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## FOREWORD

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

JATI has so far organized 89th training programs providing training to Judges, court support staff and law officers of the Government. Besides the faculty members of the Institute, resource persons amongst others include the judges of the Supreme Court, reputed lawyers and subject matter specialists who have proficiency in the relevant subject. Hon'ble Chief Justice of Bangladesh and other legal luminaries are invited as resource persons in the training program of JATI. Their valuable contribution will make the JATI a centre of excellence for judicial education in this region.

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

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

June 2009  
Dhaka

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



## DELAY IN JUDICIAL PROCEEDINGS- PROBLEMS AND SUGGESTIONS TOWARDS SOLUTION- A JUDGE'S VIEW

— Md. Tarik Haider

Judiciary is one of the three organs of the state. Where there is democracy in the body polity- the responsibility of judiciary is much more important than two organs i.e. Executive and Legislature. If judiciary fails to discharge its assigned duty properly and in an orderly manner then the total machinery may collapse. Nowadays, it is said that, "democracy and development go side by side". But in absence of a strong, impartial, independent, quick and dynamic Judicial system neither democracy nor development can flourish and sustain in country. In absence of a strong and dynamic judiciary the concept of good governance and transparency in the government activities can not be materialized and also the desired civil society can not be established and survived. Keeping all these views in mind makers of our constitution have kept provision for speedy and fair trial in article 35(3) of the constitution of the Peoples' Republic of Bangladesh. With the insertion of this provision in our constitution it has become a citizen's constitutional right to get fair and speedy trial. In spite of constitutional guarantee getting of speedy trial remains a far cry for a Bangladeshi citizen due to some practical problems which cause inordinate delay in disposal of cases/suits.

2. Two quotable questions make their rounds in the judicial arena. These are (i) "Justice delayed justice denied" and (ii) "Justice hurried is justice buried". In the ordinary course of law generally, justice is not hurried in our country, particularly when constitutional system works. But it is true, that in our country save and except a few exceptions justice is always delayed and thereby often denied.
3. Judges of Bangladesh are concerned with adjudication of various types of civil and criminal cases. So, they are concerned with both civil and criminal administration of justice. Causes of delay in disposal of cases are manifold in nature. It appears to me that causes of delay are product of three main factors. These are:
  - i) Structural limitations and defects;
  - ii) Legal and procedural defects and shortcomings; and
  - iii) Moral or ethical defects and conducts of the concerned Judges, lawyers and staff. All other reasons of delay in disposal of cases emanate from

these three main problems and related to these. Though some causes of delay in both Civil Administration of Justice and Criminal Administration of Justice are common in nature, but there are some other causes of delay which are quite distinct and related to each class of cases. Reasons for delay in disposal of civil and criminal suits/cases, appeals and revisions are discussed below separately.

#### 4. Causes of delay in Civil Cases :

- i) Pendency of large number of cases in various tiers of civil courts. Number of judges is quite insufficient to cater the need of adjudication of huge number of backlog of cases.
- ii) Structural insufficiency- Number of courts is less in comparison to the number of suits/appeals, lack of accommodation, insufficient and less experienced and poorly equipped staffs, Old system of office management, unhealthy accommodation system, poor logistic support etc.
- iii) Too many and unduly long adjournments are often granted on flimsy grounds at the hearing stage and all other stages as well, like for filing deficit court fees, process fees, cost of commissions etc. without any inquiry as to whether there are sufficient legal grounds for exercise of the courts discretion. The discretionary power of the court under section 149 of the Civil Procedure Code (C.P.C) in these regard and also under section 148 of the Civil Procedure Code (C.P.C) is not exercised by the court properly. These powers are often being used as deliberate attempt to delay the disposal of cases.
- iv) Many adjournments are frequently granted as a matter of course for filing written statement and payment of adjournment cost is rarely ordered, if ordered, default in payment allowed to go unnoticed.
- v) The parties are allowed to amend pleadings at a late stage of case even, though they could have taken the requisite steps at a much earlier stage.
- vi) Documents which must under the law are to be filed either with plaint or at the first hearing are allowed to produce at any stage of the case.
- vii) Cases are also adjourned with undue leniency at the peremptory hearing stage.
- viii) Examination and cross-examinations of the witnesses are not subject to adequate control.
- ix) Adjournments are frequently granted to enable pleaders to prepare their arguments.

- x) Suits which have been dismissed for default or decided ex parte are too frequently restored on inadequate grounds.
- xi) When a party is granted time for taking any step fails to do so within the specified time, repeated exemptions are granted to the party and thus cause of delay in disposing of cases occurs.
- xii) Processes filed by the parties are not promptly sent to the Nazir for necessary action and process service returns are also not sent to the Sherista of respective courts from Nazarat in time.
- xiii) Delay also occurs in the Nazarat in the matter of distribution and issue of process.

### **Causes of delay in Criminal Cases :**

"Every person accused of a criminal offence shall have right to speedy trial". So said in the article 35(3) of our constitution. But due to some practical problems available at various stages of criminal case proceedings have made it impossible to dispense speedy and quick justice. Reasons for delay prevalent at various stages of criminal cases are mentioned below:

- a) Causes of delay at investigation stage;
  - i) Delay in starting investigation;
  - ii) Delay in submitting investigation report;
  - iii) Non submission of allied documents like medical certificate, expert opinion, seizure list etc. along with the police report under section 173(3A) of the Code of Criminal Procedure (Cr.P.C). Delay in disposal of Naraji petition with regard to acceptance and rejection of police report or delay in disposal of revision arising out of acceptance or rejection of a Naraji petition.
  - iv) Shortage of number of investigation officer corresponding to large number of cases awaiting investigation.
  - v) Lack of experience of investigating officers.
  - vi) Absence of separate, independent, well experienced, well equipped and well trained investigating agency.
  - vii) Non availability of sufficient number of experts like chemical examiner, finger print and hand writing expert whose opinion is required by Investigation Officer for arriving at a decision regarding occurrence of the alleged incident.
  - viii) Poor logistic support of investigating agency.

## 5. Causes of delay at trial stage :

Practically trial stage of a criminal case commences after submission of investigation report under section 173 Cr.P.C. and taking cognizance of an offence by the court either on the basis of investigating report or on the basis of complaint petition. But due to following existing problems amongst others at various stages of trial disposal of criminal cases are often delayed:

- i) Huge number of backlog of cases in comparison to number of Judges and courts.
- ii) Failure of police in ensuring the attendance of prosecution witness during trial under section 171(2) of Cr.P.C. in spite of repeated issuance of processes.
- iii) Lack of proper knowledge of magistrates, judges and conducting lawyers about connected substantive and procedural laws.
- iv) Lack of initiative of judges and magistrates to try cases in a speedy manner.
- v) Non execution of writ of proclamation and attachment under section 87 and section 88 of Cr.P.C. for appearance of the absconding accused and thereby causing delay in getting a case ready for hearing.
- vi) Absence of efficient, knowledgeable public prosecutors and defence lawyers.
- vii) Absence of full and sincere co-operation of conducting lawyers towards the end of speedy trial.
- viii) Frequent adjournments of case at trial stage on less important pleas.
- ix) Outdated and time consuming mode of recording evidence of witness.
- x) Paucity of accommodation, trained manpower, machinery and other paraphernalia of courts.
- xi) Lack of sense of responsibility and accountability of judges, magistrates, conducting lawyers and connected staffs.
- xii) Absence of proper control, supervision and monitoring by the superior courts and authority over respective subordinate courts.

## 6. Recommendation to overcome the problems of delay in Judicial Proceedings:

Saving few exceptions problem of delay in disposal of civil and criminal cases

are more or less common and identical. As such, following remedial measures are suggested to address the problems discussed above:

- a) Number of courts should be increased in proportion to the figure of pending suits/cases.
- b) Classification of courts to deal with particular class of cases. According to this proposition specialized courts can be set up upto the level of Additional District and Sessions Judges level. Under this scheme joint jurisdiction of Additional District and Sessions Judge may be bifurcated. Additional District Judge will dispose of only civil appeal and other cases of civil nature, Additional District Judge will adjudicate only case of criminal nature. Similarly, judicial power of Joint District Judge and Joint Sessions Judge may also be bifurcated. Under this scheme one court should not be vested with original and appellate jurisdiction simultaneously. This sort of classification and specialization of judicial power will increase efficiency, expertise and excellence of a judge.
- c) Increases in the logistic support, adequate official and residential accommodation, modern equipment and machinery.
- d) Photocopier machine may be used for supply of certified copy of judgment/order. Related laws may be changed for this purpose.
- e) Providing steno-typist to all judges/magistrates.
- f) Audio-video system may be introduced for recording statement and deposition of accused and witness.
- g) Mandatory time frame may be fixed for concluding investigation with consequence and liability of the Investigation Officer in default.
- h) Creation of separate specialized investigating agency with well trained personnel having necessary academic back ground.
- i) Case load should be equally and systematically distributed amongst courts.
- j) Introduction a modern information system (MIS) in all courts through computerization.
- k) Unnecessary adjournment at hearing stage and other stages should be stopped. Maximum number of adjournment should be fixed by law with provision for compulsory payment of adjournment costs.
- l) Constant supervision and frequent inspections by superior courts upon sub-ordinate courts as envisaged in the Article 109 of the Bangladesh Constitution.

- m) Periodical and Annual inspection of sub-ordinate civil courts by the District Judge as per Civil Rules and Orders must be ensured without failing.
  - n) Adequate and extensive training should be imparted to judges, magistrates, government pleaders, prosecuting lawyers, investigating officers and staffs of courts.
  - o) A separate and permanent legal service cadre should be created with a view to recruit law officer on competitive basis for conducting civil and criminal cases on behalf of the government and prosecution.
  - p) An effective system of accountability and transparency of activities of judges and lawyers should be introduced.
  - q) Obsolete and inefficacious, over lapping, contradictory laws, rules and regulations should be repealed and omitted. New laws, rules, procedures should be enacted and introduced to remove present bottleneck created in the way of expeditious disposal of cases.
  - r) More criminal cases except cases involving grave and serious offences under Penal Code and other schedule offences and also under special laws should be allowed to compound by the parties with permission of court on condition of payment of monetary compensation to the aggrieved person. For this purpose necessary amendment is section 345 of Cr. P.C. and in other relevant laws may be brought. This step may reduce volume of present backlog of pending cases to a large extent.
7. Institution of judiciary is creation of law. Law is not static. It is always dynamic. Our judiciary has come to its present form through evolution and changes. Changes took place out of necessity. So, in order to keep pace with present trend and need, our judiciary also should be made more dynamic.

## Execution of Decrees and Orders and their significance in our Civil Justice System

—Hasan Shaheed Ferdous

*Execution of Decrees and Orders: (Sections 36 to 74 and Order-XXI of the Code of Civil Procedure, 1908).*

**General:** After the passing of a decree, a successful party (*decree-holder*) puts it in execution in order to reap the benefit of the decree. The unsuccessful party goes to the Court of Appeal or Revision to have the decree of the Court of the first instance *set aside* or modified. The decree passed by *the Court of the first instance* is the decree to be executed unless and until it is merged in the decree passed by the *higher Court*. The question arises: Which is the Court competent to execute the decree?

**Court competent to execute the decree:** Section 38 provides—"A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution."

Section 37 defines the '*Court which passed the decree*' and sections 38 to 46 and rules 3 to 9 of Order-XXI deal with transfer of decree, mode of transfer and functions of the transferee Court.

Section 37 has *two* parts: The "Court which passed a decree", or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include:

- (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of the first instance, and
- (b) where the Court of the first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for execution of the decree, would have jurisdiction to try such suit.

The Court which passed the decree may, either on its own motion for the sake of convenience, after recording reasons, transfer a decree for execution by another Court competent to do so, or it may do so on the application of the decree-holder. Order for transfer of a decree may be passed under the following circumstances:

(a) When the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain within the local limits of the jurisdiction of another Court. (b) If such person has no property within the local limits of the jurisdiction of the Court which passed the decree, sufficient to satisfy the decree, but has sufficient property within the jurisdiction of the transferee Court. (c) If the decree directs sale or delivery of immovable property situated outside the local limits of the jurisdiction of the Court which passed the decree. (d) Any other reason for which the Court which passed the decree considers it necessary to transfer.

A decree may be transferred by the Court which passed the decree:-

(a) to a Court in the same district (*Rule 5*),

(b) to a Court in another District (*Rule 5*),

(c) to High Court Division (*Rule 9*).

The Rules provided in the Civil Procedure Code may be adopted by a High Court or it may alter, amend or modify them, according to suitability of local conditions or for other reasons. In that case the Rules so modified are to be followed by the Courts subordinate to that High Court. (a) Where the Court to which a decree is transferred is situated in the same District, the Court which passed it may send it direct to that Court, but if it is to be executed by a Court situated in another District, it will be sent to the District Judge. (b) Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner, as if it had been passed by such Court in the exercise of its original civil jurisdiction.

The Court sending a decree to another Court for execution shall send-

(a) a copy of the decree, (b) a certificate that the decree remains unsatisfied. (c) a copy of the order for execution.

The Court receiving a decree for execution shall cause it to be filed, without further proof unless, for reasons to be recorded, it requires further proof. The District Judge receiving a decree for execution may send it for execution by a subordinate Court, competent to execute it. (*Rules 6 to 8*). Where immovable property situated in the jurisdiction of more than one Court forms one estate or tenure is sought to be attached, and sold, any one Court may deal with it. (*Rule 3*). A Court to which a decree is sent for execution, it shall have the same powers in execution of such decree, as if it had passed the decree. The Court to which a decree is sent for execution shall certify to the Court, which sent it, the result of execution. As soon as the report is sent, the transferee Court ceases to have any jurisdiction. (*Section 41*). (Readers are advised to read sections 43 & 45 also).

**Precept:** The object is to obtain speedy relief in attaching the property, in order to prevent a dishonest judgment debtor to dispose of his property with a view to defeat or delay the decree-holder. This is an *interim* attachment (*Section 46*). On the application of a decree-holder, the Court which passed the decree may, whenever it thinks fit, issue a *precept* to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the *precept*. The Court receiving such *precept* shall attach the property in the same manner as is provided in the *rules* relating to attachment. The attachment shall remain in force only for two months unless the Court sending the *precept* extends it or the decree has been transferred to the Court which effected attachment for execution, or unless the decree-holder applied for sale of the property.

**Limit of time for execution (Section 48):** *Section 48* of the Code lays down a limit of time within which a decree of a Court other than a High Court can be executed. Along with this section *Articles 182 and 183 of the Limitation Act* may be read.

According to the provisions of *section 48* no order for the execution of a decree shall be made upon any fresh application presented after the expiration of 12 years from (a) the date of the decree sought to be executed or (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree. This provision has some exceptions. For the purpose of understanding the implication of *section 48* it may be explained under:-

- (i) The decree-holder is entitled to present any number of successive applications for execution of a decree unless it is barred by the general principle of *res judicata* or under *Article 182 of the Limitation Act* or under *section 48* of the Code.

For instance, if once a petition for execution was presented and was rejected on the ground that it was not executable at the instance of the person presenting it, this decision will have the similar effect as *res judicata*.

- (ii) *Article 182 of the Limitation Act* requires that successive applications have to be filed from the dates specified in the third column of the Article before expiration of each three years or six years where the copy of the decree or order has been registered.

A obtained a decree on the 1st July 1998. If it be a decree of a Court other than High Court Division, no fresh application will be entertained at the expiration of 12 years from the date of the decree, but if there has been an appeal, review or

amendment or stay of execution this period will be computed from the date of the appellate decree or amendment or the date of order in review; the period for which the stay order was in force will be excluded in computing the 12 years. But in order to keep the decree alive for 12 years *successive petitions* for execution have to be presented in *every three years or six years* according to the provisions of *Article 182*.

In the case of a decree passed by a High Court Division in exercise of its Original Civil Jurisdiction, the decree-holder is entitled to present in succession a number of applications for execution of the decree unless the application is barred under the general principles of *res judicata* or under Article 183 of the Limitation Act. This does not apply to the decree passed by a High Court Division in its appellate jurisdiction as the decree of the first Court really merges in the decree passed by the High Court Division in its appellate jurisdiction.

If the judgment-debtor by fraud or force prevented the execution of the decree, at any time within 12 years immediately before execution nothing in *section 48* shall preclude the Court from ordering execution of the decree. For instance, the judgment-debtor locked up the decree-holder making it physically impossible for him to present the application for execution on the due date. If the judgment-debtor keeps himself out of the way to avoid warrant of arrest this may amount to fraud. Fraud or force gives rise to a fresh starting point for execution of the decree.

***Procedure to be adopted by the Court when the party chooses a wrong forum:*** If, properly speaking, a petition under *section 47* should have been filed, but the party filed a suit; objection was taken that the suit was not maintainable. The Court before whom the suit was pending may convert it to a proceeding under *section 47*. Similarly where a separate suit was the proper remedy, but an application under *section 47* into a suit subject to payment of Court-fee necessary for a suit and subject to the suit not being barred by limitation and subject to the Court having jurisdiction to try it. Order passed under *section 47* is an appealable order.

***Functions of the executing Court:*** Court executing the decree cannot question the legality or correctness of a decree which is before it for execution, but the following questions arise by way of exception :-

(i) A Court executing the decree may be either the Court itself which passed the decree, or a Court to which a decree is transferred for execution. The Court to which a decree is transferred for execution and also the Court which passed the decree itself, are, however, not precluded from entertaining any objection on the question that the Court which passed the decree had no jurisdiction to pass it.

