VOLUME XIX, JUNE 2020

ISSN: 2220-6752

Journal

of Judicial Administration Training Institute

An Annual Publication of JATI

ISSN: 2220-6752

Journal of

Judicial Administration Training Institute

(A collection of writings on various judicial and legal topics)

VOLUME XIX **JUNE 2020**

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PUBLICATION COMMITTEE

ISSN	2220-6752
Copyright	Judicial Administration Training Institute
Published by	Judicial Administration Training Institute 15, College Road, Dhaka-1000, Bangladesh
Price	Tk. 300.00, US $5

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FOREWORD

With immense pleasure, JATI is placing the Journal of Judicial Administration Training Institute, Volume- XIX of 2020 before the avid readers. We publish the Journal on yearly basis to comply with the mandate of legal research of this Institute. It is obvious that legal research can find answers to things that are unknown, fill gaps in knowledge and reshape the way legal professionals work with. It also allows them to sharpen critical thinking and analytical skills as they deal with contemporary legal issues. Moreover, legal research helps in developing critical writing skills, progressing the use of logic and verbal skills by constructively participating in debates and defending their position on a given topic. In this backdrop JATI has always strived at contributing academic and practical discourse involving legal and judicial issues through publishing this Journal.

From an initiative which was humble and limited in scope, the JATI journal has today grown into a nationally recognized platform of effective and innovative writings. With this succession, the present issue covers articles from judges, academicians and lawyers from different parts of the country. Some of the articles focus on practice and procedure regarding offences affecting administration of justice, development of access to justice and state responsibility to promote it, and a critical analysis of suit for declaration of title. Further, it includes articles from other areas, such as rights of maintenance under the Islamic *Shariah* and family laws of Bangladesh, medical negligence issues in the country, and the role of International Civil Aviation Organization under the International Civil Aviation Convention of 1944.

I appreciate the untiring effort of the research and publication unit of this Institute for its editorial work and ancillary activities relating to publication of this Journal. Board of advisors has also put in its best endeavour by advising time to time in this regard.

Finally, I thank the writers of the Journal for their invaluable contribution. I believe this Volume will be able to contribute substantial inputs for the overall legal and judicial development of Bangladesh. I hope the Journal will receive the constructive responses from its readers.

I wish success of this publication of JATI Journal, Volume XIX of 2020.

June 2020
Dhaka

Justice Khondker Musa Khaled
Director General
Judicial Administration Training Institute

[A Tribute to the Birth Centenary of the Father of the Nation]

Bangladesh Liberation War, 1971: It's Legitimacy under the International Law and the Birth of a Nation

Justice Md. Rezaul Hasan (M.R. Hasan)*

Prologue

The Awami League (AL), had won majority seats in the then National and in the Provincial Assembly of East Pakistan, in the general election held between December 7, 1970-January 17, 1971.

It was thus a lawfully acquired right of the AL to form the Government in Pakistan and to frame a Constitution for it. But, the then Pakistan regime had resorted to dillydally, on several lame excuses, instead of handing over power to the party (AL), in spite of its wining landslide victory in the general election.

In this situation, Bangabandhu Sheikh Mujibur Rahman (who then had the support of the majority of the elected members in the Assembly) delivered the historical speech of 7th March, 1971, in which he had, in the background referred to in that speech, called upon the then Pakistan regime to withdraw martial law, to take back the army personnel to the barracks, to enquire into the matter of mass killings took place in the then East Pakistan and to hand over the powers to the people's representatives. He also gave a lot of directions and imposed a lot of bans, addressing the people of all walks of life.

Through these directives, given in his speech of 7th March, 1971, Bangabandhu, indeed, established a *de facto* Government in Pakistan, and as, unquestionably in the then East Pakistan. Bangabandhu has thus appeared as, thus acquired and has elevated himself to the glorious status

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* *Judge, High Court Division of the Supreme Court of Bangladesh.*

of the father of this Nation, as recognized in the 1972 Constitution of the People's Republic of Bangladesh.

However, neither this speech of his, nor the past history of Pakistan since 1958 to 1969, could make any change in the mindset of the Pakistani Rulers. They were preparing for, as revealed by their subsequent conducts, and imposed an unjust, abrupt and unilateral war on the mass people of this country, in the mid-night of 25th March, 1971.

Bangabandhu, as befitting of his inborn farsightedness and leadership quality, declared independence of Bangladesh, immediately after the armed aggression (in or after the mid-night of 25th March, 1971), in exercise of the *people*'s right to self-determination. This declaration of independence has been referred to in the Proclamation of Independence of 10th April, 1971, whereby the Provisional Government of Bangladesh (popularly known as Mujibnagar Sarker) was formed, to run the affairs of the newly born Bangladesh state, then engaged in her liberation war.

In the background mentioned above and as noted hereinafter, this paper attempts to describe as to how and why the liberation war of 1971 and the independence declared and earned acquired by the people of Bangladesh, in exercise of their right to self-determination, is legitimate in the eye of international law.

A Direct Answer

An unambiguous and direct answer to these questions are to be found in Article-2 of Chapter-1 of the UN Charter, adopted on 26th June, 1945, in San Franssisco, California. Quoted below is the relevant portion of Chapter 1, Article 2 of the UN Charter, that lays down the principles and purpose of the United Nation, reads as follows:

"2. To develop friendly relations among nations *based on respect for the principle of equal right and self-determination of peoples*". (emphasis added).

Therefore, in the first instance, legitimacy of the independence, that has been declared by the people of Bangladesh in March 26, 1971, and acquired in 1971, in exercise of their right to self-determination, is supported by the above quoted provisions of the UN Charter, i.e. the international law.

Here, it has also to be made clear that, Article 2 of Chapter-1, does not by itself, supports a case of '*secession*' or demand for independence. Rather, the international law and customs support maintaining the integrity and sovereignty of a state. It is also to be noted that, these issues usually arise only in a federal system of Government where a particular people occupies a province or similar territory, having their distinct religious, linguistic or ethnic identity.

A Comparative Study to Clarify the Issue

However, a comparative study, between the situation that obtained in Canada, [between 1995-1980] and that of the then Pakistan [between 1954-1971] is very much relevant to further clarify this issue.

Quebec, a province of federal state of Canada, had been claiming their right to form into a sovereign state of 'Quebec' in purported exercise of their right to self-determination. A referendum was held in Quebec in 1980, which advocated *secession* from Canada. This proposal to pursue *secession* from Canada was defeated by 59.56% to 40.44% margin. Thereafter another referendum was held on 30th October, 1995, asking the people of Quebec if it should seek a mandate to negotiate sovereignty for Quebec. The *'No'* vote prevailed by a narrow margin of 50.6% to 49.4%. At one stage, this issue was referred to the Supreme Court of Canada, by the then Governor in Council. The Court was asked to give opinion as to the legality of unilateral '*secession'* if Quebec passes a referendum for '*secession',* from which had arisen the reference case In Re. Secession of Quebec.

The Canadian Supreme Court, after an in-depth and comprehensive deliberation on all relevant issues, opined that, the Canadian Constitution

does not give Quebec the right to unilaterally secede. Furthermore, the court also held that, international law and the principle of self-determination do not confer (upon Quebec) the right of secession, vide In Re Secession of Quebec: [1998] 2 SCR 217.

To arrive at its opinion as mentioned above, the court had asked itself, as to "*whether the Quebec had been denied meaningful access to the government (of Canada)*, at least what might have been argued in favour of their claim to secede from Canada. The Court, after judicious scrutiny, had answered that the *Quebec had access to government of Canada, so they do not have the right to secede*. The court also noted that, Canada, as a democracy, guarantee all citizens the right to participate in the government. However, the facts, realties and experience, in the case of the then East Pakistan, was simply opposite (emphasis added).

Context in which the people of Bangladesh had to exercise their right to self-determination

The British Colonial Government, in the aftermath of the World War II (during the post UN era) and nearly after 200 years of Colonial Rule (1757-1947) exercised over the undivided India, had, pursuant to the provisions of section 7 of the Indian Independence Act of 1947 [18th July, 1947], conceded, on the 15th days of August, 1947, the people's right to self-determination. In consequence whereof, India and Pakistan have emerged as two separate independent states in the mid of August, 1947. [Before partition of 1947, Bangladesh was within the Eastern Bengal and Assam Province, headquartered in Dhaka, designating Shillong as its Summer Capital].

However, section 8, read with clause (b) of sub-section (3) of section 19, of the Indian Independence Act, 1947, had made provisions for recognizing, establishing and functioning of a Constituent Assembly (CA) for each independent state. The task of the CA was twofold (1) to prepare a Constitution and (2) to act as federal legislature (that was function of the erstwhile central legislative under the Government of India Act, 1935).

In 1947, a Constitutional Assembly (CA) was accordingly formed in Pakistan, to make a Constitution for it. First meeting of the CA was held on 10th August, 1947, in Karachi and the CA formally came into existence on 15th August, 1947. In the year 1954, the basic draft of the Constitution was completed by the CA and was ready to be placed before the CA. But, the then Governor General (GG) of Pakistan, Mr. Ghulam Muhammad [who held this office from 1951 till he was dismissed in 1955] had proclaimed emergency and dissolved the CA on 24th October, 1954. This act of the GG Ghulam Muhammad was then challenged by filing a writ petition before the Chief Court of Sindh. The writ was accepted. Against the Sindh Court's decision, the Pakistan Government filed an appeal before the Federal Court (FC) of Pakistan. The FC had upheld his action in part, but no finding was given as to whether the GG had Power to dissolve the CA (PLD 1955 FC 240).

A legal vacuum was created after this decision of the FC. So, the GG Mr. Ghulam Muhammad promulgated the Emergency Ordinance, 1955 and thereby gave himself the power to frame Constitution for Pakistan. The Governor General had also promulgated Constitution Convention Order, 1955, and formed a Constitution Convention (CC), in the place of CA. The Governor's power to make Constitutional legislation and to form CC was challenged in the case of Usif Patel Vs. The Crown (PLD 1955 FC 387). The Federal Court (FC), by a majority upheld his action in part, but held that GG had no power to make constitutional legislation.

After this decision of the Federal Court, the constitutional crisis loomed even larger. The GG then referred the matter to the Federal Court for its opinion (under its advisory jurisdiction), in order to resolve the crisis, wherefrom arose the Reference Case No. 1 of 1955 (PLD 1955 FC 435). In this case the FC upheld the action of the GG in dissolving the CA (on the premise that Pakistan was still a dominion, although, in fact, it had acquired the status of an independent state in terms of the unequivocal provisions of section 7 of the Indian Independence Act, 1947). Noticeably, the FC had also held (and made it clear) that, the GG's duty was to bring into existence a Representative Legislature Institution, for which, he (GG)

could only nominate the electorate, but could not nominate members of the CA. With this decision of the FC, the status of the new CA as a body, legally competent to frame Constitution for Pakistan was established. Accordingly, the CA begun to work. [Interested readers may find these decisions and reference in 7 DLR(1955)FC].

Having overcome all these obstacles, ultimately, the Constitution Bill was placed before the CA, which was finally adopted on the 29th day of February, 1956(vide the preamble to the 1956 Constitution). Thus had born the 1956 Constitution of the then Pakistan, through a competent CA. The CA became the interim National Assembly and the then Governor General Iskander Mirza sworn in as the President of Pakistan.

Amongst other, Mr. H.S. Suhrawardy, Mr. A.K. Fazlul Huq and Sheikh Mujibur Rahman (as their names appear in the original text of 1956 Constitution) were the three prominent members of the CA.

But, within two and a half year of making of this Constitution of 1956 and before there having any opportunity to hold an election under it, the then President of Pakistan, Mr. Iskandar Mirza, issued a Martial Law Proclamation on 7th October, 1958, abrogated the Constitution, dissolved the National and Provincial Assemblies, dismissed the central and the Provincial Governments, dismissed the Ministers (and formed a new Cabinet with non-political persons), banned all political parties and had appointed General Ayub Khan, the Army Chief, as the Chief Martial Law Administrator (CMLA).

In the course of events, at one stage, on 27th October, 1958, Mr. Iskander Mirza was made to vacate the office by General Ayub Khan and was then sent to exile in Britain. Mr. Ayub Khan assumed the office of the President of Pakistan.

Thereafter, through a much-criticized referendum held on 14th February, 1960, Mr. Ayub Khan secured mandate to be deemed as the elected President of Pakistan and also the authority to make a Constitution for Pakistan. Accordingly he, as its sole maker, enacted a Constitution on 1st

March, 1962. He had lifted Martial Law on 8th June, 1962, and had also lifted the ban earlier imposed on the political parties, by Mr. Iskander Mirza, on 7th October, 1958.

On the other wing, in East Pakistan, mass movement was gaining momentum, focused on 6 point demands raised by the Awami League (AL). It had received spontaneous support of the mass people, including the students and working classes in the East Pakistan. It turned into, in East Pakistan, an irresistible and widely spreaded public uprise in 1969. In this situation, President Mr. Ayub Khan, by a letter dated 24th March, 1969, invited General A.M. Yahya Khan to take over power. Yahya Khan, in turn, proclaimed Martial Law on 25th March, 1969 (second ML), assumed the office of the CMLA. Then on 31st March, 1969, he had appointed himself as the President of Pakistan, however, giving retrospective effect from 25th March, 1969. He had then abrogated the Constitution of 1962 and promulgated the Provisional Constitution Order, 1969.

Thus, Pakistan had again become a country without Constitution made or adopted by her people and without any elected government.

On the face of mounting and irresistible political pressure and uprise in the East Pakistan, Yahya Khan promulgated the historic Legal Framework Order, 1970 (LFO), for holding general election, on the basis of direct adult franchise and in accordance with law (vide Articles 4-6 of the LFO).

The three members Election Commission, consisting of a Chief Election Commissioner and 2 High Court Judges, as members, was formed as per Article 8 of the LFO. A fair, transparent, neutral and participatory election was held. The election result was declared in no time and it was not disputed by anybody.

In this election, Awami League won a overwhelming majority, both in the Province of East Pakistan and in the centre. Thereby, it had acquired a legitimate right to form a Government for Pakistan. But, unlike the Quebec Province, as has been noticed in the aforementioned instance of

Canada, Awami League's access to the Government, as the victorious party in the majority seats and as the representative of the majority people, was denied by the then Pakistan regime. Rather the Pakistan Army (Eastern Command) had initiated an armed aggression on the Bengalees of East Pakistan, around or after the mid-night of 25th March, 1971, and thereby, they had not only violated the legal Order created by the LFO, 1970, in addition, they had indulged themselves into committing war crimes and genocide.

East Pakistan Province's access to Government having been denied and an unjust war, violating the legal order of LFO, 1970, having been imposed, the people of Bangladesh had legitimately acquired and exercised their right of self-determination, in the given context, and as per Article 2 of Chapter 1 of the UN Charter, by declaring independence of Bangladesh on 26th March, 1971, by enacting the proclamation of independence on 10th April, 1971 (the world's unique constitutional document), by forming the Provisional Government of Bangladesh (Mujibnagar Government), by doing and exercising all acts, deeds and things by doing, as a sovereign independent state, engaged in liberation war, till she had achieved victory on 16th December, 1971, in consequence leading to the surrender of and the dissolution of the Eastern Command of the then Pakistan Army.

The findings

Therefore, in the context aforesaid, all acts, deeds and exercises of Bangladesh, since the 7th March to 16th December, 1971, were legal and approved under the UN Charter and were recognized by the international community after Bangladesh had won victory on 16th December, 1971.

First instance

However, a reader might be interested to know about the first instance of exercising the right of self-determination. In my study, it is the 'Declaration of Independence of the United State of America', made on the 4th July, 1776 (that led to independence of America and then framing, signing and adoption of a Constitution for them, on 17th September, 1787).

This declaration of the USA was made during the pre-UN era. The people of the USA had claimed entitlement to their right to self-determination as conferred on them by the Laws of Nature (as defined, articulated and described in that declaration).

This right of self-determination, exercised by the great people of America, is foundational to the 'right to self-determination of peoples', as incorporated, later on, in the UN Charter of 1945 and recognized by all member states.

An appeal before I conclude

We, as a nation, must know about and store in our memory the causes of exercising our right to self-determination and the legitimacy of exercising such right, leading to the birth of the independent Bangladesh, as a nation.

Dated: 22 January, 2020, Dhaka.

Culpable Homicide and Murder

Md. Ashraf Hossain*

In the scheme of the Penal Code, 'culpable homicide' is genus and murder is specie. All murder is culpable homicides, but not vice versa. The academic distinction between murder and culpable homicide not amounting to murder has vexed the Courts for more than a century. If the true scope and meaning of the terms used by the legislature in section 299 which defines culpable homicide and circumstances as set out in clauses 1-4 of section 300 describing the homicide amounting to murder is over sighted confusion will be arisen.

The terms which are employed in two sections are so closely resembling each other that even the celebrated jurist Sir Fitz-James Stephen opines that definition of culpable homicide and murder are the weakest part of the Code. They are obscure[1].

To dispel the ambiguity the safest way approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of section 299 and 300[2]. This Article is aimed at discussing the issue from this point of view.

Section 299 defines the offence of culpable homicide as the act of causing death:-

(a) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or
(c) with the knowledge that such act is likely to cause death.

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* *Senior District Judge (Rtd.).*

1 *Stephen History of Criminal Law of England Vol. 3, P. 313.*

2 *State V Rayavarapu Punnay, AIR 1977 Sc. 45.*

Intent and knowledge in the ingredient of section 299 postulate the existence of positive mental attitude and this mental condition is the special *mens rea* necessary for the offence. This guilty intention in the first two conditions contemplates the intended death of the person harmed or the intentional causing of an injury likely to cause his death. The knowledge in the third condition contemplates knowledge of the likelihood of the death of the person[3]. If death is caused in any of these three circumstances, the offence of culpable homicide is said to have been committed.

Now what is the offence of culpable homicide amounting to murder is described in section 300 in which there are five exceptions also. Section 300 provides that culpable homicide is murder if the act of causing death is not covered by any of those five exceptions. Section 300 embodies the following circumstances which renders culpable homicide murder:-

(i) if the act which causes the death is done with the intention of causing death; or
(ii) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or
(iii) if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
(iv) if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

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[3] *Jayary AIR 1976 SC 1519.*

So if death is caused by any of the acts as stated in section 300 it will be culpable homicide amounting to murder[4].

It is also kept in mind that there are three provisions to exception No. 1 and if death is caused as a result of any of the provocations as mentioned in those three provisions, it will also be culpable homicide amounting to murder. For example, if the provocation is sought or if the offender voluntarily provokes and thereafter causes the death, he will not get the benefit of the exception 1 and death will be culpable homicide amounting to murder.

The opening phrases employed in section 300 "except in the case hereinafter excepted" mean that culpable homicide will not amount to murder if the case falls within any of the exceptions mentioned in the section. The five exceptions specified in this section, are special exceptions in addition to general exception enumerated in chapter IV and they are (a) Provocation, (b) right of Private defence, (c) exercise of legal powers, (d) absence of premeditation and heat of passion and (e) consent.

For convenience of comparison the acts constituting the offence of culpable homicide not amounting to murder and murder as shown in sections 299 and 300 it is better to take aid of the distinction drawn by Melville J in Reg V Govinda[5]. In this case the accused knocked his wife down, put one knee on her chest and struck her two or three violent blows on her face with the closed fist, producing extravasation of blood on the brain and she died in consequence. While adjudging the aforesaid case the ld. Judge has very ably demonstrated the difference and similarity of the provision of the two sections.

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[4] *40 DLR (AD) 200.*

[5] *1877 ILR 1 Bom 342.*

Section 299 Culpable homicide	**Section 300** Murder
A person commits culpable homicide, if the act by which the death is caused is done-	If the act by which the death is caused is done-
(a) with the intention of causing death.	(1) with the intention of causing death.

Clause (a) of section 299 and that of (i) of section 300 show that where there is an intention to kill, the offence is always murder. So the 1st part of section 299 refers to the act by which the death is caused by being done the intention of causing death and corresponds to the 1st part of section 300. Illustration (a) to section 300 demonstrates the case of this type. Intention is a subjective element and in most of the cases directs proof of it not forth coming. But it is a question of fact by which it can be gathered. In deciding the intention of the offender the court may consider the nature of the weapon used, the part of the body of the victims chosen by him for attack, the number of blows administered, the force used by the assailant, etc.

In **Md. Abdul Majid** the Appellate Division stated:

"The weapon used also a lethal on and the injury grave in nature was caused on the vital part of the body and therefore the act was done with the intention of causing such bodily injury as was sufficient in the ordinary course of nature to cause death. Thus it falls clearly within 1st clause of section 300 along with 2nd and 3rd clauses thereof."

The expression "with the intention of causing death" does not always imply the intention of causing the death of any particular person. The 1st illustration to section 299 shows that a person can be guilty of culpable homicide of a person whose death he did not intend. The same may be gathered from illustration (d) to clause (4) of section 300.

Section 299 Culpable homicide	Section 300 Murder
(b) with the intention of causing such bodily injury as is likely to cause death.	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused.
Knowledge (c) with the knowledge that the act is likely to cause death.	(3) with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.

The essence of clause (2) of section 300 may amount to murder, if the offender knows that the particular person injured is likely, either from peculiarity of condition, or immature age, or other special circumstances to be killed by an injury which would not ordinarily cause death. The illustration (b) of section 300 clarifies this provision. Similarly clause (b) of section 299 may turn to murder under clause (2) of section 300 if two additional requirement as stated therein such as knowledge of the offender as to infirmities, or immaturity, or peculiarity or condition of the victim. So the crime of murder under clause (2) of section 300 is that– there must be the intention of causing such bodily injury as the offender knows is likely to cause death. A case falling within the clause would also fall under clause 1 of section 300 and the clause has been enacted to repel the argument that intentional causing of death is murder only when the injury

is sufficient in the ordinary course to cause death. Say for example 'A' will be guilty of murder if he does an act intending to cause bodily injury likely to cause death of the person for his constitutional defects or weakness or ailments which is within his knowledge before striking the victim. The ingredients are thus (a) intention to cause bodily harm, (b) there is the subjective knowledge that death will be the likely consequence of he intended injury. The mental attitude is made of two elements (a) causing an intentional injury and (b) which injury the offender has the foresight to know would cause death.

The difference between clause (b) of section 299 and clause (3) of section 300 is one of degree of probability of death resulting from the intended bodily injury. It is the degree of probability of death which determines whether the culpable homicide is of the gravest, medium or the lowest degree. The offence is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death. A blow from the fist or a stick or vital part may be likely to cause death, a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death. The position is explained by illustration (a) of section 300. The intention of the offender can be gathered from force with which the blow is given, weapon used, organ that is targeted, nature of injury caused, origin and genesis of crime and circumstances attended upon death. Sometimes, the nature of the weapons used, sometimes the part of the body on which the injury is caused and sometimes both are relevant. The determinant factor is the intentional injury which must be sufficient to cause death in the ordinary course of nature to cause death, when the probability of death is not so high the offence does not fall within murder, but within culpable homicide not amounting to murder or some things else. So the degree of probability will be relevant for deciding between a mere likelihood of causing death by the reckless act and the reckless being imminently dangerous. In the case ***Reg v. Govinda*** as cited above the accused was found guilty of culpable homicide not amounting murder for sticking his wife several times with his fist on the back which caused her no serious injury, but the wounds inflicted on her face and eye while she was fallen down is likely to

cause death either by producing concussion or extravasation of blood on the surface or substances of the brain.

Clause (c) and (4) of section 299 and 300 respectively intended to apply (though they are not necessarily limited) to cases in which there is no intention to cause death or bodily injury (say for example driving furiously, firing at a mark near a public road). Whether the offence is culpable homicide or murder, depends upon the degree or risk to human life. If death is a likely result, it is culpable homicide, if it is the most probable result, it is murder.

Precisely it is important to note that the true difference between culpable homicide and murder as ***P.S.A. Pillai*** stated[6] is only the difference in degree and intention and knowledge. A lesser degree of intention or knowledge the case will fall under culpable homicide. Another aspect of culpable homicide not amounting to murder is with the five exceptions attached to section 300 when death is caused in the circumstances specified in those exceptions and by virtue of section 105 of the Evidence Act the burden of proving that the act comes within the exceptions lies on the accused. But the question of discharging this burden will arise only when the prosecution has affirmatively establishes that act amounts to murder under any of the four clauses of section 300. Our Penal Code recognises this type of case as culpable homicide of the first degree i.e. murder making it punishable with death or imprisonment for life with fine under section 302. While culpable homicide of the second degree deserves punishment with imprisonment for life or imprisonment for a term which may extend to ten years under section 304 Part 1 and shall also be liable to fine and that of third degree is made punishable up to ten years, or with fine or with both under second part of section 304.

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[6] *P.S.a. Pillai Criminal Law, 11th edn. 2012 at p. 564.*

Practice and Procedure Regarding Offences Affecting Administration of Justice

Moyeedul Islam*

Offences affecting administration of justice

We find the offences which affect the administration of justice in two different categories in the Penal Code– (i) in chapter X under the head `Contempt of the lawful authority of public servant' containing sections 172–190 and (ii) in chapter XI under the head `Of false evidence and offences against public justice' containing sections 191–229.

Condition to prosecute– no private complaint or F.I.R lies

Section 195 of the Code of Criminal Procedure imposes conditional bar for prosecution of some of those offences mentioned above. Subsection (1)(a) says that, except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate no Court shall take cognizance of any offence punishable under sections 172 to 188 of the Penal Code.

Short description of those sections of the Penal Code

172 *(Absconding to avoid service of summons or other proceeding),* ***173*** *(Preventing service of summons or other proceeding or preventing publication thereof),* ***174*** *(Non-attendance in obedience to an order from public servant),* ***175*** *(Omission to produce document to public servant by person legally bound to produce it),* ***176*** *(Omission to give notice or information to public servant by person legally bound to give it),* ***177*** *(Furnishing false information),* ***178*** *(Refusing oath or affirmation when*

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duly required by public servant to make it), ***179*** *(Refusing to answer public servant authorized to question),* ***180*** *(Refusing to sign statement),* ***181*** *(False statement on oath or affirmation to public servant or person authorized to administer an oath or affirmation),* ***182*** *(False information with intent to cause public servant to use his lawful power to the injury of another person),* ***183*** *(Resistance to the taking of property by the lawful authority of a public servant),* ***184*** *(Obstructing sale of property offered for sale by authority of public servant),* ***185*** *(Illegal purchase or bid for property offered for sale by authority of public servant),* ***186*** *(Obstructing public servant in discharge of public functions),* ***187*** *(Omission to assist public servant when bound by law to give assistance),* ***188*** *(Disobedience to order duly promulgated by public servant),* ***189*** *(Threat of injury to public servant),* ***190*** *(Threat of injury to induce person to refrain from applying for protection to public servant).*

It is needless to say that, the Judges and Magistrates are public servants also. So if any of the offences under sections 172–188 of the Penal Code is committed in, or in relation to a proceeding in a court, the concerned Judge or Magistrate has a peremptory duty and responsibility to make complaint in writing, otherwise the offender will remain beyond prosecution for ever. It can never be a matter of mere caprice of the Judge or Magistrate. The appellate Court has also the same duty and responsibility if the original court did not make such complaint.

Section 195 (1) (b) of the Code of Criminal Procedure says that, no court shall take cognizance of any offence punishable under any of the following sections of the same Code (Penal Code), namely, sections 193, 194, 195, 196, 199, 200, 205, 207, 208, 209, 210, 211 and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court.

Short description of those sections of the Penal Code

Sections ***191*** *(Giving false evidence),* ***192*** *(Fabricating false evidence),* ***193*** *(Punishment for false evidence),* ***194*** *(Giving or fabricating false evidence with intent to procure conviction of capital offence; if innocent*

*person be thereby convicted and executed),**195** (Giving or fabricating false evidence with intent to procure conviction of offence punishable with imprisonment for life or imprisonment), **196** (Using evidence known to be false), **199** (False statement made in declaration which is by law receivable as evidence), **200** (Using as true such declaration knowing it to be false), **205** (False personation for purpose of act or proceeding in suit or prosecution), **206** (Fraudulent removal or concealment of property to prevent its seizure as forfeited or in execution), **207** (Fraudulent claim to property to prevent its seizure as forfeited or in execution), **208** (Fraudulently suffering decree for sum not due), **209** (Dishonestly making false claim in Court), **210** (Fraudulently obtaining decree for sum not due), **211** (False charge of offence made with intent to injure) and **228** (Intentional insult or interruption to public servant sitting in judicial proceeding).*

So if any of the offences mentioned above is committed in, or in relation to a proceeding in a court, the concerned Judge or Magistrate has a peremptory duty and responsibility to make complaint in writing, otherwise the offender will remain beyond prosecution for ever. It can never be a matter of mere caprice of the Judge or Magistrate. The appellate Court has also the same duty and responsibility if the original court did not make such complaint.

Section 195 (1)(c) of the Code of Criminal Procedure says that, no court shall take cognizance of any offence described in section 463 (*forgery*) or punishable under section 471 (*Using as genuine a forged document*), section 475 (*Counterfeiting a device or mark used for authenticating documents described in section 467 of the Penal Code, or possessing counterfeit marked material*) or section 476 (*Counterfeiting a device or mark used for authenticating documents other than those described in section 467 of the Penal Code, or possessing counterfeit marked material*) of the same Code (Penal Code), when such offence is alleged to have been committed ***by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding,*** **except on**

the complaint in writing of such Court, or of some other Court to which such Court is subordinate.

So if any of the offences mentioned above is committed by a party to any proceeding in any court, the concerned Judge or Magistrate has a peremptory duty and responsibility to make complaint in writing, otherwise the offender will remain beyond prosecution for ever. It can never be a matter of mere caprice of the Judge or Magistrate. The appellate Court has also the same duty and responsibility if the original Court did not make the complaint.

Case law

"Since the document allegedly created by Moudud Ahmed has been filed in the suit and the writ petition, those are subject matter of the appeals and the documents have been used by the respondent in judicial proceeding. The Initiation of the proceeding is barred under section 195(1)(c) of the Code." *[Rajuk vs Manzur Ahmed, 68 DLR (AD) 337]*.

"From our above discussions, we find that the alleged forged document was not filed before the Civil Court and only a certified copy thereof was filed. Hence the bar of prosecution as provided under Section 195(1)(c) of the Code of Criminal Procedure is not attracted in the present case. We further hold that an Assistant Inspector of the Bureau of Anti-Corruption is competent to conduct investigation of a case initiated by the Bureau of Anti-Corruption and such investigation by an Assistant Inspector of the Bureau of the Anti-Corruption is merely an irregularity but not illegal. Furthermore pendency of a civil suit cannot bar the proceedings of criminal case for criminal offence." *[The State vs Sailendra Chandra Borman, 14 MLR (AD) 52]*.

Procedure to be followed in making written complaint

Section 476 and 476A of the Cr.P.C. provide the specific procedure for Courts to make a complaint of committing the offences mentioned in section 195(1)(b) or (c) of the Cr.P.C.–

When any Civil, Revenue or Criminal Court is, whether on application made to it in this behalf or otherwise, of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in section 195, subsection 1) Clause (b) or clause (c) which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding Officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction, and may take sufficient security for the appearance of the accused before such Magistrate or if the alleged offence is non bailable may, if it thinks necessary so to do, send the accused in custody to such Magistrate, and may bind over any person to appear and give evidence before such Magistrate.

Who shall make and sign the complaint

So, not any ministerial officer by order of the Court but only the presiding officer of the Court have to make written complaint and himself sign and then forward it to the cognizance Court, after forming an opinion that the offence has been committed in, or in relation to a proceeding in his Court. Only the High Court Division or Appellate Division may direct its any officer to sign and forward such complaint. One more thing is to bear in mind that such complaint should be forwarded not from any Court where the forged document is just verified, but only from the Court where the offence was committed. There is no legal scope to lodge any F.I.R. with any Police Station.

To which Court the complaint should be forwarded

The complaint should ordinarily be forwarded to the cognizance Magistrate within whose local jurisdiction situates the Court where the offence was committed.

The offences punishable under sections 467, 468 and 471 if committed relating to public property or committed by public servant or officer and employees of Bank or Financial Institution during discharging official duty

are scheduled offences of the Anti-Corruption Commission Act, 2004 and cognizance power lies only with the Senior Special Judge. So, in such cases, the complaint referred to above should be forwarded not to any Magistrate, but only to the Senior Special Judge within whose local jurisdiction situates the Court where the offence was committed and the Senior Special Judge may take cognizance after sanction accorded by the Commission.

Four pre-conditions are to be fulfilled

"The said section requires that, for prosecuting any person in respect of offences mentioned in section 195 (1), clause (b) or (c) i.e. offences under section 211 of the Penal Code and other sections the following four pre-conditions are to be fulfilled:

(a) The concerned court (Civil, Revenue or Criminal) has to form an opinion that inquiry should be made in relation to the offence under section 211 or the other sections of the Penal Code as mentioned in section 195 (1) (b) or (c) of the Code 1898.
(b) Such opinion has to be recorded as a finding by that court or by a superior Court to the effect that the said offence(s) appears to have been committed.
(c) After recording such finding, the presiding Judge/officer of such court himself has to make a complaint under his own signature. The superior court may however direct its subordinate court to make such complaint.
(d) Then the complaint is to be forwarded to a Magistrate, First Class having jurisdiction."
[19 MLR (HCD) 2014, Page: 256-260 (para 12)].

The presiding officer signing complaint is not subject to examine in court

Clause (aa) of section 200 of the Cr.P.C says, "when the complaint is made in writing nothing herein contained shall be deemed to require such examination in any case in which the complaint has been made by a Court

or by a public servant acting or purporting to act in the discharge of his official duties."

Proviso of section 244 (1) of the Cr.P.C. says, "Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court."

Section 121 of the evidence Act says, "No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge and Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate: but he may be examined as to other matters which occurred in his presence whilst he was so acting."

No investigation is necessary

Section 476 (2) says, "A Magistrate to whom a complaint is made under sub-section (1) or section 476A or section 476B shall, notwithstanding anything contained in Chapter XVI, proceed, as far as may be, to deal with the case as if it were instituted on a police report." So, after receiving such complaint the cognizance Court starts proceeding from taking cognizance.

No permission for prosecution under section 211 of the Penal Code

It is totally a wrong and unlawful practice to give permission to the investigating officer or to someone else to lodge F.I.R. for the offence punishable under section 211 of the Penal Code on the allegation of making false charge or accusation. There is no legal provision to give or seek such permission. If it falls under section 195 (1)(b) of the Cr.P.C then the procedure laid down in section 476 of the Cr.P.C should be followed, and if does not fall under section 195 (1)(b) of the Cr.P.C then private complaint is not barred. I think, such misapplication is going on due to misunderstanding of regulation 279 of the PRB. The regulation says that the IO to submit a formal complaint (of offence under section 182 or 211 of PC), attached to his final report, to enable the Magistrate to take cognizance. Let's have a look to the provision of the Regulation–

"279. (a) Whenever a case reported to the police is found after investigation to be maliciously false, the investigating officer shall, If evidence is available for prosecution of the complainant under section 182 or 211, Penal Code, submit to the Magistrate, through the Circle Inspector, a formal complaint, attached to his final report, to enable the Magistrate to take cognizance of the case under section 190, Code of Criminal Procedure under proviso (aa) to section 200 of that Code, the Magistrate need not examine the complainant. The investigating officer shall at the same time furnish the Court officer with a brief of the case.

(b) Prosecutions against complainants in false case shall be instituted only when the charges made are deliberately and maliciously false and not when they are merely exaggerated.

(c) The Circle Inspector shall, after satisfying himself that the complainant is well founded and that all possible enquiries have been made to collect the requisite evidence, forward the complaint to the Magistrate.

(d) If a complaint case referred to the police for investigation is found to be maliciously false, the investigating officer shall submit, together with the final report, a report to the Magistrate through the Circle Inspector giving the grounds on which the case is held to be false and recommending as to whether the complainant should be prosecuted."

Case law

"The legislative intent of section 476 read with section 195(1), of the Code, 1898 is that prosecution and cognizance of certain offences including that under 211 of the penal Code are to be dealt with caution. Accordingly the law has not allowed private individuals to lodge complaint against any person with the allegation that the later initiate a false case. Because, this liberty may seriously jeopardize the judicial and legal system. It may lead to a sort of anarchy. For instance, in case of failure of a criminal case in the form of dismissal of complaint, discharge or acquittal of the accused persons or otherwise, the complainant or others

initiating or involved in a criminal proceeding may face the accusation of false prosecution."
[19 MLR (HCD) 2014, Page: 256-260 (para 10)].

"So to avoid such probability, the law S. 476 and 195(1) require that the concerned court itself has to initiate a complaint about a false case in the manner prescribed in those provisions. The essences of provisions are that the court must record a finding about falsehood of the case and accordingly the presiding Judge or the officer himself will make a complaint." *[19 MLR (HCD) 2014, Page: 256-260 (para 11)].*

"In view of the above we hold that the impugned order is not sustainable. It is neither a legal nor proper order and therefore it is liable to be set aside to the extent of according permission for prosecuting the informant petitioner under section 211 of the Penal Code." *[19 MLR (HCD) 2014, Page: 256-260 (para 16)].*

When committed in the view or in presence of Court– Ss. 480–482 & 484, Cr.P.C.

If any of the offence under sections 175 *(Omission to produce document to public servant by person legally bound to produce it)*, 178 *(Refusing oath or affirmation when duly required by public servant to make it)*, section 179 *(Refusing to answer public servant authorized to question)*, 180 *(Refusing to sign statement)* or 228 *(Intentional insult or interruption to public servant sitting in judicial proceeding)* of the Penal Code is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody and at any time before the rising of the Court on the same day may, if it thinks fit, take cognizance of the offence and sentence the offender to fine not exceeding two hundred taka, and in default of payment, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

In every such case the Court shall record the facts constituting the offence, with the statement (if any) made by the offender, as well as the finding and sentence.

If the offence is under section 228 of the Penal Code, the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult.

If the Court considers that should be imprisoned otherwise than in default of payment of fine, or that a fine exceeding two hundred taka should be imposed upon him, or such Court is for any other reason of opinion that the case should not be disposed of under section 480, such Court, after recording the facts constituting the offence and the statement of the accused as hereinbefore provided, may forward the case to a Magistrate having jurisdiction to try the same, and may require security to be given for the appearance of such accused person before such Magistrate, or if sufficient security is not given, shall forward such person in custody to such Magistrate. Then the procedure mentioned in sections 195 and 476 should be followed.

The Court may, in its discretion, discharge the offender or remit the punishment on his submission to the order or requisition of such Court, or on apology being made to its satisfaction.

In the case of refusal of witness to answer or produce document (Ss. 179 & 175 PC)– S. 485, Cr.P.C.

If any witness or person called to produce a document or thing before a Criminal Court refuses to answer such questions as are put to him or to produce any document or thing in his possession or power which the Court requires him to produce, and does not offer any reasonable excuse for such refusal, such Court may, for reasons to be recorded in writing, sentence him to simple imprisonment, or by warrant under the hand of the presiding Magistrate or Judge commit him to the custody of an officer of the Court for any term not exceeding seven days, unless in the meantime such person consents to be examined and to answer, or to produce the document or thing.

In the event of his persisting in his refusal, he may be dealt with according to the provisions of section 480 or section 482, and in the case of High Court Division shall be deemed guilty of contempt.

In the case of non-attendance by witnesses in obedience to summons (S. 174 PC)– S. 485A, Cr.P.C.

If any witness being summoned to appear before a Criminal Court is legally bound to appear at a certain place and time in obedience to the summons and without just excuse neglects or refuses to attend at that place or time or departs from the place where he has to attend before the time at which it is lawful for him to depart, and the Court before which the witness is to appear is satisfied that it is expedient in the interests of justice that such a witness should be tried summarily, the Court, may take cognizance of the offence and after given the offender an opportunity of showing cause why he should not be punished under this section, sentence him to fine not exceeding Taka two hundred and fifty.

In every such case the Court shall follow, as nearly as may be practicable, the procedure prescribed for summary trials.

The concerned Judge or Magistrate himself cannot try– S. 487, Cr.P.C.

Except as provided in sections 480, 485 and 485A, no Judge of a Criminal Court or Magistrate, other than a Judge of the Supreme Court shall try any person for any offence referred to in section 195, when such offence is committed before himself or in contempt of his authority, or is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding.

Register such proceedings as Misc. case

Criminal Courts should register proceedings under sections 476, 480, 485 and 485A of Cr.P.C. as Miscellaneous case in form No. (R) 5(ii) of Cr.R.O Vol. II according to rule 381(6)(b) of Cr.R.O. Vol. I.

Civil Courts should register proceedings under sections 195, 476 and 480 of Cr.P.C. as Miscellaneous Criminal case in form No. (R) 2 of C.R.O Vol. II according to rule 774(28) of C.R.O. Vol. I.

Nationality and Statelessness- Legal Issues Involving in Shamima's Case

Md. Ziaur Rahman*

Shamima Begum is a British citizen by birth (Jus Soli) who traveled from the UK to Syria to join ISIS in 2015 and after the collapse of ISIS regime in early 2019, she wishes to return the UK. To protect her entering into the UK, Home Office stripped of her nationality. It was argued that due to her parent's migration history, Shamima has the right to apply for Bangladeshi Passport. Later on, Bangladesh government in a statement stated that Shamima is not a Bangladeshi citizen, she never visited Bangladesh and it will not allow her into the country. After the proactive response from Bangladesh authority, debates sparked that the UK home office decisions of stripping of nationality of Shamima made her stateless which was violation of international law. This is a complex issue involving legal, moral and political aspects. This paper will discuss and answer the legal issues involves with the Shamima's case.

Key Words: International Law, Nationality, Shamima Begum, Statelessness, Striping of

1. Introduction

Nationality is the essential foundation of a person's legal identity. It is effectively the right to have rights. It is also considered as the gateway through which people can access rights and services.[1] Hannah Arendt

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* *Chief Judicial Magistrate, Magura.*

1 *Booklet- Stateless Essentials, Institute of Statelessness and Inclusion (ISI), 'ALL ABOUT STAELESSNESS- What Development Actors Need to Know' -2018, P2.*

observed that the most basic political rights flow through one's citizenship.[2] Statelessness is the most extreme violation of the right of nationality[3] without which stateless people are unable not only to vote, hold public office, or exit and enter a country freely, but also to obtain housing, health care, employment, and education. Nationality is necessary in order to live a decent human life. Without nationality, a person is treated as a stateless one who is not recognized as a citizen by any state.[4] In *Trop V Dulles* case, US Supreme Court described, nationality is fundamental right of a citizen and stripping of nationality is cruel and unusual punishment more primitive than torture.[5] Even though international law guaranteed nationality as human rights and prohibits the deprivation of nationality[6], there are more than 15 millions stateless people all over the world.[7] The common causes of statelessness are racial/ethnic discrimination, gender discrimination, state succession, birth registration, inherited statelessness. After 9/11, world order has been changed a lot and now, one of the major reasons of statelessness is terrorism. Last year, an estimated 400 Brits returned to the UK from the Middle East after fighting

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2 *HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 277 (1951).*

3 *Ibid P16.*

4 *Article 1(1), 1954 Convention relating to the Status of Stateless Persons. It stated that, for the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.*

5 *In Trop V Dulles case reported in Trop Vs Dulles, 356 U.S. 86, 92-93 (1958) US Supreme Court noted that "The derivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship and this petitioner has done neither, I believe his fundamental right of citizenship is secured."[5] Chief Justice Warren describing stripping of nationality as 'cruel and unusual punishment' and continued, "It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international community. His very existence at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights and, presumably, as long as he remained in this country, he would enjoy the limited rights of an alien, no country need do so, because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might subject to termination at any time by reason of deportation."*

6 *Article 8(1), Convention on the Reduction of Statelessness. It stated that, a contracting state shall not deprive a person of its nationality if such deprivation would render him stateless.*

7 *Booklet- Stateless Essentials, Institute of Statelessness and Inclusion (ISI), 'SUSTAINABLE DEVELOPMENT GOAL 16.9- Legal Identity, Nationality & Statelessness' -2018, P-4.*

for groups like ISIS.[8] In 2017, UK government stripped 104 people of their British citizenship who travelled in support of terrorist group.[9]

2. Background of Shamima's Issue

Shamima Begum, now 19 years old, was a British national by birth (Jus Soli[10]). In 2015, she along with other two school girls left their home in Bethnal Green, East London and fled from UK to Syria via Turkey to join Daesh (ISIS). Just 10 days after the arrival in Raqqa, she married a foreign fighter Yago Riedjik who is a Dutch citizen. At the beginning of this year 2019, last bases of ISIS have been collapsed. At the end of the war, Shamima is now kept in a refugee camp in northern Syria in dilapidated situation. She wishes to go back her country. To protect her return, on 19 February 2019, UK Home Office stripped her nationality in a letter informing Shamima's family.[11] Identity of Shamima is violently reconfigured by the state with this step of striping nationality. It is voiced that UK government steps made Shamima stateless person. UK Home Secretary Sajiv Javid assured that he would not make any decision that would make an individual stateless. UK Home Office suggested that she has the right to apply for a Bangladeshi passport due to Shamima's parent's migration history. UK Home Secretary has the power to revoke nationality of naturalized or dual citizenship holders if it was consider 'conducive to the public good'[12] but before that, it must have to be sure

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[8] *Devyani Prabhat, Shamima Begum: legality of revoking British citizenship of Islamic State teenager hangs on her heritage, http://theconversation.com/shamima-begum-legality-of-revoking-british-citizenship-of-islamic-state-teenager-hangs-on-her-heritage-112163 (accessed on 10 April, 2019).*

[9] *AMIT KATWALA, The stateless limbo of Shamima Begum opens a nasty can of worms, https://www.wired.co.uk/article/shamima-begum-citizenship-revoked (accessed on 10 April, 2019).*

[10] *Jus soli meaning "right of the soil" commonly referred to as birthright citizenship, is the right of anyone born in the territory of a state to nationality or citizenship.*

[11] *Alex Psilakis, COUNTER TERRORISM AND INTERNATIONAL HUMAN RIGHTS, Stripping Citizenship, States Struggle to Confront Foreign Fighters, INTERNATIONAL ENFORCEMENT LAW REPORTER, Vol 35, Issue 3, P99.*

[12] *Section 40, subsection 2 of British Nationality Act (BNA)-1981. It states, "The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good." According to the government's document 'Deprivation and Nullity of British Citizenship; Nationality Policy Guidance' issued on 27 July 2017,* ***'Conducive to the public***

that the moves will not makes the person stateless.[13] More than 100 dual nationals in the UK have lost their nationality after travelling in support of Daesh/ ISIS or likewise terrorist group and most of cases, they have dual citizenship. Shamima's case is complicated one. Following the events, in a prompt reaction, Bangladesh foreign ministry gave a strongly worded statement that Shamima Begum is not a Bangladeshi citizen nor has she ever visited the country, she is a British citizen by birth (Jus Soli) and they would not allow her into Bangladesh. It is stated that, "The Government of Bangladesh is deeply concerned that she has been erroneously identified as a holder of dual citizenship shared with Bangladesh alongside her birthplace, the United Kingdom." The statement continued, "She is a British citizen by birth and has never applied for dual nationality with Bangladesh ... There is no question of her being allowed to enter into Bangladesh."[14] It is clearly manifested that Bangladesh had not been consulted fully before the home secretary asserted she could claim Bangladesh citizenship. Shamima herself also echoes the Bangladesh's stand. She insisted that she would be left stateless if she lost her British citizenship. She told the BBC, "I have one citizenship … and if you take that away from me, I don't have anything. I don't think they are allowed to do that.....This is a life-changing decision and they haven't even spoken to me."[15] Shamima Begum got the scope to challenge the Home Office decision within 28 days before Special Immigration Appeal Commission (SAIC) and she already challenged the UK Home Office decision before the Special Immigration Appeal Commission (SIAC). It seems likely that there will be a lengthy and expensive appeals process.

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good' *means depriving in the public interest on the grounds of involvement in terrorism, espionage, serious organized crime, war crimes or unacceptable behaviors.*

[13] *Sec. 40(4), BNA, which stated that the Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless.*

[14] *Tara John, Shamima Begum to be stripped of British nationality and will not be allowed into Bangladesh, government says, https://edition.cnn.com/2019/02/20/uk/shamima-begum-uk-citizenship-stripped-gbr-intl/index.html (accessed on 10 April, 2019).*

[15] *Esther Addley and Redwan Ahmed, Shamima Begum will not be allowed here, says Bangladesh https://www.theguardian.com/uk-news/2019/feb/20/rights-of-shamima-begums-son-not-affected-says-javid (accessed on 10 April, 2019).*

Shamima's case is a tragic one; Shamima has given birth of three children in last four years in ISIS regime; her eight months old son died three months ago, her one year and nine months old daughter died one month ago and she gave birth third baby just after revoking her nationality and the ill-fated premature boy died on 7th March, 2019 at a hospital in Hasakah city in northern Syria.[16] There is no doubt Ms. Shamima faces serious accusation related to terrorist activity. There is no debate on that the ISIS girl should bring to the justice for her alleged offense. Domestic and international law mandates the UK take back foreign fighters like Shamima to try them in the respective domestic court.[17] It was argued in her favor that Shamima was a 15 years old child when she left the UK. She was potentially victim of extremist grooming as she left the UK at the age of 15 years still a minor in the eye of law. She was legally, morally, biologically and emotionally just a child when she was radicalized. There is no evidence of Begum actually committing any crimes while in Syria. She was simply a house wife during her time with the Islamic State and never engaged in recruiting or propaganda or did anything dangerous.[18] She is in a situation of risk, stripping nationality and detention in Syria can make her identity contentious and exposed to further radicalization.[19]

3. Analyzing Existing International Laws

International Law makes it illegal for a country to revoke citizenship where it would leave an individual stateless. Revoking of nationality of a

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16 *Jennifer O'Connell, What is the UK government to do about Shamima Begum? There is little sympathy for the 'jihadi bride' whose British citizenship is being revoked, https://www.irishtimes.com/news/world/uk/what-is-the-uk-government-to-do-about-shamima-begum-1.3801728 (accessed on 10 April, 2019).*

17 *Alex Psilakis, COUNTER TERRORISM AND INTERNATIONAL HUMAN RIGHTS, Stripping Citizenship, States Srtugle to Confront Foreign Fighters, INTERNATIONAL ENFORCEMENT LAW REPORTER, Vol 35, Issue 3, P 101.*

18 *Jonathan Shaub, CIVIL LIBERTIES AND CONSTITUTIONAL RIGHTS, Hoda Muthana and Shamima Begum: Citizenship and Expatriation in the U.S. and U.K. https://www.lawfareblog.com/hoda-muthana-and-shamima-begum-citizenship-and-expatriation-us-and-uk (accessed on 10 April, 2019).*

19 *OJEAKU NWABUZO, The case of Shamima Begum: British identity and terrorist activity in the spotlight https:// www.enar-eu.org/ The-Case-of-Shamima-Begum-British-identity-and-terrorist-activity- under-the (accessed on 10 April, 2019).*

suspected terrorist seems like a relatively easy and low cost method to prevent reentry which might be prohibited under international law.[20] There are various international convention aimed at reducing statelessness and guaranteeing one's nationality as a fundamental human right prohibit denationalization as tool of state's counter terrorism policy.[21] Universal Declaration of Human Rights (UDHR) is the profound documents of international law on right of nationality. Article 15 of UDHR mandates that all people have the right to nationality and no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.[22] Article 15(2) curtails state discretion over citizenship law and act as a protection of state plans to strip suspected terrorist of their nationality. According to article 7 of the United Nations' 1961 Convention on the Reduction of Statelessness (CRS), "A person shall not loss the nationality of a contracting state, if such loss would render him stateless, notwithstanding that such loss is not expressly prohibited by any other provision of this convention."[23] It prohibits a contracting state from striping of nationality if doing so would render him stateless. Shamima Begum is most likely to be stateless if she lost her nationality. This article 7 should protect her from losing her citizenship in the first place, additionally article 9 of the convention note that, "A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political ground."[24] International law also prescribe some legitimate grounds for the revocation of nationality which include fraud in obtaining citizenships, acts of disloyalty and prejudicial

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[20] *UDHR Article 13(2) states "Everyone has the right to leave any country, including his own, and to return to his country; ICCPR, art. 12 state "Everyone shall be free to leave any country, including his own .... No one shall be arbitrarily deprived of the right to enter his own country.'*

[21] *Shiva Jayaraman, International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters, 17 Chi. J. Int'l L. 178 (2016), P 182.*

[22] *Article 15 of Universal Declaration of Human Rights. (1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.*

[23] *Article 7(1)(a), 1961 Convention on the Reduction of Statelessness, entered into force Dec.13, 1975, 989 U.N.T.S. 175. The article states, "If the law of a Contracting State permits renunciation of nationality, such renunciation shall not result in loss of nationality unless the person concerned possesses or acquires another nationality."*

[24] *Article 9, Ibid. The article states, "A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds."*

conduct toward the granting state.[25] There must be an opportunity for the individual to present a defense at a fair hearing.[26] ICCPR gives a guarantee to individual rights to access domestic courts.[27] If a person is later detained by the security forces of the country in which he is located, he would also be deprived of vital consular service that might make a meaningful difference in navigating a foreign legal system.[28] Other sources of treaty law also govern the right to one's nationality, including the European Convention on Nationality which states that "A) everyone has the right to a nationality; B) statelessness shall be avoided and C) no one shall be arbitrarily deprived of his or her nationality." This language closely tracks

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[25] *Article 8, ibid.*

1. A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.

2. Notwithstanding the provisions of paragraph 1 of this Article, a person may be deprived of the nationality of a Contracting State:

(a) in the circumstances in which, under paragraphs 4 and 5 of Article 7, it is permissible that a person should lose his nationality;

(b) where the nationality has been obtained by misrepresentation or fraud.

3. Notwithstanding the provisions of paragraph 1 of this Article, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time:

(a) that, inconsistently with his duty of loyalty to the Contracting State, the person

(i) has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or

(ii) has conducted himself in a manner seriously prejudicial to the vital interests of the State;

(b) that the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State.

[26] *Article 8(4) CRS.*

A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this Article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.

[27] *ICCPR, article 14 "....everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...."*

[28] *Under the Vienna Convention on Consular Relations, States have the right to assist their nationals who are detained in other States. See Vienna Convention on Consular Relations, opened for signature Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Moreover, individuals have a right, under international law, to consular access.*

the 1961 Convention.[29] Another thing should be taken into high consideration is, Shamima Begum was online groomed at the age of 15 before she left the UK and was recruited, received, transferred and harbored by ISIS.[30] She was a child of 15 years; there is no need to coercion. As per the definition of Article 3 of Palermo Protocol, Shamima Begum was a victim of trafficking.[31] The purpose of that recruitment was for child marriage, propaganda and participation in the terrorist group. As she was only 15 years at the time of her marriage, it itself was exploitative. UNICEF treats it as a major breach of human rights. As per Anti-Slavery International, child marriage can be a form of slavery if a child forced to marry without full or informed consent; once in the marriage, a child is forced to do domestic chores and /or to engaged in non-consensual sexual relation; a child is controlled through abuse and threats; a child cannot

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[29] *Gerard-Rend de Groot & Maarten Peter Vink, A Comparative Analysis of Regulations on In voluntary Loss of Nationality in the European Union, CEPS PAPER IN LIBERTY AND SECURITY IN EUROPE (Dec. 2014), http://www.ceps.eu/publications/comparative-analysis-regulationsinvoluntary-loss-nationality-european-union.*

[30] *JULIAN NORMAN, SHAMIMA BEGUM: APLLICABLE LAW ON TRAFICCING, PROSECUTIIO AND CITIZENSHIP, DRYSTONE CHAMBER, P1 available AT DRYSTONE.COM/2019.*

[31] *Article 3 of the 'Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children. Supplementing the United Nations Convention against Transnational Organised Crime-2000'. It defines trafficking in* ***Article 3***

Use of terms

For the purposes of this Protocol:

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) "Child" shall mean any person under eighteen years of age.

realistically leave the marriage.[32] A person's consent under eighteen years old or even enthusiasm, for exploitation is explicitly not relevant under 3(b) of Palermo Protocol. Shamima Begum was victim of trafficking and it the State obligation of the UK's proactive duty to return her back as per article 8 of Palermo Protocol.[33] A person who has been trafficked may nevertheless be criminally accountable for actions they have taken after being trafficked and only consideration is that the trafficked person has been 'compelled' to engage in such an act or not.[34]

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[32] *Ana's story on child marriage and forced marriage, available at https://www.antislavery.org/slavery-today/child-marriage/ (access on 25 April, 2019).*

[33] *Article 8, Palermo Protocol.*

Repatriation of victims of trafficking in persons

1. *The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.*
2. *When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.*
3. *At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.*
4. *In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.*
5. *This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.*
6. *This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.*

[34] *Article 26 of the Council of Europe Anti-Trafficking Convention requires the United Kingdom to: "... provide for the possibility of not imposing penalties on victims [of trafficking] for their involvement in unlawful activities, to the extent that they have been compelled to do so" Article 8 of the EU Anti-Trafficking Directive 2011/36/EU provides that "national authorities are entitled not to prosecute or impose penalties on victims of trafficking human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to trafficking."*

4. Analyzing Existing Domestic Laws

UK and Bangladeshi laws will be discussed bellow to find out the legality of respective government's steps on Shamima's nationality and statelessness.

4.1 Domestic Law of the UK

In *State of the Home Department Vs Al Jedda* Case UK Supreme Court has confirmed that taking away British citizenship is impermissible if it result in statelessness.[35] The British Home Secretary has the power to cancel the British citizenship of dual or multiple nationality holders.[36] In such situation, there is no concern of statelessness as the person would have another surviving nationality once their citizenship is taken away. So far, all the cases of people being stripped of their citizenship have involved dual or multiple national. In that case, as per verdict of the Supreme Court

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[35] *State of the Home Department Vs Al Jedda, Case ID UKSC 2012/0129, Reported in (2013) UKSC 62. It states, "In a section 40(2) case, establishing that the person would not be made stateless is a condition precedent to the making of a deprivation order." The fact of the case is, Al-Jedda concerns an Iraqi who, after claiming asylum in the UK in 1992, was granted British citizenship in 2000. In doing so, he lost his Iraqi citizenship as per provision of Iraqi law. Four years later he travelled to Iraq, where he caught the eye of USA forces for allegedly being member of a terrorist group and subsequently taken into custody by UK forces and detained until December 30, 2007. A couple of weeks before he was to be released from custody, the Secretary of State brought an action under section 40(2) of the 1981 Act to deprive him of his citizenship. The issue for the Court was whether the deprivation rendered the appellant stateless, or whether it was his failure to make an application for citizenship under the new Iraqi law that did so. Special Immigration Appeals Commission* ***(SIAC),*** *arguing in part that if the Secretary's order was upheld, it would result in him being nationless. The Commission rejected his appeal based on the Law of Administration for the State of Iraq for the Transitional Period (the TAL), which they found would allow him to get his Iraqi citizenship back, and hence, the British government would not be depriving him of a nation entirely by revoking his British citizenship. However, the Court of Appeals reversed the Commission's decision of denial and remanded the case, only to have the Commission come to the same conclusion under similar reasoning"-leading the Court of Appeal to reverse again." The British government then appealed that decision to the Supreme Court of the United Kingdom in 2013, arguing that al-Jedda had the ability to seek Iraqi citizenship on the day the Secretary filed the order depriving him of his nationality, meaning he would that he would not become stateless and that he could receive this status easily and quickly." The Court did not agree and, instead, ruled that the section of the 1981 Act which deals with statelessness, 40(4), only requires the question of "whether the person holds another nationality at the date of the order"-as opposed to considering all of the hoops that the government assumed al-Jedda would be able to jump through in order to regain his Iraqi citizenship." For the Court, the answer to the inquiry was no."*

[36] *Section 40(2) read with section 40(4) of British Nationality Act. Section 40(2) states, "The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good." Section 40(4) states, "The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless"*

in Pham v Secretary of State or the Home Department case, other nationality must exist on the date of deprivation order.[37] Before 2014, Home Secretary was allowed to stripe of citizenship only when it was acquired by fraud, false representation or concealment of a material fact and when doing so would be conducive to the public good.[38] Successive attempts to remove nationality of naturalized citizens (people who are not born in the UK but whose only nationality is British) have been failed since 2010, as because each time, the courts have stepped in to prevent such striping of citizenship on the ground of making somebody stateless. Because of these consecutive defeats in court, the UK made amendment in British Nationality Act (BNA) in 2014 to introduce new power for the home secretary to cancel the citizenship of single nationality holders even at the risk of creating a stateless person, in that case, home secretary must reasonably believe that the person is able to become a national.[39] At that time, it was argued on behalf of Home Office that citizenship is a privilege not a right[40] and statelessness was not going to be used as safeguard

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[37] *Pham v Secretary of State or the Home Department, Reference [2015] UKSC 19. Pham was born in Vietnam but later became a British citizen. He was alleged to have been trained by Al Qaeda and the Home Secretary made a deprivation order. Pham never formally renounced his Vietnamese citizenship and when the Vietnamese government discovered the UK's intention to deport him, they declined to accept that he was or is a Vietnamese national. Such a refusal was contrary to Vietnamese law; after extensive evidence being heard, Jackson U in the Court of Appeal felt that the law was 'tolerably clear' and that Pham was still a Vietnamese citizen. The Supreme Court upheld the Home Secretary's Deprivation Order. It is argued that Pham had 'de jure' Vietnamese nationality, he would be 'de facto' stateless as because he would not be able to enjoy the protection citizenship normally affords. UKSC's findings that Pham retained Vietnamese nationality is of no consequence to him.*

[38] *section 40(2), 40(3), BNA*

[39] *Section 40 (4A) of BNA. It states, " But that does not prevent the Secretary of State from making an order under subsection (2) to deprive a person of a citizenship status if-*

(a) the citizenship status results from the person's naturalization,

(b) the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory, and

(c) the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory."

[40] *Alice K. Ross & Patrick Galey, Making People Stateless Is 'Simply Wrong, 'Says MPs Ahead of Lords Debate, BUREAU INVESTIGATIVE JOURNALIST (Mar. 17, 2014),*

anymore.[41] Giving order to deprive people suspected of terrorism while they are out of the country with an intention to prevent them from coming back to the UK and appealing to SIAC has sinister effects.[42] This could put the UK in a type of backlash 'tit for tat situation' if it starts doing it, then other states may start doing it to the UK.[43] These countries may simply send this British citizen back to the UK due to the fact that they do not want to provide asylum for these now stateless people who may have ties to terrorism.[44] There might untenable result occur if two state attempt to denationalize an individual concurrently, there could be a race between the states to revoke which will have negative implications on international policies and law.[45] Exactly this happened in Shamima's Case. The UK planed to denationalize Shamima Begum suggesting she had dual citizenship share with Bangladesh. Bangladesh, denied Begum's nationality proactively issuing government statement which seems the UK and Bangladesh are in a potential 'race' to denationalize an individual. The fact that UK has taken away citizenship when people are out of the country and that their courts has upheld such a practice is shocking especially given the fact that it definitely makes it harder on these people when they go to appeal their decision.[46] After the amendment in 2014, naturalized citizens are at greater risk of statelessness which undermines

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https://www.thebureauinvestigates.com/2014/03/17/making-people-stateless-is-simply-wrong-says-mpsahead-of-lords-debate/ [hereinafter Ross & Galey, 'Simply Wrong].

41 *Ibid.*

42 *The United Kingdom is one of the countries whose current expatriation law allows for citizens of the United Kingdom who have no other nationality to be stripped of their citizenship under certain circumstances. See Helena Wray, The New Powers of Deprivation of Citizenship i the UK, EUR. UNION DEMOCRACY OBSERVATORY ON CITIZENSHIP (June 28, 2014), http://eudo-citizenship.eu/news/citizenship-news/1 160-the-new-powers-of-deprivation-ofcitizenship-in-the-uk.*

43 *Michael Goldstein, Expatriation of Terrorists in the United Kingdom, United States, and France: Right or Wrong, 25 Tul. J. Int'l & Comp. L. 259 (2016), P273.*

44 *ibid P 272.*

45 *Shiva Jayaraman, International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters, 17 Chi. J. Int'l L. 178 (2016) P 201*

46 *See Katrin Bennhold, Britain Increasingly Invokes Power To Disown Its Citizens, N.Y. TIMES (Apr. 9, 2014),*

http://www.nytimes.com/2014/04/10/world/europe/britains-power-todisown-its-citizens-raises-questions.html?_r-0

the concept of equal citizenship (UK-born citizen and foreign-born citizen) in a diverse and democratic society. British Home Secretary Sajid Javid advocated of striping of nationality that citizenship of attempted returnees, male and female, should be revoked; that they are threat to national security; that there is no guarantee of a successful prosecution or de-radicalization; that they'll just come back and set up terrorist cells at home.[47] The home secretary said he had to weigh up the law and the impact on people's lives as well as any potential risk of returners trying to radicalize people in the UK. "In certain circumstances we will remove them of their nationality. I won't hesitate to do that if that is the only option to me to keep people safe in the United Kingdom."[48] The international Centre for the study of Radicalization and Political Violence (ICSRPV) estimates that approximately 20000 foreign fighters have joined ISIS.[49] It is suspected that roughly five hundreds British fighters have join in ISIS.[50] In 2017, UK government stripped 104 people of their British citizenship.[51] As Shamima Begum was born in the UK, she is not a naturalized person. So, 2014 amendment would not seem to be apply to her. In her case, the home secretary has to establish that she has another actual nationality in place. But the fact is that Bangladesh already denied Shamima's nationality which means she is at real risk of statelessness.[52] Bangladesh is facing a fight to defeat terrorism including groups linked to ISIS. In this situation, it is quite natural that Bangladesh would not allow Shamima regardless of the citizenship rights she was able to claim.

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47 *Supra Note 11.*

48 *Supra Note 7.*

49 *Peter R. Neumann, Foreign fighter total in Syria/ Iraq now exceeds 20,000; surpasses Afghanistan conflict in the 1980s, INTERNATIONAL CENTRE FOR THE STUDY OF RADICALISATION AND POLITICAL VIOLENCE (Jan. 26, 2015),http://icsr.info/2015/01/foreign-fighter-total-syriairaq-now-exceeds-20000-surpasses-afghanistan-conflict-1980s/ [hereinafter ICSR].*

50 *Supra Note 19 P 180.*

51 *Supra Note 7.*

52 *Devyani Prabhat, Shamima Begum: legality of revoking British citizenship of Islamic State teenager hangs on her heritage, http://theconversation.com/shamima-begum-legality-of-revoking-british-citizenship-of-islamic-state-teenager-hangs-on-her-heritage-112163 (accessed on 10 April, 2019).*

The Home Secretary could also use Counter Terrorism and Security Act, 2015 to impose a Temporary Exclusion Order (TEO). To do this, he would have to show that he reasonably suspects that the individual is or has been, involved in terrorism- related activity outside the United Kingdom. Home Secretary could then impose a TEO which would invalidate Shamima Begum's passport for two years although this could be extended. In that case, Home Secretary would have to allow her re-entry into the UK if she agreed to certain conditions such as taking part in a de-radicalization program or reporting to a police station.

Assessing the existing laws, it may be summarized that the Home Secretary may make an order to deprive a person of British citizenship status in any of the circumstances: 1. The Home Secretary considers that deprivation "is conducive to the public good", and would not make the person stateless.[53] Shamima Begum's case appears to come within this category. 2. The person obtained his citizenship status through registration or naturalization and the Home Secretary is satisfied that this was obtained by fraud, false representation or the concealment of any material fact.[54] 3. The person obtained his citizenship status through naturalization, and the Home Secretary considers that deprivation is conducive to the public good because the person has conducted themselves "in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory" and the Home Secretary has reasonable grounds to believe that the person is able to become a national of another country or territory under its laws.[55] In the second and third scenarios, deprivation of citizenship is permissible even if the person would be left stateless.

4.2 Domestic law of Bangladesh

Bangladeshi law allows two types of citizenship; (1) citizens by birth (jus soli) and (2) citizens by decent (jus sanguinis). Every person born in

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[53] *Section 40 (2) read with 40 (4), BNA 1981*

[54] *Section 40(3) BNA*

[55] *Section 40(4A) BNA*

Bangladesh shall be a citizen of Bangladesh by birth.[56] Bangladeshi Law includes the rights of 'citizens by decent' to anyone who is born to a Bangladeshi parents. 'A person shall be a citizen of Bangladesh by descent if his father or mother is a citizen of Bangladesh at the time of his birth.'[57] Anyone claiming citizenship on account of birth must do so on a prescribed form.[58] It has also specific provision on dual nationality/citizenship. If any person is a citizen of Bangladesh and is at the same time a citizen or national of any other country, he shall, unless he makes a declaration according to the laws of that other country renouncing his status as citizen or national thereof, cease to be a citizen of Bangladesh. This provision will not apply to a person who has not attained twenty-one years of his age.[59] A person shall not, qualify himself to be a citizen of Bangladesh if he- (i) owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign state, or (ii) makes a declaration according to the laws of that other country renouncing his status as citizen or national of Bangladesh.[60]

SAIC in its judgment illustrated that Bangladeshi Law of citizenship is not clear whether British citizens in cases, be applied for Bangladeshi citizenship. In case of doubt as to whether a person is qualified to be deemed to be a citizen of Bangladesh, the question shall be decided by the Government, which decision shall be final.[61] Experts with knowledge of the British and Bangladeshi legal systems are divided on whether the

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[56] *Section 4, Citizenship Act 1951*

[57] *Section 5, Citizenship Act 1951. A person shall be a citizen of Bangladesh by descent if his father or mother is a citizen of Bangladesh at the time of his birth: Provided that if the father or mother of such person is a citizen of Bangladesh by descent only, that person shall not be a citizen of Bangladesh by virtue of this section unless- (a) that person's birth having occurred in a country outside Bangladesh the birth is registered at a Bangladesh Consulate or Mission in that country, or where there is no Bangladesh Consulate or Mission in that country at the prescribed Consulate or Mission or at a Bangladesh Consulate or Mission in the country nearest to that country; or (b) that person's father or mother is, at the time of the birth, in the service of any Government in Bangladesh. Anyone claiming citizenship on account of birth must do so on a prescribed form.*

[58] *Rule 9 of the Citizenship Rule 1952*

[59] *Section 14, Citizenship Act 1951*

[60] *Article 2B, The Bangladesh Citizenship (Temporary Provisions) Order, 1972*

[61] *Article 3, ibid*

Home Office's action is legal. In the most recent case, Respondent, the Secretary of the State of Home Department made an order of depriving E3 and N3 of their British national on grounds of terrorism-related and national security reasons. Respondent claimed that they were Bangladeshi/British dual nationals and deprivation of British citizenship would not render them stateless. In an appeal, the Special Immigration Appeals Commission (SAIC) found that two terror suspects - codenamed E3[62] and N3[63] were not dual nationals and so would have been rendered stateless.[64] These two Bangladeshi origin people had not sought to retain their Bangladeshi citizenship before the age of 21, it had automatically lapsed and therefore the British government should not have revoked their citizenship. The lawyer who acted in that case, Fahad Ansari, said that while the court accepted the men had been Bangladeshi citizens by descent, "once they reach the age of 21 that citizenship lapses unless they actively seek to retain. Both my clients were over 21. But as far as Shamima Begum stands, she is 19, which is problematic for her." Because Shamima is not yet 21, her right to Bangladeshi citizenship has not expired and so the Home Office has clearly decided that she has not been made stateless. But Najrul Khasru, a British-Bangladeshi barrister and part-time tribunal judge who has reviewed Bangladesh's citizenship laws, told he believed Begum was not a Bangladeshi citizen unless, at the time of her birth, her parents had registered her at the High Commission, which he said was very uncommon within the British-Bangladeshi community.

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62 *E3 was born in UK on 27th May, 1981. Accordingly he was a British citizen at birth pursuant to relevant provision of in the British Nationality Act 1948. Both his parents were Bangladeshi citizen at the time of this birth. On 4th June 2017, when E3 was in Bangladesh, Respondent, the Secretary of the State of Home Department made an order of depriving E3 of his British national on grounds of terrorism-related and national security reasons.*

63 *N3 was born in Bangladesh on 12th December, 1983. He was a British citizen at birth by virtue of sec 2(1)(a) of the 1981 act owing to the status of his parents. On 31th October 2017, when N3 was in Turkey, Respondent, the Secretary of the State of Home Department made an order of depriving N3 of his British national on grounds of terrorism and national security reasons.*

64 *Special Immigration Appeals Commission, Appeal number SC/138/2017 and SC/146/2017, Date of Judgment 15th November, 2018*

Shamima Begum's parents said, they did not register her birth in this way. It's now up to the courts to decide.[65]

5. Conclusion

There is no scope to say firmly, Shamima Begum has an alternative nationality in Bangladesh. She has never visited that place, nor applied for Bangladeshi citizenship. Even her parents did not register her birth at Bangladesh High Commission. She has born in the UK and grown-up there. She holds a UK citizenship by birth. If it is taken for sake of argument that Shamima has '*de jure'* Bangladeshi nationality, practically she would be '*de facto'* stateless as she would not be able to enjoy the protection citizenship normally affords. In that case, UKSC's findings that Shamima would retained Bangladeshi nationality is of no consequence to her. Practically, UK home office decisions of stripping of nationality of Shamima made her stateless which was violation of international law.

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[65] *Esther Addley, What is the truth about Shamima Begum's citizenship status? Experts split over whether Sajid Javid's move to revoke her UK citizenship is legal, https://www.theguardian.com/uk-news/2019/feb/21/what-is-the-truth-about-shamima-begums-citizenship-status (accessed on 10 April, 2019)*

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Answers to Mollify the Deadlock of Criminal cases

Shaikh Md Mujahid Ul Islam*

In spite of the dissonance among the scholars regarding the hallowing process of legal system of Bangladesh, this is true that the judges of Bangladesh are living with around three million cases. Now important issue is who plunges us into the hole of this large number of cases. As victim of admonishment for such deadlock of cases, in this article, my effort is to find out the reasons of this deadlock in criminal cases using my empirical knowledge. In this Article I presented different reasons for such odd picture. Here I showed the weakness of different stages (investigation/inquiry, stages in pre-trial stages before cognizance magistrate, difficulty in taking evidences, weakness of prosecution), which contribute for such long pendency of criminal cases. Besides these, in this article I pointed out some sociological reasons (trend to file false case for harassment, lack of social responsibility to punish the accused, public accountability) for this deadlock. Here I have also pointed out infrastructural weakness of judiciary, which contributes to this deadlock. In the eve of my discussion it can be said that through identifying those reasons of deadlock I want to agitate among both consequentialists and deontologists to persuade the stakeholders to mollify this deadlock.

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Introduction

Regarding the Criminal Justice System of Bangladesh, most of the people (both people in legal arena and people outside of legal arena) possess the conception that for disposal of a case in the court it takes long time, and truly different reasons can be possibly shown behind this plausible statement. A group of people can be found easily who speaks infinitively that the concept of deadlock of the criminal cases is their intuition, and there is no stereotypical way to break this deadlock. People are rarely found who have proper knowledge of the reasons of this deadlock. This is true that there are above more than 2.8 million cases (both civil and criminal) are pending before courts in different tiers.[1] For disposal of these cases there are 1500 courts in Bangladesh with inadequate infrastructure. Besides this statistical imbalance of ratio of numbers of cases and judges (which is very popular intuition), what are the other empirical causes for the delay of the criminal cases before court? The magnitude of the causal relation between delay of cases and weakness of criminal justice system cannot be overlooked. However, in spite of the dissonance among the scholars regarding ways of ensuring justice in criminal justice process, this dictum is unanimously accepted as intuition "Delay Defeats Equity". In this Article I will try to find out those causes of delay of a criminal case in our criminal justice system. Because of the limited resonated voice among the researchers on this issue, for accomplishing this article, I don't rely on statistic, and research work rather on the criminal procedural law books, and some books, which discuss on those procedural issues in criminal law. In this article, primarily I will try to present synopsis of the intricate basic procedure of a criminal case before the trial Court, and subsequently relying on my empirical knowledge I will try to present a bulk of reasoning that vitiates the whole criminal justice process.

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[1] *Statistics of all the cases in Bangladesh; published by The Supreme Court of Bangladesh in 2014.*

Synopsis of the procedure of criminal case

Unlike some special tribunals, the criminal justice process is basically dealt with the Code of Criminal Procedure (CRPC). A criminal case is basically started from the filing of an Ajahar (application) in Thana[2] or by filing of a complaint before the cognizance judicial magistrate court.[3] After filing the case, next step is inquiry or investigation of a case, and after inquiry, the inquiry officer gives inquiry report, and the investigation officer gives the investigation report according to section 173 of CRPC.[4] After submission of the report before the cognizance magistrate court, the court may either accept the report and take cognizance of the case, or reject the report and send it for further investigation or inquiry.[5] However after taking cognizance, if the accused persons are not present before the court, the court may issue either warrant of arrest or summon to those people, and subsequently when those persons are arrested by police or appear before the court, the criminal case becomes ready for trial, and the cognizance judicial magistrate transfers the case before the trial court.

In the trial stage, the first step of a trial court is to frame charge against the accused persons basing on specific allegation, and in this stage the court may either to frame charge or discharge the accused persons, if there is no specific allegation against them.[6] After framing charge, the next step of the criminal trial court is to adduce evidence of the witnesses in the case, and the court will issue processes for presence of the witnesses before court.[7] After adducing all the evidences of the case, the next step is examination of the accused person according to section 342 of CRPC and in this stage court reads the evidences before the accused person and asks the accused

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2 *Section 154 of the Code of Criminal Procedure, 1898.*

3 *See S M Mujahid Ul Islam, "gateway of Criminal and family Laws in Bangladesh" New Warse Publication 2015 p 32-33.*

4 *IBID p 39.*

5 *See section 190 of The Code of Criminal Procedure,1898.*

6 *See section 339A, 339 B of the Code of Criminal Procedure,1898.*

7 *S M Mujahid Ul Islam, "Gateway of Criminal and Family laws in Bangladesh" pub. New Warse Publication 2015 p 75.*

whether he pleads guilty or not.[8] The main object of this stage is to bring to the notice of the accused the evidence produced by the prosecution against him in the trial so as to enable him to explain every circumstances appearing in the evidences to him.[9] The next stage is argument of a case and after hearing of arguments of both the parties, the court will fix a date for judgment and through pronouncement of judgment formal function of a case becomes end. However the main reason of presenting the steps of a criminal case briefly is to look into the matter in which of the previously mentioned stages it takes long time to transcend.

Long pendency of a case: Fallacy or Intuition!

Statistics of pendency of almost three million cases before the courts in Bangladesh overrules this fallacy that the criminal courts are running smoothly, and those courts give quick disposal of a case. So, there is no reason to test this null hypothesis that for disposal of a criminal case, it takes long time and this long pendency of a criminal case should not be considered as fallacy but as our intuition. Leaving admonishment of our inability for quick disposal of a case, if we look into the Code of Criminal Procedure we cannot find any specific direction about the time frame to disposal of a case, and this is not feasible for any legal system to set any time frame for the disposal of a case. Consequence of delay in case disposal has the severe consequence in the society and legal institutions in Bangladesh.

The consequentiality alleges that this situation totally breaks the confidence of the person who goes to court to get justice if it takes long time to dispose up a case. For example if one person files a case of murder for the killing of his brother, if it takes long time to get judgment against the accused person the confidence of the plaintiff will totally be broken. How long he will keep patients to see the punishment of the accused. On the other hand, if one person files a false case of abduction against the accused person hiding the victim himself only to harass the accused

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[8] *Ibid p 81.*

[9] *Justice Hamidul Haque, "Trial of Civil Suits and Criminal Cases" pu. 2010 p 374.*

person, and if it takes long time to dispose up the case, the accused person will face the harassment for long time, which ultimately breaks the confidence of the accused person. So, it can be said that time is a very important factor in the justice system, and taking long time for case disposal is one of the most important barriers to criminal justice system in Bangladesh.

Why so "Late"?

Unlike us, the Constitution of United States of America itself Guarantees speedy trial of criminal cases through the 6th Amendment of the USA Constitution.[10] Through my empirical knowledge for last 12 years life in Bangladesh Judicial Service, I ransacked the reasons of the "Late" for disposal of a case, and it cannot be said unequivocally that single reason is responsible for such unusual delay. In my investigation, multiple players are playing gearing role for such unusual delay. However, in order to transcend "Late" disposal of a criminal case, in this part of my article I am trying to present the reasons of the " Late" imbedded in different segments of whole judicial process; illustrating with different practical examples.

- Taking long time in investigation/inquiry stage

In the pre-trial stage of a criminal case, primarily the lengthy process of a case starts from the investigation/inquiry stage. In most of the cases, the investigation agencies take time to submit the report. In some special laws, this problem is identified, and to resolve this problem, theses laws fix the time frame for submitting the investigation/inquiry report. For example, in Nari Sishu Nirjaton Domon Ain 2000, section 19 fixes the time for submitting inquiry report, which can be extended to 60 days. On the other hand, there is no time frame for submitting the investigation or inquiry report in the Code of Criminal Procedure. Using this vacuum, this takes long time to submit the police report. Mostly in murder case or case for robbery, police takes long time to submit the report. It seems to me when it takes long time to submit the police report the litigant parties become so

[10] *See 6th Amendment of the USA Constitution.*

much frustrated. Sometimes the investigating officer deliberately, being influenced by the accused person makes unnecessary delay in starting the investigation and recording statements of the witnesses.[11] Truly when a man files a case after the occurrence, he has a serious aggressive commitment to punishment the accused person. But after some days, his commitment is present, but his seriousness and aggressiveness become reduced. When he finds that 2 years have been passed, but there is no progress in the case, and no investigation/inquiry report is filed by police against the accused person, the litigant people becomes totally frustrated, and his confidence on judicial system is lost. So for ensuring justice this problem should be resolved.

- Taking long time in execution of W/A and WP&A

In fact, since there is no time limit in execution of proclamation and attachment process in the CRPC, it remains pending in the police station years after years.[12] The duty of execution of W/A and WP&A is generally vested on the police authority. When the cognizance magistrate takes cognizance of a criminal case basing on the police report or inquiry report, then to ensure the appearance of the accused person the court issues either W/A or summon. In some cases, this takes long time to execute the warrant of arrest or summon. In many cases, where the accused person lives within the jurisdiction of the magistrate where the case is filed, the police can arrest the accused person easily. But, where the accused person lives in any other remote district from the place of occurrence, this takes long time to arrest that accused person. If police does not become able to arrest the accused person, court issues Proclamation of warrant of attachment. But, in practice this takes long time to execute such proclamation. As a result this causes unusual delay to ready the case for delay.

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[11] *Md. Zakir Hossain, "Investigation and Trial of Criminal Cases: Challenges and Remedies" pub. Jati Journal vol. Xiii 2014 p 60.*

[12] *IBID p 6.*

- Weak, vague and ineffective police report

In the criminal justice process police report plays a very important role for deciding the fate of a case. This is the duty entrusted upon the police to submit the police report before the court.[13] But submitting weak, vague and ineffective police report is another reason for such unusual delay of a case. Investigation officers in many cases are found to be not discharging their duties due to their inefficiency and negligence.[14] If after filing the case if the police or any other investigation agency submits weak, vague or ineffective police report, this does not reveal the actual truth of a case and as a result the person who files ajahar will submit naraji petition against that and as investigation was not properly done, the magistrate will accept the naraji petition and the magistrate usually sends the case for further investigation and this is really time consuming and this frustrates the way to ensure justice. Not only that if the investigating agency summits weak, vague and inefficient police report, this affects the whole process of justice. So we should have to search for the ways to form effective investigation agencies that can investigate properly and should have to search for the laws which will direct the investigation agencies to submit specific, precise, honest investigation report.

- Filing Naraji petition for harassment

This is another strategy to make the process of the case lengthy. Sometimes people try to use the court as the weapon to harass the other parties. And as the part of this harassment they file false case against the person with whom he has enmity. For example if one person in Khulna files a case of theft against another person who lives in Dhaka. At the first instance this is not possible for the court to understand the correctness of the suit. So court orders for inquiry of the case. In the inquiry this appears that the fact of theft is not correct and there is a long pendency of a civil case between the parties. After that the party who files the case files a

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13 *Please see section 173 of CRPC.*

14 *Md. Zakir Hossain, "Investigation and Trial of Criminal Cases: Challenges and Remedies" pub. Jati Journal vo. Xiii 2014 p 57.*

naraji petition against the investigation report. The Cognizance magistrate realizing the real fact of the case the court rejects the false naraji and accepts the report and rejects the case. Against such order the person who lives in Khulna files a revision in the revision court only to harass the opposite party who lives in Dhaka. Can we ever imagine how many times the person who lives in Dhaka for job will have to go to court in Khulna to face this false and fabricated naraji petition? So we should have to think for the ways to stop the false and fabricated cases, which is another cause to delay the process of a case.

- Taking long time to prepare the case for trial

In this stage sometimes in some cases this takes long time to transcend. There are two basic characteristics for the case to be ready for trial. Firstly the court will have to take cognizance of a case and all the accused person will have to be present before the court. In most of the cases the court after taking cognizance issues either summon or warrant to the accused persons to ensure the presence of the accused persons. Practically this takes long time to ready the case for trial through the appearance of the accused persons. For example if Mr. x files a case against 10 persons who lives in different jurisdiction. If one accused person stays in outside Bangladesh, this takes long time to ensure the appearance of the accused person as he stays outside Bangladesh. As a result, this takes long time to get the case ready for trial. In order to resolve the issues, we need to search for the ways.

- Lack of accountability of public prosecutor

In a case of General Registrar (G.R) Government is a party and it is entrusted with the duty to prove the case before the court. On behalf of the govt. in support of the case the public prosecutors plead before the court to prove the case. This is the duty of the public prosecutor to appear the alamot (materials) seized at the time of occurrence. The total responsibility to prove the case before the court lies on the public prosecutor. This is undoubtedly a great responsibility for the case. But where is their accountability? The job of the public prosecutors is not permanent and the

Government for a particular tenure appoints the public prosecutors. The prosecutors' job is not permanent job and mostly they do this as part time job. They as lawyers have their own case. The remuneration for being the public prosecutor is very nominal. As after a particular tenure their job as prosecutor becomes end, they have no kind of accountability to the clients. Moreover as their remuneration is very nominal, they are very much busy with their personal works as lawyers. Due to such lack of accountability they have not any legal commitment to finish the case earlier. Sometimes due to their lack of accountability and commitment they show reluctance to finish the case.

- Frequent transfer of police

In a good number of cases police as ajaharkari files the case and in most of the G.R cases police investigates the case. In some other cases such as cases under the Narcotics Control Act 1990 police files the case and police is the ajaharkari and members of the raiding party are police and investigating officer is police. Sometimes police becomes the witness of a seizure list. So there are a good number of cases where police is the ajharkari (files the case) and in most of the G.R cases the investigating officer is police. So it can be said that in a good number of cases the witnesses are police. But if police frequently transfers from one place to another place this causes delay to appear before the court. For example a police officer files a case for accident in 2011 in Netrokona and subsequently the date was fixed in court for taking his deposition in 2014. In the meantime he has been transferred in Chattogram. The date for his deposition is communicated in Netrokona. Subsequently the date was communicated to him two days before the date fixed for deposition. He comes to the court on that date. But the accused party asked for time as the accused party is not present because of his illness. Then court gives time as thinks it justified. So in the next date that police will have to come again from Chattogram. So it can be said that the frequent transfer of police also lingers the case.

- Declination of the witnesses to give deposition before court

This is not the only responsibility of the court, police, Government or state to ensure justice. Mass people have the responsibility to ensure justice. But this is common phenomenon in my country that most of the people do not show any kind of inclination to appear before the court even he is the eye witness of the occurrence. Most of the people intentionally avoid writing down their name as witness in the ajahar even he is the eyewitness of case. In most of the cases the witness does not want to appear before the court and they intentionally try to avoid coming before the court. As a result of such declination the process for appearance of the witness would be exhausted by the court which is really time consuming. This also causes delay in the case before the court. So this is high time to avoid such situation.

- Accused people who are floating

Where the accused persons are floating delay of a case is obvious. The reason behind it is that as he has no permanent address this is very difficult to ensure his presence before the court. Such floating nature if warrant is issued, this will take time to execute that, wp&a will not be executed as he does not have property and his irregular presence before court also causes delay in the trial of a case.

- Taking long time in revision of a case

Revision of a case is very important in criminal justice system. Where a person is aggrieved by the order of a court, he has the right to go to upper court in order to revise the order of a case. This is called the right of "Revision" and the Code of Criminal Procedure wholly guides this procedure.[15] There is no time frame in the Code of Criminal Procedure for revision against an order of the magistrate. As a result it takes long time to finish a revision case. For such practice this takes long time to finish trial of a case. For example if one wife files a case for demanding dowry under

[15] *Please see section 439A of The Code of Criminal Procedure.*

the Dowry Prohibition Act 1980 and at the stage of charge court frames charge against the accused because of the specific allegation against him. Against that order the accused person goes to the revision court. The reason for filing revision is to delay the process of the trial court. If in such revision takes 3 or 4 years to finish the original trial of the case becomes delayed.

- Taking time to ensure the appearance of medical witness

Medical witnesses (doctors) are very important formal witness in many of the criminal cases; specially the cases for grievous hurt or murder case. The medical witnesses are mostly doctors who issue medical certificate or prepare post mortem report. For quick disposal of a case this is very important to ensure the presence of the doctors as witnesses before the court. But this is very difficult in the case to ensure the appearance of the doctors before the court. The reason behind it is that doctors frequently transfers from one place to another place. There is no up to date database for the doctors to trace the doctors. As a result of their non appearance of the medical officers this takes long time to finish the trial of a case.

- Bad customs and traditions in judicial system

Actually the legal system of Bangladesh and judges of Bangladesh are totally guided by the laws of Bangladesh. The judges are not at all legally guided by the customs and traditions of judicial system. In spite of that, the judges whom have no legal basis follow some customs and traditions. One of the traditions is that the judge who is in charge of another court (for the leave of another judge) will not give the judgment pending in that court. As a result of such tradition judgments of a case sometimes become pending for long days. For example if any lady judge is in pregnancy leave for 6 month, is it justified for the court in charge to leave the case pending for the arrival of the judge. If the judge is in earn leave for one month is it justified for the court to wait for one month to pronounce the verdict. It seems to me that such bad customs causes hindrance to quick disposal of cases.

- No use of technology to ensure the appearance of witness

In the twenty first century revolution comes in technology. Now communication is very easy indeed. But unfortunately use of technology is very limited in our judicial system. Still we follow the process of one century ago. One century ago the communication was not smooth at all. There was no electricity or telephone communication. There was no photo copy machine. Because of those limitation there was limited use of technology in the legal system. To ensure the appearance of the witness there is no mode of telecommunication in our legal system. To ensure their presence we still follow postal system, which takes long time to communicate the massage. This actually takes long time to communicate with that person. In the same way for the lack of use of technology this is very difficult for trace the witnesses. In Bangladesh for police there was no server where all the information of the police is preserved and through which the present address of the police will be easily traced. In the same way for the medical officers (doctors) there is no national server where all the information for the doctors will be preserved. As a result of such lack of technological use this takes long time to ensure the appearance of the witness, which unnecessarily linger the case. Suppose, in 2008 a case under narcotics control Act 1990 was filed in Munshigonj Court where a police officer was the witness of this case. Exhausting all the process he was called to the court for giving testimony in 2013. In the meantime he was transferred from Munshigonj to Chandpur in 2010 and subsequently transferred to Rangamati. As there is no national database for the doctors this takes long time for the court to tress the doctor witness. So it can be said that as there is no national database for the doctors and police this lingers the trial of the case to ensure their presence before the court.

- Insufficient infrastructure for courts

Insufficient infrastructure for courts and public prosecutors are also responsible to linger the case. In many district the infrastructure of court is not sufficient. The office time for the judges is 9 am to 5 pm. But due to the insufficient structure (ajlash) the judges cannot use their time properly.

For example if one ajlash is allocated for two courts. The judges don't get enough time to seat in ajlash and as a result this is not possible for the judges to dispose the cases speedily.

- Weak prosecution system

Weak prosecution system is really a great barrier to ensure justice. In adversarial system the court acts as an umpire. Here both the parties will play in the playground and the umpire will declare the score of the game. In the criminal case this is not the duty of the court to prove the case before the court. In the criminal cases the prosecution will have to prove the case before the court in GR case. If the prosecution system is weak and unskilled, how they will prove the case before the court. In the prosecution system police has a great responsibility. Police files case on behalf of state, police arrest the accused person, and police investigate the case and after investigation submits police reports. So thana plays an important role in the prosecution of the case. This question is raised again and again regarding the skill of police. Truly there is insufficient number of police in Bangladesh. Moreover police does not get enough time to concentrate on prosecution of case only. The police vests huge time to maintain law and order in their jurisdiction. In the protocol of VIP person's police have to vest huge time. Moreover they have regular duty to petrol in their jurisdiction. As a result in such phenomenon this is not possible for the police (thana) to concentrate on the prosecution of a case. Moreover due to the inefficiency of police it takes long time to submit the police report. Actually in CRPC there is no express provision about the time of submitting police report like some other special law. Using this vacuum the investigating officers takes long time in investigation of a case specially the case of heinous nature (Murder, dacoity).

Moreover there is a trend in the current time that police submits ambiguous police report. According to CRPC the police must have to submit charge sheet against the accused persons stating their specific allegation. But in most of the charge sheet the police without specifying the allegation against the accused persons submit charge sheet against all accused persons. This is also expression of weakness of prosecution. For

example, in ajahar the allegation against Mr. A is attempt to murder (sec 307, PC), Against B is Grievous hurt (section 326, PC), against C is theft (section 379, PC). In such case where police submits charge sheet, police submits charge sheet against all accused person under section 307, 326, 379 even there is individual allegation against the accused person individually. As a result of such ambiguity in charge sheet courts find difficulty in the trial of a case.

- Weakness of public prosecutors

I mentioned earlier that this is the responsibility of the state to prove the case before the court in GR case (case filed in thana). At the time of trial on behalf of the state the responsibility is vested on the public prosecutor to plead before the court to prove the case. But this is often alleged that the public prosecutors do not serve their duties duly before the court. The duty of the public prosecutor is to prove the case before the court. But the posts of public prosecutor are not permanent post and at the time of appointing the public prosecutors the appointing authority consider the political affiliation of the lawyers. The posting as a public prosecutor is for a particular time like 5 years. With the change of Government, the prosecutors are changed. As a result of the temporary nature of the service of prosecutor the professionalism in this service was not grown and no direct accountability is vested to the clients and courts. Moreover if the lawyers are appointed as public prosecutors they have no barrier to prosecute in his case. As the remuneration for the public prosecutors from the Govt. is very low indeed, in most of the cases the lawyers who are appointed as public prosecutor are very much busy in his own case as independent lawyers. The situation becomes very miserable where the public prosecutors are otherwise convinced to the accused person. Due to the temporary nature and part time nature professionalism among the lawyers are not grown and there is no competition among the prosecutors in their work. As a result of such lack of accountability, lack of professionalism, lack of competition, lack of sufficient remuneration the prosecution does not work properly which ultimately creates hindrance to ensure justice.

- Bad practice and customs in court (bail matter)

This is true that law can only bind the court and except law there is no authority for any judge to control any junior judge on the question of legal power of judges. There is no authority to any controlling judge to give any direction to the junior judges regarding the question of legal power of judges what the law has sanctioned to them. If the senior judges give direction to the junior judge restraining his legal power this would be great barrier to ensure justice. If we allow such direction this is not possible to ensure justice. The judges will not feel psychologically independent if his controlling judge (who gives his Annual Confidential Report i.e. ACR) gives direction on the question of his legal power.

This question is very much relevant on the question of bail matter. On the question of bail law (CRPC) permits the magistrate court to consider the bail matter of the accused person. The Constitution of Bangladesh legally binds the police authority to produce the person before the nearest magistrate court.[16] The reasoning behind it is that if the magistrate does not consider the bail matter, the accused person will have to be in police custody till the superior court considers his bail matter. That's why law gives this power to magistrate court. But there is bad practice and customs in the courts of Bangladesh where sometimes the senior judges (The Judge who gives ACR to the junior judge) gives restriction to junior judge for not considering the bail of the accused person of heinous criminals(case of murder, Dacoity, case under Special Power Act etc). Such trend creates great barrier to justice. If the magistrate court does not consider bail matter of the accused persons of such cases where is the remedy for the innocent persons who are arrested by police out of doubt or out of conspiracy? If the magistrate does not consider the bail matter on these cases where there is merit because of such malafide direction by senior judge, the accused person will have to be in jail till the revision court considers his bail. Now question is if the accused person does not have enough money to go to revision against the order of magistrate regarding bail, which will be his

[16] *Article 33 of the Constitution of Peoples Republic of Bangladesh.*

remedy if such bad trend on bail matter is followed. Now this is time to consider on these issues to ensure justice.

- Weak window of law to prevent false case

In the court of Bangladesh there is a trend to file false and fabricated case. We can hardly find an ajahar or petition before the court where there is no false statement. The people files false suit for many reasons. Sometimes there is the conflict between the parties regarding land or family issues. But in order to harass the opposite party or out of vengeance the parties file criminal cases against the opposite party. Such kind of cases is mostly false and fabricated. Sometimes the parties twist the original facts and create a fact only to file the case. Sometimes one thing happened and the ajahar contains the other thing. We can give some examples in order to explain it.

Suppose A was died leaving his three sons named B, C and D. A left some properties also like one rice mill and B maintains the rice mill from the life time of A. C and D are educated persons and lived in cities and engaged in job. B wants to take the mill in his name on the ground that he maintains the mill for long time and he leads his family on its earning. But C and D don't want to leave it. So to get mill C files a civil suit for partition. On the other hand B files a criminal case for theft against C and D which is not at all correct. B knows that the judgment will not be in his favor. But he files this case to harass the parties. He knows that as the accused B and C live in other place this is very difficult to appear before court every date.

This is very common phenomenon in Bangladesh where there are a large number of false cases in the court. The reason behind it is that the parties know very well there is no visibility of punishment for filing false and fabricated case before court. There is one section for the false case, which is section 211.

Section 211 says regarding the punishment for filing false case.

But unfortunately CRPC says this offence is bailable (he has the right to get bail from court). Moreover in order to prove the case complete trial is

necessary and the party cannot keep patience to complete the trial for such false case. There is no law for compensation for such criminal case from the accused person. If we cannot stop filing false case this is not possible to dispose the millions of cases before court.

- Weakness of civil laws reflects in criminal justice system

The civil laws for establishing civil rights in Bangladesh through civil court are really weak in deed. The civil rights are originated from religious laws and some statutory laws (SAT Act and NAT Act) and the weakness of the civil laws of Bangladesh are reflected in criminal cases, and for the land disputes, the mass people has a trend to go to criminal court though the actual fact does not cover the section of the Penal Code 1860.

- Malafide trend to show arrest

This is often alleged that the there is a trend in the police prosecution to show arrest of an accused person to the other cases even where he has no name in the ajahar. The position of law is that where a person is arrested in one case and subsequently where police finds information that he may have involvement in other case and in such a situation investigation officer can give prayer to the cognizance magistrate court to show arrest of the accused person who may have involvement in that case.

For example Mr. x is arrested in a case of theft and subsequently police finds that the accused person has the involvement in a case of dacoity and in such case police can give prayer to the court to show arrest of this accused person in this case. Truly the position of law in such case is correct. But the negative use of such legal provision is not ignorable. Sometimes it happens that where one person is arrested in one case and subsequently gets bail from the court and in order to keep the person arrested police gives prayer to show arrest to that person in another case. For example Mr. X is arrested in a case of grievous hurt (sec326 of P.C) and extortion (section 385 of P.C) and subsequently he got bail in this case from the high court Division after three months. But in order to keep the person-arrested police authority files a prayer to show arrest in another

case under the Special Powers Act 1974. If such prayer is used out of vengeance, this is really pathetic for that accused person. So we should think about the proper use of this section.

Conclusion

Famous Nobel Prize winner Amarta Sen in his famous book "The Idea of Justice" draws an important distinction between Niti and Nyaya (used in earlier Indian Jurisprudence)– " Niti" relates to organizational propriety as well as behavioural correctness, whereas " Nyaya" is concerned with what emerges and how and in particular the lives that people are actually able to lead.[17] In hallowing process of our criminal justice system, it is time to look into organisational propriety (weak prosecution system, weakness in our legal system mentioned earlier) as well as the lives that people actually lead in our society (actual impact of legal system over lives of the people). I expect that those uttered points would contribute to ensure justice (in the form of organisational propriety), and this will persuade our policy makers to think on those issues in order to mollify the savage agony of the people. Through this identification of weakness of our criminal justice system, I have no object of admonishment of any particular group, but to identify the confounding situations and legal lacunas in our criminal justice system so that we can elevate it through creating agitation among mass people by legal academic discussion.

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[17] *Amarta Sen, "The Idea of Justice" pub. By Penguin Books Ltd. England 2009 p xiv.*

An Evaluation on the Recommended Report of Law Commission on the Negotiable Instruments Act of Bangladesh

Dr. Sayeeda Anju*

Proposed 'Negotiable Instruments (Amendment) Act, 2018'[1] *has been recommended by the Law Commission (hereinafter Commission) of Bangladesh in order to add new provisions to the Negotiable Instruments Act, 1881(NI Act). Being of the opinion that the object of NI Act is not to punish but to simplify and expedite monetary transactions, the commission, in its report, asserted that the punishment under section 138 of the NI Act is neither suitable nor just. Again, it is suggested in the report, reverting to earlier law, that the cases under section 138 of the NI Act be tried in Magistrate Courts and that the offences be made compoundable. The legal position of pre-endorsed blank cheques provided as security against loan sanctioned by banks and financial institutions (practically known as security cheques) has also been discussed in great detail with a recommendation of insertion of a new proviso within section 138 banning the present practice by the Banks of holding security cheques in custody from borrowers. The primary object and the approach of the law commission's report is to reform the NI Act but unfortunately the Report is silent about many important aspects relating to the dishonour of cheques such as*

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1 *Law Commission, Recommendation to insert new provisions in the Negotiable Instruments Act 1881 (Act no. XXVI of 1881) (in Bangla), as 'The Negotiable Instruments (Amendment) Act, 2018'proposed drafted bill(Law Com No 146, 2017) http://www.lc.gov.bd/reports/146-NI Act, 2018 Final web copy pdf [accessed on 02nd Oct 2019].*

application of e-cheque, presumption of bank memo/slips, jurisdictional anomalies regarding online cheques and so on. The aim of the article is to examine the recommendation report of the Commission as to its exhaustiveness in meeting up all the lacunae present in the NI Act of Bangladesh or not.

1. Introduction

Negotiable instruments are the life blood of trade. The colonial British Rulers of the Indian sub-continent introduced the Negotiable Instruments Act, 1881 (NI Act) to define and amend the then existing law relating to negotiable instruments.[2] Cheque is a principal form of negotiable instrument and transactions by cheques are regulated by the provisions of the NI Act. Cheque has been predominantly used as a convenient means of banking but numerous instances regarding misuse of the legal provisions relating to dishonour of cheques have contributed and is continuing to contribute to the dilution of the acceptability of cheque as a safe method of financial transaction. Understandably, such a situation menaces the entire banking and business sectors of a country. Thus a timely positive, reformative and exhaustive intervention in the relevant laws is required from the government to facilitate secure cheque related transactions and for maintaining smooth functioning of trade in the country. To address the occasions of dishonour of cheque, in 1994 four new sections (ss.138-141) were inserted in the NI Act of Bangladesh replacing the old sections of Chapter XVII. Section 138 of the NI Act states that if a person issues a cheque, for the payment of any amount of money from his bank account to another person and the cheque is returned unpaid due to insufficiency of fund or any other reason (as mentioned in the said section), the person is deemed to have committed a special criminal offence. The Act also precisely describes the nature and conditions for constituting the offence and outlines the procedure to bring about such a claim along with the terms of punishment for it.

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[2] *The Negotiable Instruments Act, 1881 (Act no. XXVI of 1881) Preamble.*

Due to the Act's implications to facilitate and protect cheque transactions, its utility has increased in many folds in the business community. In fact, very few legislative provisions in Bangladesh are as widely used as section 138 of the NI Act, 1881.[3] Numerous cases relating to the dishonour of cheques are filed each day throughout the country under this section alone. However, the occasions of misapplication of the section have also increased significantly which only contribute to cause considerable suffering to the concerned parties/litigants.

Subsequent amendments in 2000 and 2006 endeavoured to rationalize the provisions of the NI Act but only succeeded to raise the punishment for offences regarding dishonour of cheque and to deprive the Magistrate Courts of the authority to conduct trial of such cases. These developments have faced criticism in Bangladesh. The Bangladesh Law Commission, in consultation with various interested groups of the country and considering several provisions of the Indian NI Act made some recommendations to incorporate, change and update the relevant provisions of the NI Act through a report published in 2017. It is certainly a laudable undertaking from the Commission as it attempts to deal with the issues faced by section 138 separately. However, the Commission's attempt is rather disappointingly, only limited to the refinement of the provisions of Chapter XVII of the NI Act and it only addresses four principal issues associated with the offences relating to the dishonour of cheque.

The recommendation of the Commission does not include any comprehensive and substantive analysis of all the short-comings of the NI Act and neither does it echo the demands of modern judicial and banking system. An examination of current banking and court practices in Bangladesh along with the analysis of relevant legislative developments in relation to cases regarding dishonour of cheque in the neighbouring countries reveal some other fixations which are left out by the Commission in the Report but are essential requirements of present era. This article outlines the recommendations of the Law Commission which

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[3] *Supra n.1.*

is followed by a detailed account of other short-comings of the NI Act. Then it attempts to explain the necessity of incorporating appropriate provisions to overcome the limits and better equip the Act to regulate modern banking practices in Bangladesh. The analysis of modern banking practices prevailing in the country and the subject matter of case laws are the key factors to judge the precision of the recommendation of the Law Commission report. Views are exchanged with randomly selected panel advocates of different banks and the idea of example is developed by conversation with relevant bank officers.[4] In doing so the article will refer to, where necessary, the concurrent Negotiable Instruments Act of India as the Commission itself has done the same in its report.

2. Recommendations of the Law Commission

The recommendations of the Law Commission on the NI Act [hereinafter the Report] focused mainly on interrelated four issues– firstly, with punishment of the offences relating to dishonour of cheque, secondly, with practices of blank cheques as security, thirdly, with competency of the court for trial of cases relating to dishonour of cheque and finally, with compoundability of such offences. The Report talks about the said four issues along with feasibility of implementation of those provisions and rationale behind proposed amendment.

2.1 Punishment for Dishonour of Cheque

Under section 138 of the NI Act, the punishment for cases relating to dishonour of cheque is imprisonment of one year or a fine of thrice of the face value of the cheque or both. The punishment of fine under section 138 was increased to thrice from twice by the third amendment of Bangladesh in 2000. The Report finds that the present punishment is a kind of humiliation for the accused and referred to interpretation of Article 35(5)

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[4] *The author wishes to acknowledge the contribution of Asif Khan Chowdhury, of the Inner Temple, Barrister, as research associate.*

of the Constitution of Bangladesh[5] which deals with the protection from punishment. The Report also finds it mismatched with other prevailing laws in Bangladesh. It used reference of the Money-Lenders Act, 1940 where the amount of punishment of borrower is not more than twice of the actual/original loan.[6] *Artha Rin Adalat Ain* 2003 (hereinafter Act of 2003)– a law enacted to expedite recovery of default loan by banks and financial institutions– is also used as reference. Section 47 of the said Act of 2003 barred the court to accept the demand of more than 200% amount by any institution. Lastly the Report proposed a fine of twice the amount of the face value of cheque. Regarding imprisonment of one year for dishonour of a cheque the Report referred to *Artha Rin Adalat Ain* 2003 for a second time and stated that, according to section 34 of the Act punishment is up to six months for noncompliance of a decree pronounced by the *Artha Rin Adalat*– a court especially constituted to enforce the Act of 2003. Finally the Report recommended that punishment for dishonour of a cheque should not exceed twice the amount of the face value of the cheque and regarding incarceration the term should not exceed six months.

Practically, re-enacting those provisions that have already been amended, that is, firstly increasing and then reducing, would create nothing less than more confusion. It is opined that the real and primary focus should not be on the incarceration of the accused but realization of the amount of debt. Surprisingly and unfortunately the Law Commission has failed to address the elephant in the room in this case where the existing provision already gives the court full discretion to imprison the accused for 'up to' one year. On the matter of pecuniary relief granted instead of focusing on the multiple (twice or thrice) of amount of the cheque, the focus should have been more on the time required to realise the amount through proper litigation process and imposing a pre-determined percentage of penal interest. This interest may be calculated as per the highest prevailing bank interest rate against loan sanctioned for all types of drawers.

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5 *The Constitution of the People's Republic of Bangladesh, Article 35: Protection in Respect of Trial and Punishment.*

6 *The Money-Lenders Act 1940 (Bengal Act no. X of 1940) s 30.*

Basically, the prescribed punishment in dishonour of cheque cases reflects two facets of the decreetal amount– one being the actual claim amount that is the face value of the cheque and the other being the penal amount (twice or thrice or any other multiples) which goes into the Government treasury.[7] It is opined that there should be a reasonable justification for the multiples to be applied on the decreetal amount as penalty as after the amendment of 2000 this area of law invariably has become quite harsh[8] as against the drawer of the cheque.

2.2 Prevalent Practice of Security Cheques in Bangladesh

There is a practice of endorsing blank or post-dated cheques as security in Bangladesh which has increased the number of cases relating to dishonour of cheque.[9] Hence, the Law Commission recommended insertion of a proviso to section 138 of the NI Act to stop the practice of allowing security cheque against any debt in case of finance by bank or financial institution. Bangladesh Bank has already directed the banks not to accept blank or post-dated cheques as security.[10] It is mentionable that there was a proviso in section 138 of the NI Act that cheques must be issued to the payee for lawful debt or liability only.[11] It was omitted in Bangladesh[12] whereas the proviso is still in use in India. The Law Commission overlooked the fact and rather simply recommended that practice of blank cheque as security by the banks or financial institutions should be stopped.

Technically it is up to the contracting parties to determine whether they want to enter into an agreement with a blank cheque or otherwise. The real

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7 *Akhtaruzzaman, Md., Cheque Dishonour and Laws relating to Filing of Cases (in bangla) (1st edn, Alif Publishers, Dhaka, 2013 at Page 131. also, Shahidur Rahman Khadem vs The State and others 17 MLR 2012 AD.298.*

8 *Removal of the provision relating to 'legal debt', s 139 of the NI Act, [Omitted by section 3 of the Negotiable Instruments (Amendment) Act, 2000 (Act no. XVII of 2000).*

9 *Supra n. 1.*

10 *'Ban on blank cheques', available at:https://dhakabankltd.com/important-business-news-extracts-february-13-2017/ [accessed on 9 September 2019].*

11 *The Negotiable Instruments Act 1881 (Act no. XXVI of 1881) s 138 (Explanation)*

12 *The Negotiable Instruments (Amendment) Act 2000 (Act no. XVII of 2000) s 2.*

matter in controversy is whether the cheque is filled with an amount exceeding the actual legal debt. If it is maliciously filled with any other amount than the actual legal debt secured or intended to be secured by the cheque then it would amount to harassment or forgery. The Law Commission in its report mentioned[13] that it is punishable under sections 463 and 464 (explanation no. c and d) of Penal Code 1860. So there is a hard law still running but no implementation is reflected.

It is worth to mention here that, the Indian Supreme Court in a recent ruling observed,[14] in cases coming within section 138, the complainant is bound to explain his financial capacity when it is questioned by the accused, closing the gateway of filling up blank cheques with unrealistic amounts- a practice which is epidemic in Bangladesh.

Microscopically, although the Report discusses the possibility of exchange of security cheques between lay persons, banks or other financial institutions, the proposed enactments at the end the of Report deal with only banks and other financial institutions[15] in receiving blank cheques. Clearly, the Law Commission should have been more careful in choosing words in their proposals as it would paradoxically affect judicial interpretation. It is suggested that overall practice of security cheques should be stopped and instead of loitering around with words and technicalities focus should more be on addressing the mischief lying within. However, completely overlooks the situation where for example two lay persons engage in such arrangement. In fact, the banks and other financial institutions are strictly regulated by debit - credit balance statement per day. So there should be a provision of showing value of bonded property or security money as accepted in favour of granting a loan. Therefore language of the related section of the proposed NI Act should be more specific and there shall be a clear cut provision to stop entire dealings of blank cheques. Not only banks or financial institutions

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13 *Supra n. 1page 8.*

14 *Basalingappa vs Mudibasappa 9 April 2019 Indian Kanoon Criminal Appellate Jurisdiction Appeal No. 636 of 2019.*

15 *Supra n. 1 page 12.*

but also the NGOs, companies and general private dealings need to stop practice of dealings of security cheque as a blank one.

2.3 Competent Court to Try the Offence

According to Section 141(c), the competent court for trial of cheque dishonour cases in Bangladesh[16] is the Court of Sessions and this has created more hustle. Hence the Law Commission has suggested that the Magistrate Courts be re-empowered[17] to try such cases.

Currently, as no court inferior to that of a Court of Sessions has jurisdiction try any offence punishable under Section 138, the complainant has to establish a case in the court after the complaint is filed. Complaint is filed as Complaint Register (hereinafter CR) case against the drawer of the dishonoured cheque before the cognizable magistrate who may be the Chief Judicial Magistrate. The Magistrate will then check the following obligations on the part of the payee which the payee was bound to follow.

Firstly, it will be checked whether the cheque was presented within the due time of six months limitation (in case of general cheques).[18] Then the Magistrate may ask the complainant whether the cheque was issued for discharging any legal debt. Magistrate may also ask questions about the date of the cheque bounce and whether he served the notice to the drawer of the cheque as per the provisions of section 138. And if satisfied, he will take the complaint into cognizance.

After the Magistrate takes the cognizance of the complaint, summon is issued to secure the attendance of the accused. In practice, after appearing before the court, the accused seeks for a bail from the Magistrate. Generally, in most of the cases bail is granted. In an aftermath of the

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16 *The Negotiable Instruments Act 1881 (Act no. XXVI of 1881) s 142 (1) (c).*

17 *The Court of Sessions was inserted by Act no. III of 2006 [4th Amendment of NI Act in Bangladesh].*

18 *In case of special cheques different period of expiration may be prescribed in the cheque itself. For example- government cheques, see, Ministry of Finance, Bangladesh, Government Treasury Rules, S.R. O. number-71.(1) Cheque shall be drawn on forms in cheque books supplied by the Controller General of Accounts to the Disbursing Officer concerned. Available at,*

http://www.mof.gov.bd/en/index.php?option=com_content&view=article&id=47&Itemid=56.

procedures in the Magistrate's Court, the whole of the case record is transferred to the Sessions Court. Then the trial is conducted as per the Code of Criminal Procedure of 1898. In the Court of Sessions, the trial is started as Sessions case. When the case record is transferred to the Sessions' Court, the accused person has to again submit a fresh prayer of bail. One of the reasons for lengthy conclusion of the trials is the accused has to submit two fresh prayer of bails in two different courts.

Thus, in Bangladesh the litigation process of cases relating to dishonour of cheques are very complex thereby increasing the pendency of cases and consequently defeating the main purpose of the legislation. The report proposes that the Magistrate Court be the proper place for trial to expedite disposal of cases.

Although, the magistrate's court has jurisdiction to imprison a person for up to 01 (One) year, unfortunately, the report fails to addresses the scenario wherein the face value of a cheque exceeds the pecuniary jurisdiction of the Magistrate Courts leaving cases falling in such category completely in the dark.

2.4 Compoundability of the Offence

Using the reference of compoundability of some offences which have the punishment of equal to or less than seven year imprisonment in the Penal Code 1860 and the Code of Criminal Procedure 1898, the Report suggested[19] that offence relating to dishonour of cheque should be made compoundable. It may have the effect of decreasing the sufferings of both the defendant and the accused. The Apex Court of Bangladesh allows the joint compromise petition filed by the parties in such cases as the offence has been termed as a petty one.[20] The Report suggested to include a proviso in section 141 of the NI Act mentioning that every offence under section 138 will be compoundable which shall be considered by the court after hearing both the parties, firstly, at the time of framing of the charge,

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19 *Supra n. 1 draft bill section 5.*

20 *Feroz Uddin vs Eshan Re-rolling Mill Ltd 29 BLD HCD 2009 684.*

secondly, at any stage of the hearing before pronouncement of the judgment. Although not written in the law but in practice most of the cases are settled by compromise between the parties. This recommendation of compoudability is certainly laudable. It is mentionable that in India there is a section regarding compoundability embedded in the Act.[21] So the insertion of the section relating to compoundability will in turn help the judges in disposal of cases avoiding unnecessary dilemma as to compoundability.

3. Provisions that could have been Considered

In the report, the Law Commission considered only four issues which seems a limited number of issues related to the NI Act. The Report is basically on cheque dishonour issues whereas the NI Act includes three instruments and cheque is one of them. Since the Report is about cheque dishonour issues there are a number of contemporary issues that should have been considered in and along with it. Focusing on contemporary issues some more provisions could have been taken into consideration by the Law Commission. They are as follows-

3.1 Revising the Definition of Cheque

The definition of "Cheque" that has been used in the NI Act of Bangladesh is still the traditional one. In practice two new forms of cheque are being used called Magnetic Ink Character Recognition (MICR) or truncated cheque and e-cheque as a part of digital medium of transaction.[22] MICR is machine readable cheque which can be verified online and is subject to be processed in any branch of the same banking network. On the other hand, e-cheque is a paperless cheque that is generated with the digital signature electronically and sent via email or any other e-transport method. These two medium of transaction are not considered as "cheque" in the NI Act in

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[21] *The Negotiable Instruments Act (India) 1881 (Act no. XXVI of 1881) s.147.*

[22] *Anirudh Wadhwa (ed), Mulla The Indian Contract Act (15th edn, Lexis Nexis, 2016) at Page 54.*

Bangladesh[23] though they are being widely used in Bangladesh with the direction of Bangladesh Bank[24] and Bangladesh Electronic Fund Transfer Network (BEFTN).[25] Through its initiative Bangladesh Automated Clearing House (BACH) is created which includes Bangladesh Automated Cheque Processing System (BACPS).[26]

Though the Law Commission in its Report compared several provisions with those prevailing in India, the backdated definition of "cheque" is not taken into consideration for amendment. In India, the NI Act is amended two times to incorporate the MICR and e-cheque under the definition of "cheque".[27] In India, unlike Bangladesh (albeit the practice is there in unregulated form), the definition of "cheque" has been updated twice over the years, and currently includes the definition and explanation relating to a cheque in electronic form and to a truncated cheque; while also maintaining a brief explanation as to what constitutes a clearing house. Moreover, the Indian Act establishes that elements in the definitions of cheques and explanations thereto coincide with those of their Information Technology Act. Furthermore, the Indian NI Act enables the drawee bank in case of reasonable suspicion about genuineness of apparent tenor, fraud, forgery, tampering or destruction to demand further information and in certain cases the detail of the cheque for verification.[28]

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[23] *Anju, Sayeeda, 'Cheque: Laws and Practices in Bangladesh', Rajshahi University Journal of Arts & Law, Vol. 43, 2015, p. 131-148.*

[24] *Anju, Sayeeda, 'Proposed Payment System Act 2015: A Critical Analysis of Cheque', The Daily Star, law analysis 23, June 2015.*

[25] *See, Bangladesh Electronic Funds Transfer Network introduced by Bangladesh Bank to facilitate interbank payments. http://www.icmab.org.bd/wp-content/uploads/2019/04/Modes_E-Payment_Systems.pdf[accessed on 31.04. 2019]*

[26] *'Automated clearing house starts on trial' The Daily Star, (Dhaka, 8 November 2009) https://www.thedailystar.net/news-detail-113284 [accessed on 03.04.2018];*

BSS, 'Automation enables BB to double cheque-clearing speed' The Daily Star, (Dhaka, 13 April 2012) https://www.thedailystar.net/news-detail-230051 [accessed on 03.04. 2018].

[27] *The Negotiable Instruments Act (India) 1881 (Act no. XXVI of 1881) s 6.*

[28] *The Negotiable Instruments Act (India) 1881 (Act no. XXVI of 1881)ss64, 81,89, 131.*

3.2 Bank Slips and Presumptions Thereto

Cheque dishonor slip made by banks manifests the reasons of dishonoring the cheque. Bank slip is a prerequisite to file a cheque dishnour case. When the cheque is found not in accordance with the bank's rule, the payee is informed by the dishonour memo bearing with a remark of the reason or reasons of dishonour. Usually the memo used in banks in Bangladesh contains 16, 17, or 18 items; among them some selective items are commonly used for returning a cheque as unpaid. It is often a reason behind complications in trial of the case as NI Act in Bangladesh does not accept all the reasons for dishonoring a cheque given in the slip. The title of section 138 of the NI Act, contains, "Dishonour of cheque for insufficiency, etc, of funds in the account''. The word 'etc' has been interpreted by the High Court Division of Bangladesh in *Shah Alam (Md)* vs *State and another*[29] case. The Court observed that the word 'etc' gives indication that there may be some other reasons for dishonouring of the cheque which may also be included within the offence. In *Khalilur Rahman* case,[30] it is found that the cheque had been returned by the bank as 'refer to drawer'. On the basis of that point the accused tried that it was not appropriate to consider the case under section 138 of the NI Act. The High Court Division of the Supreme Court of Bangladesh held that the point 'refer to drawer' is very much appropriate to consider within the mischief of section 138 of the NI Act. The Court stated, 'from the heading of the section it becomes clear that the legislature never intended dishonour of the cheques to be made punishable only in case of insufficiency of fund or exceeds the amount arranged to be paid since the word "etc" has also been used there in the caption of the section. It can be presumed that legislature contemplated various other reasons where the cheque is dishonoured.[31] By the judgments it is proved that the court rejected to apply purely literal interpretation of the provision of section

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[29] *63 DLR 2011 HD 140.*

[30] *57 DLR 2005 HD 603.*

[31] *Anju, Sayeeda, 'Dishonor of Cheque: A Legal Analysis on the Interpretation of Negotiable Instruments Act in Bangladesh', Journal of the Institute of Bangladesh Studies, Vol. 38, 2015, p. 35-54.*

138 in Bangladesh. However, in the absence of a decisive test relating to interpretation of the "etc" read with the section as a whole the risk of conflicting judgments in future is very much probable. Interestingly, India, by adding section 146 in the Indian NI Act[32] stated that Bank slip is the prima facie evidence for certain facts. The Court shall, in respect of every proceeding under cheque dishonour on production of Bank slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved. Therefore statutory law in India seems to be updated than the law of Bangladesh regarding Bank slips and presumptions thereto. In Bangladesh updated provisions are available either in the form of administrative regulations or judicial interpretation but in India the mother Act is updated accordingly.[33]

3.3 Other Aspects Relating to Litigation in Cases of Dishonour of Cheques

The Law Commission in its report could have considered expediting the litigation process of cases relating to dishonour of cheques.

Following the Indian example in Bangladesh similar provisions relating to evidence by affidavit may be introduced. The court is allowed to simplify the conventional evidentiary laws and procedure by accepting evidence by affidavit. In practice such provisions already exist in the *Artha Rin Adalat Ain* 2003[34] to accelerate trial procedure of cases falling within the 2003 Act. Although it could have been a good mechanism for speedy trial process the Report does not mention anything about it.

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[32] *The Negotiable Instruments Act (India) 1881 (Act no. XXVI of 1881) s 146*

[33] *Sayeeda Anju, 'Application of Negotiable Instruments Act in Bangladesh and India: A Comparative Study' Final Report Submitted to the Faculty of Law under Rajshahi University Research Project-2017, p. 6.*

[34] *Artha Rin Adalat Ain 2003(Act no. VIII of 2003) s 6 (4).*

Jurisdictional complications may arise where multiple cases are pending in different territorial jurisdictions against the same drawer. On the other hand, the position relating to number of notices to be issued and trial procedure is not settled in cases where one drawer issues different cheques to the same draweeon several occasion.

In India it is found that an amendment was made validation for transfer of pending cases which mainly discuss the power of transfer relating to multiple pending cases against the same drawer to one single court irrespective of territorial jurisdiction. The perks of this mechanism may be inquired into having special regard to our current legal system.

4. Findings of the Study

Firstly, the Law Commission of Bangladesh proposed punishment of imprisonment up to six months or a fine of twice the face value of the dishonoured cheque instead of one year imprisonment or thrice amount of the face value of the cheque. It is submitted the Law Commission should shed more light on the realisation of the debt from the convicted with penal interest at bank rate with costs and other legal expenses and should ponder less on the period of imprisonment of the convicted.

Secondly, a new proviso is proposed by the Commission to insert barring the acceptance of blank cheque by banks or financial institutions as security. Practically, filling in security cheques with a superficial amount is often used as a weapon by the individuals than bank in most cases. In the Report the restriction is imposed on banks and other financial institutions only and is silent where the arrangement is between lay persons. If it is the intention of the Commission to avoid harassment caused by issuing and taking blank cheques as security then it should either apply generally and not only to a specific sector or it should be totally stopped.

Thirdly, the Magistrate Court has been re-proposed to be the competent court for trial and the author coincides with this.

Fourthly, practically proposal of the compoundability of the offence under Section 138 is in practice because numerous cases are settled before the court through mutual understanding. However inserting such a proviso would enable the court conducting compromise without showing any pretext.

Fifthly, the existing definition of cheque in NI Act only includes paper cheque on plain reading and there is no definition of MICR or e-cheques. Besides, there is no direction on drawee bank as to clearing of MICR or e-cheques in case of reasonable suspicion for genuineness. The Report does not shed any light whatsoever on these issues although it refers to the Indian Act multiple times to justify their attempt for amendment. The Report should have been an exhaustive one to incorporate modern forms of cheque and their usage- which already are in wide use all over the country.

Sixthly, in the absence of decisive test for interpretation of contents of Section 138 NI Act read with its caption and presumptions relating to several formats of Bank slips further complications arising from conflicting judgments in the future is a reality. Presumption of bank slip could have been considered in the Report of Law Commission so that it could be presumed that all the cheque dishonor cases, irrespective of reasons, prescribed by the Bank comes within the ambit of Section 138 of NI Act.

5. Conclusion

The scope and application of a legislation of the NI Act's magnitude ought to be finely delineated as anything less would leave room for potential abuse and misapplication of its provisions turning the legislation into an instrument of inflicting unnecessary sufferings to innocents. Legal minds criticized the developments made through amendment in Bangladesh and have been demanding modification of relevant provisions of the NI Act. The NI Act has special limitation period, special evidentiary procedure and special rule for trial and appeal. Cheque is used as a payment instrument from early period and regulated by the NI Act, 1881, many

changes have been made in the NI Act by the Parliament but the practice is developed through Bangladesh Bank Regulations. In Bangladesh NI Act is the only statutory law for understanding cheque, and the law does not recognize MICR practice and e-cheque as an instrument of e-banking for transfer of money. Therefore in Bangladesh the payment system through e-banking is not clear at all. Since the Law Commission has taken a step to modify the law again it is necessary to accommodate almost all the challenges and contemporary needs so that the work would be considered as a comprehensive one. The present study concluded that-

- proposals may fail test of time.
- intention was to expedite but amendments were not aiming at the actual pressing issues that delay the trials.
- futile discussion on both types of punishment and silent about Magistrate's pecuniary jurisdiction.
- ambiguous amendments relating to security cheque.
- turned a blind eye on MICR or e-cheques.
- no effort made to clarify presumptions regarding dishonour of cheques and related documentary evidence, evidence by affidavit, possible jurisdictional anomalies.

The provisions of the NI Act of Bangladesh are not fit in the contemporary era, after showing the proposed recommendation this study suggests to review the existing proposals incorporating some other provisions based on demands of time.

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Maintenance Rights of Muslim Women under the Shriah Law and Family Laws in Bangladesh

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The personal rights of Muslim women in Bangladesh are defined by the principles of Shariah through Muslim family law along with the general laws. The right of maintenance is very important for women where the family laws and social tradition offer little scope for them to have independent means. Most of the women-mother, daughter, wives and dependent children rely on their family members for maintenance. Traditionally, as per the Shariah law, the Muslim mother is entitled to get maintenance from her children. In reality, changing social and traditional values, increasing nuclear family, often elder mothers are moving to old home. Additionally, Muslim wives have right to claim maintenance while married or after marriage ends. *However, the controversy arises when the issue of providing post-divorce maintenance beyond iddat period. Indeed, the present statutory laws concerning maintenance rights are not fully Shariah based. The study analyses the application of maintenance rights of Muslim women under the Islamic Shariah law as well as family laws along with court's decisions in Bangladesh.*

Keywords: *Maintenance, Rights, Muslim women, Islamic Shariah, Family law.*

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Introduction

In Bangladesh, above 86.6% people are Muslim and almost half of the populations are female. Maintenance is a lawful right of a Muslim woman. Often mother, daughter and wife deprived of maintenance rights. Subsequently, it affects the women life as well as children and other members of the family.[1] In the pre-Islamic Arabia, there were no obligation of maintenance to parents, children and wives. After the advent of Islam, according to Holy Quran and Hadith of Prophet Muhammad (BPUH) made legal provision for maintenance of mother, daughter, wives and dependent children and other relatives who are unable to maintain themselves.[2] Father must provide maintenance to their adult daughters and also to disabled adult sons in proportion to their respective claims of inheritance. Similarly, the parents have the next position in the right of maintenance after the children. The liability to maintain parents rests only on the children and is not shared by anyone else. As between the parents the mother is entitled to preference over the father under the Shariah law.[3]

However, in Islamic Shariah law, a husband is bound to provide maintenance to his wife during the subsistence of marriage and in the event of divorce, he is also responsible to provide maintenance to his wife only up to the expiration of *iddat* period.[4] Though having the Quranic texts on this issue, the controversy arises and differences of opinion exist among the Islamic scholars regarding this beyond the *iddat* period in the form of post-divorce maintenance or *maa'ta* in Bangladesh.[5]

Hence, all types of personal rights of women, which are ensured by the Shariah law are not included in the sphere of statutory laws in the country.

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1 *Sufia Ahmed & Jahanara Choudhury, "Women's legal status in Bangladesh" Published by women for women (ed.) The situation of women in Bangladesh, Dhaka 1979, 287.*

2 *R.K. Sinha, "The Muslim Law", Allahabad, India, 1995, 128.*

3 *A. Fyzee, Outlines of Muhammadan Law, Oxford University Press, Delhi, 1974.*

4 *Ibid.*

5 *A. Shahid, Post-divorce Maintenance For Muslim Women In Pakistan and Bangladesh: A Comparative Perspective, International Journal of Law, Policy and the Family, 27(2), 2013, 197–215.*

For that, most of the woman cannot claim maintenance rights because it is not included in the secular field of statutory laws.[6] Moreover, it is a very rare occasion for mother, daughter and married woman to go to the chairman or the court to exercise her claim for maintenance.[7] The social tradition is that women enforces the claim for maintenance while obtaining divorce.[8] The main obstacle of the application of the maintenance rights of women in the country are traditional attitudes of male oriented society and lack of proper legal education.[9] Hence, women are usually hesitant to avail of their rights and privileges for difficulties of social tradition, legal procedure and existing non implementation of Shariah law. An attempt has been made in this article to present the rights of maintenance of Muslim women under the Islamic Shariah law as well as family laws and its actual practice in Bangladeshi society.

Rights of Maintenance under the Islamic Shariah Law

According to Islamic Shariah law, Maintenance is called 'Nafaqah' and the meaning is a person spends on his family for fooding, lodging and other essential for the livelihood. It is a duty to maintain as an obligation of a person who is legally bound to provide fooding, lodging, clothing etc to another person.[10] As per the Islamic Shariah law, the persons who have the rights to be maintained by the other are determined on the basis of the marriage and the blood-relationship. A wife is entitled to be maintained by her husband because of her marriage and her right is absolute. The husband is legally bound to maintain his wife whether she is necessitous or not. The second category of persons entitled to maintenance is the blood-

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6 *F. Rehman, Post-divorce Maintenance for Muslim Women in Pakistan and India, Bangladesh Journal of Law, 1998.*

7 *Md. Jobair Alam and Toufiqul Islam, Rethinking Post-Divorce Maintenance: An Alternative For The Empowerment of Muslim Women In Bangladesh, 15: 1 & 2 (2015) Bangladesh Journal of Law, 81-83.*

8 *Huq. Naima, "Post Divorce Maintenance: Legal and Social Appraisal" Gender in LawJournal, Dhaka, 2002, 68.*

9 *Ibid, Sufia Ahmed, & Jahanara Choudhury, 285.*

10 *Rashid, Syed khalid. "Muslim law," Lucknow, India, 1996, 156.*

relations which include children and unmarried daughter, disabled children, parents, grandparents.[11]

The concept of parents maintenance is basically based on the following verses of the Holy Quran and Sunnah. The Holy Quran says, 'The mothers shall give suck to their offspring for two whole years, if the father desires, to complete the term. But he shall bear the cost of their food and clothing on equitable terms'.[12] Furthermore, Allah commanded all children to show kindness to parents if one of them or both of them reach old age with them (children), and not to say 'fie' and to speak them a gracious word.[13] It has been also stated that 'Let the men of means spend according to his means: and the men whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what he has given him. After a difficulty, Allah will soon grant relief'.[14]

However, the Sunnah of the Prophet Muhammad (BPUH) has been extended to all those things which are necessary to support a woman. It comprises food, clothing and accommodation but probably extended to other necessities of life for hygiene. In Sunnah Prophet Muhammad (BPUH) said many times about the rights of woman's maintenance. When the Prophet Muhammad (BPUH) asked about the rights of parents upon their child said, "They are your heaven and your hell".[15]

Similarly, the basis of the husband's liability to maintain his wife can be found in various Verse of the Holy Quran and Sunnah of the Prophet Muhammad (BPUH). The Holy Quran says 'Men are the protectors and maintainers of women, because Allah has given the one more (strength) than other, and because they (men) support those (women) from their means.[16] In case of divorce wife it has been stated that, 'There is no blame

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[11] *Ibid, Sinha, 129.*

[12] *Al Quran, Sura 2 Verse 233.*

[13] *Al Quran, Sura 17 Verse 23-24.*

[14] *Al Quran, Sura 65 Verse 7.*

[15] *H.3662, Sunan Ibn Majah.*

[16] *Al Quran, Sura 4: Verse 34.*

on you if ye divorce women before consummation or the fixation of their dower; but bestow on them (a suitable gift) the wealthy according to his means, and the poor according to his means,- a gift of a reasonable amount is due from those who wish to do the right things'.[17]

Additionally, the Holy Quran says, 'Let the women live (In Iddat) in the same style as ye live, according to your means; annoy them not, so as to restrict them. And if they carry (life in their wombs), then spend (your substance) on them until they deliver their burden: and if they suckle your (offspring), give them their recompense; and take mutual counsel together, according to what is just and reasonable. And if ye find yourselves in difficulties, let another woman suckle (the child) on the (father's) behalf'.[18] Similarly, it has been declared in the Holy Quran that 'For divorce women maintenance should be provided on a reasonable scale, this is a duty on the righteous'.[19] Therefore, based on these verses, it is the duty of a husband to provide all the basic needs for his wife. If he fails to do so, he disobeys Allah.

Likewise, in Sunnah, Jaber-b-Abdullah reported that the messenger of Allah said: Fear Allah regarding women. Verity you have married them with trust of Allah and made their private parts lawful with the word of Allah…. They have got rights over you in respect of their food and clothing according to means.[20] Apart from these, Hakim-b-Muawiyah from his father reported: I asked: O Messenger of Allah! What right has the wife of one among us got over him? He said: It is that you shall give her food when you have taken your food, that you shall clothe her when you have clothed yourself.[21] (Ahmad, Abu Daud, Ibn Majah). Ayesha also reported that Hind, daughter of Utbah, asked: O Messenger of Allah! Abu Sufiyan is a miserly fellow. He does not give what may be sufficient for me and my children, unless I take it from him without his knowledge. He

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17 *Al Quran, Sura 2: Verse 236.*

18 *Al Quran, Sura 65: Verse 6.*

19 *Al Quran, Sura 2: Verse 241.*

20 *Bukhari, Muslim.*

21 *Ahmad, Abu Daud, Ibn Majah.*

said: Take what suffice you and your children according to means (Bukhari, Muslim). Equally, Mu'awiah ibn Haidah reported: I asked Prophet Muhammad (s): "What is right of a wife over her husband?" He replied: "feed her as you feed yourself, clothe her as you clothe yourself, do not strike on her face, do not rebuke her and do not separate yourself from her except inside the house.[22]

Thus, the maintenance right derives from the authority of the Holy Quran, from the Prophet's traditions and from consensus.[23] The Prophet Muhammad (BPUH) required his followers to accord their wives the best possible treatment. He impressed upon the men the rights of women regarding the food, clothing and lodging. Even in his famous Fate well Address at Arafat, the Apostle of Allah did not forget to exhort the believers to fulfill their obligations regarding the proper maintenance of their women.[24] If the husband neglects or refuses to maintain his wife without any lawful cause, the wife may sue him for maintenance.[25]

Rights of Maintenance under the Family Law

The legal system of Bangladesh has its legacy from British India and Pakistan and it has a dual system consisting of general and personal laws. The personal or family law in the country is based on religion and culture with principles of Shariah (Monsoor, 1999).[26] In Bangladesh, the main family laws are the Muslim Personal Law (Shariat) Application Act, 1937, the Muslim Family Laws Ordinance 1961 and the Family Courts Ordinance 1985. These Family laws, however, has been promulgated to deal with personal issues and provisions have been made to dispose the cases of within the shortest time possible. But there are some shortcomings in the remedies available to all women. The Muslim Family Laws

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22 *Abu Dawud: No. 2139, Ahmed, Ibn Majah.*

23 *Nasir, Jamal J. Ahmad, the Status of Women under Islamic Law and Modern Islamic Legislation, Volume 1, 3rd ed., BRILL, LEIDEN"BOSTON, 2009, 105.*

24 *Khan, Maulana Wahiduddin " women in Islamic Sharia" The Islamic Centre, New Delhi 1998, 84.*

25 *Ibid, Kazi, 74.*

26 *Monsoor. Supra note no. 2.*

Ordinance 1961 and the Family Courts Ordinance 1985 provide remedy only for the wife and no mentioned about the maintenance of mother and children.

Maintenance of Muslim Mother

According to principles of Islamic Shariah, it is obligatory upon a man to provide maintenance for his mother, father, grandfather and grandmother if they happen to be in circumstances necessitating it. Thus, a Muslim mother is entitled to maintenance from her children all time.[27] There is social cultural and religious tradition for caring older members in family environment.[28] In practice, changing social and traditional values, increasing nuclear family, people moving from rural to urban and other factors, elder parents care and support within family are reduced gradually.[29] In rural areas, most of women are poor, illiterate and do not have own land and other property and they are on worse situation in the old age rather that urban areas.[30]

In this backdrop, Bangladesh government has enacted the Parents Maintenance Act, 2013 to ensure the maintenance of elderly parents by their children. Prior to enacting this law, there was no specific legislation to bring any legal action for maintenance by the parents against their children. Maintenance as defined in the law includes food, clothing, medication, shelter and accompaniment. The law absence, for their grandparents.[31] In case of separate living of the parents, the children shall give them a reasonable amount of money from their daily or monthly or yearly income.[32] Traditionally, the sons who are responsible to afford food

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27 *Ibid, Serajuddin, 262.*

28 *M. Nazrul Islam and Dilip C Nath, A Future Journey to the Elderly Support in Bangladesh, Journal of Anthropology, Volume 2012, 2.*

29 *Sabrina Flora Meerjady, Ageing: A Growing Challenge, Bangladesh Medical Journal, 2011 Vol. 40, No.3 September 2011 Issue, 49.*

30 *S Jesmin Syeda, Social Supports For Older Adults In Bangladesh, The Journal of Aging in Emerging Economies December, 2011.*

31 *Section 4, The Parents Maintenance Act 2013.*

32 *The Parents Maintenance Act 2013, section 3(7).*

and shelter to their parents as well as take care of the other members of their family.

There is a protective provision that the law strictly prohibits keeping the parents in old care centre and describes the higher degree of punishment in the breach of the provision of this law.[33] The offences are cognizable, bail able and compoundable. In case of obstruction or non-cooperation from son's wife or daughter's husband or children or any other relatives, such person shall be liable as abettor to the same punishment.[34]

Though the law has established the parents' legal entitlement to maintenance from child but it has some drawbacks. It does not provide for the maintenance of adoptive or childless parents. Equally, it is silent as to whether they are entitled to bring civil suit for maintenance in the Family Court. Additionally, the law does not mention that by whom and how 'reasonable amount of money to be paid by child is to be determined.[35] Looking at the positive aspects of the law it can be said that, if the law is properly implemented, it will bring welfare to many unfortunate parents of the country.

Right of Children to Maintenance

In accordance with Islamic Shariah law, a Muslim father maintains his daughter as best as his means permit. The duty of the father to maintain extends beyond puberty and also till they are married when daughter have no property of their own. Father is bound to maintain even if he is poor or the children are in the custody of the mother. The fact that the mother has the custody of the daughter till the latter attains puberty does not relieve the father of his obligation to maintain the daughter. Father is also bound to maintain his sons until they have attained the age of majority. As well, the father has a right to refuse to maintain the children if they refuse to live with him, except for a reasonable justification for the same. If a child is

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[33] *Section 5, The Parents Maintenance Act 2013.*

[34] *Section 6, The Parents Maintenance Act 2013.*

[35] *A. N. M. Moin Uddin Shibly and Rasel Ahmed Rafi, Rights of Elderly Parents and Parents' Maintenance Act, 2013, The Daily Star, 29th January, 2019.*

kept in custody by the mother and is prevented from returning to the father, it cannot be said that the child is at fault and that its conduct has disentitled it to maintenance. Even if a child prefers to live with the mother due to natural affection or attachment for her, that would not affect the liability of the father to maintain the child. In *Mst. Akhtari Begum v. Abdul Rashid*[36] case which the right of a four year old child was upheld despite the fact that the child was in the custody of the mother.

As well, the mother is liable to maintain the children if the father is necessitous and she herself is not poor. There are some conflicts of opinion regarding maintenance by mother and by the grandfather in such cases. If the mother is dead or poor, then the liability moves on to the maternal grandparents. The duty of mother and grandfather arises only when the father is not able to maintain the children even by earning. But the Muslim family law does not confer any obligation of maintenance of illegitimate children.[37]

Wife's Right of Maintenance

Under Muslim family law the wife's right to be maintained by her husband is absolute. This rights exclusively created by the marriage contract or *kabinnama.*[38] to be provided at the husband's expense with food, clothing and accommodation and customarily extend to other necessaries of life.[39] Husband has the personal responsibility to maintain his wife and this obligation does not hinge upon the possession of any property whether ancestral and the husband cannot even transfer his obligation to maintain his wife. So maintenance of the wife is the prior duty of a husband and the entire burden of maintenance is on the husband even though she is capable of earnings.[40]

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[36] *1937 AIR Lahore 236.*

[37] *Ibid, Sinha, 129.*

[38] *Taslima Monsoor, "From Patriarchy to Gender Equity: Family law and its Impact on women in Bangladesh". The University Press Limited, Dhaka, 1999, 220.*

[39] *Nasir Jamal Ahmad J, the Status of Women under Islamic Law and Modern Islamic Legislation, Volume 1, 3rd ed., (Boston: Brill, Leiden), 2009, 105.*

[40] *T. Mahmood & S. Mahmood, Introduction to Muslim Law (Universal Law Publishing Co. 2013).*

Therefore, the wife is entitled to maintenance during the continuance of the marriage (Huda, 2004) and she could recover maintenance from her husband as per the family laws. The Dissolution of Muslim Marriage Act 1939 discussed regarding maintenance whether a wife, who is at fault, is entitled to dissolution under the law.[41] Muslim Family Laws Ordinance 1961 tried to evolve a procedure through which the wife can easily have her remedy, but it has not produced any appreciable improvement. According to the Muslim Family Laws Ordinance 1961, 'If any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may, in addition to seeking any other legal remedy available, apply to the Chairman who shall constitute an Arbitration Council to determine the matter and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.[42]

Thus, in case of husband fails to maintain his wife during marriage, wife can bring a claim in a Family Court under the Family Court Ordinance 1985 for up to six years of past maintenance. It has been declared by the High Court Division in *Md. Sirajul Islam vs. Mst. Helena Begum*[43] that court had jurisdiction to pass the decree for past maintenance and the Appellate Division of the Supreme Court in *Jamila Khatun vs.Rustom Ali*[44] held that the wife is entitled to past maintenance even in the absence of any specific agreement by overruling the decision of High Court Division *Jamila Khatun vs.Rustom Ali.*

Under the Family Courts Ordinance 1985, a wife can sue in the Family Court for maintenance and other personal issues. Indeed, the Ordinance 1985 deals main personal issues of women which are dower, divorce, maintenance, guardianship and restitution of conjugal rights.[45] Accordingly, the wife has certain duties to be followed before claiming

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[41] *The Dissolution of Muslim Marriage Act 1939, section 2(ii).*

[42] *The Muslim Family Laws Ordinance 1961, section 9.*

[43] *Bangladesh Law Digest (BLD), 1996, 47.*

[44] *Jamila Khatun vs. Rustom Ali 16 BLD (AD) (1996) 61; 43 DLR (1991) (HCD) 301.*

[45] *The Family Courts Ordinance 1985, section 5.*

maintenance. Muslim law attaches a condition of obedience on the part of the wife as a condition precedent for claiming maintenance from the husband. [46] The wife is under a duty to obey all the just and reasonable commands of the husband.[47] But if she does not act upon her husband lawful wishes or live apart from him, she becomes a refractory and is not entitled to be maintained by her husband.[48]

In this regards, the relevant case was *Ahmed Ali Khan* vs. *Sabha Khatun Bibi*[49], the court adjudged that when the wife works against the husband's wishes she becomes a rebellion or disobedient and is not entitled to maintenance from her husband. As per the judgment, a wife is considered to be disobedient to his husband in the following circumstances: (i) if without a valid excuse she disobeys his reasonable orders; (ii) if she refuses to perform marital obligations without valid reasons; (iii) refuses to cohabit in the house he has chosen; (iii) goes on *Hajj* without his consent unless it is obligatory for her to go; (iv) takes employment outside the house without his consent.[50]

Maintenance of a Divorce Wife

Wife's right to maintenance is a debt against the husband under the Islamic Shariah law. Wife is preferred over all the other persons (even the young children & other necessitous relations). It is clearly enumerated in the holy Quran[51] and Sunnah that a woman who is divorced on account of repudiation for any cause other than her own, is entitled to post-divorce maintenance and lodging during her *iddat*. Moreover, the traditionally established women rights of maintenance after dissolution of marriage,

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[46] *T. Monsoor, Maintenance to Muslim Wives: The Legal Connotations, The Dhaka University Studies, IX (1), 1998, 63-85.*

[47] *S. A. Ali, Mohammedan Law, Himalayan Books, New Delhi, 1985.*

[48] *M. S. Rahman & Moniruzzaman, Trends and Issues of Judicial Protection of Women's Right to Maintenance under Muslim Law in Bangladesh, Barisal University Journal (Part-2), Vol.1, 2017, 111- 120.*

[49] *PLD, 1952 Dacca, 385.*

[50] *Ahmed Ali Khan vs. Sabha Khatun Bibi, PLD 1952 Dacca, 385.*

[51] *Sura-al-Baqrah, verses 225 and 240.*

during *iddat*, are enforceable under the statutory laws of the country. Nevertheless, the controversy starts from the moment of a separation and arguably a divorcee is entitled to three months of maintenance, which is known as post-divorce maintenance. There has been an inexorable debate in Bangladesh that how long after divorce, the divorced wife is entitled to maintenance.

There are differences of opinion among the Islamic Scholars as to allowing post-divorce maintenance *(maa'ta)* beyond *iddat* period under Islamic Sharia law. The Muslim jurists have differently interpreted the divorced woman's right of maintenance deviating from Islamic teaching. After that the different interpretations have created the problems for Muslim women in the country. Consequently, there appears to have become an almost dogmatic notion to the effect that the divorced women are not entitled to post-divorce maintenance beyond their religiously prescribed waiting period.[52]

In *Mst Razia Akhter* vs. *Abul Kalam Azad* (Family Suit No. 193 of 1989 unreported) the court granted to woman maintenance for the *iddat* period, *i.e.* until the son was born five months after the divorce. This extension of the period is in line with the Islamic Shariah law and the statutory law. Under section 7(5) of the Muslim Family Laws Ordinance of 1961, if the wife is pregnant at the time of divorce, it is not effective unless the pregnancy ends. But section 9 of this Ordinance is silent on the issue of post-divorce maintenance.[53] In the absence of such legal provision, a divorced woman suffers from lack of financial support as during the post-divorce period. Wife may undergo a critical situation after the separation she deprives from the right to maintenance and granting post-divorce maintenance only for a shorter period and not beyond the *iddat* period.[54]

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[52] *F. Rahman, Post-divorce maintenance for Muslim women in Pakistan and India. Bangladesh Journal of Law. Vol. 2 No. 1. 1998, 26-52.*

[53] *Naima Huq, Post Divorce Maintenance: Legal and Social Appraisal, Gender in Law Journal, Dhaka, 2002, 68-69.*

[54] *S. Aktar, Protecting Divorced Muslim Women's Right through Maintenance: A Comparative analysis based on the Present Legislative Reforms among the Muslim Community, The Northern University Journal of Law, Volume III, 2012.*

However, the issue of post-divorce maintenance was first raised in the case of *Hafiz-ur-Rehman* vs *Shamun Nehar Begum Hefzur Rahman vs Shamsun Nahar Begum*[55] in Bangladesh. The High Court Division held that financial security could be provided to divorced women in impecunious circumstances by making their former husbands liable for their maintenance until their remarriage.[56] This significant attempt of the High Court Division to uphold the divorced women's right to the post-divorce maintenance in this case. The verdict was that the person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of *iddat* for an indefinite period, that is to say, till wife losses the status of a divorce by remarrying another person.[57]

Meanwhile, the Appellate Division of the Supreme Court overturned this decision in *Shamsun Nahar vs Hefzur Rahmanon*[58] on the ground that in Muslim family law there is no such obligation on the husband to maintain his divorced wife after the *iddat* period. However, at first the Appellate Division observed that it is naturally followed from the Quranic Verse 2: 241 that *maa'ta* is a something to which a divorced woman is entitled and which a former husband is under legal obligation to pay.[59] According to judgment, *maa'ta is* considered as consolatory gift, compensation or indemnity, basically different from regular maintenance of divorcee. It is incumbent on the righteous as enjoined by Allah in the Holy Quran. Thus, it is given once at a time at the time of divorce. The amount of *maa'ta* shall be determined with reference to the means of the husband, the circumstances of the divorce, and the duration of the marriage.[60] Based on this judgment of Appellate Division, it has been proved that the decision

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55 *47 Dhaka Law Reports (DLR), 1995, 54.*

56 *Muhammad Serajuddin Alamgir, Sharia law and Society: Tradition and change in the Indian Subcontinent, Dhaka: Asiatic Society of Bangladesh, 1999. 261.*

57 *F. Rahman, Post-divorce maintenance for Muslim women in Pakistan and India. Bangladesh Journal of Law. Vol. 2 No. 1. 1998. 26-52.*

58 *59 DLR, 1999, (AD),172.*

59 *4 MLR 1999 AD 41.*

60 *M. J. Alam & T. Islam, Revisiting Post-divorce Maintenance: An Alternative for the Empowerment of Muslim Women in Bangladesh, Bangladesh Journal of Law, Vol. 15: 1 & 2, 2015, 81-83.*

of the case consistency with the Shariah law regarding post-divorce maintenance of women in Bangladesh.[61]

Challenges of Maintenance Rights

Woman has a legal right to maintenance, which devolves upon her husband, father and children. Even when she is wife or ex-wife; it becomes obligation of the husband. Reality is different in that sense, the practice of implementation of maintenance rights is depended on family laws, belief of the people and religious traditions which heavily influenced the cultural practices of the society in Bangladesh. As a result, women are facing challenges when they claim maintenance from the family members. It is often seen that husband left his wife and children without providing any foods, clothes, treatment and shelter.[62] The actual challenge is the dominant patriarchal nature of the society in the country, where women discrimination is common matter.[63]

In the patriarchal society, women are not expected to apply their maintenance rights easily and even they cannot deny male authority. The prevailing social belief in that if a wife claims maintenance it would hurtful for the conjugal life as well as family harmony.[64] Hence, women are not given their granted maintenance rights under family law by the dominant patriarchal system. In this social context, a woman normally enforces the claim for maintenance while obtaining divorce.

Another major problem of the family law both religious and statutory law system appears to be that it does not take into account the reality of the

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[61] *Redwanul Hoque, Judicial Activism in Bangladesh: A golden mean approach, Cambridge scholar publishing, 2011, 1.*

[62] *M.A. Mannan, Status of women in Bangladesh: Equality of Rights- Theory and practice, (Dhaka: Bangladesh Institute of Development studies (BIDS), 1998, 4.*

[63] *Sharmeen A Farouk, Violence against Women: a Statistical Overview, Challenges and Recommendations, Dhaka: Bangladesh National Women Lawyers Association (BNWLA), 2005.*

[64] *M Baharul Islam, Lecture synopsis on Muslim personal law in Bangladesh Bar Council Course, 2003, 6.*

social conditions.[65] In addition to this, the adversarial natures of legal system in the country and the judges have limited scope to interpret of the existing family laws regarding maintenance of rights of the women.[66]

Besides, there is no clear guideline regarding maintenance amounts which is problematic for women in the country. Even there is no scale or standard has been fixed for maintenance by the Holy Quran or by the Sunnah. Thus, about the scale of maintenance, there has always been difference of opinion among the jurists.[67] which is main obstacles for fair justice.

Based on family laws, when women claim maintenance it is needed proof of marriage such as a copy of the marriage registration certificate or *Kabinnama.* Women who are unable to prove their marriage by the registered certificate, apparently, they deprived from maintenance. If women cannot provide proof of the marriage; consequently, she is not able to enforce her maintenance claim as well. Unfortunately, in trial family courts are not familiar in this regard.[68] Thus, the social attitude along with existing legal principles should be reformed for proper implementation of maintenance rights.[69]

Conclusion

Since legal status is an important instrument to measure the real position of women in the family, society and state. Bangladesh can also make the provisions of post-divorce maintenance *(maa'ta)* for the divorced Muslim woman either for such definite period or beyond the *iddat* period. Accordingly, it is needed to take pragmatic steps to insert such provision

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[65] *Taslima Monsoor, Maintenance to Muslim Wives: The Legal Connotations, The Dhaka University Studies, IX (1), 1998, 63-85.*

[66] *Ali, Saheen S. (2000) Gender and Human Rights in Islamic and International law. The Hague, London and Boston: Kluwer Law International, 140.*

[67] *Muhammad Sharif Chaudhry, Women's Rights in Islam. Sh. Muhammad Ashraf publishers, Lahore, Pakistan, 1991, 65-66.*

[68] *Naima Huq, Past and post Divorce Maintenance: legal and social Appraisal. A seminar paper, 1998, 6.*

[69] *Hilary Land, "Changing women's claims to maintenance the state, the law and the Family: Critical perspectives". London & New York, 1994, p.24.*

in the Muslim Family Laws Ordinance, 1961 by way of amendment or make a comprehensive legislation on this issue. Similarly, the judiciary can contribute to upholding maintenance jurisprudence not taking the recourse to abrogate the Muslim family laws as developed by Islamic Shariah. In that way, judiciary can play a proactive role to provide legal protection to divorced Muslim women and restore the socio-economic conditions of the women in Bangladesh. Additionally, it is needed to change existing social attitude and the spread of the proper teachings of Islamic Shariah rules regarding women personal rights. In addition, awareness of personal rights will help to reduce illegal attitude of counter partner. Last of all, there should be ensured an Islamic society where both male and female have mutual respect and understanding for each other. An Islamic family more precisely an Islamic wife, provides prosperity, balance and care for the parents and coming generation.

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The Parents Maintenance Act 2013, section 4.

The Parents Maintenance Act 2013, section 5.

The Parents Maintenance Act 2013, section 6.

Role of International Civil Aviation Organization in Promoting Civil Aviation: An Analysis with Special Reference to the International Civil Aviation Convention, 1944

Dr. Md. Sahal Uddin*

The International Civil Aviation Organization (ICAO) is considered to be an example of a highly successful United Nations agency. President Obama has praised ICAO for forging a truly 21st Century international security framework that will make air travel safer and more secure than ever before. ICAO was created in 1944 by the Chicago Convention in order to promote the safe and orderly development of civil aviation around the world. The organization sets standards and regulations necessary for aviation safety, security, efficiency and regularity, as well as for aviation environmental protection. ICAO also serves as a clearinghouse for cooperation and discussion on civil aviation issues among its 191 member states. It is managed by a Secretariat which is advised by a Council made up of 36 member states, which includes the U.S. and other major actors in the area of civil aviation. ICAO and concerned member states support efforts to assist developing countries to improve their national civil aviation systems and thus meet international standard.

Introduction

International Civil Aviation Organization[1] is the specialized agency of the United Nations handling issues of international civil aviation. The

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constitution of ICAO is the Convention on International Civil Aviation, drawn up by a conference in Chicago in November and December 1944, and to which each ICAO Contracting State is a party. This Convention is also known as the Chicago Convention. In October 1947, ICAO became a specialised agency of the newly-established United Nations. A world specialized agency of the United Nations, ICAO was created in 1944 to promote the safe and orderly development of international civil aviation. It sets standards and regulations necessary for aviation safety, security, efficiency and regularity, as well as for aviation environmental protection. The Organization serves as the forum for cooperation in all fields of civil aviation among its 191 Member States. Fifty-four States attended this Conference end of which a Convention on International Civil Aviation was signed by 52 States set up the permanent International Civil Aviation Organization (ICAO) as a means to secure international co-operation a highest possible degree of uniformity in regulations and standards, procedures and organization regarding civil aviation matters. At the same time the International Services Transit Agreement[2] and the International Air Transport Agreement[3] were signed. The International Civil Aviation Organization (ICAO) was established to set standards for the safe and orderly development of international civil aviation by developing treaties and international standards, recommending best practices, and offering guidance to states. Today its objectives include aviation safety, security, environmental protection, and sustainable development of air transport. The organization also regulates operating practices and procedures covering the technical field of aviation. It also ensures fair opportunity to operate international airlines, promote flight safety, minimize expenses and penalties. The most important work accomplished by the Chicago Conference was in the technical field because the Conference laid the foundation for a set of rules and regulations regarding air navigation as a whole which brought safety in flying a great step forward and paved the

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[1] *Hereinafter called as ICAO*

[2] *Hereinafter called as ISTA*

[3] *Hereinafter called as ITA*

way for the application of a common air navigation system throughout the world.

Establishment of International Civil Aviation Organization

The Convention on International Civil Aviation (also known as Chicago Convention), was signed on 7 December 1944 by 52 States. Pending ratification of the Convention by 26 States, the Provisional International Civil Aviation Organization (PICAO) was established.[4] It functioned from 6 June 1945 until 4 April 1947. By 5 March 1947 the 26th ratification was received. ICAO came into being on 4 April 1947. In October of the same year, ICAO became a specialized agency of the United Nations linked to Economic and Social Council (ECOSOC).

Civil aviation regulation dates back to the 18th century.[5] As aviation developed as an industry, countries passed national laws that were inconsistent with other countries and it became apparent that international regulation was required to ensure public safety. It was not until 1944 that an international aviation regulatory system was developed after 54 countries met for a conference in Chicago to discuss the future of international aviation. The conference resulted in the Convention on International Civil Aviation, commonly known as the Chicago Convention. This Convention established the rules under which international aviation operates and came into force in 1947.[6] Headquarters of ICAO are located in the Quartier International of Montreal, Quebec, Canada. ICAO has regional and sub-regional offices spread around the world, including in Bangkok, Dakar, Lima, Mexico City and Paris. 191 contracting states who become members of ICAO by ratifying or otherwise issuing notice of adherence to the Chicago Convention. ICAO has its genesis in Article 57 of the Charter of the United Nations.

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4 *Gabriel S Sanchez, "The Importance of the Chicago Convention Provisions" Av L &Pol'y (2010) 27.*

5 *Background of Convention on International Civil Aviation, 7 December 1944.*

6 *Ibid at 199.*

Mission of ICAO

The main mission of ICAO includes strengthening of safety and security, increasing of efficiency of international civil aviation, and promotion of principles enshrined in the Chicago Convention. And also other which is following-

- Foster the implementation of ICAO Standards and Recommended Practices (SARPs) to the greatest extent possible worldwide.
- Develop and adopt new or amended SARPS and associated documents in a timely manner to meet changing needs.
- Strengthen the legal framework governing international civil aviation. Ensure the currency, coordination and implementation of regional air navigation plans and provide the framework for the efficient implementation of new air navigation systems and services.
- Respond on a timely basis to major challenges to the safe, secure and efficient development and operation of civil aviation.
- Ensure that guidance and information on the economic regulation of international air transport is current and effective.
- Assist in the mobilization of human, technical and financial resources for civil aviation facilities and services.
- Ensure the greatest possible efficiency and effectiveness in the operations of the Organization, inter alia to meet the above objectives.

Structure of ICAO

ICAO has sovereign body the Assembly, and a governing body the Council. The Assembly meets every three years to review the work of the Organization and give policy guidance. Between Assembly sessions, the Council conducts the daily business of ICAO. The council perform mandatory and permissive functions under Article 54 and 55 of this Convention. The Air Navigation Commission is the permanent body responsible for technical matters. There is also other personnel who

perform their duty under ICAO.[7] ICAO's work consists mainly of developing and adopting standards and recommended practices in areas such as aircraft operation, aerodrome design, personnel licensing, aviation safety and security, aviation medicine, the economics of civil aviation, environmental protection, legal principles, etc.

The following description is given by ICAO itself:

According to the terms of the Convention, the Organization is made up of an Assembly, a Council of limited membership with various subordinate bodies and a Secretariat. The Chief Officers are the President of the Council and the Secretary General. The Assembly, composed of representatives from all Contracting States, is the sovereign body of ICAO. It meets every three years, reviewing in detail the work of the Organization and setting policy for the coming years. It also votes a triennial budget. The Council, the governing body which is elected by the Assembly for a three-year term, is composed of 36 States. Each member of the ICAO have equal vote. The Assembly chooses the Council Member States under three headings: States of chief importance in air transport, States which make the largest contribution to the provision of facilities for air navigation, and States whose designation will ensure that all major areas of the world are represented. As the governing body, the Council gives continuing direction to the work of ICAO. It is in the Council that Standards and Recommended Practices are adopted and incorporated as Annexes to the Convention on International Civil Aviation. The Council is assisted by the Air Navigation Commission (technical matters), the Air Transport Committee (economic matters), and the Committee on Joint Support of Air Navigation Services and the Finance Committee. The Secretariat, headed by a Secretary General, is divided into five main divisions: the Air Navigation Bureau, the Air Transport Bureau, the Technical Co-operation Bureau, the Legal Bureau, and the Bureau of Administration and Services. In order that the work of the Secretariat shall

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[7] *The convention of International Civil Aviation, 1944. A- (43-60). And also Buergenthal, T., Law-Making in the International Civil Aviation (Syracuse University Press, 1969).*

reflect a truly international approach, professional personnel are recruited on a broad geographical basis.

ICAO works[8] in close co-operation with other members of the United Nations family such as the World Meteorological Organization (WMO), the International Telecommunication Union (ITU), the Universal Postal Union, the World Health Organization (WHO) and the International Maritime Organization (IMO). Non-governmental organisations which also participate in ICAO's work include the International Air Transport Association (IATA), the Airports Council International (ACI), the International Federation of Air Line Pilots' Association (IFALPA), and the International Council of Aircraft Owner and Pilot Associations (IAOPA).ICAO, is made up of an Assembly, a council of limited membership with various subordinate bodies and a secretariat.

Secretariat of ICAO

ICAO has been headquartered in Montreal since 1947, in a building downtown that houses the offices of the Secretariat and all essential departments. The Organization has a staff of about 900 officials, nearly one third of whom work in the regional offices in Paris, Mexico City, Lima, Dakar, Cairo, Nairobi and Bangkok. Secretariat is made up of five bureaus: Air Navigation Bureau, Air Transport Bureau, Legal Bureau, Technical Cooperation Bureau, and Administration and Services Bureau. The Language and Publications Branch (LPB) comes under the Bureau of Administration and Services. It comprises the Translation sections (six languages), the Terminology Section, the Publications Section, and also the Interpretation Section. The Interpretation Section provides interpretation services at the meetings of the two permanent bodies, the Council and the Air Navigation Commission, which each hold three sessions per year. The interpreters also serve many other meetings such as technical panels, symposiam, technical and diplomatic conferences, workshops and other events that are organized, usually, during the recess of the permanent bodies.

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[8] *The Effectiveness of International Decisions (Sijthoff Oceana, 156 (1971) at 161.*

Functions of ICAO

Safety

Aviation safety is one of ICAO's core objectives. ICAO establishes a safety program to achieve an acceptable level of safety in aviation operations. The acceptable level of safety shall be established by the states concerned.[9] The safety programe include many safety activities aimed at fulfilling the program's objectives. A state safety program embraces those regulation and directives for the conduct of safe operators from the perspective of air traffic services (ATS), aerodromes and aircraft maintenance. The safety programe may include provisions for such implement such safety activities in an integrated manner requires a coherent SMS. