising phenomena as a 'new balance of liberty and security' where a Trade-Off between liberty and security is taken place, replacing the original balance where individuals' liberty is in the supreme position that cannot be compromised in any circumstances. In other words, when under the preventive detention mechanism individuals' right to liberty is compromised for an apprehended risk caused by a suspected terrorist or political activist or any other individual, a new balance replaces the original balance between liberty and security. Thus, the right to liberty of an individual is undermined for the sake of public security under the new balancing scheme.[38] Many other scholars also reiterated the same view with Waldron and criticized the concept of Trade-Off between liberty and security based on the vague concept of threat to national security.

### 3.1 Criticism of Trade-Off between Liberty and Security through Preventive Detention

The concept of striking a new balance by Trade-Off between liberty and security through preventive detention is severely criticized by academics. It is argued that civil liberties are so important that they cannot be curtailed merely because of a change in the situation or because of increased risk. Besides, such adjustment is considered by many as deceitful and as a 'product of political defeatism'.[39] However, there is a wide range of philosophical, jurisprudential and practical grounds for criticizing the concept of Trade-Off between liberty and security through preventive detention. The following paragraphs of this section would elucidate the reasons for which the concept of the new balance of liberty and security is highly controversial.

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37 Claudia Card, 'Torture, Terror and Trade-Offs: Philosophy for White House, by Jeremy Waldron' (Book Review)' (2011) 121 Ethics 832, 832-834.

38 Chris Mania Peter, 'Incarcerating the Innocent: Preventive Detention in Tanzania' (1997) 19 Hum Rts Q 113, 114.

39 Waldron (n 36) 191.

### 3.1.1 Philosophical Arguments against the Trade-Off between Liberty and Security

There are a number of philosophical explanations as to why a Trade-Off between liberty and security is not possible. It is argued that civil liberties are always anti-consequentialist, and because of this unique nature, they are not responsive to any change in the situation of the society. Based on this conception, it is contended by theorist that the right to liberty is excluded from any kind of balancing or adjustment.[40] This proposition can also be explained by the Joseph Raj's concept of 'exclusionary reason'.[41] The exclusionary reason of civil liberties proposes that civil liberties by virtue of their nature provide a commitment or assurance to their holder that the privilege they offer will not be taken away arbitrarily. Thus, it is argued that civil liberties are not 'sensitive to changes on the scale of social costs'[42] as they involve some moral obligations as well. This hierarchy of civil liberties can be understood more clearly by two concepts advocated by Ronald Dworkin and John Rawls named as 'rights as trumps' and 'doctrine of lexical priority', respectively. To grasp the proposition more clearly it is necessary to explain these concepts.

To elucidate the supremacy of the right to liberty, Dworkin's concept of 'rights as trumps'[43] is often used by academics as metaphor. In simple words, 'rights as trumps' are those rights which will prevail over everything and therefore, they cannot be denied to any individual in any circumstances. Based on this conception, it is argued that civil liberties subsume such kinds of special rights which give reason to treat their holders in a particular way, even if some social aims would be served by doing otherwise. In case of balancing rhetoric as discussed in this writing, this particular social aim is enhancing security, over which civil liberties will prevail. Thus, based on Dworkin's idea, civil liberties are characterized as such kind of rights which cannot be regarded as vulnerable 'to routine changes in the calculus of social utility.'[44]

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40 *ibid*, 194.
41 Joseph Raj, *Practical Reason and Norms* (OUP 1999) 37.
42 Waldron (n 36) 196.
43 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) xi and 190.
44 Waldron (n 36) 196.

In addition to Dworkin's 'rights as trumps', John Rawls's argument about 'lexical priority'[45] is very much relevant to understand the argument regarding the priority of civil liberties over other social needs i.e. the security of the public.[46] Rawl's concept of 'lexical priority' requires that in determining priority among different rights, the liberty principle will get the highest priority and therefore, liberty can only be restricted for liberty's sake.[47] Based on this theory, it is contended that if we consider that security falls into the domain of the principle governing social and economic goods, then a Trade-Off of liberty against security is simply ruled out.[48] The same view is also expressed by Christopher Michaelsen arguing that the right to life and the right to liberty come first in comparison to other human rights.[49] Thus, by relying on philosophical theories proposed by scholars it is seen that a change in the balance of liberty and security merely because of a change in the circumstance of the society is not acceptable. And for this reason, a Trade-Off between civil liberties and security or more specifically a Trade-Off of liberty against security is theoretically not possible.

### 3.1.2 Jurisprudential Arguments against Balancing Rhetoric

Aside from the above-mentioned theoretical aspects, there are a number of jurisprudential problems with regard to bringing a new balance between liberty and security through imposing indiscriminate preventive detention. Firstly, striking a new balance between liberty and security infringes the principle of equality. Because, although it is argued that the change in the balance is supposed to apply to everyone equally, during its application in real life, it works in a different way.[50] Thus, there is a risk that the diminution in liberty may affect some people more than others.[51] It is more applicable in the case of developing countries where preventive detention is used to deal with a particular political situation or to stifle political

45 John Rawls, *A Theory of Justice* (Harvard University Press 1999) 36-40 and 214-220.
46 Waldron (n 36) 197.
47 Christopher Michaelsen, 'Balancing Civil Liberties against National Security- A Critique of Conunterterrorism Rhetoric' (2006) 29 UNSWLJ 1, 9.
48 Waldron (n 36) 197.
49 Michaelsen (n 47) 10.
50 Waldron (n 36) 200.
51 *ibid*, 194.

dissent.[52] Indeed, there are copious illustrations of increasing use of preventive detention without proper discretion in developing countries like Bangladesh, India, Pakistan, Sri Lanka etc. Thus, Waldron argues that when we talk about balance, it is not the balance between all persons' liberty versus all persons' security; rather it is the balance of the liberty of a group of minority against the interest of the community as a whole.[53] So, if a particular group of the society is suspected because of their appearance, ethnicity or religion or political belief, 'and if the changes in the scheme of civil liberties facilitated the suspicion on just that basis, and remove some of the safeguards that would prevent or mitigate that sort of suspicion',[54] that will definitely frustrate the idea of justice. So, from this particular context, a Trade-Off of liberty against security by imposing preventive detention is not a matter of individual cost and benefit, rather a matter of 'moral corruption of the system as a whole.'[55]

In addition, a Trade-Off of liberty against security frustrates the principle of presumption of innocence, which is one of the universally recognized principles of criminal jurisprudence. It is well established in all legal systems that a person charged with a crime may not be punished in a proceeding until his guilt is proved in accordance with due process of law.[56] Therefore, the idea that a person accused of crime should be at liberty until the guilt is determined in a judicial proceeding, has its roots in the history of the common law.[57] So, it can be contended that a person is supposedly entitled to freedom as long as the offence is not proved beyond reasonable doubt.[58] In this regard, one of the major concerns with preventive detention is that it is highly depended on untested theory of predictability.[59] Therefore, preventive detention is applied entirely based on anticipation even before committing the offence by the concern

52 Greer (n 32) 53 and 55.
53 Waldron (n 36) 201.
54 *ibid*, 204.
55 *Ibid.*
56 Sam J Ervin Jr, 'Preventive Detention a Species of Lydford Law' (1983) 52 Geo Wash L Rev 113, 121.
57 J Patrick Hickey, 'Preventive Detention and the Crime of Being Dangerous' (1969) 58 Georgetown L J 287, 287.
58 Sangero (n 4) 921.
59 William A Dobrovir, 'Preventive Detention: The Lesson of Civil Disorders' (1970) 15 Villanova L Rev 313, 314.

individual. Indeed, such punishment without conviction runs counter to the presumption of innocence.[60] Thus, in a preventive detention framework where a Trade-Off between liberty and security is taken place, the detainees are in a vulnerable position as the presumption of innocence does not operate in this case.[61]As a result, the notion of striking a new balance between liberty and security through preventive detention can be identified as a significant waiver of the presumption of innocence.[62] In this way, the balancing rhetoric can be identified as a step backwards[63] as it leads to greater injustices against individuals committed by the State.[64] Thus, this new balance tends to ruin the basic notions of fairness and justice.[65]

Moreover, in the case of preventive detention on the ground of state security, the detainee is usually singled out to be temporarily dealt with outside general criminal procedures which is also prejudicial to the detainee.[66] Although, there may exist provisions for administrative review, it is important to note that, except few exceptions in most cases detaining authorities are not legally bound to comply with the decision of the review board and therefore, the government can ignore any recommendation to release the detainee.[67] Besides, all international human rights instruments emphasis on the accused's right to fair trial in a judicial proceeding. Deprivation of liberty through preventive detention on the ground of national security is generally imposed by executive authorities without any effective participation of the detainee. Thus, it frustrates the right to a fair trial where the right to liberty is jeopardized without total accountability on the part of the detaining authority.[68] In this way, preventive detention is a clear departure from the ideal system that no one should be deprived of

60 Rinat Kitai-Sanjero, 'Presuming Innocence' (2002) 55 Okla L Rev 257, 287; Sangero (n 4) 915.
61 Thomas B Allington, 'Preventive Detention of the Accused before Trial' (1970) 19 U Kan L Rev 109, 120.
62 Sangero (n 4) 933.
63 Ervin Jr (n 8) 292.
64 Peter (n 38) 114.
65 Angel and others (n 14) 347.
66 Allington (n 61) 132.
67 Greer (n 32) 49.
68 Peter (n 38) 114.

his freedom without having had a fair trial.[69] For this reason, critics termed preventive detention as a species of 'Lydford law' and compare such kind of detention as an outcome of 'Gestapo-like proceeding'.[70]

### 3.1.3 A Trade-Off between Liberty and Security Increases the Power of the State

The process of limiting civil liberties of a group of individuals to prevent imaginary harm to the State may enhance the power of the government at the expense of the right to liberty of individuals.[71] For instance, Dragu Tiberiu observed that the government policy of different countries regarding reducing liberty to enhance security to fight against terrorism shows a common trend in all cases that it increases the power of the government.[72] Thus, it can be said that diminishing civil liberties of citizens through increased use of preventive detention would also increase the power of the State which consequently increases the chances to transform it as a repressive one. Because, in such a case, State's increased power may not be used only to enhance security but also, for example, to torture the suspected detainees to get information,[73] or to detain a suspect for a prolonged period.[74] This particular issue has been reflected in *A v Secretary of State for the Home Department*,[75] in which the House of Lords struck down the detention policy of the UK government regarding indefinite detention of suspected terrorists.[76] In addition, such increased power of the State is also a threat to the right to privacy of its citizens, even though such a reduction of privacy does not increase security from terrorism.[77]

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69 Peter (n 38) 115; Robert Martin, *Personal Freedom and the Law in Tanzania; A Study of Socialist State Administration* (OUP 1974) 9.

70 Ervin Jr, (n 56) 115.

71 Russell Hardin, 'Civil Liberties in the Era of Mass Terrorism' (2004) 8 J Ethics 77, 79.

72 Tiberiu Dragu, 'Is There a Trade-Off between Security and Liberty? Executive Bias, Privacy Protections and Terrorism Prevention' (2011) 105 Am Pol Sc Rev 64, 64.

73 Waldron (n 36) 205.

74 *ibid*, 206.

75 [2004] UKHL 56.

76 Claudia Aradau, 'Forget Equality? Security and Liberty in the "War of Terror"' (2008) 33 Alternatives 293, 307.

77 Dragu (n 72) 75.

### 3.1.4 Practical Limitations of the Trade-Off between Liberty and Security

The concept of striking a new balance between liberty and security also has some practical limitations as well. Indeed, the very nature of trading-off between liberty and security results in a great deal of adverse consequences, not only to the wellbeing of the detainees but also to the community at large.[78] Caine has elaborated this issue mentioning a number of factors which disrupt the life of a person detained in custody on preventive grounds that includes with others loss of employment, accommodation, other financial loss as well as the negative impact on the family life of the detainee.[79] In addition, aside from the tangible and measurable costs of preventive detention, there are a number of intangible human costs of preventive detention caused by removing an individual from his normal environment and incarcerating him without commission of any offence.[80] Most importantly, in contrast to the deprivation of freedom of an individual and the moral stigma caused by preventive detention, the danger posed by the detained individual is only hypothetical which makes the situation worse.[81]

By analyzing the preventive detention practice in different jurisdictions Steven Greer has identified two most common reasons of violation of human rights caused by striking a new balance between liberty and security through preventive detention. Among them the first one relates to the improper application of preventive detention order by the executive, and the second one is breach of procedural formalities prescribed in the preventive detention laws.[82] The classic example of the impropriety on the part of the detaining authority includes *mala fide* practice, bad faith, non-application of judicial mind, unlawful delegation of the power to detain, vagueness, irrelevance or non-existence of the grounds of detention etc. On the other hand, procedural flaws signify failures to comply with less significant procedural requirements of the detention.

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78 G Caine, 'The Denial of Bail for Preventive Detention' (1977) 10 Aust & NZ J Crim 27, 27.
79 *ibid*, 34-35.
80 Angel and others (n 14) 347.
81 Sangero (n 4) 933.
82 Greer (n 32) 52.

Another practical difficulty of striking a new balance by imposing preventive detention is unjust deprivation of liberty of a significant number of people in the name of protecting the society from something which may or may not happen.[83] Although the advocates of striking a new balance between liberty and security contended that preventive detention acts as an aiding tool to enforce criminal law, in reality it does not do so. Most importantly, although the State has the obligation to protect itself and its citizen from harm, it does not give the State a license to restrict the freedom of any individual whom it considers as a threat to security. Thus, it is contended that, instead of shifting the balance of liberty and security, 'the State should use its police power to prevent the harm of law-breaking from materializing and not just take retroactive steps to apprehend offenders so that they can be put on trial following the commission of an offence'.[84] So, the vigilance of the State power is required, not curbing civil liberties through preemptive detention. In other words, although it may seem feasible in theory to maintain legal order by imposing preventive detention, striking a new balance between liberty and security is pragmatically ineffective as a tool for enforcement of criminal law.[85] Considering these issues, Jeremy Waldron identified the whole scheme of setting a new balance as a deception from the government side.[86]

Thus, it is seen that in the academic arena, the concept of Trade-Off between liberty and security through imposing preventive detention is highly controversial.[87] Indiscriminate use of preventive detention or the ready availability of preventive detention may result in to the other ignore potentially fairer and more effective interventions to prevent crime.[88] Therefore, ignoring the other options, the present practice of preventive detention for national security is highly criticized by human rights advocates and legal scholars. Thus, Lord Johan Steyn has compared the

83 Allington (n 61) 122.
84 Sangero (n 4) 924.
85 Ervin Jr (n 56) 126.
86 Waldron (n 36) 209.
87 Marshall (n 1) 142.
88 Morse (n 2) 154-155.

present practice of Trade-Off between liberty and security as a legal black hole.[89]

## 4. Preventive Detention Framework in Bangladesh and the Positive Role of the Judiciary with regard to Balancing Rhetoric

Unlike the constitutions of India and Pakistan, there was no provision of preventive detention in the 1972 Constitution of Bangladesh. However, the amended Article 33 of the Bangladesh Constitution empowers the Parliament to enact laws concerning preventive detention.[90] Consequently, the Special Powers Act, 1974 [91] came into operation, enabling the executive to detain an individual to prevent any prejudicial act.[92] The definition of prejudicial act includes with others, any act which is intended or likely 'to create or excite feeling of enmity or hatred between different communities, classes or sections of people',[93] 'to interfere with or encourage or incite interference with the administration of law or the maintenance of law and order',[94] 'to cause fear or alarm to the public or to any section of the public'[95] and 'to prejudice the economic or financial interest of the State'.[96] The vagueness of these grounds indicates that the executive has wide discretion to bring any situation within the purview of prejudicial act, [97] which also provides enough room to misuse the power to impose preventive detention for purposes other than that of protecting the legitimate interest of the State.[98] Section 3 of the Special Powers Act, 1974 requires the approval of the detention order of the Government and any detention order without such approval will not remain in force. But it is important to note here that even before the approval of the Government it may possible that an individual has to suffer one month detention in the

89 Lord Johan Steyn, 'Guantdnamo Bay: The Legal Black Hole' (2004) 53 Int'l & Comp. L. 1, 6-15; Elias (n 13) 206.
90 Constitution (Second Amendment) Act 1973 (Act No. XXIV of 1973), s 3.
91 Act No. XIV of 1974.
92 Special Powers Act, 1974, s 3.
93 Special Powers Act, 1974, s 2(f)(iv).
94 *ibid*, s 2 (f) (v).
95 *ibid*, s 2 (f) (vii).
96 *ibid*, s 2 (f) (viii).
97 *Abdul Latif Mirza v Bangladesh* (1979) 31 DLR (AD) 1.
98 M Ehteshamul Bari, 'Preventive Detention Laws in Bangladesh and their Increased Use During Emergencies: A Proposal for Reform' (2017) 17 OUCLJ 45, 60.

present scheme merely because of the subjective satisfaction of the District Magistrate or the Additional District Magistrate as the case may be.[99] Thus, it is seen that the Special Powers Act, 1974 has replaced the original balance between liberty and security as contemplated in the original Constitution and executed a Trade-Off between liberty and security where security is being purchased at the cost of liberty of suspected individuals.

However, Article 33(4) of the Constitution provides that an individual cannot be detained in preventive custody for a period exceeding six months without the consensus of an advisory board. The provision with regard to the formation of the advisory board is outlined in the section 9 of the Special Powers Act, 1974. But it is evident from the provision of Article 33 of Bangladesh Constitution that it does not contemplate the formation of an advisory board for every detention order. Rather, the requirement of scrutiny by an advisory board arises if the preventive detention needs to exceed the period of six months as mentioned in Article 33. Besides, as the Constitution and the Special Powers Act, 1974 do not provide the maximum period for which an individual can be detained in preventive custody, the right to liberty of an individual can be suspended for an unlimited period of time only on the satisfaction of the advisory board in Bangladesh. Thus, the law of preventive detention in Bangladesh is quite harsh which makes the issue of judicial review of preventive detention more crucial to maintain a logical balance with regard to Trade-Off between liberty and security and to protect the fundamental rights and freedoms of its citizens.

The right to judicial review of a detained person is a universally recognized right.[100] A number of international human rights instruments have mentioned the right to judicial review as a mandatory condition for imposing any form of detention. Thus, Article 8 of the Universal Declaration of Human Rights 1948, Article 9(4) of the International Covenant on Civil and Political Rights, 1966, Principle 32 of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988, Article 7 of the African Charter on Human and

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99 *Serajul Islam v State* (1997) 49 DLR 209.

100 Anthony Gray, 'Preventive Detention Laws: High Court Validates Queensland's Dangerous Prisoners Act 2003' (2005) 30 Alt L J 75, 75.

Peoples Rights 1981 highly emphasize on judicial review as an available remedy to the detainee against his detention order whether such detention is an administrative detention or a pre-trial detention in a judicial proceeding.[101] However, based on characteristics, academics classified judicial review of preventive detention in two categories i.e. strong and weak.[102] In case of the former one, courts usually conduct thorough scrutiny of the decision of the executive and also determine the rights of the detainee against such executive discretion. On the other hand, in case of the later, courts usually take the view that they do not have adequate expertise to conduct scrutiny regarding the justification of the detention or to assess the public interest.[103] Even, in some cases, they decline to query the decision of executive in respect of preventive detention on the ground of lack of jurisdiction.[104] It is important to note in this regard, Bangladesh has developed a strong judicial review system regarding preventive detention by adopting an objective test. In case of the objective test, 'the courts take it upon themselves to determine whether or not any given detention is necessary to prevent the threat to public security which the government claims would otherwise be posed if the detainee were to remain at large'.[105]

Although, section 34 of the Special Powers Act, 1974 purports to bar the jurisdiction of courts from questioning any order of preventive detention, it does not limit the powers of the High Court Division of the Bangladesh Supreme Court to exercise its jurisdiction in a writ of *habeas corpus*. In this regard the observations of Chief Justice Hossain in *Abdul Latif Mirza v Bangladesh* are pertinent:

> *The Constitution... has cast a duty upon the High Court to satisfy itself that a person in custody is being detained under an authority of law, or in a lawful manner... The Bangladesh Constitution, therefore, provides for a judicial review of an executive action... The High Court, therefore, in order to discharge its constitutional function of judicial*

101 *ibid*, 76-77.
102 Greer (n 32) 48-49; Elias (n 13) 126.
103 Peter (n 38) 114-115.
104 Greer (n 32) 49.
105 *ibid*, 50.

> *review, may call upon the detaining authority to disclose the materials upon which it has so acted in order to satisfy itself that the authority has not acted in an unlawful manner.*[106]

Moreover, the Bangladesh judiciary does not make itself confine only to scrutiny the procedural aspects of deprivation of liberty by preventive detention; rather, it justifies the very necessity of such detention in a given case. Thus, in *Aruna Sen v Government of Bangladesh*, the court adopted the strong form of judicial review by holding the view that any person who is in the charge of taking decisions affecting the liberty of any citizen must act judicially and therefore, such detention is open to objective judicial review.[107] Regarding the extent of the satisfaction of the executive the court held that the detaining authority needs to be very careful in examining the materials before passing the order of detention. The court further makes the position of the judiciary more specific holding the view that it is the duty of the court to scrutinize the subjective satisfaction of the detaining authority from an objective perspective.[108] Adopting an objective judicial view, the Bangladesh judiciary usually assesses the decision of the advisory board constituted under the Special Powers Act, 1974 applying a reasonable person standard discretion.[109] Thus, the court held that mere capability or possibility to create problems to public safety and public order by itself cannot be the basis of preventive detention, unless the detainee indulges himself in a prejudicial act.[110] The court has also addressed the vagueness of the definition of prejudicial act and held that detention on the ground of vague and unspecific allegations without giving sufficient material to enable the detainee to make effective representation is illegal.[111] In addition, in a number of cases, the court has invalidated preventive detention on the ground of slightest technical flaw in formalities as well.[112]

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106 *Abdul Latif Mirza v Bangladesh* (1979) 31 DLR (AD) 1.
107 *Aruna Sen v Government of Bangladesh* (1975) 27 DLR HCD 122, 137.
108 *Md Ferdous Alam Khan for Serajul Alam khan v State* (1992) 44 DLR 603.
109 *Ranabir Das v Ministry of Home Affairs* (1976) 28 DLR HCD 48.
110 (1991) 43 DLR 372.
111 *Sayedur Rahman Khalifa v Secretary, Ministry of Home Affairs* (1986) 6 BLD 272.
112 Greer (n 32) 52.

Thus, it is seen that although the preventive detention legislation of Bangladesh gives the executive authority wide discretion to curb liberties on an individual, the judiciary has played a proactive role in this regard and defend the right to liberty of citizens. As a result, in Bangladesh, a Trade-Off of liberty against security does not get implemented in real sense. Rather, the Bangladesh judiciary has asserted its role as the guardian of individual liberty against executive expediency through allowing legal relief in numerous *habeas corpus* applications.

## 5. Conclusion

Needless to say that how individual freedoms are to be accommodated to the needs of the State is a challenging aspect of the concept of Trade-Off between liberty and security.[113] Although preventive detention is often preferred as an effective tool to ensure public security, it is also recognized as an extremely serious and invasive intervention infringing the fundamental human rights and civil liberties of an individual.[114] Even the concept of security at the cost of liberty is considered by many as the denial of human rights to its subjects[115] and thus, it is termed as an abuse of criminal law.[116] It is seen that the balancing rhetoric as outlined in this article causes interpersonal loss of liberties, where only certain people sacrifice their liberties to make the rest feel safe. It is simply unethical. It also violates the principle of equality before the law and frustrates the purpose of justice.[117] In other words, a Trade-Off between liberty and security can be regarded not only as a limitation of liberty under the camouflage of security but also a denial of equality and equity.[118] Indeed, security and liberty are interrelated and mutually reinforcing [119] and

113 Angel and others (n 14) 302.
114 Marshall (n 1) 116.
115 Laura Whitehorn and Alan Berkman, 'Preventive Detention: Prevention of Human Rights' (1991) 2 Yale J L & Lib 29, 33-35; International Commission of Jurists, *States of Emergency-Their Impact on Human Rights* (International Commission of Jurists, 1983) 429.
116 Douglas Husak, 'Lifting the Clock: Preventive Detention as Punishment' (2011) 48 San Diego L Rev 1173, 1180.
117 Pamala L Griset, 'Torture, Terror and Trade-Offs: Philosophy for White House by Jeremy Waldron (Book Review)' (2012) 37 Crim Rev J 269, 269.
118 Aradau (n 76) 309.
119 Michaelsen (n 47) 4.

therefore, each of them needs the other to be fully enjoyed.[120] Thus, presumption can be drawn that in real life a Trade-Off between liberty and security is not feasible.

But it is also true that in national life situation may arise where lives of hundreds of citizens can only be secured through curbing the liberty of an individual or a particular group of individuals under preventive detention mechanism. This particular circumstance puts the State in a perplexing situation as it has to choose any one of the options from two conflicting choice i.e the liberty of individuals and the national security of the State. Moreover, as the State has the positive obligation to protect the right to life of its subjects, it is bound to take all necessary steps to safeguard the right to life of its citizens. Thus, for the protection of right to life and to protect the national security of the State, preventive detention is a global legislative practice. But it is also true that right to liberty is one of the core human rights values and showing due respect to this right is highly required in all circumstances. For this reason, all preventive detention frameworks contain a series of safeguards for its subjects.

The preventive detention legislation of Bangladesh is not an exception to that. It guarantees a set of procedural safeguards for the detainees including the right to be informed about the charges, access of lawyer etc. Besides, unlike other countries, the decision of the advisory board is binding upon the detaining authority in Bangladesh. In addition, the Constitution of Bangladesh enables an aggrieved party to seek the aid of the writ of *habeas corpus* in case of unlawful detention. Aside from these legislative and constitutional safeguards, the judiciary of Bangladesh shows stringent attitude in numerous cases to curb unlawful preventive detention practice through a series judicial review and thus, emphasizes liberty over security. In this way, the theory of Trade-Off between liberty and security has got a new dimension in Bangladeshi jurisdiction.

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120 Ifeolu Tokimi, 'Liberty and Security in the Age of Terrorism: Negotiation a New Social Contract' (2015) 1 Plymouth L Crim J Rev 195, 212.

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# Child Marriage in Bangladesh: Causes, Impacts and Legal Protection System

Nasrin Jannat Seba*

*Children all over the world are facing various problems. In this case the children of Bangladesh are not exception. They are living in the hazardous situation and facing may types of problem every moment. Criminals are using the children in various criminal activities such as- child marriage, child labour, child trafficking, sexual abuse, smuggling and drug business etc. Now it is essential to keep up the children safe from these criminal activities. The system of child protection is becoming complex because the children are in the hazardous situation. In effect of this situation, national and international organizations are facing many types of complexity in giving the children full protection. The subject matters of child protection are very much widens. For this reason the research has tried to make an inquiry about the child marriage.*

***Key Words:*** *Children, hazardous situation, criminal, child marriage, child labour, child trafficking, sexual abuse, smuggling, drug business, child protection and organization.*

## Introduction

Marriage is an important institution for the individual and society at large. For the individual it is a significant and memorable event in the life cycle, as well as the foundation of the family in societies where marriage is the only legal bond for the protection of off spring. Child marriage is a violation of human rights whether it happens to a girl or a boy, but it

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represents perhaps the most prevalent form of sexual abuse and exploitation of girls. The harmful consequences include separation from family and friends, lack of freedom to interact with peers and participate in community activities, and decreased opportunities for education. Child marriage can also result in bonded labour or enslavement, commercial sexual exploitation and violence against the victims. Because they cannot abstain from sex or insist on condom use, child brides are often exposed to such serious health risks as premature pregnancy, sexually transmitted infections and, increasingly, HIV/AIDS. Parents may consent to child marriages out of economic necessity. Marriage may be seen as a way to provide male guardianship for their daughters, protect them from sexual assault, avoid pregnancy outside marriage, extend their childbearing years or ensure obedience to the husband's household. The role of government is to develop and implement systems to prevent or discourage this practice. Government action is required to review customary and civil law. Because child marriage is closely associated with poverty, government commitment to poverty reduction is likely to lead to a decrease in child marriage.

## The Situation of Child Marriage in Bangladesh

Child marriage is a violation of children's rights. When a child is married, his or her fundamental rights are violated. Despite being prohibited by international human rights law and many national laws, child marriage continues to rob million of children around the world of their childhood. Child marriage rate in South Asia is the second highest in the world, behind only West Africa.[1] Globally, 36 percent of women aged 20-24 were married or in union before they reached 18 years of age.[2] One in three girls in the developing world are married by eighteenth birthday. Bangladesh has one of the highest rates of child marriage in the world. One-third of women aged 20-24 in Bangladesh are married by the age of 15 and about two-thirds by the age of 18. About 64 percent of women in the 20-24 ages group are married before 18 years of age. A higher proportion of women which is about 71 percent in rural areas are married

[1] Plan Asia, Report on *Asia Child Marriage Initiative: Summary of Research in Bangladesh, India and Nepal* (Bangkok: Plan Asia Regional Office), p. 01.

[2] United Nations Children's Fund, Report on *Child Protection Information Sheets* (New York: UNICEF, 2006), p. 17.

before 18 years of age, compared to 56 percent of women in urban areas.[3] Bangladesh has the highest rate of marriage under 16 in South Asia, with about half of the nation's girls marring before reaching their mid-teens.[4] Although the practice of child marriage in Bangladesh has been decreasing in the last 30 years, it continues to be a major problem. In Bangladesh 75 percent of women aged 20-49 married before 18 years age which is one of the highest rates in the world.[5]

## Child

Children constitute the foundation of a nation. Country's future development generally depends on present children development process. According to the Section 3(c) of the Mines Act, 1923-child means a person who has not completed his eighteen years.[6] A child is an individual who is under the age of 18 years according to the United Nations Convention on the rights of the Child, 1989[7] and the ILO Convention on the Worst Forms of Child Labour (No. 182), 1999[8]. According to the section 2(63) of the Labour Act, 2006 of Bangladesh, children shall include all individuals under the age of 14 and 14–18 age group children shall constitute adolescents in accordance of section 2(8) of this law.[9] The Domestic Violence (Prevention and Protection) Act, 2010[10], Section 2(5), defines- child means a person below the age of eighteen years. According

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3 Plan Asia, *Asia Child Marriage Initiative: Summary of Research in Bangladesh, India and Nepa*l, *op.cit*., p. 12.

4 National Institute of Population Research and Training (NIPORT), *Bangladesh Demographic and Health Survey, 2009* (Dhaka: NIPORT, 2009), pp. 75-76.

5 United Nations Children's Fund and Bangladesh Bureau of Statistics, *Multiple Indicator Cluster Survey (MICS), 2006* (Dhaka: UNICEF & BBS, 2007), p. 27.

6 Government of the People's Republic of Bangladesh, *The Mines Act, 1923*, Adopted, modified or amended by *The Bangladesh Laws (Revision and Declaration) Act, 1973*, (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 1973).

7 United Nations, *United Nations Convention on the Rights of the Child, 1989*, (New York: UN, 1989).

8 International Labour Organization, *The Worst Forms of Child Labour Convention, 1999,* No. C182 (Geneva: ILO, June 1999).

9 Government of the People's Republic of Bangladesh, *The Bangladesh Labour Act, 2006* (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 2006).

10 Government of the People's Republic of Bangladesh, *The Domestic Violence (Prevention and Protection) Act, 2010*, (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 2010).

the National Children Policy, 2011[11] of Bangladesh-children shall include all individuals under age 18 and 14–18 age group children (male and female) shall constitute adolescents. The Prevention and Suppression of Human Trafficking Act, 2012[12], section 2(14), mentioned that child means a person who has not completed the age of eighteen years. Section 4 of the Children Act, 2013[13] of Bangladesh defines that person under 18 years shall be treated as children.

## Child Marriage

The Special Marriage Act, 1872[14], Section 2(2) and 2(3) mentioned that- the man must have completed his age of eighteen years, and the woman her age of fourteen years, according to the Gregorian calendar; each party must, if he or she has not completed the age of twenty-one years, have obtained the consent of his or her father or guardian to the marriage. According to the Section 3 of the Christian Marriage Act, 1872[15]- 'minor' means a person who has not completed the age of twenty-one years and who is not a widower or a widow. The Dissolution of Muslim Marriage (Amendment) Act, 1986[16], Section 2(vii), states that- a woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on this grounds- if she having been given in marriage by her father or other guardian before she attained the age of eighteen years, repudiated the marriage before attaining the age of nineteen years. According to the Section 2(1) and 2(4) of the Child Marriage Restraint

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11 Government of the People's Republic of Bangladesh, *National Children Policy, 2011*, (Dhaka: Ministry of Women and Children Affairs, 2011).

12 Government of the People's Republic of Bangladesh, *The Prevention and Suppression of Human Trafficking Act, 2012*, (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 2010).

13 Government of the People's Republic of Bangladesh, *The Children Act, 2013*, (Dhaka: Ministry of Women and Children Affairs, 2013).

14 Government of the People's Republic of Bangladesh, *The Special Marriage Act, 1872*, Adopted, modified or amended by *The Bangladesh Laws (Revision and Declaration) Act, 1973*, (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 1973).

15 Government of the People's Republic of Bangladesh, *The Christian Marriage Act, 1872,* Adopted, modified or amended by *The Bangladesh Laws (Revision and Declaration) Act, 1973*, (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 1973).

16 Government of the People's Republic of Bangladesh, *The Dissolution of Muslim Marriage (Amendment) Act, 1986,* (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 1986).

Act, 2017[17] of Bangladesh-'minor' means a person who, if a male, is under twenty-one years of age, and if a female, is under eighteen years of age. 'Child Marriage' means a marriage to which either of the contacting parties is a minor.

## Objective of the Study

The study present the causes, consequences and the legal framework which are working to restrain child marriage in Bangladesh. The major objectives of this study are as below:

i. To focus the general scenario of child marriage in Bangladesh;
ii. To identify the causes and consequences of child marriage around the country;
iii. To examine the legal framework which are working to restrain child marriage; and
iv. To propose a set of recommendations as a way forward.

## Methodology

It is a qualitative study and secondary data have been used in this study. The study has two parts and the first part provides an overall picture, causes and consequences of child marriage in Bangladesh. For this, a review of relevant available documents, articles and web based information has been used. The second part provides the existing policies and legal frameworks in order to identify scope, and gaps. This involves reviewing all relevant national laws in this regard. This part will show us the scope and gaps of using the national legal frameworks. Finally, the recommendation part will provide a brief idea of what needs to be done to restrain child marriage in Bangladesh.

## Limitations of the Study

Major limitations of this study are as follows:

i. Only secondary data have been used in this study.

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[17] Government of the People's Republic of Bangladesh, *The Child Marriage Restraint Act, 2017,* (Dhaka: Ministry of Women and Children Affairs, 2017).

ii. National laws are explained in this study. There has no discussion about international laws and policies.
iii. There has no case study or comparative study in this work.

## Causes of Child Marriage

In countries where child marriage is common, the practice tends to occur as a result of a range of different socio-economic and cultural factors. Family status, gender inequality in society, poverty, literacy, cultural dynamics, and legal inequality are common factors to occur child marriage in Bangladesh.[18]

## Poverty and Dowry

Poverty is one of the most frequently cited factors behind child marriage in Bangladesh. Poorer families may see early marriage as financially beneficial because of the increased dowry cost of their aged girl and the families want no longer burden on the part of their daughters.[19] The practice of dowry payment plays a critical role in the early marriage of girls in poor families. The amount of dowry demand is proportional to the age of a girl, as young girls are preferred more by the boy's family. So poor parents arrange the marriages of their adolescent daughters as they fear that the amount of dowry will increase as their daughters get older. For poor unemployed boys, dowry is a means to get hold some money, which they sometimes use to start small business. In some cases it is a driver of early marriage for the boys in poor families.

## Lack of Education

Marriage of a girl frequently correlates with low levels of education, or no education at all.[20] Education helps girls to have more autonomy in choosing a partner and to make free and helps them to take decision about

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18 International Planned Parenthood Federation (IPPF), Report on *Ending Child Marriage: A Guide for Global Policy Action* (London: IPPF, 2006), p. 20.

19 United Nations Children's Fund, Report on *Bangladesh, Situation Assessment, and Analysis of Children and Women in Bangladesh* (Dhaka: UNICEF, 24, September 2009), p. 2.

20 International Planned Parenthood Federation (IPPF), *Ending Child Marriage: A Guide for Global Policy Action*, o*p.cit.,* p. 10.

marriage and sexual reproductive health. Education is strongly associated with child marriage in Bangladesh. 86% of women with no education were married before 18 years of age, compared to 26% of women who had completed secondary or higher education.[21] Furthermore, uneducated parents are less likely than educated parents to be aware of laws prohibiting child marriage and many consequences associated with this practice. Additionally, lack of education among parents may cause them to have less appreciation for education and regard it as irrelevant rather than valuable.[22] It revealed that among women who never attended school/madrasha nearly 59 percent of them were married at very early ages, around 31 percent marriages were occurred at early ages and only 10 percent marriages took place at mature ages. On the other hand, among women who ever attended school/madrasha notably fewer them had married at very early ages but the incidence of marriage at early ages was fairly higher and at mature ages was drastically higher compared to their never-attended counterpart.[23]

## Gender Inequality

In Bangladesh, gender inequality is a common scenario. Here culture is associated with gender discrimination, family honor, safeguarding virginity, family prestige, among others.[24] Women are dominated by men in family level, community level and national level. It is a social custom in Bangladesh that male guardians take all decision of their family. Males always try to control the females and male guardian does not take opinion of female guardian at the time of being their girl child's marriage. It makes the gender inequality and it is one of the main causes to create child marriage especially in rural Bangladesh.

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21 Bangladesh Shishu Akdikar Forum (BSAF), Report on *State of Child Rights in Bangladesh 2013* (Dhaka: BSAF, 2013), p. 25.

22 World Vision, Report on *Before She's Ready: 15 Places Girls Marry by 15* (London: World Vision International, 2008), p. 10.

23 M. Salim Zahangir, *Early and Very Early Family Formation in Bangladesh*, Master Thesis, Department of Sociology (Stockholm: Stockholm University, 2011), p. 23

24 Bruce J, Clark S., Report on *Including Married Adolescents in Adolescent Reproductive Health and HIV/AIDS Policy* (Geneva: World Health Organization, 2003), p. 6.

**Social Insecurity**

Teen-age girl child always faces insecurity in the society. Sometimes they face eve teasing, sexual harassment and other sexual assaults. Parents feel that their daughters will get rid of sexual abuse and illicit sexual contact if they are married. Parents in reality feel that their daughters will be better off and safe with a regular male guardian if they are married within their expected time. Being poor also heightens a girl's vulnerability when parents want to marry her at a young age because of traditional beliefs such as protecting a girl's 'honor.'[25]

**Family Ties and Relationships**

In Bangladesh, there have a strong religious impact in the society and family formation. Parents think that it is their duties to give marry their girl children in early age. They also think that their children will live in a family and for this purpose they give marriage their children in the early age. In Bangladesh, local attitudes concerning the ideal age for marriage, the expectation for submissive wives, discriminatory family norms, and other directives under customary law are often rooted in societal customs and religious norms.[26] It is also one of the major causes to create child marriage in Bangladesh.

**Place of Residence**

There is an extremely close relation between child marriage and place of residents. Rural residents reflect their cultural norms, traditional beliefs and social values. Rural areas are disadvantaged in term of education and socio-economic status.[27] In Bangladesh, nearly 75 percent of rural girls marry before the age of 16. On the other part urban people in somewhat

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[25] International Center for Research on Women (ICRW), Report on *Too Young to Wed: Education and Action Toward Ending Child Marriage* (Washington, DC: ICRW, 2005), p. 23.

[26] United Nations Children's Fund, Report on *Early Marriage: Child Spouses* (Florence: UNICEF Innocent Research Centre, 2001), p. 19.

[27] S.M. Mostafa Kamal, *Che Hashim Hassan, Gazi Mahbubul Alam and Yang Ying,* "Child Marriage in Bangladesh: Trends and Determinants", *Journal of Biological Science*. *Available at* https://www. rese archgate.net/profile/S_M_Mostafa_Kamal/publication/259988146_Child_ marriage [accessed in December 27, 2018].

are more averse to begin early marital life and thus the rate of very early marriage is relatively less strong in urban areas. The rate of marriage before 15 years is 11% higher in terms of the rural women than that of urban women. On the other hand, the rate of marriage over 17 years is 14% higher in the sphere of urban women than that of rural women.[28]

**Lack of Awareness and Gaps in Laws**

Because of inadequate legal protection or inadequate implementation of existing laws, child marriage continues with impunity in Bangladesh like other countries.[29] While laws prohibiting child marriage exist in most countries, they often lack enforcement in developing nations. Laws can be enforced only when cases are reported and handled by the legal system, but this frequently does not happen due to lack of awareness of national laws and thus children are usually married with the endorsement of their parents.[30] Additionally, some domestic laws are weak and contain gaps that impede effective implementation. For example, some laws prohibit nonconsensual marriage and marriage of children below a given age but provides no sanctions for violations of these restrictions.[31] The enforcement of child marriage prevention law and compulsory registration of birth and marriage is very weak. Social awareness about the need to register all births and marriages is still low. There is an easy access to take birth certificates to legitimize marriages involving minors. Thus, parents, *Qazi* and government officials are involved in propagating this practice, and the enforcement of the law is not strict enough to deter them from violating it.[32]

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28 A. Barkat and M. Majid, Report on *Adolescent Reproductive Heath in Bangladesh: Status, Policies, Programs and Issues* (Bangkok: USAID Asia, 2003), p. 31.

29 Rangita de Silva-de-Alwis, *Child Marriage And The Law, Legislative Reform Initiative-Paper Series*, (New York: UNICEF Working Paper, Division of Policy and Planning, 2007), p. 34.

30 *Ibid.*

31 United Nations Children's Fund, *Early Marriage, A Harmful Tradition Practice,* (New York: UNICEF, 2005), p. 7.

32 Manasi Bhattacharyya, Report on *Research on Early and Forced Marriage in Poor Urban Areas of Bangladesh* (Dhaka: UNDP Bangladesh, 2015), pp. 34-35.

## Impacts of Child Marriage

Child marriage violates girl's human rights, and it impedes efforts to reduce gender-based violence, advance education, overcome poverty, and improve health indicators.[33] Child marriage reinforces the gender implications of poverty and powerlessness, diminishing the physical, mental, intellectual and social growth of the girl and intensifying her social isolation.[34]

## Poverty

Child marriage is a form of oppression, and it perpetuates an inter-generational cycle of poverty and absence of opportunity.[35] The practice often leads to devastate the consequences for the girl involved, as well as for her family and the larger community. A child bride rarely has a support system due to her lack of education and isolation from her peers. Thus she typically has few skills and limited mobility and she is constrained in her capacity to overcome poverty for herself, her children, and her family.[36] Young brides are likely to have more children and hence a greater financial burden, especially if resources are scarce to being with.[37]

## Denial of Education

Denial of education is a significant factor causing child marriage and it emerges as a consequence of child marriage as well.[38] In Bangladesh, a girl may be withdrawn from school once a marriage possibility is

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33 International Center for Research on Women (ICRW), *Too Young to Wed: Education and Action Toward Ending Child Marriage*, *op.cit.,* p. 23.

34 Rangita de Silva-de-Alwis, *Child Marriage And The Law, Legislative Reform Initiative-Paper Series*, *op.cit.,* p. 34.

35 Nawal M. Nour, "Child Marriage: A Silent Health and Human Rights Issue, Reviews" *Obstetrics & Gynecology*, vol. 2(1), 2009, pp. 52-54. *Available at:* http://www.ncbi.nlm.nih. gov/pmc/articles/ PMC2672998/pdf/RIOG002001_005.pdf. [accessed in January 02, 2019].

36 Alexander Hervish & Charlotte Feldman-Jacobs, Report on *Who Speaks For Me? Ending Child Marriage, Policy Brief* (Washington DC: Population Reference Bureau, 2011), p. 44.

37 World Vision, *Before She's Ready: 15 Places Girls Marry by 15*, *op.cit.,* p. 24.

38 World Vision, *Before She's Ready: 15 Places Girls Marry by 15, op.cit.,* p. 20.

presented.[39] Prevented from continuing their education, young brides are deprived of the opportunity to develop intellectually, prepare for adulthood, and contribute to the progress of her family and society.[40] Early marriage and early pregnancy is one of the important reasons for girls not being able to continue education.

**Gender Based Violence and Sexual Abuse**

Girls married at young age are often at more risk of domestic violence, abuse and forced sexual relations. Child marriage is often characterized by a wide age gap between the spouses. Girls who marry before the age of 18 are more likely to be married to men who are significantly older. This carries additional risks for girls and they are less able to negotiate with their husbands. They cannot make decisions within the household and cannot protect their own health and well-being. The younger girl who faces her first sex, she more likely faces a violence.[41] Child marriages commonly involve compulsory sexual intercourse, domestic violence and loss of freedom.[42]

**Physical and Psychological Threat**

Child marriage increases the prevalence of infectious diseases, malnutrition, high child mortality rates and low life expectancy for women.[43] Child marriage and early childbirth are linked to high rates of pregnancy-related complications or risk to the life of the newborn. Young brides often become pregnant before their bodies development that creates a much greater risk and that childbirth becomes as life-threatening bodily

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39 UNICEF Bangladesh, *Women and girls in Bangladesh,* (updated June 2010), p. 11. *Available at:* http://www.unicef.org/bangladesh/Women_and_girl_in_Bangladesh.pdf [accessed in December, 27, 2018].

40 *Ibid.*

41 Antony Davis, Claire Postles and Giorgian Rose, *A girl's right to say no to marriage*, *op.cit.,* p. 43.

42 World Vision, *Before She's Ready: 15 Places Girls Marry by 15*, *op.cit.,* p. 21.

43 Rangita de Silva-de-Alwis, *Child Marriage And The Law, Legislative Reform Initiative-Paper Series*, *op.cit.,* p. 35.

harm. These negative health consequences include obstetric fistula, hemorrhaging, and even death.[44]

The psychological impact of child marriage can be significant for both boys and girls. Child marriage can mean that children are disconnected from their parents and close relatives, leaving them isolated and vulnerable without necessary support in dealing with marriage, parenthood, domestic duties and supporting a family.[45] The loss of childhood, forced sexual relations, and denial of free will and social development resulting from early marriage have vast psychosocial and emotional consequences that are often detrimental to the young brides life.[46]

## Legal Protection System of Restraining Child Marriage in Bangladesh

Child marriage is not only social phenomena but also a national problem for our future development. It damages children's childhood and works as a barrier of his/her future development. Government of the People's Republic of Bangladesh takes many initiatives to restrain child marriage.

## The Special Marriage Act, 1872

The Special Marriage Act, 1872[47] provide a form of marriage for persons who do not profess the Christian, Jewish, Hindu, Muslim, Parsi, Buddhist, Sikh or Jaina religion, and for persons who profess the Hindu, Buddhist, Sikh or Jaina religion and to legalize certain marriages the validity of which is doubtful. The Section 2(2) of this Act specified that- the man must have completed his age of eighteen years, and the woman her age of fourteen years, according to the Gregorian Calendar. Section 2(3) mentioned that- each party must, if he or she has not completed the age of twenty-one years, have obtained the consent of his or her father or guardian to the marriage. According to the Sections 2(2) and 2(3) of this

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44 International Center for Research on Women (ICRW), *Too Young to Wed: Education and Action Toward Ending Child Marriage*, *op.cit.,* p. 23.

45 Bangladesh Shishu Adhikar Forum (BSAF), *State of Child Rights in Bangladesh 2013*, *op.cit.,* pp. 25-26.

46 United Nations Children's Fund, *Early Marriage, A Harmful Tradition Practice, op.cit.,* p. 9.

47 Government of the People's Republic of Bangladesh, *The Special Marriage Act, 1872*, *op.cit.*

law 18 years aged man and 14 years aged woman can marry with the consent of his or her father or guardian. These Sections are completely opposite to the Child Marriage Restraint Act of 2017. Section 10 pronounced that- before the marriage is solemnized, the parties and three witnesses shall sign a declaration in the form. If either party has not completed the age of twenty-one years, the declaration shall also be signed by his or her father or guardian, except in the case of a widow, and, in every case, it shall be countersigned by the Registrar. It has ensured the responsibility and accountability of the guardians in such a type of marriage and it has made firm the marriage registration system of this country.

**The Christian Marriage Act, 1872**

The Christian Marriage Act, 1872[48] is expedient relating to the solemnization of the marriages of Christians. According to the Section 3 of this Act, unless there is something repugnant in the subject or context, 'Minor' means a person who has not completed the age of twenty-one years and who is not a widower or a widow. Section 19 directed that- the father, of living, of any minor, or, if the father be dead, the guardian of the person of such minor, and, in case there be no such guardian, then the mother of such minor, may give consent to the minor's marriage, and such consent is hereby required for the same marriage, unless no person authorized to give such consent be resident in Bangladesh. It has made a great obstacle to restrain the child marriage within the country and it would help the guardians to be concerned with the child marriage.

**The Muslim Personal Law (*Shariat*) Application Act, 1937**

The Muslim Personal Law (*Shariat*) Application Act, 1937[49] is expedient to make provision for the application of the Muslim Personal Law (*Shariat*) to Muslims in Bangladesh. According to the Section 2 of the

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48 Government of the People's Republic of Bangladesh, *The Christian Marriage Act, 1872*, *op.cit.*

49 Government of the People's Republic of Bangladesh, *The Muslim Personal Law (Shariat) Application Act, 1937*; adopted, modified or amended by *The Bangladesh Laws (Revision and Declaration) Act, 1973* (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 1973).

Muslim Personal Law (*Shariat*) Application Act, 1937 notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding interstate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and waqfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (*Shariat*). It has given the legal legitimacy to accomplish the marriage and divorce and to distribute the property according to Islamic *Shariah*. But this Act did not mention the age of the both parties of a marriage of the Muslim community in the country. Sub-section (a), (b) and (c) of Section 3(1) mentioned that- any person who satisfies the prescribed authority that he is a Muslim, he is competent to contract within the meaning of Section 11 of the Contract Act, 1872, and he is a resident of Bangladesh, may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of the provisions of this Section, and thereafter the provisions of Section 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified. It has made a difficult condition to determine the suitable age of men and women of a marriage. Taking this opportunity Islamic scholars have given different explanation about the age of marriage. This Act has opened the door of child marriage in the Muslim community which makes the barrier to restrain the child marriage and child protection in our country.

**The Dissolution of Muslim Marriage Act, 1939**

The Dissolution of Muslim Marriage Act, 1939[50] extends to the whole of Bangladesh from 1973. According to the Section 2 and 2(vii) of this Act- if a girl having been given in marriage by her father or other guardians

[50] Government of the People's Republic of Bangladesh, *The Dissolution of Muslim Marriage Act, 1939*; adopted, modified or amended by *The Bangladesh Laws (Revision and Declaration) Act, 1973* (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 1973).

before she attained the age of eighteen years, repudiated the marriage before attaining the age of nineteen years. It provides that the marriage has not been consummated. This Act provides an opportunity to women behave lawfully against the child marriage. It is playing a vital role to restrain the child marriage in Bangladesh.

**The Muslim Marriages and Divorces (Registration) Act, 1974**

The Muslim Marriages and Divorces (Registration) Act, 1974[51] applies to all Muslim Citizens of Bangladesh wherever they may be. Section 3 states that- notwithstanding anything contained in any law, custom or usage, every marriage solemnized under Muslim Law shall be registered in accordance with the provisions of this Act. Section 5(1) states that- every marriage not solemnized by the Nikah Registrar shall, for the purpose of registration under this Act, be reported to him by the person who has solemnized such marriage. Whoever contravenes the provision of subsection (1) shall be punished with simple imprisonment for a term which may extend to three months, or with fine which may extend to five hundred taka, or with both. This Section will inspire the people of Bangladesh to register the Muslim marriage. For this rule it would be possible to restrain the child marriage in the country. Section 11 states that- if the Government is of the opinion that a Nikah Registrar is guilty of any misconduct in the discharge of his duties or has become unfit or physically incapable to discharge his duties, it may, by order in writing, revoke his license, or, suspend his license for such period, not exceeding two years as may be specified in the order. It has compelled the Nikah Registrar to do his duty in the right way. It has made the Nikah Registrar to be aware of restraining the Muslim child marriage.

**The Births and Deaths Registration Act, 2004**

Birth registration and getting a name are fundamental rights of a child. Birth Certificate is mandatory to prove the age of a person. In this circumstance the Government of the People's Republic of Bangladesh

[51] Government of the People's Republic of Bangladesh, *Muslim Marriages and Divorces (Registration) Act, 1974* (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 1974).

enacted the Births and Deaths Registration Act, 2004.[52] Section 8(1) states that- the father or mother or guardian or the prescribed persons shall be liable to provide information related to birth of a child to the register within 45 (forty five) days of the child's births. Section 10 states that- name of the child should be fixed before birth registration. But with the condition, birth of any child may be registered if the child is not given any name, the parent or guardian of such child shall provide the name of the child to the registrar within 45 days of the registration. Sections 8 and 10 have made an obligation for a child to register his/her birth and to get a name. In this sphere, the parents or the legal guardians must bring up duties to do this work by their own responsibility according to the Act.

Section 18 mentioned that-

(1) The birth or death certificate issued under this Act shall be deemed to be one of the primary evidences of age, birth or death related information of a person to any office or court or school-college, government and non-government organization. (3) Notwithstanding anything contained in any other law for the time being in force, the birth or death certificate shall be used to prove the age of a person in the following cases- (a) Issuance of passport; (b) Registration of marriage; (c) Admission into educational institutions; (d) Appointment in government or non-government organization (e) Issuance of driving license; (f) Preparation of voter list (g) Land registration and (i) Other cases as prescribed by rule. A child will get the protection from child marriage if he registers his/her birth in light of this Act and he/she will get or enjoy the citizen rights easily. These types of service are not possible to get without birth registration certificate.

**The Hindu Marriage Registration Act, 2012**

The Government of the People's Republic of Bangladesh enacted the Hindu Marriage Registration Act in 2012.[53] According to the Section 3(1) of this Act notwithstanding anything contained in any other Act, custom and usage, Hindu marriage may be registered, in accordance with the

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[52] Government of the People's Republic of Bangladesh, *The Births and Deaths Registration Act, 2004* (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 2004).

[53] Government of the People's Republic of Bangladesh, *The Hindu Marriage Registration Act, 2012* (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 2012).

manner as prescribed by rules, for the purpose of protecting the documentary proof of Hindu marriage. Section 3(2) mentioned that notwithstanding anything contained in sub-section (1), the validity of any marriage solemnized according to the Hindu *sastra* shall in no way be affected due to non-registration of such marriage under this Act. The legal legitimacy of a Hindu marriage will not be offended if the parties do not register their marriage. For this reason, the parties of a Hindu marriage are not bound to register their marriage. Section 5 states that notwithstanding anything contained in any other Acts, being a Hindu male, under-21 (twenty-one) years of age, or being a Hindu female under 18 (eighteen) years of age, contracts a marriage shall not be registrable under this Act. It has recognized the age limit determined by the government to a Hindu marriage. If a Hindu marriage is registered then its legal base must be consolidated. The positive side of this Section is that it will inspire the Hindu community to make a marry following the prescribed age.

Section 6(1) announced that after solemnization of the marriage in accordance with the Hindu religion, usages and rituals, following the provisions of this Act Hindu Marriage Registrar shall register the Hindu marriage in accordance with the prescribed manner, on application made in any manner as determined by any party to the marriage for the purpose of protecting the documentary proof of such marriage. In one side, this section will discourage both the parties of a marriage to register their marriage. On the other side, it will inspire the Hindu community to accomplish child marriage according to law. It can be said that this Act does not make an obligation to register a Hindu marriage. It is the main weakness of this Act. At the same time this Act is not capable of protecting the Hindu children from the child marriage.

**The Child Marriage Restraint Act, 2017**

The Government of the People's Republic of Bangladesh enacted the Child Marriage Restraint Act, 2017[54] for restraining the child marriage in Bangladesh. Section 2(1) defines that 'minor' means, in case of marriage, a person who, if a male, has not completed 21 (twenty-one) years of age,

[54] Government of the People's Republic of Bangladesh, *The Child Marriage Restraint Act, 2017*, *op.cit.*

and if a female, has not completed 18 (eighteen) years of age; Section 2(4) mentioned that 'child marriage' means a marriage to which either or both of the contracting parties are minor. It has made clear the definition of child marriage and the age of marriage. As a result it becomes easy to identify the child marriage. Section 5(1) pronounced that the Court may, if satisfied, *suo-motu* or on the basis of a complaint made by a person or on the basis of any information received through any other means, that a child marriage has been arranged or is about to be solemnized, issue an injunction against solemnization of the child marriage. Section 5(2) mentioned that the Court may, either on its own motion or on the basis of the complainant's application, rescind any order issued under sub-section (1). This Section has defined the powers of a court to restrain the child marriage which has ascertained the implementation process of this Act.

Section 7(1) mentioned that if any adult, male or female, contracts a child marriage, it shall be an offence, and for this, he shall be punished with imprisonment which may extend to 2 (two) years, or with fine which may extend to 1,00,000 (one lakh) taka, or with both, and in default of payment of the fine, shall be punished with imprisonment which may extend to 3 (three) months. Section 7(2) mentioned that if any minor, male or female, contracts a child marriage, he will be punished with detention which may extend to 1 (one) month, or with fine which may extend to 50,000 (fifty thousand) taka, or with both. Provided that if any case is filed against, or penalty imposed upon, a person under section 8, no punishment shall be imposed upon the aforesaid minor, whether male or female. It has assured the punishment to the related parties with child marriage bringing under the jurisdiction of the court. Section 8 mentioned that where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, shall commit an offence, and for this, be punished with imprisonment which may extend to 2 (two) years but not less than 6 (six) months, or with fine which may extend to 50,000 (fifty thousand) taka, or with both, and in default of payment of the fine, shall be punished with imprisonment which may extend to 3 (three) months. This section has brought the guardians of the parties of a child marriage to book. This provision will discourage the guardians of a child marriage to accomplish such a marriage in our

society. Section 9 states that if any person solemnizes or conducts a child marriage, it shall be an offence, and for this, he shall be punished with imprisonment which may extend to 2 (two) years but not less than 6 (six) months, or with fine which may extend to 50,000 (fifty thousand) taka, or with both, and in default of payment of fine, shall be punished with imprisonment which may extend to 3 (three) months. According to this section, if anybody is related with the accomplishment of a child marriage he/she will be punished. Thus many of the guardians will not engage in a child marriage due to the fearlessness of punishment.

Section 11 says that if any Marriage Registrar registers a child marriage, it shall be an offence, and for this, he shall be punished with imprisonment which may extend to 2 (two) years but not less than 6 (six) months, or with fine which may extend to 50,000 (fifty thousand) taka, or with both, and in default of payment of the fine, shall be punished with imprisonment which may extend to 3 (three) months, and his license or appointment shall be cancelled. This section declared that if a marriage registrar does not register a marriage according to the law he will must suffer the punishment. This provision will compel the Marriage Registrar to do his duty according to the law. Section 12 announced that for the purpose of proving age of a male or female who is in marriage or intends to contract a marriage, the birth certificate, national identity card, secondary school certificate or an equivalent certificate, junior school certificate or an equivalent certificate, primary school certificate or an equivalent certificate or passport shall be considered as a legal document. This Section has contributed to put an effective step to prove the ages of the parties of a marriage. It is possible to restrain a child marriage if a marriage is accomplished on the basis of proving the age.

Section 17 mentioned that notwithstanding anything contained in any other law for the time being in force, the Mobile Court may impose penalty for the offences committed under this Act, subject to inclusion of this Act in the Schedule of the Mobile Court Act, 2009 (Act No. LIX of 2009). If a child marriage is going to be occurred in that case the related authority can direct a mobile court to restrain the child marriage instantly according to this section. By this activity the authority will be capable of restraining the child marriage and protecting the child. Section 19 fixed that notwithstanding anything contained in any other provision of this Act,

if a marriage is solemnized in such manner and under such special circumstances as may be prescribed by rules in the best interests of the minor, at the directions of the court and with consent of the parents or the guardian of the minor, as the case may be, it shall not be deemed to be an offence under this Act. If a child marriage occurred according to the section 19 of this Act in that case the child marriage will get the legal recognition. Again if a minor is conceived or raped before her marriage in that case her marriage can be accomplished under the jurisdiction of this section. By this way the greatest interest of the minors will be kept in a special context. But using this section of this Act the guardians will take opportunities to make marry of their child by collusion. This type of incidence will act as a great barrier in the sphere of protecting the child marriage. The marriage registration has not been obligatory for all religions by the Child Marriage Restraint Act, 2017. If this type of provision is incorporated in the Act in that case it will be more fruitful or effective to restraint the child marriage of all religions and casts.

**Recommendations**

Child marriage can't be virtually remove within a short time from Bangladesh because the problem of child marriage indissolubly rooted in our society. Bangladesh government can address the problem of child marriage with the following important policy measures:

- There is a need to extend government education programme for the children of poverty-stricken areas. Government should take initiatives of special schooling programme for girl children.

- Provide allowances for the poor families and accelerate the food for education programme at a large scale.

- Community-based intervention should be taken for raising awareness among the parents/guardians for discourages against child marriage.

- There is need to raising awareness among the mass people about the harmful effects of child marriage on child health and development. Mass media and civil society can play an important role about it.

- Support families through conditional cash transfer, awareness raising programme, mobilization, other social support and link with social safety net programme so that parents/guardians do not give marriage their child in early age.

- Birth Registration is essential in preventing child marriage by enforcing minimum age limit for marriage related laws. This is needed to ensure free and compulsory birth registration and a free birth certificate for every children.

- Existing laws and regulations against child marriage must be in place and rigorously enforced by law enforcement agencies. The Child Marriage Restraint Act, 2017 must be applicable for all citizens of Bangladesh.

## Conclusion

Bangladesh government enacted different Acts and Ordinances relating to the issue of child marriage. The Special Marriage Act, 1872 has given the legal recognition to the child marriage. The Christian Marriage Act, 1872 has made a great obstacle to restrain the child marriage within the country. The Muslim Personal Law (*Shariat*) Application Act, 1937 did not mention the age of the both parties of a marriage of the Muslim community in the country. According to the Dissolution of Muslim Marriage Act, 1939 a woman can regret her marriage before the fulfillment of becoming her 19 years age if her parents oblige to marry before her age of 18. This Act played a vital role to restrain the child marriage in the country. The Muslim Marriages and Divorces (Registration) Act, 1974 has made the marriage registration compulsory. It has made an opportunity to legitimise every Muslim marriage lawfully. The Births and Deaths Registration Act, 2004 mentioned that a person must show his birth certificate to prove his age in case of a registered marriage. So a child will get the protection from child marriage. The Hindu Marriage Registration Act, 2012 provides that if a Hindu marriage is accomplished under the age determined by the government in that case it is not necessary to register the marriage. It will inspire the Hindu community to accomplish child marriage according to law. The Child Marriage Restraint Act, 2017 have made clear the definition of child

marriage and the age of marriage. If a minor is conceived or raped before her marriage in that case her marriage can be accomplished under the jurisdiction of this Act. By this way the greatest interest of the minors will be kept in a special context. But using this section of this Act the guardians will take opportunities to make marry of their child by collusion. This type of incidence will act as a great barrier in the sphere of protecting the child marriage. In conclusion it can be said that some Acts and Ordinance are playing vital role to restrain child marriage in Bangladesh. But some Acts and Ordinances are also contradictory with this issue.

# Status of Women Empowerment in Bangladesh: An Equal Rights Perspective

Mily Sultana*

*State development depends on development of all people or whole people of the state; empowerment is a significant issue in Bangladesh. There are half of the total people who remain far from the development process of the state. This is a duty of family members, social developers and state administrators to facilitate the women to make a pavement for them to go forward. The laws can provide specific provisions and guidelines to avail of the opportunities. It waits for argument regarding implementing authority. Another thing is that equal rights propaganda should be replaced with effective and need based rights. In economic and financial matters the opportunities might be equal. Misperception regarding the women empowerment process and nature of works of the women activist bodies should be clarified and tried to be removed through taking proper initiatives which are compatible with the existing modern world.*

***Key words:*** *Empowerment, Women, Development, Equality, Effective, Rights, Opportunities, Activities.*

## Introduction

A woman hardly ever earns money on her own and possesses the ownership of the property; frequently they are financially dependent on her father, then husband and thereafter her son for economic security.[1] A woman's work is never done.[2] The economic and socio-political condition

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[1] B Hartman and J Boyce, *A Quiet Violence: View from Bangladesh Village, Food First, 1998, p. 86.*

[2] *Ibid., pp. 86-87.*

of the women is not tremendously unique in South Asia[3] but in some exceptional cases scenario is different. Women empowerment is one of the most striking issues in the country which would like to fortify the basement of national development with a hasty rate of growth.[4] Bangladesh reiterated the engagement of women in state practices in the national and international forums. The Sixth Five Year Plan (2011-2015) considered women engagement in political and economic activities to attain the Millennium Development Goal (MDG).[5] Sri Lanka in South Asia became the pioneer in empowering the women.[6] Besides, it took more than thirty years to endorse the Convention on the Elimination of all Sorts of Discrimination against Women (CEDAW) and Beijing Plan of Action since the adoption.[7] The cabinet finally brought the Policy for Women's Development to existence.[8] Still there remains a significant amount of conservative motives.[9] Bangladesh has articulated its focal point on the four parameters such as; economic participation, education, health and political participation for pragmatic woman empowerment in the state[10]while the United Nations have set up five components for woman empowerment such as; (i) Women's sense of self-worth, (ii) their right to have and to determine choices, (iii) their right to have power to control their own lives, both within and outside the homes, (iv) Their ability to influence the direction of social change, nationally and internationally.[11]

## What is Woman Empowerment?

Woman empowerment means and includes the financial capabilities of the common women in the state. Financial capabilities of the women enlarge a

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3 M. Shahidul Islam and Suvi Dogra, Institute of south Asian studies (ISAS), National University Singapore, Working Paper, No. 119, 2011, p. 1.

4 Center for Research and Information, Bangladesh: Empowering the Women (Dhaka: 2015), p. 3.

5 *Ibid.*

6 M. Shahidul Islam and Suvi Dogra, *ibid.*

7 Hameeda Hossain, *Women Development Policy,* The Daily Star, April 4, 2011.

8 *Ibid.*

9 Rebeka Sultana, in a personal interview in 2017.

10 Center for Research and Information, Bangladesh: Empowering the Women (Dhaka: 2015), p. 5.

11 M. Shahidul Islam and Suvi Dogra, Institute of south Asian studies (ISAS), National University Singapore, Working Paper, No. 119, 2011, p. 1.

lot of opportunities and endeavors to decide the social and personal factors.[12] The integration of women into the economic activities along with men leads women segment of a state to development. Now a days it is attracting concentration of the high profile social workers, financial policy makers, counsel of the donor countries in the third world. They all claim women participation in economic affairs of a state.[13] Empowerment usually facilitates women to access resources such as food, immovable property, daily or monthly income, and other forms of wealth and monetary gains as well as social resources such as knowledge, power, prestige within family and community.[14] The empowerment of women has been characterized by considering a multi-dimensional concern which can be indicated by education, occupation, family planning method and its mutual acceptance, house hold decision making process, freedom of movement, seeking opinion at the case of marriage, preferences, political choice and participation, subject of legal rights in the state.[15]

## Legal Framework

In Bangladesh a number of legal protection has been ensured for the protection and empowering the women. The Constitution of Bangladesh has dignified the women with adult franchise comparing their male counterpart. The Constitution has vowed that the general people including male and female are the owner of the state.[16] The woman has equal opportunity to participate in state activities.[17] The Constitution has also made the policy to keep the reproductive health fit for work and healthy.[18] The government has taken unfettered initiatives to educate the females in the state and made education compulsory.[19] The government is bound to

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12 Farhana Akter (27), Women Right Activist, personal interview, taken on 12 July, 2018.

13 Gauranga Kumar Pall, Dhaneswar Chandra Sarkar and Shyla Naznin, Present Situation of Women Empowerment in Bangladesh, *International Journal of Mathematics and Statistics Invention (IJMSI),* Vol. 4, Issue 8, 2016, pp. 31-38.

14 R B Dixon, Rural Women at Work: Strategies for Development in South Asia, Baltimore: Johns Hopkins University Press, p. 3.

15 National Institute and Population Research and Training (NIPORT) , Bangladesh demographic and Health Survey 1999- 2000, (Bangladesh and Calverton: 2001), Mariland USA, p. 14.

16 The constitution of the People's Republic of Bangladesh, 1972, Art. 7.

17 The Constitution of the People's Republic of Bangladesh 1972, Art. 10.

18 *Ibid., p. 18.*

19 *Ibid.,* Art. 17.

provide equal opportunity of job or to choose profession irrespective of gender. Nobody could set a barrier on it.[20] Besides, there are some special laws in the state to ensure women rights and privileges.[21] The government has also protected the aged women through their siblings.[22]

**Dilemma between Equal and Identical Rights**

It is a common practice to ignore the opinion of a woman in Indian sub-Continent.[23] It has been practiced for years. The women are not given any chance to submit her opinion neither economic affairs nor even conceiving babies for the families.[24] Family planning program is not a matter of unilateral role to play.[25] The women activists in Bangladesh are working for equal rights to the women. Practically, the equal word does not suit in all the cases. Opportunity may be kept equal but rights should be made effective in comparing the nature of job. The physical construction of male and female are different. The females have to endure a circle of menstruation in every month. She is taught to keep this secret from others. They are not informed properly that this is a sign of maturity of a female or a reproductive health. They need an exemption in these days as well as proper care is needed in these days. In social culture, it refers to a very secret and defaming thing to disclose.[26] Since our social practice, social security still is not in full secured condition for a girl to do everything, at all the times, awareness should be sought and effective rights should be given to women.[27]

One more thing to argue, that the women are staged as a market commodity in the name of modernization and empowerment. 'The practice of decency among women means backwardness and indecency significantly grows modernism and empowerment' – this type of belief

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20 *Ibid.* Art. 29.
21 *The Nari o Shishu Nirjatan Daman Ain,* 2002.
22 *The Parents Maintenance Act,* 2015.
23 Jenneki Arens and Jos Van Beurden, *Jhagrapur: Poor Peasants and Women in a village in Bangladesh,* (Calcutta: Orient longman Ltd, 1977), p. 35.
24 *Ibid., pp. 35- 36.*
25 *Ibid., pp. 55-56.*
26 Shahela Anjum, final year student of Dhaka Medical College, personal interview on July, 01, 2018.
27 Eti Laila Kazi, Teacher, in a personal interview taken on 12 April, 2018.

and practices are going on in the society.[28] In the advertisement world the cheapness of women of the society are sketched. In the world of sports, culture, arts, modern practices of development and modernism, it is observed that the women are not properly shown due respect.[29] The women are to play an anchor role for the satisfaction of spectators, directors, viewers, big officers of the national and international offices.[30] Sushila Nag, an airlines worker was telling the terrific tale. They had to test themselves with zero thread practice in big air ports in India.[31] She argues for a scanner which could identify the metal and like other things in or with body. The security personnel though they are female used to misbehave with the air hostesses and female cabin crews.[32] The practice in Bangladesh is no better to tolerate. The male crews and cabin crews always do criticize of the female counter parts and try to defame.[33]At first it is needed to show due respect to the females and their needful rights should be given to them. A good working environment from house hold to industry, from government office to home, from street sweeper to air crews, from constable to four star general in disciplinary forces could empower them effectively.[34] In the mega city Dhaka, it is observed that like some other countries, city female travelers have been introduced. The length of fundamental freedom for women should be developed to ensure truthful women empowerment.

## Parameters of Woman Empowerment

There are few parameters with which the levels of empowerment of women are measured. The United Nations has set up five parameters with which the status of women in a state could be scaled. Those are self-determination; secondly, sense of self identity; thirdly, access to opportunities and resources; fourthly, power to control their family and

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28 Dr. Sabela Ishtiaq, Women Entrepreneur personal interview taken on 12 .03.18 in Chennai.
29 Akter Zahan, Women Empowerment worker in a NGO in Bangladesh, interviewed on 15 April 2018.
30 Afsana Lailac, Teacher, Personal Interview, April 15, 2018.
31 An Air Hostess in Spice Zet Airways, India.
32 Shushila Nag, air hostess, in Spice Zet Airways, India.
33 Al Imram Khan and Shirin Sultana, personal interview taken on April 17, 2018.
34 Riazul Islam, Journalist in Germany, telephonic interview taken on 12 May 2018.

social life; and finally, to influence the social changes.[35] Basically, these five factors regulate our whole domain of life. If we could think about the villages, we would find that there are lacks of works. The women of the villages usually are neglected by the family heads. A Union Parishad Chairman, the head of the smallest unit of the state administration tells that women are coming out from the family dominance.[36] Two things are creating barrier against that. One is lack of work and another one social contempt against women work. We need to respect works of the women force.[37] Since last two or three decades, it has been observed that females are being appointed in risky jobs also by the Non-Governmental Organizations (NGOs) like red cross and crescent society to extend awareness program in the coastal areas of Bangladesh, health sector by BRAC, and the International Center for Diarrheal Disease Research, Bangladesh (ICDDR,B).[38] Now a days, the women entrepreneurs are significantly contributing to the national and international market, opportunities in job have been increased both in governmental and non-governmental sectors, in education remarkable development have been taken place, parents seldom hankers after for male child; they could neglect the social contempt for male child, in scientific renovations females from Bangladesh are contributing much, in national politics, the female educated candidates are coming forward, special emphasis has been given on the females and reservation of forty five female selective seats in the parliament of Bangladesh indicates the rising trends of women empowerment in Bangladesh.[39]

## Decision Making Process

Women, in Bangladesh social practice, like to be dominated either by father, brother or by the husband or son.[40] In her words domination in all

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35 Guidelines to Women Empowerment, Department of Economic and Social Affairs, UN Department of Population. [www.un.org last visited on 12 July 2018].

36 A K M Enamul Huq Shahin, UP Chairman in Rangpur, Personal interview taken on May 12, 2018.

37 *Ibid.*

38 M. Shahidul Islam and Suvi Dogra, Institute of south Asian studies (ISAS), National University Singapore, Working Paper, No. 119, 2011, p. 14.

39 Tania Sultana, Assistant Professor, Stamford University Bangladesh, personal Interview taken April 20, 2018.

40 Rehana Akter, Women Right Activist, interviewed on May 21, 2018.

the circumstances may not be a barrier to empowering women.[41] Woman's economic participation strengthens the decision making process in the family, over their life and enables to exert influence in the society.[42] Evidence has been found that the age and family structure is the basic factors of scaling women authority in a family.[43] In the decision making process there are two types of indicators, one is extrinsic control over human behavior, financial factors and intellectual parameters; another one is intrinsic capabilities like sense of humor, confidence and transformation of women consciousness which generates the power to overcome the barriers.[44] Decision making process in financial activities refers to the women's capabilities to share or control the domestic financial matters with husband or male authority in a family.[45] It might include the dimensions like participating in spending money about all purposes of the family requirements, purchasing huge amount of house hold goods, and purchasing family luxuries for life style.[46] House hold decision making process combines the formulation and execution of the family daily affairs, child care and rearing up, and own health care endeavors.[47]

## Places Where to Concentrate More

The women development policy has fundamentally described and took sufficient events to bring the women segment in the main stream for the economic development of the country. It has been formulated following the instructions of the international documents and United Nations declarations of Millennium Development Goal (MDG).[48] The Sixth Five Year Plan (2011-2015) took necessary initiatives by the government of Bangladesh to engage women in the political, social and family affairs.[49] It

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41 *Ibid.*

42 Gauranga Kumar Pall, Dhaneswar Chandra Sarkar and Shyla Naznin, Present Situation of Women Empowerment in Bangladesh, *International Journal of Mathematics and Statistics Invention (IJMSI),* Vol. 4, Issue 8, 2016, p. 31.

43 *Ibid.*

44 G Sen and B Srilata, Women Empowerment and Demographic Process: Moving Beyond Cairo, 2000, pp. 96-97.

45 Gauranga Kumar Pall, Dhaneswar Chandra Sarkar and Shyla Naznin, *ibid., p. 33.*

46 *Ibid.*

47 *Ibid*. p. 35.

48 Hameeda Hossain, *Women Development Policy,* The Daily Star, April 4, 2011.

49 Bangladesh Empowering Women [www.cri.org.bd].

has been identified that the term itself would never empower the women in Bangladesh as well as it is not a matter to be given by the male colleague. A clean approach is needed where the women would get support from the family, father and brother, mother and from husband. Women empowerment does not mean breaking of families.[50] There is a practical concept in Bangladesh that for working with women empowerment family has to forsake.[51] In law, lots of things have been assured for the women but the place of implementing authority is still in dark.[52] An environment should be created where women empowerment process will be fortified by the family, society and state.[53]

## Conclusion

Bangladesh including other south Asian countries are implementing the Sustainable Development Goals and SDG 5 requires achievement of gender equality and empower all women and girls. Women development and empowerment is a significant topic in Bangladesh and abroad because they are contributing half of the total process. The foreign donors and the local NGOs are working spontaneously to fortify the hands of women segment of the society.[54] There is classification in women expectation. Few women become capable to achieve empowerment when she faces problem. In this study, it has been articulated that women are supposed to get rights according to the constitution. They are the citizen of Bangladesh. They deserve to get every logical citizenship rights. There is a difference in physical construction between male and female. The nature of service in male and female perspective is different. The question of equal right mostly creates collision between boys and girls, man and woman. The needs of both sides are different. Leave, medical support, wash room facilities of male and females in work place sometime matters. In daily life it is observed that women can employ more strength comparing the male one without any protest. Since the capabilities are different, rights cannot be of equal nature. The right should be effective and need based not on so called equality. We should keep in our mind that

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50 Shahanara Sultana, Assistant Professor, personal interview taken on May 18, 2018.
51 Sharmin Jahan Happy, Women Activist, interviewed on April 17, 2018.
52 Tania Sultana, focused Group discussion in Stamford University on June, 07, 2018.
53 Sultana Jahan, *ibid.*
54 DANIDA, CIDA Yearly Report 2010.

no male member of the society is able to be pregnant and give birth a child but only the female can conceive and give birth child.

Considering the existing socio-economic conditions of our women and legal provisions relating to their rights, duties and status in our country, in order to ensure effective empowerment of our women the government should introduce such a constructive education-system which creates their awareness concerning rights, duties and status, improves their necessary skills in their professional and occupational activities and expands their technical & technology based knowledge. The state should also enact laws guaranteeing their rights to ownership and possession of both movable and immovable property and implement such laws properly. Their participation in the decision making process of family, institution as well public affairs should also be ensured.

We should also take initiatives to bring changes of mind set-up, moral changes in the members of our society, reconstruction of social morality not only of the individual morality but also of collective morality by giving appropriate inputs containing gender friendly philosophical thoughts. Again, the women, especially those who hold advanced and progressive position of the society and the state, should raise their voice against those people who always want to deteriorate the position of women.

# Construction Workers' Rights and Safety: An Unsung Issue in Bangladesh

Md. Raisul Islam Sourav*

*Construction industry plays significant role in the economic growth of the country. Construction workers are in the centre of this development process as the sector is still mostly labour intensive. Despite this vital contribution, construction workers are one of the most negligent and vulnerable workers group in Bangladesh. Moreover, whole construction sector is highly hazardous considering the overall risk and safety concerns. However, there are a lot of irregularities regarding the rights of workers in this industry like no formal appointment, no minimum wages, work beyond formal working hour, no practice of maintaining record book, irregularities in paying wages, lack of safety arrangements, lack of hygiene in work place etc. Non-compliance of law and inadequate amount of compensation for injury or death enhances the plights of construction workers. However, the Bangladesh National Building Code 2006 is the principal legislation in construction industry whereas the Bangladesh Labour Act, 2006 has some common provisions for the wellbeing of the workers. Nevertheless, non-implementation of the existing laws is the main challenge to ensure rights and safety of the construction workers in Bangladesh. Thus, this paper will shed light on the present rights of the construction workers given by the national statutes and status of safety arrangements exist in work place.*

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*Subsequently, the article will analyze the leading legislations in this regard to assess the effectiveness of laws to address the rights and safety of the construction workers. Finally, this study will suggest some way forwards to overcome the existing obstacles.*

*Key Words: Construction Workers, Bangladesh, Rights, Safety, Labour Law, BNBC.*

## Introduction

Bangladesh, being a lower middle-income country focuses on infrastructure development rapidly now-a-days. Both the public and private agencies are emphasizing on infrastructural development of the country hugely. The infrastructural development of Bangladesh also reflects the economic growth and financial strength of the country. There are many aspects of construction sector including real estate sector, construction of government buildings, bridges, ports, roads, metro rail, tunnel etc. Construction as a term, however, is not defined comprehensively by any of the domestic laws in Bangladesh. Nonetheless, the principal international instrument in construction sector i.e. the ILO Safety and Health in Construction Convention 1988 has defined the term construction which covers:

> (i) building, including excavation and the construction, structural alteration, renovation, repair, maintenance (including cleaning and painting) and demolition of all types of buildings or structures;
>
> (ii) civil engineering, including excavation and the construction, structural alteration, repair, maintenance and demolition of, for example, airports, docks, harbours, inland waterways, dams, river and avalanche and sea defence works, roads and highways, railways, bridges, tunnels, viaducts and works related to the provision of services such as communications, drainage, sewerage, water and energy supplies;

> (iii) the erection and dismantling of prefabricated buildings and structures, as well as the manufacturing of prefabricated elements on the construction site.[1]

A large number of workers are involved in construction industry in Bangladesh as the sector is still highly depended on human labour. In accordance with the World Bank report, the construction sector in Bangladesh now accounts for about 8.9 percent of GDP, employing around 3 million people, and accounting for 5.1 percent of the employed labour force in 2015.[2] Moreover, the construction sub-sector performed better in Fiscal Year (FY) 2018, set to post 10.11 percent growth compared to 8.77 percent the previous year, according to the provisional statement of the Bangladesh Bureau of Statistics (BSS).[3] Real estate, renting and business activities have also performed better, expanding by 4.5 percent in FY 16 compared to 4.4 percent in FY 15.[4] The value of the economic activities in this sector is estimated at 737.17 billion for FY 18.[5]

However, construction workers are the integral part of this development process. Although there is massive technological improvement in construction works, still there is good demand and supply of human labour in this sector in Bangladesh. Construction workers are one of the most negligent worker groups in this country as well. A lot of unemployed illiterate youth come to this industry mostly to survive themselves by earning daily basis. However, the nature of employment in the construction sector is quite informal. Workers are mainly employed on a daily basis without any recruitment letter or contract and there is no practice of giving wage slip or maintaining record books. Most of the time

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[1] Art. 3(a) of the Safety and Health in Construction Convention, 1988 (No. 167).

[2] Chowdhury, Sarwar A, Better days ahead for the construction sector, The Daily Star, 18 December 2016 https://www.thedailystar.net/supplements/better-days-ahead-the-construction-sector-1331377, accessed on 3 April 2019.

[3] Construction sector to witness double digit growth, The Financial Express, 15 April 2018 https://thefinancialexpress.com.bd/economy/bangladesh/construction-sector-to-witness-double-digit-growth-1523797433, accessed on 3 April 2019.

[4] Sarwar A Chowdhury, Better days ahead for the construction sector, The Daily Star, 18 December 2016 https://www.thedailystar.net/supplements/better-days-ahead-the-construction-sector-1331377, accessed on 3 April 2019.

[5] Construction sector to witness double digit growth, The Financial Express, 15 April 2018 https://thefinancialexpress.com.bd/economy/bangladesh/construction-sector-to-witness-double-digit-growth-1523797433, accessed on 3 April 2019.

they are called '*jogali'*, which means 'helper', one of unorganized labour segments in Bangladesh.

However, the Bangladesh National Building Code (BNBC) is the main legal instrument to regulate the industry and to protect the interest of the construction workers. Apart from it, the main labour oriented law of the country the Bangladesh Labour Act (BLA), 2006 has some common provisions regarding the work environment, safety, welfare, compensation etc. Nevertheless, lack of proper monitoring from governmental authority, lack of investment from the part of the employer to ensure safety in work place and lack of awareness from the part of the workers are mainly making the situation challenging for Bangladesh. However, this article will mainly focus on the rights and safety measures of construction workers' in Bangladesh along with working environment, workers' welfare and compensation.

To do these, this article firstly looks into the present plights of construction workers in Bangladesh. Then it will analyze the constitutional obligation and other domestic legal frameworks to ensure rights safety of the workers in this industry. After that, this research endeavours to evaluate the existing legal instruments one after another and find out the lacunas existing in the legislations throughout this article. At the next segment, this study will shed some focus on the role of executing authorities to ensure rights and safety in work place. Finally this article will recommend some way forwards to overcome the situation in Bangladesh.

## Plights of Construction Workers in Bangladesh

There are many unsolved issues relating to construction workers such as working hour, minimum wages, safety, security, workers' welfare, compensation etc. and all these are being overlooked by the stakeholders like other sectors. Presently only the Ready Made Garments (RMG) industry gets some focus to be complaint in all aspects including workers' safety due to the Rana Plaza collapse incident and heavy pressure getting from international buyers whereas workers' safety in construction and other sectors have always been ignored by the monitoring agencies. The scenario is more severe for child and women construction workers as there are wage discrepancy and discrimination on the basis of their age and

gender identity only. Along with the risks of deprivation of wages, the absence of a safe working environment and termination of job without any notice and payment, female construction workers are also at risk of sexual harassment and rape.

Construction workers mostly work long hours under sunny and hot weather while according to the culture of the country male workers can go to bushes, drains or somewhere else for their toilet purposes but female workers cannot do that. So they are being deprived of getting access to sanitary toilet and obliged to drink less water. Consequently, female construction workers become a victim of urinary tract infection, back pain, asthma, skin diseases, respiratory problems, constipation and uterine prolapse.[6]

It is also true that construction work is hazardous comparing to other sector in terms of the risk and number of injuries and death in concerned. In addition, the deadline to finish the work, constant cycling, non-compliance of safety measures, unhealthy site environment, lack of facilities, lack of awareness among workers etc. make this sector challenging for the workers specially from safety perspective. Occupational Safety, Health, and Environment (OSHE) study reveals 1,196 construction workers died in a decade (between 2005 and 2016) resulting in an average of approximately 100 deaths a year[7] while 147 workers deaths in 2016 alone.[8] The number of deaths went up to 179 in 2017[9], and as the trend shows, it is highly likely that construction related worker deaths will continue to rise. However, the most common reason behind death in construction site are electrocution (33.03% in 2017)[10] and

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6 Fahmina, Taskin, Female Construction Workers: Outside Legal Purview, New Age, 15 March 2018, http:// www.newagebd.net/article/ 36457/ female-construction- workers-outside-legal-purview, accessed on 3 April 2019.

7 According to the Bangladesh Institute of Labour Studies (BILS) report, approximately 100 injuries in 2016.

8 Reaz, Shaer, Construction site safety: progress made or more of the same?, The Daily Star, 30 September 2018, https:// www.thedailystar.net/ star-infrastructure/news/ construction-site-safety-progress-made-or-more-the-same-1640602, accessed on 3 April 2019.

9 Wardad, Yasir, 179 construction workers die in 2017, study reveals, The Financial Express, 25 January 2018, http:// today.thefinancialexpress.com.bd/ print/179-construction-workers-die-in-2017-study-reveals-1516812038, accessed on 3 April 2019.

10 *Ibid.*

falling from height (28.95% in 2017).[11] The major causes of construction injury and death are:

a) Electrocution
b) Fall from heights
c) Suffocation
d) Wall collapse
e) Fall of material
f) Formwork/shuttering failure
g) Roof collapse
h) Earth collapse
i) Scaffold failure
j) Miscellaneous[12]

The rate of injury is also not negligible rather equivalent to death.[13] The main causes of construction site injury and death are: a) lack of proper training b) deficient enforcement of safety rules c) lack of safety equipment d) unsafe work methods and/or sequencing e) unsafe site conditions f) failure to use provided safety equipment g) poor attitude held towards safety and h) non-use of Personal Protection Equipment (PPE) i) isolated sudden unavoidable events.[14] Aside from death and injury, construction workers also suffer from numerous health hazards such as asthma and breathing problems, hearing loss and skin diseases etc.

However, workers' behavior also play a crucial factor behind the failure to ensure construction site safety practices. Many accidents often occur as a result of insecure actions, in which combinations of human conduct play a role, such as, overconfidence, lack of concentration, lack of motivation and irresponsibility, lack of use of PPE; other factors that must be

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11 *Ibid*.

12 Jamal, Mahbubul Alam Chowdhury, Safety management Issues in Construction Industry of Bangladesh, Project Report for the degree of Master of Engineering in Civil and Structural Engineering, Department of Civil Engineering, Bangladesh University of Engineering and Technology.

13 According to the Bangladesh Institute of Labour Studies (BILS) report, approximately 100 injuries in 2016.

14 Jamal, Mahbubul Alam Chowdhury, Safety management Issues in Construction Industry of Bangladesh, Project Report for the degree of Master of Engineering in Civil and Structural Engineering, Department of Civil Engineering, Bangladesh University of Engineering and Technology.

considered are, physical problems, lack of ability and the absence of adequate supervision.[15]

Nevertheless, taking proper precaution in construction site is vital to ensure safety for both public and workers as well during construction. There are several instances of death and injury due to lack of proper safety measures for example, three construction workers (one was mason and two other assistants) died as scaffolding outside a 12-storey under-construction building broke at Dhanmondi, Dhaka. The victims were plastering an outside wall of the 12th floor of the building while they were standing on scaffolding made of metal pipes and bamboos. As the scaffolding broke, the three fell on the roof of a ground-floor parking space.[16]

In an another incident a worker was killed and two others including an engineer were injured as a 36-metre-long girder weighing about 70 tonnes of the Malibagh-Mouchak-Mogbazar flyover fell on 13 March 2017 in Dhaka. Another girder collapsed during installation at the same spot few days before this albeit none was hurt at that time. Almost a year ago, 25-year-old construction worker Rabbi Ahmed Emon died due to fall of iron rods from the same flyover on him in the same area. Earlier at least four people died and 15 were injured when a concrete girder of the under-construction flyover at Bahaddarhat in Chattogram collapsed in 2012.

However, the judiciary played a role to compensate the victim and victim's family after the Moghbazar-Mouchak flyover collapse incident which brought some ray of hope to those families. A High Court bench ordered the authorities concerned to take public safety measures in Moghbazar-Mouchak flyover construction in 2016. The High Court Division (HCD) had also issued a rule asking the authorities concerned to explain why Taka 50 lakh should not be paid as compensation to the victim's family who were killed during the Moghbazar-Mouchak flyover construction collapse. The court also asked as to why Taka 30 lakh should

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15 Solís-Carcaño, Rómel G. and Franco-Poot, Ricardo J., Construction Workers' Perception of Safety Practices: A Case Study in Mexico, Journal of Building Construction and Planning Research, January 2014, 2(1), 1-11.

16 Construction Site: 3 Workers Killed in City, The Daily Star, 9 June 2018, https://www.thedailystar.net/backpage/12-storey-fall-two-workers-killed-city-1588498, accessed on 3 April 2019.

not be paid to each of the families of the two men who were injured in the same incident.[17]

Nevertheless, the culture of giving proper compensation is not established in this country. Also there is no specific law to assess the damage and pay the damages while the Bangladesh Labour Act, 2006 has provision for very nominal amount of compensation. It is the superior judiciary which takes its own initiative to compensate the victim or victim's family when a news got published in the media or someone brought it before the court. An institutionalization to assess and give proper damages is necessary to rehabilitate the victim and victim's family. Moreover, awareness will be grown among the contractors or developers if they face severe punishment or burden of paying huge amount of money.

## Safety Arrangements under the Legal Frameworks in Bangladesh

Bangladesh is legally committed to promote and protect workers' rights under several international treaties and by their ratification in domestic law. Nevertheless, the execution of these laws is not always visible whereas the State investment policies are also neglecting the rights of the workers in several aspects. Moreover, recurrence of safety failure resulting death and fatal injury in construction sector indicate the impunity with which the employers tend to evade workplace safety laws while the toiling workmen continue to be deprived of their basic human rights including 'right to life', the number one fundamental human right, in exchange of their job.[18]

Nevertheless, there are multi parties involved behind the failure to protect the very basic and legal rights of the construction workers including the developer, owner, contractor, department of inspection of factories and establishments, and other governmental authorities. Each of them has separate liabilities depending on the fact and circumstance of every incident. Maximum construction accidents arise from basic root causes

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17 HC: Why no compensation for Malibag flyover collapse victims?, Dhaka Tribune, 7 June 2017, https://www.dhakatribune.com/bangladesh/court/2017/06/07/malibagh-flyover-collapse-compensation, accessed on 3 April 2019.

18 Sourav, Raisul Islam, The Dark Surface of Construction, The Daily Sun, 12 April 2017 http://www.daily-sun.com/post/218963/Dark-Surface-of-Construction-Work, accessed on 3 April 2019.

such as lack of proper training, deficient enforcement of safety, unsafe equipment, unsafe methods or sequencing, unsafe site conditions, not using the safety equipment by the workers etc. Most of the times these safety measures are being grossly neglected and concerned laws are being violated due to lack of strong implementation of existing laws.

However, in order to address the safety issue relating to the construction workers, apart from the International Labour Organization (ILO) Safety and Health in Construction Convention, 1988 (No. 167), there are couple of basic laws in Bangladesh i.e. the Bangladesh Labour Act (BLA), 2006 and the Bangladesh National Building Code (BNBC), 2006. In addition, the government has formulated a National Occupational Safety and Health Policy in 2013 which also contains provision regarding workplace safety. Apart from these, the Constitution of the country has also guaranteed workers' rights in following ways:

The Fundamental Principles of the State says:

- The State will emancipate peasants and workers from all forms of exploitation;[19]

- The State will ensure the right to work, that is the right to guaranteed employment at a reasonable wage having regard to the quantity and quality of work, and reasonable rest, recreation and leisure;[20]

- Everyone shall be paid for work on the basis of the principle from each according to his abilities, to each according to his work.[21]

Additionally, the fundamental rights guaranteed in Chapter III, especially relevant to workers' rights, include:

- Article 34 prohibits all forms of forced labour and makes it a punishable offence; and

[19] Article 14.
[20] Article 15.
[21] Article 20(1).

- Article 38 guarantees the right to freedom of association and to form trade unions.

However, there is a Department of Inspection for Factories and Establishment (DIFE) for the enforcement of BLA, 2006 & Rajdhani Unnayan Kattripakkha (RAJUK) or the Capital Development Authority is legal authority to enforce the BLA and BNBC, 2006 and responsible to take legal actions against the violators.

**The Effectiveness of the Bangladesh Labour Act, 2006**

The Bangladesh Labour Act, 2006 is the parent law for the overall wellbeing and safety of the workers in the country. Nonetheless, this Act doesn't address the issues of construction workers comprehensively rather covers some common issues as a whole. There is one reason behind not covering the construction industry as still this industry is not formal whereas the BLA mainly looks after the formal labour sector in the country. Additionally, the language of the BLA is ambiguous regarding its applicability to construction work. According to the section 2(61) of the chapter one, establishment to include: 'Contractors or sub-contractor's establishments for the purpose of construction, reconstruction, repair, alteration or demolition of any building, road, tunnel, drain canal or bridge.'

Despite that, it is apparent from the text that this law will also can be applicable to construction work as well. The dark surface behind the impunity against infringement of workers' rights prevails in this Act as there is no provision in the BLA which requires the employers to stop fall from height or stopping electrocution or safe use of trenches etc.[22] Consequently, most of the provisions inserted in this legislation relating to worker health and safety issues are not relevant to the key issues of safety on construction sites.

However, Chapters 5 to 8 of the BLA, 2006 imposes some general obligations concerning health, safety and welfare of workers although

[22] Sourav, Raisul Islam, The Dark Surface of Construction, The Daily Sun, 12 April 2017 http://www.daily-sun.com/post/218963/Dark-Surface-of-Construction-Work, accessed on 3 April 2019.

most of them are primarily relevant for factories, not construction sites. The relevant provision for construction sites are set out in Table 1 below:

| **Relevant Responsibility** | **Section of the BLA, 2006** |
|---|---|
| Arrangement for sufficient and suitable lighting | Sec. 57 |
| Arrangement of sufficient supply of pure drinking water | Sec. 58 |
| Provision of clean and sanitary latrines | Sec. 59 |
| Fencing of machinery in motion or use | Sec. 63 |
| Maintenance of cranes | Sec. 68 |
| Maintenance of hoists | Sec. 69 |
| Secure covering and fencing of floor openings | Sec. 72 |
| Carrying of weights likely to cause injury prohibited | Sec. 74 |
| Notice by employer to inspector of death or bodily injury | Sec. 80 |
| Availability of first aid boxes etc | Sec. 89 |
| Presence of safety record book | Sec. 90 |
| Facilities for washing and bathing | Sec. 91 |

*Table 1: The relevant provision for construction sites enumerated in the BLA, 2006*

The compensation regime is also very weak under the BLA. Chapter 12 deals with the circumstances when an employer is liable to pay compensation to an injured worker or a dependent family in case of death of that worker. Under the law, an employer is liable to pay compensation if personal injury is caused by accident arising out of and in the course of his employment. In case of death, whatever the circumstances of the death, the employer must deposit 1 lakh taka only in the labour court and subsequently it is the responsibility of the concerned labour court to disburse the money to the dependents. The compensation amount is not only very poor but also inconsistent comparing the weight of loss and accordingly not at all acceptable in present situation. Thus, the law should

be amended to increase the amount of damages scientifically considering the actual loss and its consequences.

However, according to the BLA, when a worker suffers permanent total disability that mean losing the capability to work, the employer must pay 1.25 lakh taka. Apart from these, in relation to certain specified injuries, the BLA stipulated that the employer must pay a specified percentage of 1.25 lakh or pay a certain number of month‘s salary. Nevertheless, the enforcement of the existing provisions of paying negligible amount is also not visible due to lack of proper enforcement of the law. The DIFE usually blames that they are not responsible to inspect construction site as their main duty is to ensure safety at factory. Moreover, they have insufficient number of inspectors which resulting the non-compliance of law.

Therefore, it is evident from the above discussion that under the BLA, 2006 there is no comprehensive principles of safety management in relation to construction, instead it sets out discrete and specific actions that developers or employers should undertake to avoid a particular hazard. Furthermore, there is no single independent authority to monitor and regulate the construction industry.

**The Worthiness of the Bangladesh National Building Code, 2006**

The most significant legal instrument regarding the safety management in construction site is the Bangladesh National Building Code (BNBC), 2006. The BNBC actually derives from the Building Construction Act, 1952. In 1993 the BNBC was first drafted following the 1989 American Concrete Institute (ACI) code by the Housing and Building Research Institute (HBRI) to regulate the technical details of building construction and to maintain standard in building construction. Subsequently, in 2006 the Building Construction Act, 1952 was amended to include a new section 18A to empower the government to promulgate the Building Code as a legally binding document. However, now the BNBC is the principal legal instrument concerning construction industry and applies to any construction, addition, alternation or repair, use and occupancy, location, maintenance, demolition and removal of building or structure or any appurtenances connected or attached to it.

Although, the Bangladesh National Building Code, 2006 is the key legal document applicable to construction sites, but even in the Code there are few provisions which deal with the safety of the workmen during construction. The BNBC provides that: "the owner or the professional appointed by him to supervise the work, shall ensure the quality of materials used, soundness of the work and observance of all precautionary measures."[23]

The Code clearly sets out the constructional responsibilities according to which the relevant authority of a particular construction site shall adopt some precautionary measures to ensure the safety of the workmen.[24] So, the employer can never escape himself from being responsible in case of any violation of the safety provisions.

Section 1.4.1 of chapter-1, part-7 of the Code, states the general duties of the employer to the public as well as workers. According to this section, "all equipments and safeguards required for the construction work such as temporary stair, ladder, ramp, scaffold, hoist, run way, barricade, chute, lift etc shall be substantially constructed and erected so as not to create any unsafe situation for the workmen using them or the workmen and general public passing under, on or near them".

Therefore, the safety issue of the construction workers during construction is a precondition for the site authority. The site authority or the relevant employer of the workers must provide the construction workers with the safety tools prior to the introduction of the construction or demolition or even in case of handling of materials. However, employers usually want to avoid their liabilities either by claiming that the workers denied to take safety tools and failed to ensure their own safety by themselves or merely naming this as accident.

The Code has clarified the issue of safety of workmen during construction and with relation to this, set out the details about the different safety tools of specified standard like goggles, gloves, safety boots, apron and hand shield having filter glass of accepted standard and suitable to the eyes of a

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23 Part-7, chapter-1, Para 1.2.1 of the Bangladesh National Building Code, 2006.
24 Part-7, chapter -1 of the Bangladesh National Building Code, 2006.

particular worker.[25] In relation with the health hazards of the workers during construction, this chapter describes the nature of the different health hazards that normally occur in the site during construction and at the same time specifies the specific measures to be taken to prevent such health hazards. According to this chapter, exhaust ventilation, use of protective devices, medical check-up etc. are the measures to be taken by the particular employer to ensure a healthy workplace for the workers.

The key areas of safety responsibilities enumerated under the BNBC are as follows.[26]

| **Key Area Relating to Safety** | **Section of the BNBC, 2006** |
|---|---|
| Storage, stacking, and handling of materials | Chapter 2, para 2.21 - 2.2.20 |
| Loading and unloading of materials | Chapter 2, para 2.3.1 – 2.3.2 |
| Excavation and foundation worker | Chapter 3, para 3.2.1 – 3.2.12 |
| Pile rig | Chapter 3, para 3.3/1 – 3.3.4 |
| Construction of walls | Chapter 3, para 3.4.1 – 3.4.4 |
| Construction of floors | Chapter 3, para 3.5.1 – 3.5.6 |
| Concrete work | Chapter 3, para 3.6.1 – 3.6.4 |
| Formwork and scaffold | Chapter 3, para 3.7.1 – 3.7.6 |
| Erection operations | Chapter 3, para 3.8.1 – 3.8.7 |
| Electrification, equipment and operations | Chapter 3, para 3.9.1 – 3.9.7 |
| General construction hazards | Chapter 3, para 3.10.1 – 3.10.5 |
| Demolition | Chapter 4 |

*Table 2: Main safety responsibility areas under the BNBC, 2006*

[25] Part-7, Chapter-3 of the Bangladesh National Building Code, 2006.

[26] Jamal, Mahbubul Alam Chowdhury, Safety management Issues in Construction Industry of Bangladesh, Project Report for the degree of Master of Engineering in Civil and Structural Engineering, Department of Civil Engineering, Bangladesh University of Engineering and Technology.

However, unbiased and regular enforcement of the BNBC coupled with strong legal enforcement of work place safety are the main challenge behind the lack of safety in construction sites in Bangladesh. Some of the legal issues related to the enforcement and implementation of BNBC as stated in the Code itself are:

a) Part 2, Chapter 2, Section 2.1 discusses about Code enforcement agency. The Government shall establish a new or designate an existing department/agency responsible for enforcement of this Code throughout Bangladesh. The Code enforcing agency shall have the authority of the government and shall herein be referred to as the Building Regulatory Authority (BRA). This authority shall work as apex body to implement the provisions of the Bangladesh National Building Code and will be administered under the Ministry of Housing and Public Works, Government of Bangladesh.

b) Part 2, Chapter 2, Section 2.3.1 enumerates that the administrative and operational chief of the Code enforcing office shall be designated as the Building Official (i.e. the authorised officer) who will perform duties as laid down in the Building Construction Act.

c) Part-2, Chapter-2, Section 2.4.1 suggests that the administrative jurisdiction of building officials will be the areas falling under the Master Plan control of Rajdhani Unnayan Kattripakkha (RAJUK), Chittagong Development Authority (C.D.A.), Rajshahi Development Authority (R.D.A) and other development authorities for their respective areas.

d) Part 2, Chapter 2 gives an idea about the duties and powers vested on the Building Official:

i. Section 2.9.1.provides that the Building Official shall be authorized to enforce all the provisions of this Code and for such purposes the Building Official shall have the power of a law enforcing officer.

ii. Section 2.9.5 narrates that all necessary notices and orders to correct illegal or unsafe conditions, to require the specified safeguards during construction, and to ensure compliance with all the requirements of safety, health and general welfare of the public as included in this Code shall be issued by the Building Official.

iii. Section 2.9.8 suggests that the Building Official may issue an order for immediate discontinuation of a work and cancellation of a previous permit for such work at any stage if any work is being done contrary to the provision of this Code.

e) Part-2, Chapter-3 of the code tells about duty holder.

i. Part-2, Chapter-3, Section 3.8.1 provides that the owner of a building is the one who shall be responsible for carrying out the work in conformity with the provisions of this Code.

ii. In Part-2, Chapter-3, Section 2.13.1 states the term owner which is defined as any person, firm, corporation or government department or agency who as owner of the property constructs any building or structure on that property.

iii. Most importantly, the following statement clarifies about the duty of the developer firms who are currently playing the major role in construction sector. Part-2, Chapter-3, Section 2.13.1 states that the term owner shall, for the purpose of these provisions include any developer who by appointment, contract or lease is or has been responsible for the actions listed above.

iv. For the safety measures Part 2, Chapter 3, Section 3.8.6 states that the owner shall take proper safety measures in and around the construction site.

However, the Code imposes obligation on the government that either a new body will be established or designate an existing agency to execute the enforcement of this Code with a given area of jurisdiction. Nonetheless, the government has yet to establish such an agency to monitor and regulate the construction industry. The Bangladesh Legal Aid and Services Trust (BLAST), along with Bangladesh Occupational Safety Health and Environment Foundation (OSHE) and Safety and Rights Society (SRS) had jointly filed a Public Interest Litigation (PIL) in the High Court Division (HCD) of the Supreme Court of Bangladesh in January 2008 to secure compliance with legal provisions regarding safety and security of construction workers as provided in the Bangladesh National Building Code, 2006.

The petitioners claimed that the concerned authority's failure to give effect to the provisions of the 2006 Code had endangered the security of construction workers, exposing them to the risk of severe injuries and death, in violation of their right to life as guaranteed by Article 32 of the Constitution. Subsequently, the HCD directed the Ministry of Housing and Public Works to establish an agency, or designate an existing body, responsible for the enforcement of the Bangladesh National Building Code 2006, throughout the country by 01 November 2012. Nevertheless, yet there is no progress to establish a Code enforcing authority.

Apart from the issue of enforcement, there is also a fundamental question regarding the determination of responsibility for violation of the Code and what actions shall be taken against the violator. However, Part-2 Chapter-2 Section 2.13.1 of the Code stipulates that if the owner of the property, who shall be responsible for carrying out the work in conformity with the provisions of this Code, violates any part of this Code shall be guilty of an offence and the authority shall take legal action against such offenders. But in reality there is a lacuna in the Code that it does not specify what sort of legal actions should be taken against such offenders and what amount of money should be paid as compensation to the victims of accidents as a result of safety negligence.[27]

However, currently both the permission giving and enforcing agency under the Building Construction Act, 1952 is RAJUK. The chief obligation of RAJUK is monitoring whether construction is being done in accordance with the RAJUK approved designs. It does not look into workers' safety. As a result, the performance of RAJUK in enforcing the BNBC is not at all satisfactory. Hence, people violate the plans during the construction of their building and structures including the safety issues as there is lack of law enforcement and strong monitoring from enforcing authority.

However, RAJUK usually avoids its responsibility by saying insufficiency of number of inspector whereas RAJUK can at least monitor some basic issues by using its existing manpower properly. Nonetheless, undoubtedly it is true that the existing manpower is not enough to monitor the whole

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27 Jamal, Mahbubul Alam Chowdhury, Safety management Issues in Construction Industry of Bangladesh, Project Report for the degree of Master of Engineering in Civil and Structural Engineering, Department of Civil Engineering, Bangladesh University of Engineering and Technology

work process in such a big metropolitan city like Dhaka. In that case RAJUK also can outsource manpower to do its functions. The government should also enhance the human resources in RAJUK. In addition, the government can empower local authority like City Corporation to play vital role in enforcing these rules along with RAJUK. Nevertheless, setting up an independent authority to regulate the construction industry has now emerged as a crying need as RAJUK or other city development authorities are only authorized to take care of these issues inside their territorial jurisdiction. A huge number of area is beyond their jurisdiction and that area is also need to be monitored accordingly.

The Department of Inspection for Factories and Establishments (DIFE) is also a toothless tiger in this regard. They had been facing neglect from the government since its inception in 1970. The number of factories and establishments has increased over the years, but the department has not been equipped with adequate logistics and manpower to discharge its functions properly.[28]

## Way Forward and Conclusion

The concerned stakeholders must consider the significance of safety in workplace for all workers during building construction as construction industry contributes a lot to the country's economic development. Thus, realistic and timely measures should be taken to improve present safety regime at building construction sites. The whole construction work sector must be included in formal work to cover the rights and safety issues of the workers under the Bangladesh Labour Act, 2006. Both the government and private investors should take necessary steps to remove the barrier to accommodate the construction workers group as a formal worker.

Strict implementation of the ILO Safety and Health in Construction Convention (No.167), and its accompanying Recommendation (No.175) can ensure safe and healthy working conditions in Bangladesh. In addition to this, the efficiency of present safety arrangement for the construction workers under the BLA needs to be addressed. Constitution of an independent authority is obvious to regulate the construction industry. Apart from the enforcing agencies like the DIFE and RAJUK, local authority such as city corporation or municipality need to be more empowered to monitor and regulate this sector till the establishment of an

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28 ibid

independent authority to regulate this sector. Most of the injuries and death in building construction industry are caused due to lack of proper knowledge and training regarding safety measures and also because of negligence and ignorance on the part of either the worker or the management or both. Maximum construction site incidents can be avoided simply by following the BNBC strictly so as not to lose any more valuable lives. However, the government can introduce insurance for the workers as the current compensation regime is very poor under the present law.

However, to ensure a safe workplace at the blooming construction industry and to uphold the rights of the construction workers concerned stakeholders of the country should seriously think about the following recommendations to overcome the shortcoming of the construction industry in Bangladesh:

I) Adequate safety measures such as modern equipment at workplaces must be provided;

II) Proper training must be offered to the engineers, inspectors and workers to make sure productivity in a secured work environment;

III) Proper warning should be provided before starting a risky work in order to minimize accidents especially in electrocution work and in a high rise-building;

IV) Workers should put on safety belts when they work in a high rise building;

V) Workers should know how to use helmets on construction sites, how to put on gum boots, and how to use of safety nets etc.;

VI) Employer must provide and oblige the workers to use the personal protection equipment;

VII) Rules regarding safety and security need to be strictly imposed and violations must be punished in an exemplary manner.

VIII) The government should inspect the construction sites regularly for compliance of rules and rules violations are to be reported to them so that they can take necessary steps properly;

IX) Media should report workplace accidents and make the higher authorities of real estate companies accountable and workers aware in this regard;

X) Automation and a move to reducing labour-dependency can be explored in the pursuit of safer construction sites;

XI) Constitution of an independent body is urgent to regulate the construction industry;

XII) RAJUK should undertake measures to ensure safety and security of the workers;

XIII) Local authority needs to be empowered to monitor and regulate the standard of safety at construction site unless a new independent body has been constituted;

XIV) Government can instruct the stakeholders to offer a well-structured monthly remuneration instead of daily or irregular pay-system;

XV) Appointment letter, minimum wages, leave, pay slip, minimum working hour, maternity benefits etc. should be given to the construction workers;

XVI) Workers should be offered medical allowances, festival bonuses, and some other allowances by the company;

XVII) Proper health and safety training as well as detailed briefings are a necessary step before work begin;

XVIII) There's a need for comprehensive training and safety policy enforcement at a national level as opposed to just private initiatives;

XIX) Immediate revision of the accident compensation clauses under Bangladesh Labour Act, 2006 is needed;

XX) Initiative to introduce insurance for workers' is essential;

XXI) A separate fund can be created for the compensation of the injured or died workers;

XXII) Professional bodies like Institute of Architects Bangladesh and Bangladesh Institute of Planners can be involved in construction projects as members of the supervisory team to enhance the quality and reliability of the construction projects;

XXIII) Based on the National Action Plan under the National Occupational Health and Safety Policy, 2013 actions should be taken to ensure safety issues of RMG, construction, leather and ship breaking industries;

XXIV) The government should take proper measures to bring women construction workers under a coordinated social protection mechanism that should include fair wages, accident and health insurance, safety and security measures, sanitation and drinking water, low-cost housing, day care facilities etc.

XV) The contractors must be registered and a government monitoring cell should work to monitor and supervise whether laws are violated.

However, the kind of killing happened in the construction sites can be regarded as corporate manslaughter.[29] Although the Penal Code, 1860 and some other special piece of legislations have been enacted for protecting individual right to life and liberty from attack of other individual(s), but there is absence of specific legislation for addressing killing of people for acts of a corporate body. Corporate manslaughter is a crime which enables a corporation to be punished and censured for culpable conduct that leads to a person's death and it extends beyond compensation that might be awarded in civil litigation or any criminal prosecution of an individual for his individual act. The criminal liability of the owners of corporation is direct in such a way that he is the ultimate beneficiary of the corporation; and the ultimate decision makers of a corporation are some individuals and not the corporate personality.

Furthermore, trivial and shamefully inadequate amount of compensation which has been offered to the families of the dead and injured workers after these kinds of incidents exemplifies the disregard and disrespect for

[29] Sourav, Raisul Islam, The Dark Surface of Construction, The Daily Sun, 12 April 2017 http://www.daily-sun.com/post/218963/Dark-Surface-of-Construction-Work, accessed on 3 April 2019

construction workers without whose blood the tag of lower middle-income country could not have earned. Civil as well as criminal liabilities should be imposed upon them for not exercising due diligence in ensuring workplace safety.

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# A Review on 'What Next in the Law' by the Right Honourable Lord Denning

Jibrul Hasan*

*'What Next in the Law'* by the Right Honourable Lord Denning[1] delivers an entertaining account of law reform as well as the administration of justice in England. While serving as the Master of the Rolls, Lord Denning wrote this book in 1982. The author prefaces his target to look into the future, to set down some legal issues and to reach forth to the reform of the law in several branches. He finds Royal Commissions, Departmental Committees and government Blue Books to recommend for development, but turned down by the successive governments. Being disquieted, he deems his book would be the necessary spur to get things done. He thrashes out decided cases of House of Lords and Court of Appeal as he supposes '*the experience of the past points the way to the future'*. The author reckons the function of the law as to thwart the abuse of power. He admits that most of the topics in the book to be controversial and that he did it consciously.

Former Master of the Rolls Lord Denning is the most eminent judge of the 20th century. The fondness of lawyers and people in general for him is perhaps incomparable in history. As Master of the Rolls, he headed the civil side of the Court of Appeal for 20 years. He used to write judgments in ordinary language. The ardent feelings of justice often engrossed him in controversy, particularly to the debate- whether the duty of the judge is to change the law instead of explaining it. He was the last judge having the right to continue the judicial functions for life. Although he had to give up his position in the very year of publishing this book for the conflict-ridden remarks he made on the black jurors. He deduces some non-English ethnic origin to be not suitable as jurors as they did not have the same standard of

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1 Alfred Thompson Denning; b. 1899; edu., Magdalen College, Oxford (First, Jurisprudence and Mathematics); called to the bar, 1923; K.C., 1938; King's Bench Judge, 1944-1948; Lord Justice, 1948-1957; Lord of Appeal, 1957-1962; Master of the Rolls, 1962-1982. Died in 1999.

conduct as racially write English-men. He also finds black defendants in Bristol riots case using peremptory challenges to pack the jury with colored men. In turn, two black jurors threatened to prosecute him for libel. This confrontation led him to step down as Master of the Rolls at 83 years of age. He died in 1999 at the age of 100. The 14th Lord Chief Justice Lord Bingham said, *"Lord Denning was the best known and best loved judge of this, or perhaps any, generation. He was a legend in his own lifetime."*

The eight parts of the book set out different topics. Each Part has diverse captions and sub-captions planned to entertain the reader. The construction of the book allows the reader to easily take hold of every issue. The author examines every issue from historical perspective to the current state of law and puts forward proposals for reform. To make the discussion fascinating and comprehensive, each part contains an introduction and comes up with author's propositions to close the loopholes as portrayed out. The detailed references are found in the footnotes.

The book begins with a preface and then steps forward through the discussions on great reformers of law, jury trial, legal aid, personal injuries, libel, privacy and confidence, bill of rights, and misuse of power.

By the first part, the readers become familiarised with the five **greatest reformers** of English law from 13th, 16th and 18th centuries namely- Henry Bracton, Sir Edward Coke, Sir William Blackstone, William Murray and Lord Brougham. At the outset, the author places discussion on William Bracton who proclaimed the much quoted words, "*King is under no man, but under God and the Law*". The author demonstrates the contribution of Bracton in introducing the English system of precedent by using his notes on 2000 decided cases of 13th century. The author depict that while Attorney-General Sir Edward Coke was a strange mixture of cruel and unjust, whereas wise and just while Chief Justice, and a renowned personality for his writings. As Attorney-General, Coke's disgraceful conduct is well portrayed in the case of Sir Walter Ralegh (p. 8). To inflict capital punishment, Coke used a fake letter against the accused. However, as a Chief Justice of the King's Bench, Coke took his valiant and courageous position in the *Bishop case* (1617) where he refused to act upon the King's order to stop further proceeding of the case until the King was consulted with. For this, he was sacked from the post of Chief Justice by the *writ of supersedes*. After removal from the office, Coke became

Member of Parliament and played active role to pass Bill of Right in 1628. The author then speaks about William Blackstone, the greatest exponent of the common law. His reference, written as an introduction for students of common law, was published in 1765. How the *Commentaries* played vital role in the development of law is illustrated in that portion. The author then comes to William Murray, a Scottish origin, who derived his principles of law from the Roman civil law and writers of Scottish, Dutch and French legal systems. He wanted to generalize the principles of law and to shape them for future guidance. For integrating the principles of equity and good conscience with English law, Murray was subjected to much criticism. Murray's library was gone up by fire in the incident of *Gordon Riots* (1780) for which poet William Cowper wrote *'the lawless herd with fury blind, have done him cruel wrong.'* Thereafter, the author talks about Lord Brougham who become a celebrity in the public eye by his defense of Queen Caroline, his flamboyant speaking, and the famous speech of 1830 which *The Times* described as 'overpowering, matchless, and immortal'.

Part two of the book deals with **Jury Trial**, which is asserted by the author as the glory of English law. It is the most interesting chapter in this book. He quotes his friend Lord Devlin who proclaims 'it is the lamp that shows that freedom lives.'[2] He points out weakness of the existing jury system. In doing so, the author depicts out earlier stories when occasionally jurors were kept *"without meat, drink, fire or candle"* for their unanimous verdict and if found with such things they would be prosecuted and punished. Referring a judge namely Judge Jeffreys, the author says that time and again the judges threatened the jury to decide a particular matter according to their will. The author describes a few notable incidents from 1367 under the heading of *Causes celebres*. The author demonstrates 19th century as the golden era of Jury Trial. The *M'Naghten's* (1843), the *Cabin Boy* (1884), and the *Russell Baby* (1924) are the most celebrated cases discussed here. Many reforms took place during the author's term of office in the Court of Appeal, for example- abrogation of the rule requiring unanimity, approval of jury vetting, and right of challenging the jury. The author condemns the errors of jury trial and explains how to overcome these. The author finds attempts to pack the jury with colored juror to get verdicts in favor of the accused. He suggests abolishing peremptory challenge, making panel of qualified jurors, having special jurors for

[2] (p.35).

complicated cases, trying minor cases other than by jury, fixing the qualification of juror, non-suitability of the ordinary man to be juror and the new way of selecting the jurors.

**Legal Aid** is dealt with in Part three. The author tells the age old adage that no wise man would go to law court unless he was pretty sure of winning- or the circumstances made it inevitable. The reason was that the loser party had to pay the costs of litigation to the winner one. He tells about Court of Chancery, the only court of that time having much of the lawsuits regarding the assets of late persons. The author starts from the time when the property had to be sold very often for paying the costs of the lawyers and it was considered as abhorrently mischievous to let someone lend cash to litigant or undertake to pay his lawyer. It was said, 'every person must bring his own suit upon his own bottom and at his own expense'.[3] Even an accused was never permitted to have a counsel on an allegation of felony, and only he could make a statement from the dock. By a law of 1836 the accused was permitted to have counsel for his defense. The author thinks the legal aid scheme, in civil cases dated from 1949 and in the criminal cases from 1967, to be of immense worth to recover debts or damages which the poor people otherwise could not do. He claims the State funded Legal Aid to be a great revolution since the Second World War. However, the author depicts some facts where the legal aid fund had been abused by the plaintiff only to harass the defendant and to impose undue pressure for a settlement. He contends that solicitors had an interest in running up costs of legal aided cases. He suggests the Area Committee in granting legal aid should be more watchful. He also thinks that it is unjust to an innocent person who wins the case after fighting a legally-aided person, but gets nothing from him or legal aid fund. He thinks the legal aid scheme should be extended for the middle income people and the unassisted defendants who succeed the case against legal aided plaintiffs. The author believes the responsibility of the solicitor is not only towards his client but also towards the legal aid fund. This is an interesting chapter that is worth reading.

In Part four, Lord Denning shows the law on **personal injuries**, based upon the law laid down in the 19th century, to be utterly outdated and thus he feels the need of urgent reform. As regards traffic accident, the author finds many injured or killed were unable to prove the defendant's

[3] *Wallis v Duke of Portland,* (1797) 3 Ves Jun 494.

negligence and thereby recued no damages. Even though the plaintiff did succeeds in establishing the defendant's fault, the law used to be that he could recover nothing if he was at fault himself. By the rulings of illustrious case of *Butterfield v Forrester* (1886) and *Davies v Mann* (1842), the question used to put for over 100 years is 'Which of the two had the last opportunity of avoiding the accident?' But after the Act of 1945 the plaintiff could recover damages despite his own fault. The author states that the drivers are mandatorily required to have insurance under Road Traffic Act and from there injured person could recover damages from the insurance company if the defendant had no means to pay. Considering the situation of motor traffic, the author thinks, the plaintiff need not prove the defendant's negligence since requiring a wounded person to prove fault results in the gravest prejudice to many innocent persons. Thereafter, the author talks about damages which is still resultant of jury trial and it had to be one lump sum. Until 19th century, as the author says, the amount of damages was entirely at large for the jury to decide. Even the amount was never been subdivided into different items but one lump sum only. In 1970, parliament mandates the damages to be divided up into four items: pecuniary loss and expenditure during trial, future expenditure, loss of future earnings and pain and sufferings and loss of amenities. He thinks, instead of a lump sum award there should be a system of periodic payments. He suggests *solatium* to be introduced instead of awarding compensation since the pain and suffering resulting from accident cannot be assessed in terms of money.

The law on libel is dealt with in Part five of the book. The author finds the law on libel in a deplorable condition. He illustrates the development of libel law through the Star Chamber of the 17th century, the Common Law Courts and the events of the 19th century. Earlier serious libels were criminally prosecuted and most cases were tried by civil courts. After the 19th century, there were no such divisions and every libel could be dealt with by both civil and criminal courts. Over the hundred years, as the author says, it was a rarity to prosecute the newspaper for libel. In this chapter, the author tries to uncover the underlying policy of libel law. In response to the House of Lords view of the readers' appreciation is the foremost thing than what the writer intends to say, Lord Denning considers it a wrong observation. According to him, the words alleged to be libel must be with the intention to refer to the plaintiff. He has always a preference to give fair comment and fair information of the newspaper a special dispensation from prosecution. To surmount the deplorable state of the libel law, he wants the Reports of the special Committees to be implemented.

Part six is about **Privacy and Confidence**. The author initiates this component with the discussion on human rights disputes– privacy vs. freedom of expression. He observes that the relevant laws on that area do not find place in any statute in England but in the judge-made laws. The author describes a number of cases where privacy and confidence gained prominence and sometimes not. He opines unreasonable interference upon one's seclusion or privacy or into his private affairs to be an infringement of privacy rights. He thinks breach of confidence is justified only if it is done in the public interest. He stresses on the investigative journalism and wants to give it a special privilege. To this end, he thinks the newspaper or television ought not to be asked to disclose the source of their information unless such revelation is necessary for public interest. Thus, he postulates for a balanced exercise between privacy right and public interest. In this circumstance, Law Commission was to opine if the law on privacy should be left to be worked by the courts or be embodied in a statute. Though the Law Commission was in favour of a statute, the author thinks it is the balancing exercise in each incident and for that reason it should be left with the court. The author's stance is the reconciliation between the right of privacy and the right of freedom of expression.

Part seven of the book is on Bill of Rights. Before giving feedback on general people's aspiration that a bill of rights is considered necessary in England, the author goes back in history. He speaks shortly on the Magna Carta of 1215, the Petition of Right of 1628, the Bill of Rights of 1689, the Universal Declaration of Human Rights of 1948, and the European Convention on Human Rights of 1950. He inquires if Parliament is to pass a statute making the European Convention part of national laws, how the courts consider these instruments, and what the effect would be if these human rights instruments were made expressly part of national laws. To show the way in which the courts in England consider the European Convention, the author discusses four leading cases. He opines that European Convention on Human Rights should not be incorporated into national laws since it would make the European Court supreme judicial body over the English House of Lords along with other reasons. He thinks not to disregard the European Convention altogether nor to shallow it altogether. He thinks House of Lords may have a look upon to the Convention and consider if it is a proper case to apply the Convention. Thus, the author is against any new Bill of Rights in England.

The concluding Chapter eight deals with **abuse of power** which is taken from the author's Richard Dimbley Lecture delivered on television previously. He starts his discussion with the well-known dictum of great

historian Lord Atkin, *'Power tends to corrupt, and absolute power corrupts absolutely'*. The author is of the view that in the past the abuse was remedied by revolt and currently the only acceptable remedy for such is by resort to law. And to get this acceptable modern remedy effective, the necessary corollary is the independence of the judges, and he is proud in saying that it has been achieved in England. Regarding the debate on parliamentary supremacy, the author reminds Lord Coke's saying of nearly 400 years back, *'When an Act of Parliament is against right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge that Act to be void.*[4]' The author regrets that this sapling planted by Lord Coke failed to mature in England, but grew up into a strong tree in the USA. The author is against the unregulated power and immunities of the trade unions in inflicting injury on employers and others fairly distant from the dispute. The author is not in favor of the rulings that minister's statutory power to do a thing 'if it appeared to him' or 'if he thought fit' could not be questioned in courts. In this regard he quotes Thomas Fuller, *'Be you never so high, the law is above you'*. The author terms the media to be the most powerful bodies which can make public opinion. He gives example of unfair presentation of media too. The author gives example of *Granada* case where after delivery of the verdict by Court of Appeal, the outrageous media said '*Denning is an ass'*, *The Observer* came out with a headline *'Why Denning is an ass'*, *The Times* made their heading '*Lord Denning, this time, is on the wrong side....'*, and when the House of Lords upheld the Court of Appeal, *The Times* described it *'The decision of the House of Lords in the Granada Television case is restrictive, reactionary, and clearly against the public interest'*. Lastly, the author talks about the judges. On the issue of judges' misuse of power, the author comes up against Juvenal's question, '*But who is to guard the guards themselves?*'. Regarding the touchy question as to whether the judges would be the tools of the appointing authority, the author's straight answer is *'No'*. He suggests trusting the judges.

Lord Denning wants to reform the prevalent status of law which again is represented in his last sentence of the book, '*In this book I have stood the law on its head- in the hope that you may help to get it the right way to up.'*

In *What Next in the Law*, Lord Denning MR pointed out cases in which very often the House of Lords overturned his verdicts of the Court of Appeal. Occasionally he didn't accept it, however sometimes he stands

[4] *Dr Bonham's case* (1608) 8 Co Rep 113b, 118a.

himself corrected. In reaching his own proposal, he discussed the recommendations coming from the Royal Commissions, Departmental Committees and other authorities of law. He was condemned by the House of Lords, even though he dares speak against the authorities including the government. Being a sitting judge, he criticizes the existing system and the judges of House of Lords. In relation to the case of *Lewis v Daily Telegraph Ltd*, he indicates that had he been in the House of Lords he would not have agreed to that ruling[5]. He did not hesitate to say that during the *Artemus* case (1910) not a single member of the House of the Lords had any experience of the law of libel in England[6]. For taking the Royal Commission Report, proposing amendment of law on personal injuries, down from the shelf for years, the author term it, 'Scurvy treatment by an ungrateful Government'.[7] So it remains a big controversy whether a sitting judge can speak in a way disregarding his higher authorities including the government. Should this be done very often by judges?- is also remained unrequited.

I believe *What Next in the Law* is an excellent book. Planned to bring changes in the various branches of law, this book is a pleasure read as the author writes in simple English without the technical terminology. Though the topics discussed in the entire book are lacking in depth but every issue is very fascinating to read. By going through this book, one can appraise his own jurisdiction. Hence, *What Next in the Law* is worth reading for law students, lawyers, law makers, judges, journalists and those who are concerned with the future of law in any jurisdiction.

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5 (p. 183).
6 (p. 174).
7 (p. 157).


# Judicial Administration Training Institute

The Judicial Administration Training Institute, shortly named as JATI, is the only training institute in Bangladesh which provides training to the judges and judicial magistrates, government pleaders, public prosecutors and the court staff. This statutory organization has been established in 1996 with the task of imparting legal knowledge and practical skill of administering courts and attached offices to the members of the subordinate judiciary and other stakeholders of the justice sector for brining positive change in the justice delivery system in Bangladesh. The JATI has been trying to achieve the objectives by arranging various types of training programme separately for the target groups. It also publishes an yearly journal on the contemporary judicial issues, complexities of laws and their application in practical field.