On a reading of *Order-XXI, Rule-7*, it will appear that though the Court to which a decree is transferred for execution shall cause copies and certificates of it

to be filed without any further proof, but it has the power also, for reasons to be recorded, to require such proof. The question of territorial or pecuniary jurisdiction does not arise when the decree is to be executed by the same Court which passed the decree, but if the decree be a nullity the executing Court, be it a Court which passed the decree or the Court to which it is transferred for execution, may question it.

(ii) The executing Court may, however, interpret the decree. The question of interpretation does not arise when the decree has been passed in unambiguous form, but where there is ambiguity, it is competent to construe the decree and its precise meaning. While doing so, it may declare a decree to be incapable of execution.

**Execution by transferees and legal representatives (Section 49 and 50):** A decree is transferable like any other property. The transferee of a decree shall hold the same subject to the same equities as would have been available to the judgment-debtor against the original decree-holder. The assignee of a decree, therefore, does not stand in a better position than the assignor and takes it subject to all equities and defences.

**Procedure in execution cases: (Sections 51 to 54 and O.XXI, rr. 10 to 96).**

**Application for execution:** An application for execution may be either *oral* or in *writing*. When a decree is for payment of money, the Court may on the oral application of the decree-holder immediate execution thereof by the arrest of the judgment-debtor before the preparation of the warrant. Every other application for execution shall be in writing, signed and verified *in the manner provided for verification of pleadings*.

The Court to which application is made may require production of a certified copy of the decree. When an application is made for attachment of movable, belonging to the judgment-debtor, but not in his possession, an inventory of the properties are to be annexed to the application, containing a reasonably accurate description of the same (*rule 12*). In case of application for attachment of immovable properties belonging to the judgment-debtor a description of the property for the purpose of identification and the judgment-debtor's share in the property are to be furnished, (*rule 13*). The Court may require certified copy of the public record showing the judgment-debtor's interest and description of the property to be supplied. Unless there be any condition in the decree to the contrary any one or more of joint decree-holders may apply for execution of the decree. The Court may make provision for protection of the interest of those who have not joined in the application for execution. A *joint decree* cannot be executed by one

of the decree-holders for his share, but if the decree specifies the share of the particular decree-holder or holders, any of them may proceed with the execution for his share. In a decree or an interest in a joint decree is transferred to another, and the *transferee* or the assignee put the decree into execution, the same procedure is followed as in the case of execution by the original decree-holder, but the Court has to give notice to parties concerned before executing the decree. Provided also that where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.

*Rule 17, O.XXI* provides for preliminary *scrutiny* of the application. *Rules 18, 19 and 20* provide the procedure for-

(a) Execution of cross decrees. (b) Execution of cross claims. (c) Cross decrees and cross claims in mortgage suits.

A holds a decree against B for Tk. 50,000. B holds a decree against A for Tk. 1,00,000. In equity Tk. 1,00,000 should be *set off* and the execution should proceed only for Tk. 40,000. But in case of execution of *cross decrees* the following rules have to be followed :-

(a) If the two sums are equal satisfaction shall entered on both decrees. (b) If the two sums are unequal, the execution may proceed at the instance of the decree-holder of the larger sum and for the balance only after adjusting the decree for the smaller sum. But this rule shall not apply unless-

(a) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits; (b) the sums due under the decrees are definite. (*See illustration under r. 18*). The provisions in *rr. 18 and 19* shall apply to decrees under mortgage bonds.

The Court may refuse to proceed against the person and property of the *judgment-debtors* simultaneously.

The Court issues notice to show cause (r- 22). (a) when the application for execution is made one year after the decree; (b) when the execution is sought against the legal representative of the judgment-debtor.

The rule of issuing notice, when one year after the decree for execution, application is filed, has been modified by many of the High Courts Division; and notice is ordered even when execution is applied for before one year. The object of the notice is to give opportunity to the judgment-debtor or the legal representative to satisfy the decree or to offer explanation as to why it would not be executed. When the judgment-debtor or the legal representative does not appear or show cause to the satisfaction of the Court, execution shall be ordered. **Court**

*shall then issue process for execution as provided in rr. 24 and 25.*

**Stay of Execution (Rs. 26 to 29):** Order for stay of execution can be passed by the following Courts:

(i) The Court which passed the decree, when he is moved for execution, before the judgment-debtor has filed any appeal. The Court may stay on such terms or conditions as it thinks fit, awaiting the filing of appeal and obtaining stay order from the appellate Court. (ii) The Court to which the decree has been sent for execution, awaiting order from the Court which passed the decree. (iii) The Court of appeal, during the pendency of the appeal, under the provisions of *O.XI, R. 5*. (iv) When a suit is pending in any Court, against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.

**Mode of Execution:** The mode of execution of a decree depends on the nature of a decree. The decree may be for recovery of money, for Specific performance of Contract or for recovery of Specific immovable property or for restitution of conjugal rights, etc. Rs. 30 to 36 deal with the mode of execution of each of the above decrees. It is needless to quote them here.

**Arrest and Detention:** The remedy of arrest and detention in a civil prison is available only against the judgment-debtor in a money decree. Before arresting him, a notice is to be issued to show cause. The procedure laid down in *rr. 37 to 40* are to be followed.

**Against movable and immovable properties:** Attachment is effected following the procedure in *rr. 41 to 54*. After the attachment, any private transfer or delivery of property attached or any interest therein and any payment to the judgment-debtor of any debt, dividend or Moines contrary to such attachment shall be void against all claims enforceable against the attachment (*section 64*). The attachment shall be removed when the decree is satisfied, or the decree is set aside or reversed. After the attachment, if objection is made that such property is not attachable, the Court executing the decree may investigate the claim or objection. This is a summary procedure, which the executing Court is competent to follow; but if in the opinion of the Court there has been designedly unnecessary delay in preferring the objection or the claim, it shall make no investigation. Pending the investigation of such claim, the Court ordering the sale may order postponement of the sale. If the Court decides in favour of the objection, it shall pass orders releasing the property from attachment. But if the Court is satisfied that the property attached was in the possession of the judgment-debtor or on his behalf, on the date of the attachment, the claim shall be disallowed. If any property is subject to mortgage or charge,

attachment may continue subject to such encumbrance. The order passed under this provision is final subject to a civil suit under *O.XXI, r. 63*, for which the period of limitation is one year from the date of the order (*vide Art. 11 of the Limitation Act*).

**Attachment before Judgment (Section 94 and O.XXXVIII, Rr. 5 to 12):** Before the decree is passed and during the pendency of a suit the Court may, in order to prevent the justice being defeated, direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property. But before issuing any such order for attachment before judgment, the Court is to be satisfied by affidavit or otherwise that the defendant with a view to obstruct or delay the execution of the decree that may be passed is about to dispose off the whole or any part of his property or is about to remove the whole or any part of it, from the local limits of the jurisdiction of the Court, the Court may direct the defendant to furnish security for the fulfillment of the decree or order conditional attachment of the whole or any portion of his property. Before ordering such attachment of the whole or any part of it, from the local limits of the jurisdiction of the Court, the Court may direct the defendant to furnish security for the fulfillment of the decree or order conditional attachment of the whole or any portion of his property. Before ordering such attachment under *O.XXXVIII, r. 5*, the Court has to be satisfied that the transfers were going to be made after the suit had been instituted and that such transfers were with the intention of obstructing the plaintiff, if he obtained a decree. Where any claim is preferred to the property attached before judgment, it shall be investigated in the same manner as has been provided in *O.XXI, r. 58*, of the Code. The order attachment shall be withdrawn when security called for by the Court is furnished. By virtue of the order passed under *O.XXXVIII, r. 5*, when an attachment is effected before judgment, it shall not be necessary to reattach the property when an application for execution is made. Agricultural produce in possession of an agriculturist cannot be attached.

**Sale:** The Court executing the decree may order the property attached by it and liable to be sold for satisfaction of the decree. Before actually selling the property under the provisions of *O.XXI, r. 66*, proclamation of sale by public auction has to be issued mentioning the details as per *clause (2)* of the rule, and fixing the date and time for sale. The Court may at his discretion adjourn the sale from time to time recording its reasons. If it is adjourned for more than seven days a fresh proclamation shall be made unless the judgment-debtor consents to waive it. The sale is knocked down at the highest bid; but before it, the judgment-debtor may deposit with the Court, the amount of debt for which he is liable for the cost incurred up to the time. The holder of the decree shall not bid without the express

permission of the Court. When the decree-holder purchases with such permission, the amount shall be adjusted against the decretal dues, cost etc. and surplus, if any, has to be deposited in the Court. The purchaser shall immediately deposit required percent of the purchase money in the Court. If the decree-holder is the purchaser the Court may dispense with such deposit. The full amount of purchase money payable shall be paid to the Court before it closes, on the 15th day from the date of sale. If the amount be not deposited in time, the deposit already made as earnest money, after defraying the expenses of sale shall be forfeited to the Government and the property shall be resold. If there be any deficiency of price on resale by reason of the purchaser's default, on all expenses attending such resale shall be certified to the collector by the officer or any other person holding the sale and shall be recovered from the defaulting purchaser by way of execution. No officer of the Court shall be allowed to bid for the purchase.

*Rules 74 to 81* provide for sale of movable property of different kinds and *rules 82 to 88* provide for sale of immovable properties.

***Application for setting aside sale:*** This is provided in *rr. 89 and 90*. Application for setting aside the sale may be made on deposit of the amount mentioned in the proclamation for sale less any amount which has since been paid plus the certain per cent of the purchase money for payment to the purchase, be he the decree holder or an outsider. Such application for setting aside the sale on deposit may be made by any person owning the property or any person holding an interest in such property by virtue of a title acquired before sale. The limitation for making such application is 30 days from the date of sale under *Art. 166 of the Limitation Act*. The Court has no power to extend the time under the provisions of the Code. If a person applies under *r. 90* to set aside the sale he shall not be entitled to make an application under *r. 89* unless he withdraws the application under *r. 90*. Application to set aside sale on the ground of material irregularity or fraud in publishing or conducting the sale may be made by (a) decree-holder, (b) any person entitled to a share in the ratable distribution of assets, (c) any person whose interests are affected by the sale.

The number of persons entitled to apply to set aside the sale under *r. 90* are many more than the number provided in *r. 89*.

*The grounds on which sale can be set aside under r. 90 are -*

(a) There must be material irregularity or fraud in publishing and conducting the sale, (b) and that the applicant must have sustained substantial injury, and (c) such injury must have been caused by reason of the material irregularity or fraud.

A few instances of material irregularity in publishing or conducting sale are

given below :

(i) Non-service of notice under O.XXI, r. 22 or other rules. (ii) Putting the property to sale on a day other than the date fixed. (iii) Selling property not covered by the decree. (iv) Not depositing 25 per cent. of the purchase money under rr. 84.

The purchaser cannot plead that he is a *bona fide* purchaser for value, and his rights should not be affected by irregularities in conducting and publishing sale. If the judgment-debtor knowing full well the irregularities or fraud waives the objection and allows the sale to proceed, he shall be estopped from impeaching the sale on the ground of fraud or irregularity. If after the sale has been held, the purchaser finds that the judgment-debtor had no valuable interest, he may apply to have the sale set aside. (rule- 91). If no application is made under r. 89, 90 or 91 or such application is disallowed, the Court shall make an order confirming the sale. No suit to set aside an order made under r. 92 shall be at the instance of the person against whom such order is made. If the sale is set aside the purchaser shall be entitled to refund of the money with compensation of certain per cent. provided in a previous rule. When sale has become *absolute*, the Court shall grant a *certificate* mentioning the property sold, the name of the purchaser and the date when it was made absolute.

**Delivery of Possession:** Rule 95 contemplates cases when khas possession is to be delivered in respect of immovable property in the direct possession of the judgment-debtor, and r. 96, cases of immovable property in the occupation of tenants or other persons entitled to occupy the same. Under r. 95 the person in possession is to be ousted, and if need be removing any person who refuses to vacate the same. Under r. 96 delivery shall be made by affixing a copy of the certificate of sale on some conspicuous part of the property and proclaiming to the occupant by beat of drum or other customary mode that the interest of the judgment-debtor has been transferred to the purchaser.

**Resistance to execution and delivery of possession to the decree-holder or the purchaser (Section 74 and O.XXI, rr. 97 to 103):** The decree-holder or the purchaser of a property at the auction held by the Court is entitled to reap the benefit of the decree peacefully. Any unlawful resistance is punishable under the provisions of *section 183 of the Penal Code*. at the same time the decree-holder or the auction-purchaser is to be given all assistance by the Court to get possession of the property decreed in his favour or sold to him. Resistance may be offered either by the judgment-debtor or by somebody on his behalf or somebody claiming a right to the property and denying the interest of the judgment-debtor in the property. When the judgment-debtor or somebody on his behalf offers resistance

and that resistance or obstruction is without any just cause, the Court may order such person to be put in civil jail for a term not exceeding 30 days and may direct that the decree-holder or the auction-purchaser be put in the possession of the property.

When resistance is offered against delivery of possession, the decree-holder or the purchaser may apply to the Court, complaining of such resistance or obstruction and this will be inquired into by the Court. When the Court is satisfied that there was no just cause for it, orders to the above effect to put the persons resisting or obstructing in civil jail and to deliver possession to the decree-holder or the purchaser. But there may be cases where resistance or obstruction was by a *bona fide* claimant. If on inquiry, the Court is satisfied that the resistance or obstruction was offered by any person other than the judgment-debtor claiming in good faith to be in possession of the property on his account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application. *R. 99* deals with the two cases of claims in good faith, *viz.*, persons claiming on their own account and persons claiming on account of some person other than the judgment-debtor. Persons claiming on their own account do not claim on behalf of the judgment-debtor. The order passed under this rule is final subject to the result of a suit, if any, under *r. 103*. If a *bona fide* claimant was in possession at the time of delivery of possession and was opposed by the process of delivery of possession the remedy lies under *r. 100*. On his application to the Court under *r. 100*, the Court investigates into his claim and if the Court is satisfied as to his claim it shall permit the owner to be in possession of that property. The provisions under *rr. 99 to 103* have no application to resistance or obstruction by a person to whom the judgment-debtor transferred the property after the institution of the suit, in which the decree was passed or to the dispossession of any such person. Orders passed under the above *r. 99 or 101* are final, unless it is set aside in a regular civil suit instituted under the provisions of *r. 103*.

***Delegation of powers in execution cases to the Collector (Sections 68 to 72):*** The Government may declare by notification in the official Gazette that in any area the execution of decrees by way of sale of immovable property or any interest therein or execution of any particular kind of decree, shall be transferred to the Collector. The procedure and laid down in *rr. 69 to 72* are to be followed in such cases.

***Rateable distribution of assets:*** *Section 73* of the Code provides rateable distribution of assets amongst the different decree-holders provided they are vigilant in the sense that they make application in due time, according to the provisions of the section. Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for

execution of decrees for payment of money passed against the same judgment-debtor and having obtained satisfaction, the assets shall be distributed rateably amongst all of them after deducting the cost of realization. Conditions, therefore, for rateable distribution are :

(1) Assets must be held by the Court. (2) The decrees must be for payment of money. (3) Against the same judgment-debtor. (4) Application must have been made before the receipt of the assets by the Court.

The applicant will not be entitled to get a portion of the asset rateably unless the above conditions are present. The object is to avoid multiplicity of execution cases and also to secure equitable administration of the property placing all the decree-holders on the same footing. The condition that the application shall be made at a particular time, namely, before the assets are received, follows the maxim of equity that equity helps the vigilant and not the indolent. The section provides a cheap and expeditious remedy. There are a few exceptions to the rule of rateable distribution:

(a) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale ; (b) where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer order that the be sold free from mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold; (c) where any immovable property is sold in execution of a decree ordering its sale for the discharge of an encumbrance thereon, the proceeds of sale shall be applied-first, in defraying the expenses of the sale; secondly, in discharging the amount due under the decree; thirdly, in discharging the interest and principal money due on subsequent encumbrances, if any; and fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

But by the principle of rateable distribution of assets the claim of the Government is not affected. The claim of the Government must have precedence over all other claims. The section does not confer any jurisdiction on the executing Court to entertain a claim for rateable distribution of assets when one of the decree-holders is the Government.

## JUVENILE COURT AND TRIAL OF CHILD : FROM BANGLADESH PERSPECTIVE

—Md. Zakir Hossain

### Introductory Remark

A proper child development programme is very important towards overall progress of the nation. Everyone should partake in the efforts to bring up the children as worthy citizens of the country. Children are the future leaders of the nation. To go ahead the nation towards prosperity comprehensive child development programme is needed on a priority basis. The purpose of the Children Act 1974, *inter alia*, is to consolidate and amend the law relating to the custody, protection and treatment of children and trial and punishment of youthful offenders. The said Act was enacted after repealing the century old the Reformatory Schools Act, 1897 and the Bengal Children Act 1922. Keeping in mind, the Government has taken up a number of activities that have direct bearing upon the children. The Ministry of Social Welfare has been assigned with the key role of overseeing all activities pertaining to children in this country. As per Article 28 (4) of the Constitution, the state can make special provision for progress of children aiming at child development, in 1974 the Children Act was enacted and in 1976 the Children Rules were formulated. Government of Bangladesh also ratified the United Nations Convention on Child Rights.

### Constitution of the Juvenile Courts:

Section 2 (1) of the Children Act hereinafter shortly referred to the Act provides that Juvenile Court means a court established under section 3. Section 3 states that despite anything contained in the Code (Code of Criminal Procedure), the Government may by notification in the official gazette; establish one or more Juvenile Courts for any local area. The Government has established two Juvenile Courts under section 3, one sits at Conabari, Gazipur and the other sits at Puler Hat, Jessore, Bangladesh where two Correctional Institutes for Young Offenders were established by the Government.

Section 4 of the Act has clearly revealed that the powers conferred on a Juvenile Court by this Act shall be exercisable by (I) the High Court Division (II) a Court of Session (III) a Court of Additional Sessions Judge (IV) a court of an Assistant Sessions Judge at present court of Joint Session Judge (V) a Sub-Divisional Magistrate (VI) a Magistrate of the first class. It is to be noted here that the post of sub-divisional Magistrate had been abolished long ago, therefore, in my view the Chief Judicial Magistrate and Additional Chief Judicial Magistrate, Chief

Metropolitan Magistrate and any other first class Judicial Magistrate can exercise the power of Juvenile Court.

### **Powers of Juvenile Courts:**

Section 5 of the Act has spelt out the powers of Juvenile Courts. When a Juvenile Court has not been established for any local area, no court other than a court empowered under section 4 shall have power to try any case in which a child is charged with the commission of an offence or to deal with or dispose of any other proceeding under the Act, but shall not have power to try any case in which an adult is charged with any offence mentioned in Part VI of this Act. Parts-VI of the Act has mentioned special offences in respect of children under sections 34 to 47.

When it appears to a Juvenile Court or a court empowered under section 4, such court being subordinate to the Court of Sessions, that the offence with which a child is charged is triable exclusively by the Court of Session, it shall immediately transfer the case to the court of session for trial in accordance with the procedure laid down in this Act.

### **Effect of Joint Trial of Child and Adult:**

Section 6 of the Act has strictly forbidden joint trial of child and adult. A child below 16 years of age must be tried by the Juvenile Court under the Children Act, 1974 and by no other court. When the accused is found by the court to be of 14 years age the Special Tribunal had no jurisdiction to try the accused and convict him under the Special Powers Act, 1974. As the trial is illegal and without jurisdiction, the conviction and sentence is set aside with the direction for fresh trial by Juvenile Court<sup>1</sup>. Appellate Division held that the joint trial of a child offender with adult is not sustainable in law for want of jurisdiction<sup>2</sup>. In the case of *Baktiar Hossain vs. The State* 14 BLD 381 their Lordships held that on the basis of section 66(1) of the Children Act, age of the accused be determined. It also held that when an accused is brought before any criminal court for facing trial and it appears that he is a child, the Court shall make an enquiry as to his age by taking such evidence as may be forthcoming and shall record a finding thereon stating his age as nearly as possible. When such a plea is taken by the accused, a duty is cast upon a court to determine the age of the accused by holding an enquiry. In the case of *Bimal Das vs. The State* 14 BLD (AD) 218, their Lordships held that section 66(1) of the Children Act is applicable when it appears to the court that a person charged with an offence (or not) is a child. If he does not so appear the court has no duty to ascertain the age of that person.

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<sup>1</sup> Md. Shamim v. the State 5, MLR (2000) 37.

<sup>2</sup> Md. Nasir Ahmed v. State 42 DLR (AD) 89.

**Seats of Juvenile Courts:**

Section 7 of the Act provides sitting places of juvenile courts. Due to financial constraint, it is difficult to provide separate sitting arrangement for juvenile courts.

**Committal to the Court of Sessions and split up the case Record:**

Section 8 provides that when a child is accused along with an adult of having committed an offence and it appears to the court taking cognizance of the offence that the case is a fit one for committal to the court of session, such court shall, after separating the case in respect of the child from that in respect of the adult, direct that the adult alone be committed to the court of Session for trial. And the case in respect of the child shall then be transferred to a Juvenile court if there is one or to a court empowered under section 4, if there is no Juvenile court for the local area, and the court taking cognizance of the offence is not so empowered

**Presence of the persons in the Juvenile Courts:**

Section 9 of the Act provides that who are legally entitled to be present before the Juvenile courts. Section 10 narrates that the Juvenile courts at any stage of the hearing of the case or proceedings may direct the person to go outside the court.

**Court may dispense with attendance of a child:**

Section 11 of the Act is comparable to the provisions of section 205 and 540A of the Code of Criminal Procedure. In pursuance of the section if at any stage during the hearing of a case or proceeding, the court is satisfied that the attendance of a child is not essential for the purpose of the hearing of the case or proceeding, the court may dispense with his attendance and proceed with the trial of the case or of the proceeding in the absence of the child. Section 12 of the Act provides that a child can be competent witness. Some persons can be withdrawn from the court while child is being testified as witness. Section 13 of the Act provides that the persons who can attend court at the time of the case for which a child charged with. Section 14 of the Act has empowered the Juvenile court to send the child suffering form dangerous disease to the approved place or hospital for better treatment. At the time of passing order the Juvenile court has to consider the character and age of the child, the circumstances in which the child is living, the reports made by the Probation Officer, and such other matters as may, in the opinion of the court, require to be taken into consideration in the interest of the child.

**Status of the Reports of Probation Officer:**

The reports of the Probation Officers and other reports to be treated confidential and in an exceptional circumstances the same may publish for the ends of justice.

**Restriction on Press and Media:**

Section 17 of the Act provides that no report in any newspaper, magazine or news-sheet nor any news giving agency shall disclose any particular of any case or proceeding in any court under this Act in which a child is involved and which leads directly or indirectly to the identification of such child, nor shall any picture of such child be published. Provided that for reasons to be recorded in writing, the court trying the case or holding the proceedings may permit the disclosure of any such report, if, in its opinion, such disclosure is in the interest of child welfare and is not likely to affect adversely the interest of the child concerned. Whoever publishes any report or picture in contravention of the provisions of section 17 shall be punishable with imprisonment for a term which may extend to two months, or with fine which may extend to taka two hundred, or with both,

**Application of the Code of Criminal Procedure:**

Section 18 of the Act clearly provides that except as expressly provided under this Act or the rules made thereunder, the procedure to be followed in the trial of cases under the Act shall be in accordance with the provisions of the Code of Criminal Procedure.

**Bail of the Child offender:**

Section 48 of the Act has discussed about the bail of the child arrested for non bail able offence. Where a person apparently under the age of sixteen years is arrested on a charge of a non-bail able offence and cannot be brought forthwith before a court, the officer in charge of the police station to which such person is brought may release him on bail, if deficient security is forthcoming but shall not do so where the release of the person shall bring him into association with any reputed criminal or expose him to moral danger or where his release would defeat the ends of justice.

**Duty of the Court for Determination of Age:**

Whenever a person whether charged with an offence or not brought before any criminal court otherwise than for the purpose of giving evidence, and it appears the court that he is a child, the court shall make an inquiry as to the age of that person and for that purpose shall take evidence as may be forthcoming at the hearing of the case, and shall record a finding thereon, stating his age. It is the obligation of the court to inquire in to the age of the person who appears to be child. In this respect, lawyer can play vital role. By making an application, he can bring into the matter to the notice of the court.

**Restriction on Punishment of Child:**

Section 51 of the Act imposes restrictions on the conviction and sentence to the child offender. Notwithstanding anything to the contrary contained in any law, no child shall be sentenced to death, transportation or imprisonment. Provided that when a child is found to have committed an offence of so serious a nature that the court is of opinion that no punishment, which under the provisions of this Act it is authorized to inflict, is sufficient or when the court is satisfied that the child is of unruly or of so depraved character that he cannot be committed to a certified institute and that none of the other methods in which the case may legally be dealt with is suitable, the court may sentence the child to imprisonment or order him to be detained in such place and on such conditions as it thinks fit. Provided further that at any time during the period of such detention the court may, if it thinks fit, direct that in lieu of such detention the youthful offender be kept in a certified institute until he has attained the age of eighteen years. A youthful offender sentenced to imprisonment shall not be allowed to associate with adult prisoners.

According to section 52 of the Act where a child is convicted of an offence punishable with death, transportation or imprisonment, the court may, if it considers expedient so to deal with the child, order him to be committed to a certified institute for detention for a period which shall be not less than two and not more than ten years, but not in any case extending beyond the time when the child will attain the age of eighteen years.

**Prohibition of using the Words “Conviction” and “Sentence” in the Judgment by Juvenile Courts:**

Save as provided in the Children Act, the words ‘conviction’ and ‘sentenced’ shall cease to be used in relation to children or youthful offenders dealt with under this Act, and any reference in any enactment to a person convicted, a conviction or sentence shall, in the case of a child or youthful offender be construed as a reference to a person found guilty of an offence, a finding of guilty or an order made upon such a finding, as the case may be<sup>3</sup>.

**Procedure of Trial before Juvenile Courts:**

Criminal trial begins from the date of framing charge. Charge means an accusation against a person with respect to the commission of offence. Chapter XIX relates to charges which contains in sections 221 to 240 of the Code of Criminal Procedure. Two procedures of trial of the criminal cases have been described in the Code of Criminal Procedure. Chapter XX of the Code of Criminal Procedure under sections 241 to 250 deal with the procedure of the trial of cases by Magistrates and

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<sup>3</sup>Bablu V. The State 1 BLD (HCD) 454

chapter XXIII deals with procedure of trial before the Court of Sessions under section 265A to 265L.

The procedures specially provided in the Act is to be followed by Juvenile Courts. But the same is not complete and comprehensive. Therefore, the Juvenile Courts have to follow the procedure of trial spelt-out in the Code of Criminal Procedure in view of Section 18 of the Act. If trial is held by the Magistrate as Juvenile Court, he will have to follow the procedure of trial fixed for the Magistrate and on the other hand, if trial is held by Sessions Judge or Additional Sessions Judge or Joint Sessions Judge he will follow the procedure of trial before Sessions Judge. In the special laws, generally, the tribunal has to follow the procedure of trial envisaged in the statute. For example, in trying special cases under the Special Powers Act, in Nari O Shisu Nirjatan Daman Cases, Speedy Tribunal Cases, the tribunals are to follow the procedure followed in Sessions triable cases.

The Act is not exhaustive. A simplified procedure may be evolved for trial of Juvenile court as per the mandate of section 77 subsection 2(a) of the Act. Procedure for the investigation of the Juvenile Cases may be put in the statute and therefore should be a provision for submitting separate police report i.e. either charge sheet or final report as the case may be where child and adult are implicated in a Criminal Court and the case of the child should be registered at Juvenile Case, so that it is easy to determine the number of cases for keeping the statistic update. Child may be accused, child may be witnessed and child may be victim. It is hoped that the law will be enacted as child friendly. Child as a human being should have easy access to law to vindicate their rights when they are infringed. The laws relating to child have no parity with each other.

Therefore, it is the desire of the time to formulate a Child Code in conformity with the UNCRC, our existing social norms and values. We should not be oblivious as to the unique provision of the Act that section 70 removed the disqualification attached to conviction. Where a child is found to have committed any offence, the fact that he has been so found shall not have any effect under section 75 of the Penal Code or section 565 of the Code Criminal Procedure or operate as a disqualification for any office, employment or election under any law.

### **Role of the Apex Court and some NGOs' in protecting the right of child:**

The role of the Apex Court of the country, media and NGOs' is sine qua non for securing Child Rights in Bangladesh. In this respect I may refer to a very conspicuous example. In *State v. Deputy Commissioner, Satkhira and others*<sup>4</sup> a boy of 12, Nazrul Islam, was taken into custody as an accused in a number of dacoity cases. Even after his acquittal he was not released and he languished

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<sup>4</sup>45 DLR 1993 (page 643).

literally in jail for twelve years. On the basis of a newspaper report a Division Bench of the High Court Division issued a suo motu Rule. Nazrul who was tried in violation of the Children Act, 1974, was freed. Various directions were sent to the Ministry of Home Affairs with regard to the similarly situated victims of prison mismanagement. Their Lordships Mr. Justice Md. Imman Ali and Mr. Justice AKM Fazlur Rahman sent a copy of the landmark judgment passed by them in *State v. Roushan Mondal@ Hashem 59 DLR 72* to the Ministry of Law, Justice and Parliamentary Affairs for recommending legislation in line with the views expressed by them in the said judgment. So far I know concerned Ministries have taken some Positive steps to make the Children Act and Rules as tailor-made legislation keeping conformity with the said resounding judgment.

### **Summary Recommendations:**

- (i) To bring a complete and comprehensive amendment in the Children Act 1974 keeping conformity with the CRC and our socio economic factors.
- (ii) To formulate rules simplify the procedure of the trial by Juvenile Court.
- (iii) To amend the forms of FIR, Police report keeping a space for the age of the accused that is a separate form may be used for Police report.
- (iv) To established separate Exclusive Juvenile Court at least one in each Divisional Head Quarter.
- (v) To include Juvenile Justice System in the curriculum of Law Schools and Social Science Department of the Universities.
- (vi) To impart training to Judges, Magistrates, Police and other Stakeholders.
- (vii) To create widespread awareness through Mass Media, Radio, Television, News Paper etc.
- (viii) To bring about parity as to the definition of child lying sporadically in different national legislations.
- (ix) Provision should be made to the effect that the date of offence will be determining point as to whether the accused is a child or not, irrespective of the date of framing charge to fulfill the purpose of Section 70 of the Children Act.
- (x) Supervisory and Monitoring Committee may be constituted in all levels of Local Government to over see the condition of the child accused.
- (xi) To compile a Child Code.

# The Applicability of the Chittagong Hill Tracts Regulation, 1990 (amended up to 2003) Within the Sphere of the Present Legal System of Bangladesh: Experiencing In the Rangamati Judge Court

—Syed Md. Fakhru Abedin

## 1. Preface:

Chittagong Hill Tracts (hereinafter is called as CHT) is the only ethnic territory under the codified law in Bangladesh. Almost eleven (11) ethnic tribes live at the CHT on the southeast part of Bangladesh. Historically, the legal system of the CHT is exceptional from the other places of Bangladesh. The social and legal system of the 11 (eleven) groups of tribal people of this area is regulated by their own local custom and principles. The social and family disputes within the tribal people have been resolved by their own growing principles and local custom from the time immemorial. Nevertheless, under Rule 40 of the Chittagong Hill Tracts Regulation of 1900, the circle chief of the respective hill districts and subordinate to them Headmen and Karbarys are authorized to administer justice among the tribal people.

Later, under Section 4(4) of the Chittagong Hill Tracts Regulation (Amendment) Act of 2003 (Act No. xxxviii), Section 66 of three Hill Districts Council Act, 1989 (Act No. xix, xx, xxi), Section 22(uma) of the CHT Regional Council Act under the Hill Tracts Peace Agreement of 1998 (Act No. xii), the existing judicial system under local custom has been legally recognized by the Government. The legal system of the CHT established on local principles and custom for dispute resolution regarding personal, family social rights among the indigenous people is quite inconsistent with the modern legal system of the state. However, smriti(memory) and sruti(hearing) based on social principles and local custom of hundreds years old are not kept in written form or document, for what reason, the courts have faced many barriers to the proper administration of justice among the litigants in the CHT. However, the Government promulgated the CHT Regulation (amendment) Act, 2003 on September 21, 2003, which has given effect from July 1, 2008 by the insertion of further amendment to the regulation on June 4, 2008 publishing in the Bangladesh Gazette.

## 2.1 Evolution of Leal System in Chittagong Hill Tracts (CHT):

Before establishing the present Chittagong Hill Tracts as a separate district in 1860, it was a part of Chittagong district. At first, the administrative headquarters

of CHT was set up in Chandraghona in 1860 and later in 1868 it was transferred to Rangamati. Under the Rules for territorial circles in the CHT, 1884, CHT was divided into five circle (1) Raja Harishchandra (Chakma) circle, (2) Mong Raja Circle, (3) Bomang Raja circle, (4) Sadar sub-divisional khasmahal and (5) Sangu sub-divisional khasmahal. Under the above rules the area of three circles was ascertained. In 1892, amending the 1884 circle rules made another circle of Government reserve forest with the remaining three circles. For the management of the administration of the hill districts "Rules for the administration of Chittagong Hill Tracts" was promulgated that was consist of 17 rules, by which the CHT was divided into 33 block. Under these rules there is appointed a dewan in each block and each block is divided into Mouzas in which Headmen are appointed.

After that, to mobilize the administration of the CHT, the then British Government promulgated the CHT Regulation, 1900 (Regulation 1 of 1900). Under Section 18 of this regulation, the government amended and modified the Rules for the administration of the CHT, which is popularly known as Hill Tracts manual. According to this manual, the circle chief and mouza headmen are empowered with some judicial power to resolve the social disputes among the indigenous people of CHT.

The basis of the judicial and administrative power of the circle chief (Raja) and headmen is historical local customs and principles, which got legal recognition later. Francis Buchanan in his book 'Francis Buchanan in South-Eastern Bengal' has pointed out that there was the system of headman in every tribes of CHT. The superintendent of CHT Captain J.M. Graham in a letter has written, "As often happens not even the 'Roaja' of a village to be found, and then the only course is to apply to the head zeminder such as the Poang Raja, kalindi rani to produce the person wanted while they having a thorough knowledge of their ryots and a hold over them, no difficulty in doing."

Captain T.H. Lwin in his 'Report on the capitation tax revenue settlement of the Chittagong Hill Tracts' has written "Formerly the head of a village (or what we miscall a Talookder) was appointed by the chief being generally the most able man of the village was set forward by his village fellows to be their mouth piece and through whom they paid their tribute...This was what was formerly the custom."

Later, under the CHT regulation of 1900 and according to section 18 of this regulation by amending and modifying the Rules for the Administration of the CHT of 1892, the duties and judicial power of the circle chief and mouza headmen has been fixed.

## 2.2 Judicial Power of the circle chief and headmen:

Notwithstanding anything contained in the rules for the Administration of Chittagong Hill Tracts of 1900, mouza headmen will try the matters in dispute being before them by the inhabitants of the respective mouza. They will make their decision upon social principles and local custom among the disputing parties. But the headmen cannot impose fine more than twenty five taka and can make an order to return the stolen goods and to detain the guilty person until the Deputy Commissioner orders otherwise. On the other hand, the circle chief will try the matters in disputed bring before him as khas mouza headmen and the matters come from the decision of headmen and also the headmen himself initiate to for disposal of the disputes. The circle chief can impose fine up to fifty taka. The decision of Deputy Commissioner of these cases as revision is final thereto. There is no system of court-fee in case of adjudicating the matters in dispute by circle chief or headmen. The fine imposed is distributed among the aggrieved persons (if any) and distribute it to the village community collectively as a local custom, also provided that with the approval of the Deputy Commissioner, Circle chief of mouza headmen can collect a certain amount of fee for the cost of such adjudication. It is interesting that on 5. 5. 1964 then Deputy Commissioner S.Z. Khan C.S.P. made an order under memo no. 1243(400)/c, as follows:

“It has been brought to my notice that of late the magistrates' courts as well as the police are taking cognizance of tribal cases whereas tribal courts exist for this purpose vide rule 40 of the Chittagong Hill Tracts manual.

It is therefore ordered that henceforth Magistrates court or the police should not take cognizance of any cases of tribal nature, particularly relating to complaints arising out of enticement/elopement etc. of tribal girls by tribesmen or plainsmen. On receiving such complaints, the Magistrates or the police officer concerned must refer the case to tribal court (i.e. Headman) for necessary action under intimation to the Deputy Commissioner.”

But the following offences are out of the judicial power of circle chief and headmen:

But the following offences are out of the judicial power of circle chief and headmen:

- (a) Sedition,
- (b) Crimes against the public servant in discharging his public duties,
- (c) Crimes against public policy,
- (d) Rioting with deadly weapons,

- (e) Rioting for causing grievous hurt,
- (f) Crimes against human body of such kind-murder, culpable homicide, intentionally causing grievous hurt , illegal confinement, rape, kidnapping, abduction and unnatural offences,
- (g) Robbery, Dacoity, criminal house-trespass.
- (h) Forgery,
- (i) Under the CHT Regulation, 1900-Section 11(possession of firearms and ammunitions and manufacture of gun powder), Section 12 (prohibition to carry daos, spears, bows and arrows or any of those weapons), Section (imports, exports, manufactures, possesses or sells intoxicating drugs), Section 14 (imports or sells foreign spirit or fermented liquor), Section 15 (exports or sells spirit or fermented liquor manufactured or produced in the CHT), etc.
- (j) Same kind or other offences are fixed by the Deputy Commissioner. The above-mentioned offences and disputes are out of the jurisdiction of circle chief and headmen; as such offences are more grievous in nature and affect the whole society. This principle is also the basis of the statutory legal system. So, there are some influences over the traditional legal system among the ethnic communities and also there is an impact that the ethnic community is integrating with the statutory legal system gradually.

### **2.3 Dispute resolution by the circle chief or mouza headmen under section 66 of the CHT District Council Act ( Act No. xix, xx, xxi of 1989):**

The circle chief and headmen follow the rules in this respect, as follows:

- (a) Dispute of social, cultural and family matters among the indigenous people of the respecting hill districts be submitted to the local Karbary or Headmen and he will resolve the dispute according to existing social principles and local custom.
- (b) Appeal lies to Headmen against the decision of Karbary, to the respecting circle chief against the decision of Headman and to the Chittagong Divisional Commissioner is final thereto,
- (c) Before disposal of such appeal the circle chief or Divisional Commissioner will take advice from at least three persons of his nomination.
- (d) For such dispute resolution under this section respecting District Council can fix (i) trial procedure and (ii) fees to be paid by the applicant and the appellatant.

#### **2.4 Karbary Adalat:**

Though there is no provision in Rule 48 of the CHT Manual of 1900 about the appointment of karbary, in section 66(1) of the CHT District Council Act, there is the recognition of the karbary. The primary duty of the karbary is to resolve disputes regarding social conflict or enticement/elopement of ethnic girls within the rural areas of the CHT. Normally, concerning circle chief with the recommendation of mouza headmen appoints karbary to a specific block or village.

#### **2.5 Social disputes and offences among the ethnic areas:**

There are some social disputes and offences that are settled under the auspices of local customs by the above-mentioned bodies of karbary, circle chief, headmen etc. Such disputes are as follows:

- (i) Cultivating one's ascertained jhum,
- (ii) Stealing one's domestic animals or birds,
- (iii) Forcibly cutting off one's crops,
- (iv) Possessing or killing domestic animals or birds without the permission of its owners,
- (v) Restraining the flow of water of general resources either intentionally or with ill-motive.
- (vi) Damaging another's forest or fruit garden,
- (vii) Restraining the general way to public,
- (viii) Unchastely to religious place,
- (ix) Defame anybody by gesture or other means,
- (x) Breaking peace of any family or society by drug addiction,
- (xi) Physical or mental torture on the wards of the family,
- (xii) Misbehave with the older members of the family or society,
- (xiii) Creating chaos in the society with conjugal conflict,
- (xiv) Extra-marital consummation,
- (xv) Public nuisance,
- (xvi) Unable or neglect to give maintenance to the wards,
- (xvii) Denying the paternity of the child,

- (xviii) Neglect to perform duties and obligations as a guardian,
- (xix) Breaking family and social punctuality,
- (xx) House-trespass,
- (xxi) Mischief by fire or stealing causing damage to one's property,
- (xxii) Creating conflict in the society regarding marriage,
- (xxiii) Attempt to commit rape,
- (xxiv) Entering one's vacant house,
- (xxv) Creating conflict between husband and wife,
- (xxvi) Family dispute regarding inheritance or maintenance of adoptive son,
- (xxvii) Dispute regarding partition of inheritable or inherited property,
- (xxviii) Boundary dispute of dwelling house,
- (xxix) Eviction from the possession of land,
- (xxx) Misappropriation of property,
- (xxxi) Marital relations with prohibited degree or different religion,
- (xxxii) Non-payment of debts,
- (xxxiii) Expressing disobedience or negligence to the existing local customs and social principles,
- (xxxiv) Hunting birds and animals recklessly,
- (xxxv) False, frivolous and vexatious allegation against anyone,
- (xxxvi) Dishonor anyone's religious or social belief,
- (xxxvii) Disturbing conjugal relations among the spouse by extra-marital relation,
- (xxxviii) Creating health disorder or risk to life by applying in heinous matters or hurt,
- (xxxix) Creating obstacle to education and cultural activities,
- (xl) Instigating to commit offence or immoral activities,
- (xli) Creating fear and force in the mind of child and women,
- (xlii) Disturbing anyone's personal., family and social lives with defamatory statement,
- (xliii) Applying poison to hunt animals or to catch fish or in cultivation,
- (xliv) Damaging natural forest produces,

- (xlv) Instigating disputes among the heirs in respect of inheritance,
- (xlvi) Beating the wife of nephew by uncle or wife of the bother by elder brother or daughter in law by the father in law or wife by husband,
- (xlvii) Illegal pregnancy and abortion,
- (xlviii) Professing prostitution,
- (xlix) Selling or trafficking local wine (solai mod) without permission of legal authority,
- (l) Fishing from anyone's place (jhak) without permission.

Though the local authority, on local customs and principles deals these with, some of the above-mentioned offences fall within ambit of the statutory legal authority. Practically, the local authority dissolves the disputes among the ethnic people of the Chittagong Hill tracts, but they can choose the forum of statutory authority.

### **3.1 Problems to administer justice in the Chittagong Hill Tracts:**

There are eleven groups of tribal people in the Chittagong Hill Tracts. Their personal laws are fully based on the different local custom and principles of different tribes. e.g. capacity of marriage, prohibited degree of marriage, kinds of marriage, legal effects of regular and irregular marriage, mixed marriage, void marriage and its effects, marriage of widow, polygamy and its effects, presumption of marriage, duties and obligations of the spouse, divorce, types of divorce, inheritance and its principles, partition, adoption, paternity, guardianship, gift, maintenance, will etc. Nevertheless, some sort of criminal disputes and the local authority also deals with civil matters, which were established under local customs and principles. But there was also statutory legal system of magistracy under the auspices of the Code of Criminal Procedure, 1898, for the administration of Criminal justice in there hill districts. On the other hand, the civil disputes and other matters of criminal in nature out of the jurisdiction of the magistrates were administered under the CHT Regulation of 1900, Rules for the Administration of the CHT of 1900, the CHT land disputes resolution commission Act of 2001, by the Deputy Commissioner and Divisional Commissioner. It appears that there was the cardinal authority of the executive body of the Government, also in respect of judicial activities, in the Chittagong Hill Tracts, which was fully controversial with the civil and criminal administration of justice in other places of the country. Though the effective body throughout the country exercised the judicial power of the magistracy, but there was a separate court system for civil and criminal administration of justice that was totally absent in the Chittagong Hill Tracts.

From the historical day of the separation of judiciary from the executive organ of

the country on November 1, 2007, to administer criminal justice throughout the country, a separate body of judicial magistracy has been established that is an integral part of the judiciary of the country. However, the judiciary of the Chittagong Hill Tracts had not been separated wholly at the first instance of November, 01,2007. There is set up only judicial magistracy, replacing the existing magistracy system for the administration of criminal justice. But, Criminal jurisdiction out of the powers of the judicial magistrates and civil disputes among the people of the Chittagong Hill Tracts had been dealt with by the Deputy Commissioner and Divisional Commissioner. Such a system was totally different from the legal system of other places of the country that appeared as the 'dual system' in one country.

Later, on June 4, 2008, the amendment of the CHT Regulation of 1900 (Act No. xxxviii of 2003) has given effect to set up the District Judge's Court and original civil court replacing the existing system. From July 01, 2008, the District Judge's Court and original civil court of Joint District Judge have been established. It is seen that the District Judge and Joint District Judge have taken over their charge on July 1, 2008 but after that they are facing several problems of such nature:

- (a) There are controversy with the existing provisions of CHT Regulation of 1900 and amending previsions of the same;
- (b) There is raising debate to administer justice whether through local system or statutory legal system;
- (c) The applicability of the present CHT Regulation;
- (d) The priority between the local customs and statutory provisions;
- (e) Determination of legal regime among the indigenous people;
- (f) Complexity of land disputes for the non-existence of any land survey report and registration procedure;

So, these problems are much related with our topics and we will discuss them in several paragraphs.

### **3.2 Controversy in between the provisions of the CHT Regulation:**

The CHT Regulation, 1900 has been amended by the CHT Regulation (Amendment) Act, 2003 on September 21, 2003 that has given effect from July 1, 2008. But there has been found various contrasts in between the provisions of that regulation. Such controversy can be cited as follows:

- (i) Section 4(2) of the CHT Regulation, 1900 states, "No other enactment heretofore or hereafter passed shall be deemed to apply in the Chittagong

Hill Tracts: Provided that the Government may, by notification in the official Gazette- a) declare that any other enactment shall apply in the said Tracts, either wholly or to the extent or with the modifications which may be set forth in the notification, or b) declare that any enactment which is specified in the schedule to, or which has been declared to, apply by a notification under clause(a) of this sub-section shall apply in the said Tracts. Provided further that no such declaration shall be made after the commencement of part iii of the Govt. of India Act, 1935."

From the reading of this sub-section, it is clear that the provision of this section is now ineffective hereafter and the Govt. had not made any declaration to give effect any enactment in the said Tract. But the Government amending the regulation inserted provisions for the establishment of District Judge's Court and original Civil Court. It is apparently clear to all that the District Judge's Court and original Civil Court cannot take any step without the statutory enactment e.g. the Code of Civil Procedure, 1908, Court- fees Act, 1870, Specific Relief Act, 1877 etc. which are applicable in the places other than the CHT. Another point is that,- the amendment of 2003 to the Regulation is an integral part of that Regulation, but there is no mention about the applicable law in that amendment. So, it is a great controversy in between the provisions of the CHT Regulation of 1900 (amended up to 2003) relating to the applicable law in the CHT under the auspices of the regulation.

- (ii) After the amendment of 2003, section 7 of the Regulation states, "Chittagong Hill Tracts to be three district under the Deputy Commissioner. But in the next line of that section states. "the CHT shall constitute a district for the purpose of criminal jurisdiction" which is controversial with the first line. Section 8(1) runs "The Rangamati, Khagrachory and Bandarban districts of the CHT shall constitute three separate sessions divisions" is also controversial with the second line of section 7. Also in section 8(3), there is clear mention about three districts for the administration of civil jurisdictions.
- (iii) Section 7 states, " .... the general administration of the said Tracts, in criminal, revenue and all other matters, shall be vested in the Deputy Commissioner." But section 8(1) provides "... the concerned District Judge shall be the Sessions Judge of the respective session's division." Further, section 8(3) provides "The Rangamati, Khagrachory and Bandarban districts of the CHT shall constitute three separate civil jurisdictions under three District Judges."

From the reading of sub-section (1) and (2) of section 8, it is clear that the District Judges of three hill districts will be the head for the administration of civil and

criminal justice in their respective districts. But under section 7 of the CHT Regulation vesting the Deputy Commissioner with the 'criminal...and all other matters' is controversial with section 8(1) and (2) of that regulation. That will also tend to administer 'dual system' in the Chittagong Hill Tracts that is not expected by any community.

### **3.3 Contracts between the CHT Regulation, 1900 and the Code of Criminal Procedure, 1898:**

For the administration of Criminal justice across the country, the Code of Criminal Procedure, 1898 is the principal statute regarding procedural matters, which is applicable to the whole extent of Bangladesh, except otherwise specifically provided in any special or local enactment. If we consider that the code of criminal procedure is applied in the Chittagong Hill Tracts under declaration of the Government by notification in the official Gazette, according to the CHT Regulation of 1900, the amendment to the code of criminal procedure will be applicable to the same extent. The principle amendment to the Code of Criminal Procedure has been made with the separation of judiciary from the executive organ, by the Code of Criminal Procedure (amendment) Ordinance, 2007. But to that effect the existing CHT Regulation of 1900 is not be amended in consistent with the Code of Criminal Procedure. So, there are some grave contrasts between the two, which are as follows.

- (i) Section 7 of the CHT Regulation, 1900 provides, "The Chittagong Hill Tracts shall constitute a district for the purpose of criminal jurisdiction and for revenue and general purposes, the Deputy Commissioner shall be the District Magistrate, and subject to any orders passed by the Government under section 6, the general administration of the said Tracts, in criminal revenue and all other matters, shall be vested in the Deputy Commissioner." But after the separation of judiciary on November 1, 2007, the amendment of 2007 to the Code of Criminal Procedure is applicable, in which section 10(1) provides "In every district and in every Metropolitan area, the Government shall appoint as many persons as it thinks fit to be executive Magistrates shall appoint one of them to be District Magistrate."

So, it is clear that the District Magistrate is the executive head of the District. Hence, under the CHT regulation of 1900, the Deputy Commissioner as the District magistrate is the executive head and in accordance with the Code of Criminal Procedure 'criminal and all other matters' cannot be vested in the Deputy Commissioner. According to the provisions of section 4A (1) (c) (ii) of the Code of Criminal Procedure, the criminal jurisdiction is vested in the Chief Judicial

Magistrate or the Chief Metropolitan Magistrate. So, there is a contrast between the CHT Regulation and the Code of Criminal Procedure that can facilitate 'dual administration' in the same field.

- (ii) Section 9 of the said regulation provides, "The Government shall exercise the powers of a High Court for the purpose of the submission of sentences of death penalty confirmation under the Code of Criminal Procedure, 1898 and the Commissioner shall exercise the powers of a High Court for all other purposes of the said code." Article 95(3) of the Constitution provides, "In this article 'Supreme Court' includes which at any time before the commencement of the Second proclamation (tenth Amendment) Order, 1977, exercised jurisdiction as a High Court or Supreme Court in the territory now forming part of Bangladesh."

In accordance with this article under section 9 of the Regulation 'the Government' and 'the Commissioner' have exercised the powers of a High Court and they would be treated as High Court regarding confirmation of death penalty and all other purposes of the Code of Criminal Procedure. So, this did not include the writ jurisdiction of the High Court Division. But after the separation of judiciary from the executive organ on November 1, 2007, how far it is possible to administer criminal justice as a Supreme Court by any executive body. We can say that Section 9 of the Regulation becomes *functus officio* with the emergence of separation of judiciary and such powers will vest in the High Court Division. But section 9 is not amended thereto which is controversial with the Constitution (Article 100) and section 435, 436, 438, 439, 554, and 661A of the Code of Criminal Procedure.

- (iii) Under sections 11(5), 12(3), 13(1), 14(1), and 15 of the regulation of Deputy Commissioner is vested in judicial powers in the Chittagong Hill Tracts regarding possession of firearms and manufacture of gun powder, carrying daos, spears and bows and arrows, intoxicating drugs, foreign spirit and fermented liquor and locally made spirit and fermented liquor. But such offences are triable by the judicial officers under the provisions of the Code of Criminal Procedure, 1898, Drugs Control Act, 1990, Arms Act, 1878, etc.

As the provisions of the said regulation is not amended hereafter the separation of the judiciary, there is a contrast regarding judicial powers of the Deputy Commissioners and Judicial Officers in the Chittagong Hill Tracts. So, it can be said that after the separation of the judiciary, the judicial edifice of the country including the Chittagong Hill Tracts are changed. But the government does not amend the CHT regulation of 1900, which is the applicable law in the CHT. That's

why there are arising problems of jurisdiction, conflict of jurisdiction among the executive officers and judicial officers. Also, there is a confusion regarding applicable law in the Chittagong Hill Tracts, as there is no clear mention about the applicable law in the amendment of 2003 to the regulation.

### **3.4 Conflict between the CHT Regulation and the Code of Civil Procedure:**

The Code of Civil Procedure, 1908 is the bible of the civil administration of justice and it is wholly applicable in all other places of Bangladesh except the Chittagong Hill Tracts. But from July 1, 2008, there is established District Judge's Court and original civil court of Joint District Judge who are the judicial officers, replacing the existing court of Divisional Commissioner and Deputy Commissioner who are the executive officers. There was civil administration of justice under the auspices of the CHT Regulation. But there are also some contrasts with the Code of Civil Procedure. These are as follows:

- (i) When the amendment of 2003 to that regulation has given effect the Government declares in special provision of 6(ka) that 'all civil suits or legal proceedings of civil nature pending before the Deputy Commissioner of Rangamati, Khagrachory and Bandarban district will be deemed to be transferred to the respective Joint District Judge at once.' And in the special provision of 6(kha) the Government declares that 'all criminal cases, appeals and legal proceedings of criminal nature pending before the Divisional Commissioner of Chittagong will deem to be transferred to the respective District Sessions Court at once.' But in section 17 of the Regulation provides, "All officers in the Chittagong Hill Tracts shall be subordinate to the Deputy Commissioner."

But it is not possible, as the District Judge and Joint District Judge cannot be subordinate to the Deputy Commissioner. Because, according to the Code of Civil Procedure the District Judge's Court is the court of appeal of civil suits and Joint District Judge's is an original civil court in the hill districts.

- (ii) Section 18(2) of the regulation provides, "in particular.....such rules may- (a) provide for the administration of the civil justice in the Chittagong Hill Tracts;" upon which the Government has made rules. It also states that by such rules the Government has made rules. It also states that by such rules the Government may (c) provide for the registration of documents in the said Tracts; (d) regulate or restrict the transfer of land in the said Tracts.'

The registration of documents is regulated in accordance with the Registration Act, 1908 and the transfer of land and other property is administrated under the Transfer of Property Act, 1882 throughout the country except the Chittagong Hill

Tracts. Following this, the provisions of the Code of Civil Procedure are not applicable in the Chittagong Hill Tracts. So, there is established a separate system of civil administration of justice than other places of Bangladesh and such system is very much controversial with the statutory legal system of civil justice. As for example, (a) regarding the valuation of suits the Suits Valuation Act, (b) regarding the court-fees the Court-Fees Act, 1870 are not followed, (c) there is no specific rules regarding proper stamp under the Stamp Act. These are conflicting with the Code of Civil Procedure in case of dealing with the civil suit or legal proceedings of civil nature.

(iii) Section 8(4) of the regulation provides, "The Joint District Judge as a court of original jurisdiction, shall try all civil suits in accordance with the existing laws, customs and usages of the districts concerned, except the cases arising out of the family laws and other customary laws of the tribes of the districts of Rangamati, Khagrachory and Bandarban respectively which shall be triable by the mauza Headmen and Circle chiefs."

There is an original civil jurisdiction of the Code of Civil Procedure and the Civil Courts Act, 1870. But there is no such court of Assistant Judge in the Chittagong Hill Tracts under the regulation. Section 8(4) reads as, 'shall try all cases in accordance with the existing laws, customs and usages of the districts concerned.' But there is no mention about what will prevail between existing laws and customs or usages. On the other hand, the civil justice system is wholly based on the existing laws. To apply customs and usages in it, there will arise further litigation (i.e. litigation within litigation) to prove the customs and usages of the districts that can break ultimate object of the civil justice system. Another point is that, what sorts of customs and usages will be taken into account, whether procedural or substantive, to the administration of civil justice.

(iv) Section 8(4) of the regulation only states, "The Joint District Judge..... shall try all civil cases in accordance with the existing laws, customs and usages of the districts concerned." Section 8(5) of the regulation provides, " An appeal against the order, judgment and decree of the Joint District Judge shall lie to the District Judge."

There is applicable the CHT Regulation of 1900 in the Chittagong Hill Tracts but there is no specific provision regarding the conflicts between the regulation and the Code of Civil Procedure. As there are no provisions of issuance of commission, receiver, attachment and arrest, etc. for the proper administration of civil justice under the CHT Regulation and also in the customs and usages of the districts. Also there is no mention about the applicability of the ADR mechanism that is

enumerated in details in the Code of Civil Procedure. Many people other than the ethnic people live in the Chittagong Hill Tracts. In practice, we have seen that there are most cases filed before the court that relates to the disputes among the people other than tribal people. In absence of registration of documents process, land survey report and declaration from the Government, the judges have to face complexity to administer justice among the people also. There is no court of Assistant Judge to deal with the family court. The Joint District Judge is burdened with the caseloads of different categories civil, family as well as criminal. Such system is completely controversial with the Code of Civil Procedure and also with the existing laws of the country, that's tend to 'dual system of justice' in the country, one system is in the Chittagong Hill Tracts and another system is in other places of Bangladesh.

### **3.5 Complexity of local customs and social principles'**

There are eleven groups of tribal people in the Chittagong Hill tracts and also there are eleven types of laws applicable among the people of each tribe, as for example,

- (a) Chakma personal and family laws,
- (b) Marma personal and family laws,
- (c) Tripura personal and family laws,
- (d) Tanchangya personal and family laws,
- (e) Mro personal and family laws,
- (f) Bom personal and family laws,
- (g) Khumi personal and family laws,
- (h) Kiang personal and family laws,
- (i) Chak personal and family laws,
- (j) Pangkhua personal and family laws,
- (k) Lusai personal and family laws,

Like this, there are various types of customary laws and principles among the tribes in respect of civil and criminal disputes. Practically, it is not permissible for the judges to know all the customary laws and principles of indigenous community regarding the disputes of civil nature and in the criminal cases. So, the court has to rely on the statutory laws nature than the customary laws and principles. But doing so, the ethnic communities will be displeased to the administration of justice under the auspices of separate judiciary. Also, there are no guidelines to the judges under which the customary laws and usages can be administered from the bulk of different types of customs. Such complexity of customary rules and absence of specific guidelines to the judges of the statutory legal system hampers the proper administration of both civil and criminal justice and ultimately the public will be the sufferer.

#### **4. Recommendations:**

The CHT is the integral part of Bangladesh. But the legal system if CHT is administered under the auspices of different legal instruments other than prevailing legal instruments throughout the country, e.g. the CHT Regulation of 1900, the CHT. Manual, the CHT Accord of 1997 etc. With the change of the time, the legal system of CHT has been changed and the principal statutes of the legal system of Bangladesh have come into operation. From this paper, we can find that there are various conflicts, controversies and demand of the people to the existing legal system in CHT. To overcome such contrasts and balancing people's demand, we can suggest following steps to be taken:

- The conflicts regarding the powers and functions between the administrative body and judicial body in CHT should be removed with the amendment of the CHT Regulation of 1900.
- With the emergence of separation of the judiciary, the legal system of CHT should be administered under the auspices of statutory mandates.
- The local customs, rules and principles should be applicable regarding disputes of family or social matters among the indigenous people.
- The contrasts in between the provisions of the CHT Regulation of 1900 should be removed.
- The CHT regulation of 1900 should bring in conformity with the provisions of the Code of Civil Procedure, 1908 and the Code of Criminal Procedure, 1898.
- Regarding court-fees and other charges for the administration of justice in CHT statutory guidelines should be made.
- There are various types of local customs and principles among the indigenous community e.g., substantive and procedural. It should be guided by the Supreme Court of Bangladesh and the Government that what types of customs and principles can be applied by the court of justice.

#### **5. Concluding Remarks**

To complete this article it is needed that to mention the current storm over the legality of the Chittagong Hill Tract (CHT) Manual Act, 1900 after 100 years of its enactment which has triggered tension and anxiety among the hill people in the CHT. A person named S.P Marma from Rangamati filed a writ petition with the

High Court challenging the legality of the CHT Manual Act, 1900. Though the hearing of the writ will be held shortly, it has switched on yet another panic button in the CHT. The adivasi leaders of CHT expressed their anxiety and worry over this issue and feared that, if the court rule goes against the act, 'indigenous life and culture would come under threat and even the history of CHT might be distorted.' The three circle chiefs (Mong, Chakma and Bomang) of the Khagrachhari, Rangamati and Bandarban, CHT Regional Council and the Headman (village chief) Association have already submitted separate memorandums to the Law Minister expressing their deep anxiety over the petition.

Historically speaking, it was in 1860 the British government divided the Chakma kingdom of Chittagong into two districts named Chittagong and Chittagong Hill Tracts by Act XXII. Chittagong was then included into Bengal Province of India which soon became completely populated with the Bangladeshi people. In the case of the CHT, the British recognized the distinct identity of the tribes by treating the CHT as an 'Excluded Area' and in order to protect constitutionally their political, economic and cultural rights, they had administered it under a separate edict called the Chittagong Hill Tracts Regulation of 1900 - also known as the CHT Manual. The CHT Manual laid down detailed rules and regulations for the administration of the CHT. The Manual has clearly stated that: " No person other than a Chakma, Mogh or a member of any tribe indigenous of CHT, the Lushai Hills, the Arakan Hill Tracts or the State of Tripura shall enter or reside within CHT unless he is in possession of a permit granted by the Deputy Commissioner at his discretion." (Read also: Section 18. Article 7 of Chapter 3, Rule 7(1), Rule 34, Rule 51, and Rule 52 of the CHT manual). However, administrative changes were made in CHT under British rule - Firstly, in 1921, the CHT Regulation of 1900 was amended to declare CHT a 'Backward Tracts' and gave the Governor in council sole authority in the area; and secondly, the Government of India Act of 1935 created CHT a totally 'Excluded Area' and so granted further recognition to the special status of CHT. But the provisions of the Manual were executed properly and the indigenous hill people were safe during the British period. In August 1947, the British handed over the administration of CHT to the government of Pakistan. The government of Pakistan amended the CHT Manual several times in order to find a legal excuse for migration of non-indigenous people and to open up the CHT for 'resource exploitation'. Above all, the then Pakistani Government interpreted the CHT Manual as a legacy of British colonial administration which helped separating the CHT from the rest of the country. Therefore the constitution of Pakistan, promulgated by president Ayub Khan in 1962, changed the administrative status of the Chittagong Hill Tracts from that of an 'excluded Area' to that of a 'Tribal Area'. However the CHT Manual remained in force. After independence, Bangladesh

government also pursued deliberate attempts to bring in fold the administration of the CHT. After several rounds of negotiations between the government and the warring tribal movements from the 1980 onwards, a peace deal was finally struck on 2 December 1997. Thereby a partially autonomous self-government system has been re-established and the region has been officially recognized as a 'tribal-inhabited area', not questioning the legality of the CHT Manual.

But from 2003 onwards there were frequent writs challenging the legality or the constitutionality of several Acts of the CHT. Earlier, the Hill District Council Acts of 1989 and the CHT Regional Council Act of 1998 have been challenged in the Bangladesh Supreme Court through two separate writ petitions. The petitioners have alleged that 'having a separate regional council for the CHT violates the unitary framework of the Bangladeshi republic', and that it relegates the Bengali inhabitants of the region to 'second class' citizens and thus, offends the equal rights or non-discrimination clauses of the constitution. The recent controversy over the legality of the CHT Manual is also deliberated move in that line. It has to be understood that the absence of direct constitutional backing for the CHT self-government system with its primacy to indigenous peoples makes it susceptible to legal challenges in the High Court as a potentially unconstitutional arrangement. If the court orders to stop the implementation of CHT Manual Act, 1900, the Hill people will have to face legal battle against that, leading to yet another tragedy.

Finally, it can be said that to maintain a peaceful and harmonize living in CHT the Government has to take initial steps to meet the chaos situation in the legal system of CHT balancing the meets and bounds of the indigenous communities of that area. Otherwise there will arise more and more complexity in the administration of justice in CHT.

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## **Patentability of computer software : a critical analysis of TRIPs Agreement**

— Muhammad Nazam uddin

Production of computer software has been increasing day by day. Youngsters are now more enthusiastic to concentrate on creation of more up-to-date version of computer software. National or international markets are also very keen to take this software promptly. Without software the functioning of computer becomes almost impossible. However it helps the smooth functioning of computer and can also be used to get the desired goal easily. Now the question arises as to how far this computer software is protected by law. Is this protection granted through copy right or patent? Is there any chance to get patentability of computer software? These are the important questions which always shakes the mind of creators.

### **How computer software is protected in our country.**

Computer is an electronic machine capable of storing and processing data. The explanations, instructions and system which are developed in order to run the computer to a certain direction are called computer software. So computer software includes those which govern the operation of a computer in line with the objects to be achieved. In our country computers software is protected by copyright as it is legally treated under the head of 'Literary work'

Under section 14 sub-sections 2 of the Copy Right Act 2000 following rights regarding computer software are recognized to be protected on behalf of the creators.\*1

These are;

1. Right to reproduce the work in any material form
2. Right to publish the work
3. Right to perform the work in public
4. Right produce, reproduce or to publish any translation of the work
5. Right to make any cinematographic film or sound record in respect of the work
6. Right to communicate the work by broadcast
7. Right to transfer ownership or to transfer some privileges
8. Right to sell or hire any copy of the work or to offer to sell or hire any such copy.

\*1. See section 14 of the Copy Right Act 2000 at page 298 of Md. Altaf Hossain, 'Intellectual Property Act' Edition- 2002.

As computer software is treated to be literary work, its protection period will be next 60 years after the death of creator.

Under section 84 of the Copy Right Act 2000, the person who violates the copy right of computer software will have to face the imprisonment of maximum 3 years and minimum 3 months or fine of maximum taka 2 lakh and minimum taka 50 thousand. But by a recent amendment to the copy right act in 2005 the fine against the infringement of copy right to software has been increased from present maximum 2 lakh to 4 lakh and present minimum 50 thousand to taka 1 lakh. The object of increasing punishment was to protect the computer software more strictly.

### **What should be the better protection system either copyright or patent?**

Protection by patent protection and copyright constitute two different means of legal protection which may cover the same subject-matter, such as computer programs, since each of these two means of protection serves its own purpose. Software is protected as works of literature under the Berne Convention, thus any software written is automatically covered by copy right. This allows the creator to prevent another entity from copying the program and there is generally no need to register code in order for it to be copyrighted.

Patents, on the other hand, give their owners the right to prevent others from using a claimed investigation, even if it was independently developed and there was no copying involved. In fact, one of the most recent EPO (European Patent Office) decisions\*2 clarifies the distinction, stating that software is patentable, because it is basically only a technical method executed on a computer, which is to be distinguished from the program itself for executing the method, the program being merely an expression of the method, and thus being copyrighted.

Patents cover the underlying methodologies embodied in a given piece of software, or the function that the software is intended to serve, independent of the particular language or code that the software is written in. Copyright prevents the direct copying of some or all of a particular version of a given piece of software, but don not prevent other authors from writing their won embodiments of the underlying methodologies.

Copyright can also be used to prevent a given set of data from being copied while still allowing the author to deep the contents of said set of data. So, the above discussion recognizes that patent can be better protection for computer software.

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\*2. *Petition no T 424/o3 of the European Patent Office (EPO) available at net ([www.patent.gov.uk](http://www.patent.gov.uk))*

Moreover, one can seek copyright protection and patent protection for computer software at a time for example, Software: Terend Micre PC-cillin Internet Security 2007.\*<sup>3</sup>

### **Provision of international instrument on copy right protection of computer software.**

Article 10 paragraph 1 of TRIPs Agreement says that computer programs whether in source or object code shall be protected as literary works under the Berne Convention 1971.

Article 10 paragraph 2 requires that arrangements of information are to be considered as “intellectual creations.”

“Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such.” \*<sup>4</sup>

The WIPO Copyright Treaty (WCT) though not binding upon the WTO members who have not joined the WCT- similarly provided in Article 4 that computer programs are protected as literary works within the meaning of article 2 of Berne Convention. Such protection applies to computer programs, whatever may be the mode or from of their expression.

### **Whether computer software can be protected under patent**

Patent is a document issued by a government office on application and the patented invention can normally be exploited, manufactured and used with the authorization of the owner of that patent. It recognizes the exclusive right of a patentee to gain commercial advantage out of his invention. This is to encourage the inventors to invest their creative faculties knowing that their inventions would be protected by law.

The Patent and Design Act 1911 recognizes that patent will be granted for those inventions which fulfill three substantive conditions. These are novelty, inventive step, and industrial application. In the absence of any one of them, the invention loses its competence to claim patent. Novelty means new and different form the existing knowledge or invention in the particular field of technology. Inventive step means a noticeable step behind creation of the claimed invention. Industrial application means that how far the invention is technologically reproducible and

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\*3. *Micro trend owns the title, copyright and the trade secret, patent rights in the software and the copyright in the documentation, and reserves all rights not expressly granted to any Agreement. The software is protected by copyright, trade secret and U.S. patent laws.*

\*4. *See Article 10 of TRIPs Agreement at page 79 of Intellectual Property rights and Bangladesh, Ullah Mahfuz, Edition 2002 published by RELA*

the relevance of practical purpose and utility of the claimed.\*<sup>5</sup>

Article 27 of the TRIPs Agreement says that patents shall be available for any inventions whether products of or processes in all fields of technology provided that they are new, involves an inventive step and capable of industrial application. However patent shall be available without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

In line with the provision of national law and the provision of article 27 of TRIPs Agreement, if we can prove that computer software is an invention in the field of technology with fulfillment of requirements of novelty, inventive step and industrial application, then computer software will be easily protected under patent.

Now the question arises whether computer software can constitute an invention which means a solution to the technical problem using scientific principles in the fields of physics, chemistry or biology. So if the computer software is an integral part of process in the field of physics and chemistry and which is called a process controlled by scientific computer program, then that software will be called an invention. However if the software makes a technical contribution to art, then that software will be patentable.

An invention which included a computer program could be patentable so long as the invention as a whole was technical. The Board of Appeal in conventional patentability criteria should not be excluded from patent protection.\*<sup>6</sup>

In *Kearney*, the Technical Board of Appeal held that a computer program that altered machine operators when their machines needed to be repaired or worn tool needed to be replaced solved a technical problem and as such was a patentable subject matter.\*<sup>7</sup>

In fact, the plain theory is that if it can be shown that the subject matter makes a technical contribution to the known art, patentability would not be denied merely on the ground that a computer program is involved in its implementation and if it can not be shown that the computer program seeking patentability is technical,

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\*5. The whole text of *The Patent and Design Act 1911* is available in *Attaf Hossain, Intellectual Property Act*, published by *Bangladesh Law Book Company*. There are some renowned cases on these substantive requirements of patents namely, for patent *Molins and Molins VS Industrial machinery co. ltd.* Page-149, for inventive step *The General Tire and rubber com. VS The Firestone tyre and rubber com.* Page-157, for Industrial application *Chiron Corporation VS Organon Teknika* page- 167 of *David I Bainbridge, case and Materials in Intellectual Property Law*.

\*6. *Vicom/computer related invention T208/84-1987EPOR74* available at net ([www.patent.gov.uk](http://www.patent.gov.uk))

\*7. *Kearney/computer-related invention T42/87-1997EPOR 263,241* available at net ([www.patent.gov.uk](http://www.patent.gov.uk))

then it will not be patentable. For example it was decided that a ROM carrying a particular program was not distinguishable from the program itself and as such, was unpatentable. So the computer program seeking patentability shall have to be distinguished from the program itself and as such, was upatentable. So the computer program seeking patentability shall have to be distinguished from ordinary software program in which there happens transformation of some signals.\*8

The extent of patentability of computer software depends on different application of it. Where the software is normally used for general purpose, then the software is unpatentable because that software merely transformed mathematical values into electrical signals amounting to reproduction of information not making any technical effect. If the program could be treated as forming part of the process, patent would be granted provided further that the normal condition of patentability like novelty, inventive step and industrial application are fulfilled.

Now, we can make a clear distinction between program which is not patentable and program which is patentable.

- a. The computer program which merely transforms mathematical values into electrical signals amounting to not more than a reproduction of information and bringing about no technical effect is not patentable. On the other hand the computer program which is technical and not merely linguistic in nature and it extends beyond text-processing to provide a technical contribution or to resolve some technical problem, is patentable. More positively the program that has technical character is patentable. The technical must be found in the effects caused by the execution of the computer program by the hardware. So it must have to be resulted in additional technical effects that went beyond the normal physical interaction between the software and the hardware on which it was run.
- b. A claim to a data processing system for making a trading market in one stock exchange security in which a set of 'means' were to provided for analyzing customers but and sell orders against given criteria is not a technical production and as such is not patentable because this program can be introduced in any encoding language to cause data to acted upon so as to effect legal transactions. On the other hand, a claim to process for producing a chemical in which a program of defined content is used to control production provides the element of novelty and inventiveness. So the claim having technical consequences is patentable beyond doubt.\*9

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\*8. Page-382, *Intellectual Property Law*, Lionel Bently and Brad Sherman, Oxford University Press.

\*9. Page-144, *Intellectual property: Copyrights, Trademarks and allied rights*. W.R. Cornish, Universal Law Publishing Co. Pvt. Ltd.

- c. Two suggestions are required by the European authority for patentability of computer software. These are as follows-
  1. A computer program that utilizes “controllable forces of nature to achieve predictable results.”
  2. A computer program which provides a “technical effect.”

On the other hand a computer program having no controllable force and technical effect loses its patentability.

In context of our country and our national law, it is pertinent to be mentioned that our IT industry and IP protection are both lagging behind. We have been just scrambling towards excellence of information technology and standard of IP protection system. But we can not stay lazy for long. Our talented youngsters have been looking forward to bringing up computer software which is patentable as mentioned above. If it happens so, then an important question will arise as to whether our national law is going to permit patentability of computer software. To say, till now computer software is not being properly protected ever under copyright. Recently Mostafa Jobber, the owner of computer software (Bijoy) got some administrative relief in which the Port Authority was requested to seize the pirated copy of Bijoy, the computer software. However on observation of above points and findings we see that there is no embargo or impediments to provide patent on computer software by local patent office. In coming days we can see some milestone decision of our National Patent Office whereby it would grant patent on computer software.

However, whether computer software can be protected under patent should be decided on the basis of sound economic reason and interest of industry and circumstances. So if a person likes to get patent protection of software and if his creation comprises pure software or a data structure with questionable technical effect and the software can create appeal to the significant US market and if the government do not impose any impediment on foreign application, then that person can file a patent application in the USA patent office. When the software is a computer implemented invention having technical effect, the creator can also file an application before European Patent Office because in the above cases both countries allow patentability of computer software.

Most importantly the TRIPs Agreement recognizes the principle of ‘national treatment’ in Article 3 which means that national of any member country will be treated in the same ways nationals of the country where protection is granted.

Article 3 of TRIPs Agreement says in sub-article 1 that—

'Each Member shall record to the nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits.....'

In sub-Article 2 says —

'Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designing of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.'\*10

The Paris Convention (1967) recognizes the principle of national treatment where by it states that member states will obtain protection under the same condition as the citizen of particular member state. The Rome Convention also recognizes the same principle. The Berne Convention (1971) provides automatic protection. It means that with any formalities after signing the convention any citizen of member country will get protection in another member country.

So form the above international instruments, it appears that a citizen of any member country, for example, Bangladesh can file an application for patentability of computer software before European patent office or USA patent office or 'PCT receiving office' under the Patent Cooperation Treaty (1970)

The patent Cooperation Treaty (PCT) is an international patent law treaty, which provides a unified procedure for filing patent application to protect inventions. A patent application filed under the PCT is called an international application or PCT application. A PCT application can be filed in the national office termed as 'PCT receiving office.' But if for the cause of national security provisions the national law does not permit it, it can be filed with the 'International Bureau of WIPO.' Once an application is submitted, a copy of such application will be sent by the receiving state which is called 'home copy.' And another copy before the international searching authority which is called as 'search copy.' The record copy and search copy shall be sent to by the receiving office.

Under the PCT, the international search and the international preliminary

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\*10. See Article 3 of TRIPs Agreement at page 77 of Intellectual Property Right and Bangladesh, Ullah Mahfuz, Edition-2002 Published by BELA

examination, which is optional, are conducted by different national or regional patent offices, formally called respectively International Searching Authorities (ISA) and International Preliminary Examining Authority (IPEA). The ISA will examine the basis requirements of patent like novelty, inventive step and industrial application. Then they will provide a comprehensive report on the basis of which patent shall be granted.

Rule 39. 1 of Patent Cooperation Treaty states that

“No International Searching Authority shall be required to search an international application if, and to the extent to which, its subject matter is any of the following:

(...)

(vi) **computer programs** to the extent that the International Searching Authority is not equipped to search prior art concerning such programs.”

Rule 67.1 of PCT states that

“ No International Preliminary Examining Authority shall be required to carry out an international preliminary examination on an international application if, and to the extent to which, its subject matter is any of the following:

(...)

(vi) **computer programs** to the extent that the International Preliminary Examining Authority is not equipped to carry out an international preliminary examination concerning such programs.”\*<sup>11</sup>

Apparently it is seen that consideration of patentability of computer programs are within the purview of PCT. Moreover even in 1970, it was in the mind of assignee of PCT that computer programs might come under patentability in coming years. Searching the PCT application is an optional task which is not compulsorily required for ISA or IPEA to the extent of its existing equipments in respect of computer programs as revealed by the above mentioned Rules of PCT.

Moreover, here I am not drawing the result that the national legislation is bound by the TRIPs Agreement to grant patent protection for computer software that deserves the eligibility of technical innovation. It is up to the government to decide or to initiate as to what will be the IP protection for computer software. But here I highlight the patentability of computer for computer software which can be granted either National Patent Office or Regional/International Patent Office on application of some interested private persons. Dr. Karl-Friedrich Lenz, a Japanese

\*11. The text content of Patent Cooperation Treaty is available at net in goggle search.

writer also opined the same view and initiated a principle termed as 'dubio mitius.' He said in the following way-

'This principle means that when in doubt the TRIPS treaty should be interpreted in a way that interferes less with the sovereignty of Member State. This principle is recognized in multiple decisions of the Appellate Bored. Leaving decisions about the area of software patents to the Member States instead of assuming that it is already decided by the TRIPS treaty is in line with this principle.'<sup>\*12</sup>

In respect of government initiative, we can say that the government is to consider the sound economic reason, extent of transfer of technology, excellence of innovation of computer software, consumers' choice and above all national interest in granting patentability of computer software. In this aspect Paul Hartnack, the then Comptroller-General of the UK Patent Office, rightly commented in 1998

'Some have argued that the TRIPS agreement requires us to grant patents for software because it says "patents shall be available for any inventions.... In all fields of technology, provided they are...capable of industrial application." However, it depends on how you interpret these words.

Is a piece of pure software an invention? European law says it isn't. Is pure software technology? Again, for much software many would say no.

TRIPS is an argument for wider protection for software. But the decision to do so should be based on sound economic reasons. Would it be in the interests of European industry, and European consumers, to take this step?'<sup>\*13</sup>

### **Practice of software patent in different IP protection system.**

Software patent is a patent on any performance of a computer realized by means of a computer program. In Europe Article 52 of the European Patent Convention (EPC) excludes "programs for computers" from patentability (Art. 52(2) to the extent that a patent application relates to a computer program "as such" (Art. 52(3)). This has been interpreted to mean that any invention which makes a non-obvious 'technical contribution' or solves a "technical problem" in a non-obvious way is patentable even if that technical problem is solved by running a computer program. An interpretation, which is followed by the Boards of Appeal of the EPO, is that an invention is patentable if it provides a new and non-obvious technical solution to a technical problem.

<sup>\*12.</sup> 'TRIPS and Software Patents in Japan' Dr. Karl-Friedrich Lenz available at [net.www.tripsagreement.com](http://net.www.tripsagreement.com)

<sup>\*13.</sup> John Moetteli, 'The Patentability of software in the U.S. and Europe,' presented at St. Gallen, Switzerland, October

The problem, and the solution, may be entirely resident within a computer such as a way of making a computer run faster or more efficiently in a novel and inventive way. Alternatively, the problem may be how to made the computer easier to use, such as in T928/03, Konmi, Video Game System.\*14

According to a European Commission press release of 2002 patents for computer-unlamented inventions have already been issued by the EPO.” The Comptroller of the British Office reported on 2<sup>nd</sup> nov.2000 that over 15% of the patents granted over 20000software-related patents and it is said that objections are made in relation to less that 1% of software-related applications.\*15

In the USA, due to different treatment of federal patent rights in different parts of he country, in 1982 the U.S. Congress created a new court 9the Federal Circuit) to hear patent cases. Following several landmark decisions by this court, by the early 1990s the patentability of software was well established, and in 1996 the USPTO issued Final Computer Related Examination Guidelines stating that “A practical application of a computer-related invention is statutory subject matter. This requirement can be discerned from the variously phrased prohibitions against the patenting of abstract ideas, laws of nature or natural phenomena”

In Japan software-related inventions are patentable. To qualify as an invention, however, there must be “a creation of technical ideas utilizing a law of nature.”

In Australia, pure or abstract methods of doing business are not considered to be patentable, but it the method is implemented using a computer, it avoids the exclusion for business methods.

In South Korea, software is considered patentable and many patents directed towards “computer Programs” have been issued. In 2006, Microsoft was ordered to halt sales of its “Office” suite due to a patent infringement ruling by the Supreme Court of Korea.

## **Conclusion**

Patentability of software is well-recognized in the USA and more recognized to be patentable in Europe and the European Patent Convention supports its patentability. Therefore, where it is permitted under national laws and where US market is a significant market in the world, globally minded client should think of filing software patent application in the USA first. The applicant should also consider the value and adjustment of filing strategy in order to minimize the cost

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\*14. Available at net-<http://legal.european-patent-office-org/dg3/bibilo>

\*15. See at page 381 of *Intellectual Property Law*, Lionel Bently and Brad Sherman, Oxford university Press.

pet patent and maximize potential returns. As Bangladesh is a signatory to the TRIPs Agreement, she may also catch light of above points for granting patentability of computer software in order to develop and promote the software technology vis-a-vis economic stability.

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# Violation of Child Rights and Its Protection Mechanism in Bangladesh

— ASM Tofazzel Haque

— Md. Asraful Islam

— Moha. Afsar Uddin

## 1. Introduction

There is a saying that education is the backbone of a nation but modifying this, it can be said now that children are the backbone of the modern nation if they are well educated and well trained and free from exploitation of any kind. But it is a matter of great regret that the modern civilization witnesses gross violation of children rights in different parts of the world. Bangladesh is no exception to these common phenomena. In Bangladesh child rights are frequently violated in different forms i.e. physical violence, mental violence and financial violence etc. Violences which are taken place in Bangladesh are mainly due to poverty, illiteracy, ignorance, unawareness, stereotyped social out look etc. This research study undertakes the responsibilities to show the present scenario of child rights, the state of laws governing child rights nationally and internationally and above all prescribes some recommendations to uphold and protect the rights of the children in Bangladesh.

## 2. Definition of child

Definition of child is not organized and uniformed in Bangladesh because different laws have defined child from different view considering the age. The age limit of child is given below under different legal instruments:

According to section 2(f) *The Children Act, 1974*, 'Child' means a person under the age of sixteen years for the purpose of juvenile justice administration.

According to section 1(3) *the Bengal Vagrancy Act, 1943* 'Child' means a person under the age of fourteen years.

According to section 2(m) of *the Nari O Sishu Nirjaton Domon Ain 2002*, amended in 2003 'Child' means a man who has not exceed the age limit of 16 years.

According to Section 2(f) of *the Jail Code, 1864*, a 'Child' means a person under the age of 16 years.

According to Section 3 of the *Majority Act 1875*, a minor or child is a person who has not completed his eighteen years of age.

Section 82 of *the Penal Code, 1860* has considered those as children whose age is below nine years.

It is pertinent to mention that Article 1 of the *United Nations Convention on the Rights of the Child (UNCRC), 1989* states that a child means every human being below the age of eighteen years.

### **3. Meaning of Violence**

Let us know about the meaning of violation. In accordance with Article 19 of the Convention on the Rights of the Child, 1989, violence means all forms of physical or mental violence, injury and abuse, neglect and negligent treatment, maltreatment or exploitation.<sup>1</sup> In other words, violence is the intentional use of physical force or power, threatened or actual, against a child, by an individual or group, that either results in or has a high likelihood of resulting in actual or potential harm to the child's health, survival, development or dignity.<sup>2</sup>

### **4. The violence which are committed against children**

Violence against children occurs in all sectors in Bangladesh. It includes inter alia, trafficking, sexual abuse and neglect, kidnapping, acid throwing, rape, corporal, emotional, mental, domestic violence, prostitution, child labour etc. Now let us allow to narrate these types of violence in the light of information, statistics, causation and its effects in Bangladesh and in international arena.

#### **A. Trafficking**

Human trafficking is when a person is lured, recruited, or taken by force into another country, where they are forced to work under brutal and inhuman conditions. Human trafficking happens all over the world. Traffickers target mostly women and children in countries where living conditions are very poor. Victims can be tempted with false promises of good jobs and better lives in another country. Sometimes, victims are kidnapped. The law prohibits trafficking in person; however trafficking remained a serious problem affecting men, women & children. During the year 2008, 45 trafficking cases were adjudicated by the special court dealing with incidents of repression against women and children. The Court convicted 21 persons and ordered life imprisonment in 18 cases. According to government sources, law enforcement authorities rescued 87 victims of trafficking from January to December 2008. Since August 2005, a cooperative

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<sup>1</sup> Article 19 of the Convention on the Rights of the Child, 1989

<sup>2</sup> World Report on Violence and Health (2002)

effort between NGOs, the Government, and the UAE resulted in the repatriation of 199 camel jockeys 198 of whom were retraced with their biological parents. According to the Centre for women and children services most trafficked boys were under 10 years of age most trafficked girl were between 11 to 16 years.<sup>3</sup>

The Kuwait Times reported that the United Arab Emirates has sent home more than 1,000 smuggled child jockeys. These children had been trafficked from Bangladesh, Pakistan and other places.<sup>4</sup> Qatar is a destination country for men and women from India, Pakistan, Bangladesh, Nepal, the Philippines, and Indonesia. In 2004 the US blacklisted Bangladesh and moved it from Tier 2 to Tier 3 category of blacklisting. In that report it noted that Bangladeshi boys are trafficked into the United Arab Emirates and Qatar and forced to work as camel jockeys and beggars.<sup>5</sup> Women and children from rural areas in Bangladesh are trafficked to urban centers for commercial, sexual exploitation and domestic work.

### **B. Abuse & Neglect:**

Most instances of sexual abuse occur in urban area where children are employed in household or in the garment industries or in brothel. In rural Bangladesh, poor girls without a trade or dowry are often sold in marriage to older men. If a girl is the second wife and the first one does not recognize the marriage, it is not registered and can be abandoned any time (even after pregnancy), without any legal remedy. Half of all the married women in Bangladesh are below 18 and 20 per cent give birth to their first child by the age of 15. It is very much necessary to create public awareness and improve the legal system to save the children from sexual exploitation in the society. It is sometimes unfortunate that the child abuse goes unpunished due to negligence or abuse of power.<sup>6</sup> Abuse is the main point in the most described cases of sexual exploitation. Many kidnappings were done for this purpose even if the mention of it was obtained omitted in subsequent report to avoid embarrassment to the victims. Also frequently enough the victim were silenced by their tormentors.<sup>7</sup>

### **C. Prostitution :**

About 40,000 children from Bangladesh are involved in prostitution in Pakistan, while another 10,000 children are active in Bangladesh. Poverty, abuse & neglect in families, both rural & urban, force many children to enter into the commercial sex trade. In a study in & around Dhaka, it was found that then almost 50% of the girls were sold off by an intermediary & forced to work as prostitution. Significantly about 25% were daughter of prostitutes. Of the latter 10% were adopted.

<sup>3</sup> <http://www.state.gov/g/drl/rls/hrrpt/2007/100612.htm>

<sup>4</sup> <http://www.kuwaittimes.net/navariednews.asp>

<sup>5</sup> [http://www.ecpat.net/eng/Ecpat\\_inter/IRC/newsdwsk\\_articles.asp](http://www.ecpat.net/eng/Ecpat_inter/IRC/newsdwsk_articles.asp)

<sup>6</sup> State of Human Rights 1995 of Bangladesh, Bangladesh Manbadhikar Samonnoy Parishad;

<sup>7</sup> State of Human Rights in 1995: Human Rights Commission of Pakistan; Page 139.

**Estimated Number of Child Prostitutes in Different Countries:**

Countries	Estimated Number
Thailand	80,000-100,000
Sri Lanka	30,000
Taiwan	40,000-60,000
China	200,000-500,000
Brazil	500,000-20,00,000
Dominican Republic	25,000
West Africa	35,000
Bangladesh	10,000-20,000
United States of America	100,000-30,00,000
India	400,000
Australia	4,000
Vietnam	40,000

The International Labor Organization estimates that more than 2 million children under age 18 are involved in prostitution, half of them in Asia and 300,000 in the United States.<sup>8</sup>

**D. Corporal punishment**

The first source of corporal punishment against children is the family. Families are still vehemently following the old-fashioned approach against sparing the rod. The second customary source is the school teacher. It was estimated that more than 80% of the school resorted to corporal punishment.

**School and Corporal Punishment**

The corporal punishment is a regular affair in thousands of schools everywhere. Children not only carry overload of text books and note books on their tender backs, but bear the brunt of canes for silly reasons. Very often the teachers ask them to stand or 'kneel down' under hot sun. Sometimes students are asked to complete the assigned writing work in kneel down position.

**Kinds of Punishments in Schools:**

There are three types of corporal punishments in schools.

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<sup>8</sup> <http://www.gutmacher.org/pubs/journals/2307997.htm>

**Physical Punishments:**

The physical punishments which are usually provided in schools are making the children stand as a wall chair, keeping the school bags on their heads, making them stand for the whole day in the sun, make the children kneel down and do the work and then enter the class room, making them stand on the bench, making them raise hands, hold a pencil in their mouth and stand, holding their ears with hands passed under the legs, tying of the children's hands, making them to do sit-ups, caning and pinching, and twisting the ears.

**Emotional Punishments:**

Among the emotional punishments slapping by the opposite sex, scolding abusing and humiliating, label the child according to his or her misbehavior and sent him or her around the school, make them stand on the back of the class and to complete the work, suspending them for a couple of days, pinning paper on their back and labeling them "I am a fool", "I am a donkey" etc, teacher takes the child to every class she goes and humiliates the child, and removing the shirts of the boys etc. are important.

**Negative Reinforcement :**

Detention during the break and lunch, locking them in a dark room, call for parents or asking the children to bring explanatory letters from the parents, sending them home or keeping the children outside the gate, making the children sit on the floor on the classroom, making the child clean the premises, making the child run around the building or in the playground, sending the children to principals, making them to teach in the class, making them to stand till the teacher comes, giving oral warnings and letters in the diary or calendar, threatening to give TC for the child, asking them to miss games or other activities, deducting marks, treating the three late comings equal to one absent, giving excessive imposition, make the children pay fines, not allowing them into the class, sitting on the floor for one period, day, week and month, and placing black marks on their disciplinary charts are the negative reinforcements provided in most of the schools.

**E. Child labour**

Child labour is the employment of children at regular and sustained labour. This practice is considered as exploitative by many countries and international organizations. Child Labor is very common throughout the world. According to UNICEF, there is an estimated number of 250 million children aged 2 to 17 in child labor worldwide, excluding child domestic labour. The most widely rejected

forms of child labour include the military use of children as well as child prostitution. Less controversial, and often legal with some restrictions, are work as child actors and child singers, as well as agricultural work outside of the school year (seasonal work) and owning a business while operating it out of school's hours.<sup>9</sup> ILO estimated in 2004 that 218 million children were involved in child labour, of whom 126 million were in hazardous work.<sup>10</sup> Increasing Child Labour is a core problem in Bangladesh. Increase of family dependency on Children's earning, high demand of child labour in the labour market, inadequate access to services for the children like education, livelihood options, etc., on the other hand traditional values, norms, ethnicity, minority and practices, weak legal protection mechanisms are contributing to the increase in child labour in Bangladesh.

According to Baseline Survey it is estimated that 7.4 million children are economically active between the ages of 5-17 years and out of them 400,000 are child domestic workers (CDW) who are between the ages of 6-17 years in Bangladesh. 445,226 street based child workers are engaged in different kind of jobs in Bangladesh like shop keeper, vendor, restaurant helper and vagrants (Tokai).

## 5. Abuse of Child: A Statistical Report (2008)

Month (s)	Injury	Kill	Rape	Suicide	Kidnap	Acid Victims	Arrest	Trafficking	Missing	Total
January	10	35	26	5	14	3	2	6	8	109
February	9	28	12	4	15	1	7	5	8	89
March	8	23	30	4	18	3	0	8	12	106
April	16	13	28	4	22	4	0	8	4	99
May	10	34	38	2	17	5	1	12	7	126
June	4	26	26	2	14	1	1	6	8	88
July	21	36	30	3	27	3	2	2	11	135
August	14	29	47	7	23	2	0	5	7	134
September	8	16	27	1	15	3	0	0	5	75
October	12	24	14	1	15	5	0	31	2	104
November	7	25	15	2	8	3	1	9	6	76
December	11	19	26	1	17	4	5	4	7	94
<b>Total</b>	<b>130</b>	<b>308</b>	<b>319</b>	<b>36</b>	<b>205</b>	<b>37</b>	<b>19</b>	<b>96</b>	<b>85</b>	<b>1235</b>

<sup>9</sup> <http://en.wikipedia.org/wiki/childlabour>

<sup>10</sup> Teaching Seminar on Child Rights, Organized by Faculty of Law, University of Dhaka & UNICEF

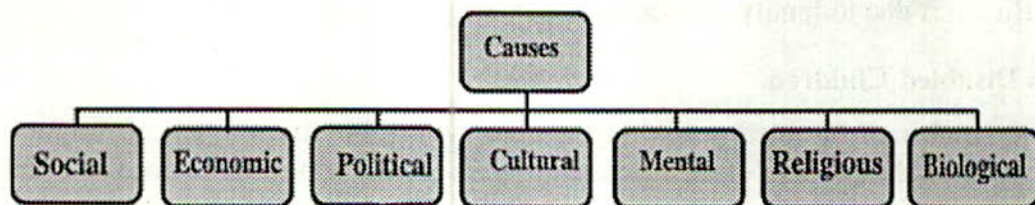
### 6. Settings in which Violence against Children Occurs

Violation against children commonly occurs in the following settings-

- a. Home and family (Domestic Violence)
- b. Violence in school and educational settings
- c. Violence in care and justice system
- d. Violence in work settings
- e. Violence in the community.<sup>11</sup>

### 7. Causes for Violation of Child Rights

The causes which are responsible for giving rise of the violation of child rights are shown in the following diagram:



### 8. Situation of Children in Bangladesh<sup>12</sup>

According to 1991 census of Bangladesh, the under 18 population of the country was 50.64 million (50.63 per cent of the total population). Due to resource constraints, under-development and lack of adequate employment opportunities in the country, many of these children are deprived of basic needs like education, health, nutrition and shelter.

#### A. Health and Nutrition

The Government was committed to ensure health for all by the year 2000. Still now, many of the children are vulnerable to various diseases and malnutrition. More than 90 per cent of children of Bangladesh become malnourished by the age of 12-18 months. This is not only due to poverty and the lack of proper food intake but also because of frequent bouts of illness and the lack of the knowledge. The number of under 15 children compelled to work due to extreme poverty and deprivation in the urban areas alone was estimated to be nearly 2.9 million in one of the studies carried out in 1990. Although the law prohibits child labour in the factories, many children are forced to take different kinds of jobs from early childhood for livelihood.

<sup>11</sup> Teaching Seminar on Child Rights, Organized by Faculty of Law, University of Dhaka & UNICEF

<sup>12</sup> The National Children Policy of Bangladesh, 1994

**B. Legal Rights of Children**

Different laws have been enacted in the country at different times to protect the children and guarantee their legal rights. These laws deal with the interest and the right of the child in case of marriage, divorce, guardianship, employment, child labour, child trafficking etc.

**C. Children in Different Circumstances**

Among the children in difficult circumstances in society, the number of orphans, destitute and street children is increasing. Many people migrate in search of a livelihood to the cities due to natural hazards like floods, cyclones, tidal bores, river erosion and disease and as well as man made disasters. Children are facing difficulties due to family and social reason also.

**D. Disabled Children**

The number of disabled people in the country is about 10 per cent of the total population. Nearly half of them are children. Everyday 100 children become blind due to victim of deficiency.

**E. Girl Child**

The situation of the girl child is different from that of the boy child. Consciously or unconsciously the girl child is discriminated against. By comparison girl children have less access to education, health, nutrition, security and all other opportunities. Even the death rate of girl is higher than the boys.

**9. Legal Framework of Child Rights in Bangladesh**

There are lots of legislations in Bangladesh including the Constitution of the People's Republic of Bangladesh to protect the rights of the children in different aspects. But the provisions of those legislations are not uniformed. For that reason there are always difficulties in implementing those laws. The legislations of Bangladesh which are containing the provisions relating to child rights are mentioned below:

1. The Constitution of the People's Republic of Bangladesh. (Articles: 15, 17,18, 21, 27, 28)
2. The Children Act, 1974
3. The Children Rules, 1976
4. The Penal Code, 1860 (Sections: 82, 83, 90, 361-369, 375)
5. The Labour Act, 2006

6. The Family Courts Ordinance, 1985
7. The Muslim Family Laws Ordinance, 1961
8. The Women and Child Repression (Prevention) Act, 2000
9. The Suppression of Immoral Traffic Act, 1933
10. The Suppression of Violence against Women and Children (Amendment) Act, 2003.
11. The Child Marriage Restraint Act, 1929
12. The Birth and Death Registration Act, 2004

The legislations mentioned above reveals that laws for the rights and protection of the children in Bangladesh are bulky and very organized and uniformed which can be the safeguard and guiding star for the promotion of human rights of the children in Bangladesh.

### **10. International Legal Frameworks of Child rights**

The international legal frameworks of child rights are very sound and enriched as well. These instruments also are the weapons to protect and ensure the rights of the children in international level. And it is noted here that most of the states unanimously recognized these instruments and it shows the positive approach by the world community for standardizing and upholding the rights of the child nationally and globally. We can see some tremendous instruments which are as under-

1. The United Nations Convention on the Rights of the Child, 1989.
2. The Optional Protocol of the Convention of the Rights of the Child, 2000.
3. The Universal Declaration of the Human Rights, 1948.
4. The International Covenant on Civil & Political Rights, 1966.
5. The International Covenant on Economic, Social and Cultural Rights, 1966.
6. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.
7. The Declaration of the rights of the Child, 1924.
8. The United Nations Declaration of the Rights of the Child, 1959.
9. The ILO Minimum Age Convention, 1973.
10. Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption, 1993.

11. The ILO convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999.

### 11. Different Rights of the Child Enumerated in the UNCRC

In 1989 the United Nations Convention on the Rights of the Child was adopted by the General Assembly. It is the basic international instrument protecting the rights of the child. As Bangladesh has ratified<sup>13</sup> this convention, the provisions of this Convention are binding upon Bangladesh. The following rights are enumerated in the United Nations Convention of the Rights of the Child, 1989:

Registration of birth and right to name and nationality<sup>14</sup>; Right of identity<sup>15</sup>; Right to stay with parents<sup>16</sup>; Appropriate legislative, administrative, and other measures for the implementation of the rights of the child<sup>17</sup>; Right against illicit transfer and non-return of children abroad<sup>18</sup>; Right to express views freely<sup>19</sup>; Freedom of expression<sup>20</sup>; Freedom of thought, conscience and religion<sup>21</sup>; Freedom of association and of peaceful assembly<sup>22</sup>; Protection of home and correspondence<sup>23</sup>; Access to information<sup>24</sup>; Recognition of the principle that both parents have common responsibilities for the upbringing and development of the child<sup>25</sup> ; Protection against all forms of physical or mental violence, injury or abuse<sup>26</sup>; Right to special protection and assistance for the deprived children<sup>27</sup>; Recognition of adoption for the best interest of the child<sup>28</sup>; Rights as a refugee<sup>29</sup>; Rights for the disabled children<sup>30</sup>; Right to the enjoyment of the highest attainable standard of health<sup>31</sup>; Right to protection or treatment of physical or mental health<sup>32</sup>; Right to benefit from social security, including social insurance<sup>33</sup>; Right to a standard of living<sup>34</sup>; Right to education<sup>35</sup>; Right to rest and leisure<sup>36</sup>; Right to be protected from economic exploitation<sup>37</sup>; Appropriate measures to protect children from the illicit use of narcotic drugs and psychotropic substances<sup>38</sup>; Protection from all forms of sexual exploitation and sexual abuse<sup>39</sup>; Protection against the abduction, sale or trafficking<sup>40</sup>; Protection against all other forms of exploitation<sup>41</sup>; Protection against torture or other cruel, inhuman or degrading treatment or punishment<sup>42</sup>; Protection under international humanitarian law in armed conflict<sup>43</sup>; Right of physical and psychological recovery and social reintegration of a child victim of any form of neglect<sup>44</sup>; and Rights under penal laws<sup>45</sup>.

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<sup>13</sup> Bangladesh has ratified the UNCRC in 1990, <sup>14</sup> Article 7 of the UNCRC, <sup>15</sup> Ibid., Article 8, <sup>16</sup> Ibid, Article 9, <sup>17</sup> Ibid, Article 10, <sup>18</sup> Ibid, Article 11, <sup>19</sup> Ibid, Article 12, <sup>20</sup> Ibid, Article 13, <sup>21</sup> Ibid, Article 14, <sup>22</sup> Ibid, Article 15, <sup>23</sup> Ibid, Article 16, <sup>24</sup> Ibid, Article 17, <sup>25</sup> Ibid, Article 18, <sup>26</sup> Ibid, Article 19, <sup>27</sup> Ibid, Article 20, <sup>28</sup> Ibid, Article 21, <sup>29</sup> Ibid, Article 22, <sup>30</sup> Ibid, Article 23, <sup>31</sup> Ibid, Article 24, <sup>32</sup> Ibid, Article 25, <sup>33</sup> Ibid, Article 26, <sup>34</sup> Ibid, Article 27, <sup>35</sup> Ibid, Article 28 & 29, <sup>36</sup> Ibid, Article 31, <sup>37</sup> Ibid, Article 32, <sup>38</sup> Ibid, Article 33, <sup>39</sup> Ibid, Article 34, <sup>40</sup> Ibid, Article 35, <sup>41</sup> Ibid, Article 36, <sup>42</sup> Ibid, Article 37, <sup>43</sup> Ibid, Article 38, <sup>44</sup> Ibid, Article 39, <sup>45</sup> Ibid, Article 40

We find that the rights set forth in the UNCRC and International Bill of Rights are well enough and exhaustive but unfortunately those specific rights have been grossly violated in Bangladesh in particular and in the globe in general despite of the state parties of the international instruments relating to child rights.

## 12. Findings and Recommendations

As a developing country and as a state party of the international human rights instruments, Bangladesh has a legal responsibility and obligation in implementing the laws relating to rights of the child. Considering the vulnerable situation of the children of Bangladesh we are providing the following recommendations for ending the violations against children and for establishing their rights:

1. The definition of child is not universal. Different national legal instruments have given different definitions of child from the point of age. So, the definition of child must be uniformed. The age limit of a child should be raised to 18 in all aspects.
2. Lessons relating to rights of the child should be designed for each class from the primary level. In the higher levels of education different courses of human rights and child rights should be introduced.
3. Some TV programmes on child rights should be shown on regular basis. It will help the children to be aware about their rights as well as the others to be conscious about the rights of the children.
4. Simplified, self-explanatory text of CRC should be translated into regional languages. It should be displayed in all educational institutions, factories, work establishments and some other suitable places.
5. Corporal punishment in schools should be banned and teachers should be instructed in alternative methods of persuasion.
6. Children should not be put in fetters under any circumstances.
7. Though the Children Act, 1974 prescribes about the establishment of the Juvenile Courts but it has not yet been established. In line with this prescription, Special Juvenile Courts should be established for making the trial of the children offenders and flexible approach should be shown towards them during the trial.
8. There should be Borstals (reformatory training centers) in every district separately from jails and only the children up to 18 should be kept there.

9. A census should be taken of all handicapped children, along with factors of their handicap.
10. Clinical, educational and training facilities should be set up on a scale that they are accessible to all handicapped children wherever they are.
11. The CRC's bar on torture or other cruel, inhuman or degrading treatment or punishment (which includes whipping and amputation) and on capital punishment and life imprisonment for persons below 18 years of age should be incorporated in the Domestic law.
12. The punishment of rape with a girl child should be raised to death sentence.
13. Appropriate law should be made against sexual harassment of children.
14. The registration of the birth of all children must be ensured in cooperation with non-governmental organizations and with the support of international organizations.
15. Different public awareness campaigns and measures to provide appropriate assistance to families in carrying out their child-rearing responsibilities should be developed to prevent domestic violence, prohibiting corporal punishment and preventing early marriages and other harmful traditional practices.
16. Programmes for the rehabilitation and reintegration of traumatized children need to be developed and adequate procedures and mechanisms should be devised to deal with complaints of both physical and psychological ill-treatment. Allegations of violations of children's rights should be investigated and prosecuted.
17. Some steps should be taken in the area of health and welfare services. In particular, concerted efforts are needed to combat malnutrition and ensure the implementation of a national nutritional policy for children.
18. Gender disparities in education, health and opportunities for employment should be speedily corrected. This will require affirmative action in all sectors.<sup>46</sup>
19. The National Children Policy, 1994 should be implemented properly.

### 13. Conclusion

As a developing country Bangladesh is very much dependent on her development

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<sup>46</sup> State of Human Rights in 1995: Human Rights Commission of Pakistan; Page 139.

on the youth workforce. So it should be prime priority for Bangladesh to create and maintain such a congenial atmosphere where they can get optimum opportunity to grow up normally capable of fulfilling the desire of the nation in the days to come. Government may ensure this atmosphere through the implementation of the aforesaid recommendations with the help of NGO's, human rights activists and different donor agencies of home and abroad. Considering the future importance of the children government and the responsible private individual should work in a body to change the fate of the neglected, ignored, exploited children which will ultimately change fate of the nation. In doing so Bangladesh should uphold and implement its Constitution commitment as enshrined in the Article 19(1); i, e, the state shall endeavour to ensure equality of opportunity to all citizens.<sup>47</sup> We think, as a matter of fact, if the state ensures the equal opportunity to the children that would be great investment which will play a pivotal and pragmatic role for the protection of human rights of the children in Bangladesh.

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<sup>47</sup> Equality of opportunity: The State shall endeavour to ensure equality of opportunity to all citizens.

## THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT

### Explanatory Note

1. At its first meeting held in Vienna in April 2000 on the invitation of the United Nations Center for International Crime prevention and in conjunction with the 10<sup>th</sup> United Nations Congress on the prevention of Crime and the Treatment of offenders the Judicial Group on Strengthening Judicial Integrity (Comprising Chief Justice Latifur Rahman of Bangladesh, Chief Justice Y. Bhaskar Rao of Karnataka State in India, Justice Govinda Bahadur Shrestha of Nepal, Chief Justice M. L. Uwais of Nigeria, Deputy President Pius Langa of the Constitutional Court of South Africa, Chief Justice F. L. Nyalali of Tanzania, and Justice B. J. Odoki of Uganda meeting under the chairmanship of Judge Christopher Weeramantry, Vice-President of the International Court of Justice, with Justice Michael Kirby of the High Court of Australia as Rapporteur, and with the participation of Dato' Param Kumaraswamy, UN Special Rapporteur on the Independence of Judges and Lawyers) recognized the need for a code against which the conduct of judicial officers may be measured. Accordingly, the Judicial Group requested that code of judicial conduct which had been adopted in some jurisdictions be analyzed, and a report be prepared by the Co-ordinator of the Judicial Integrity Programme, Dr. Nihal Jayawickrama, concerning:
  - a. the core considerations which recur in such codes; and
  - b. the optional or additional considerations which occur in some, but not all, such codes and which may or may not be suitable for adoption in particular countries.
2. In preparing a draft code of judicial conduct in accordance with the directions set out above, reference was made to several existing codes and international instruments including, in particular, the following:
  - (a) The Code of Judicial Conduct adopted by the House of Delegates of the American Bar Association, August, 1972.
  - (b) Declaration of Principles of Judicial Independence issued by the Chief Justices of the Australian States and Territories, April 1997.
  - (c) Code of Conduct for the Judges of the Supreme Court of Bangladesh, prescribed by the Supreme Judicial Council in the exercise of power

- under Article 96(4) (a) of the Constitution of the Peoples' of Bangladesh, May 2000.
- (d) Ethical Principles for Judges drafted with the cooperation of the Canadian Judges conference and endorsed by the Canadian Judicial Council, 1998.
  - (e) The European Charter on the Statute for Judges, Council of Europe, July 1998.
  - (f) The Idaho Code of Judicial Conduct 1976.
  - (g) Restatement of Values of Judicial Life adopted by the Chief Justices Conference of India, 1999.
  - (h) The Iowa Code of Judicial Conduct.
  - (I) Code of Conduct for Judicial Officers of Kenya, July 1999.
  - (j) The Judges' Code of Ethics of Malaysia, Prescribed by the Yang di-Pertuan Agong on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief Judges of the High Courts, in the exercise of powers conferred by Article 125(3A) of the Federal Constitution of Malaysia, 1994.
  - (k) The Code of Conduct for Magistrates in Namibia.
  - (l) Rules Governing Judicial Conduct, New York State, USA.
  - (m) Code of Conduct for Judicial Officers of the Federal Republic of Nigeria.
  - (n) Code of Conduct to be observed by Judges of the Supreme Court and of the High Courts of Pakistan.
  - (o) The Code of Judicial Conduct of the Philippines, September 1989.
  - (p) The Canons of Judicial Ethics of the Philippines, proposed by the Philippines Bar Association, approved by the Judges of First Instance of Manila, and adopted for the guidance of and observance by the judges under the administrative supervision of the Supreme Court, including municipal judges and city judges.
  - (q) Yandina Statement: Principles of Independence of the Judiciary in Solomon Islands, November 2000.
  - (r) Guidelines for Judges of South Africa, issued by the Chief Justice, the

- President of the Constitutional Court, and the Presidents of High Courts, the Labour Appeal Court, and the Land Claims Court, March 2000.
- (s) Code of Conduct for Judicial Officers for Tanzania, adopted by the Judges and Magistrates Conference, 1984.
  - (t) The Texas Code of Judicial Conduct.
  - (u) Code of Conduct for Judges, Magistrates and other Judicial Officers of Uganda, adopted by the Judges of the Supreme Court and the High Court, July 1989.
  - (v) The Code of Conduct of the Judicial Conference of the United States.
  - (w) The Canons of Judicial Conduct for the Commonwealth of Virginia adopted and promulgated by the Supreme Court of Virginia, 1998.
  - (x) The Code of Judicial Conduct adopted by the Supreme Court of the State of Washington, USA, October 1995.
  - (y) The Judicial (Code of Conduct) Act, enacted by the Parliament of Zambia, December 1999.
  - (z) Draft Principles on the Independence of the Judiciary (“Siracusa Principles”), prepared by a committee of experts convened by the International Association of Penal Law, the International Commission of Jurists, and the Centre for the Independence of Judges and Lawyers, 1984.
  - (aa) Minimum Standards of Judicial Independence adopted by the International Bar Association, 1982.
  - (bb) United Nations Basic Principles on the Independence of the Judiciary, endorsed by the UN General Assembly, 1985.
  - (cc) Draft Universal Declaration on the Independence of Justice (“Singhvi Declaration”) prepared by Mr. L.V. Singhvi, UN Special Rapporteur on the Study on the Independence of the Judiciary, 1989.
  - (dd) The Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, adopted by the 6<sup>th</sup> Conference of Chief Justices, August 1997.
  - (ee) The Latimer House Guidelines for the Commonwealth on good practice

governing relations between the executive Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles, 1998.

- (ff) The Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System, adopted by the expert group convened by the Centre for the Independence of Judges and Lawyers, February 2000.

At its second meeting held in Bangalore in February 2001, the Judicial Group (comprising Chief Justice Mainur Reza Chowdhury of Bangladesh, Justice Claire L 'Heureux Dube of Canada, Chief Justice P.V. Reddi of Karnataka State in India, Chief Justice Keshav Prasad Upadhyay of Nepal, Chief Justice M.L. Uwais of Negeria, Deputy Chief Justice Pius Langa of South Africa, Chief Justice S.N.Silva of Sri Lanka, Chief justice B.A. Samatta of Tanzania, and Chief Justice B.J. Odoki of Uganda, meeting under the Chairmanship of Judge Weeramantry, with Justice Kirby as Rapporteur, and with the participation of the UN Special Rapporteur and Justie P.N.Bhagwati, Chairman of the UN Human Rights Committee, representing the un High Commissioner for Human Rights) proceeding by way of examination of the draft placed before it, identified the core values, formulated the relevant principles, and agreed on the Bangalore Draft Code of Judicial Conduct. The Judicial Group recognized, however, that since the Bangalore Draft had been developed by judges drawn principally from common law countries, it was essential that it be scrutinized by judges of other legal traditions to enable it to assume the statue of a duly authenticated international code of judicial conduct.

The Bangalore Draft was widely disseminated among judges of both common law and civil law systems and discussed at several judicial conferences. In June 2002, it was reviewed by the working party of the Consultative Council of European Judges (CCJE-GT), comprising Vice-President Gerhard Reissner of the Austrian Association of Judges, Judge Robert Fremr of the High Court in the Czech Republic, President Alain Lacabarats of the Cour d'Appel de Paris in France, Judge Otto Mallmann of the Federal Administrative Court of Germany, Magistrate Faffaele Sabato of Italy, Judge Virgilijus of the Lithuanian Court of Appeal, Premier Conseiller Jean-Claude Wiwinius of the Cour d'Appel of Luxembourg, Judge Conseiller Orlando Afonso of the Court of Appeal of Portugal, Justice

Dusan Ogrizek of the Supreme Court Appeal of Slovenia, President Johan Hirschfeldt of the Svea Court of Appeal in Sweden, and Lord Justice Mance of the United Kingdom. On the initiative of the American Bar Association, the Bangalore Draft was translated into the national languages, and reviewed by judges, of the Central and Eastern European countries; in particular, of Bosnia-Herzegovina, Bulgaria, Croatia, Kosovo, Romania, Serbia and Slovakia.

The Bangalore Draft was revised in the light of the comments received from CCJE-GT and others referred to above; Opinion no. 1 (2001) of CCJE on Standards concerning the independence of the judiciary; the draft opinion of CCJE on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behavior and impartiality; and by reference to more recent codes of judicial conduct including the Guide to Judicial Conduct published by the Council of Chief Justices of the Australia in June 2002, the Model Rules of Conduct for Judges of the Baltic States., the Code of Judicial ethics for Judges of the Peoples' Republic of China, and the Code of Judicial Ethics of the Macedonian Judges Association.

The revised Bangalore Draft was placed before a Round-Table Meeting of Chief Justices (or their representatives) from the civil law system, held in the Peace palace in the Hague, Netherlands, in November 2002, with Judges Weeramantry presiding. Those participating were Judges Vlandimir de Freitas of the Federal Court of Appeal of Brazil, Chief Justice Iva Brozova of the Supreme Court of the Czech Republic, Chief Justice Mohammad Fathy Naguib of the Supreme Constitutional Court of Egypt ( assisted by Justice Dr. Adel Omar Sherif), Conseillere Christine Chanet of the Cour de Cassation of France, President Genaro David Gongora Pimentel of the Suprema Corte de Justicia de la Nacion of Mexico, President Mario Mangaze of the Supreme Court of Mozambique, President Pim Haak of the Hoge Raad der Naederlanden, Justice Trond Dolva of the Supreme Court of Norway, and Chief Justice Hilario Davide of the Supreme Court of the Philippines (assisted by Justice Reynato S. Puno). Also participating in one session were the following Judges of the International Court of Justice: Judge Raymond Ranjeva (Madagascar), Judge Geza Herczegh (Hungary), Judge Carl-August Fleischhauer (Germany), Judge Abdul G. Koroma (Sierra Leone), Judge Rosalyn Higgins (United Kingdom), Judges Francisco Rezek (Brazil), Judge Nabil Elaraby (Egypt), and Ad-Hoc Judge Thomas Frank (USA). The UN Special Rapporteur

was in attendance. The Bangalore Principles of Judicial Conduct was the product of this meeting.

**Preamble**

WHEREAS the Universal Declaration of Human Rights recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge.

WHEREAS the International Covenant on Civil and Political Rights guarantees that all persons shall be equal before the courts, and that in the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law.

WHEREAS the foregoing fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions.

WHEREAS the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice.

WHEREAS a competent, independent and impartial judiciary is likewise essential if the courts are to fulfill their role in upholding constitutionalism and the rule of law.

WHEREAS public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.

WHEREAS it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.

WHEREAS the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country.

AND WHEREAS the United Nations Basic Principles on the Independence of the Judiciary are designed to secure and promote the independence of the judiciary,

and are addressed primarily to States.

THE FOLLOWING PRINCIPLES are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judges.

## **Value 1:**

### **INDEPENDENCE**

#### **Principle:**

Judicial independence is pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

#### **Application:**

A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free there from.

In performing judicial duties, a judge shall be independent of judicial colleague in respect of decisions which the judge is obliged to make independently.

A judge shall encourage and uphold safeguards for the discharge of judicial

duties in order to maintain and enhance the institutional and operational independence of the judiciary.

A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

**Value 2:****IMPARTIALITY****Principle:**

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

**Application:**

- 2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.
- 2.2 A judge shall ensure that his her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.
- 2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimize the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.
- 2.4 A judges shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.
  - 2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge or disputed evidentiary facts concerning the proceedings;
  - 2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or
  - 2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other tribunal

can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

**Value 3:****INTEGRITY****Principle:**

Integrity is essential to the proper discharge of the judicial office.

**Application:**

- 3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.
- 3.2 The behavior and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

**Value 4:****PROPRIETY****Principle:**

Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

**Application:**

- 4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.
- 4.2 As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.
- 4.3 A judge shall, in his or her personal relations with individual members of the legal profession who practice regularly in the judge's court, avoid situation which might reasonably give rise to the suspicion or appearance of favoritism or partiality.

- 4.4 A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.
- 4.5 A judge shall not allow use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.
- 4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial officer and the impartiality and independence of the judiciary
- 4.7 A judge shall inform himself or herself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.
- 4.8 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.
- 4.9 A judge shall not use or lend the prestige of the judicial officer to advance the private interests of the judge a member of the judge's family or of anyone else nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.
- 4.10 Confidential information acquired by a judge the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.
- 4.11 Subject to the proper performance of judicial duties, a judge may:
- 4.11.1 Write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;
- 4.11.2 Appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;
- 4.11.3 Serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; or

- 4.11.4 Engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.
- 4.12 A judge shall not practise law whilst the holder of judicial office.
- 4.13 A judge may form or join associations of judges or participate in other organizations representing the interest of judges.
- 4.14 A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.
- 4.15 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.
- 4.16 Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judges in the performance of judicial duties or otherwise give rise to an appearance of partiality.

**Value 5:****EQUALITY****Principle:**

Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

**Application:**

- 5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds".)

- 5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.
- 5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.
- 5.4 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.
- 5.5 A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

**Value 6:**

**COMPETENCE AND DILIGENCE**

**Principle:**

Competence and diligence are prerequisites to the due performance of judicial office.

**Application:**

The judicial duties of a judge take precedence over all other activities.

A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.

A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.

A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments

establishing human rights norms.

A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.

A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

## IMPLEMENTATION

By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.

## DEFINITIONS

In this statement of principles, unless the context otherwise permits or requires, the following meanings shall be attributed to the words used:

“**Court staff**” includes the personal staff of the judge including law clerks.

“**Judge**” means any person exercising judicial power, however designated.

“**Judges family**” includes a judge's spouse, son, daughter, son-in-law, daughter-in-law, and any other close relative or person who is a companion or employee of the judge and who lives in the judge's household.

“**Judges spouse**” includes a domestic partner of the judge or any other person of either sex in a close personal relationship with the judge.



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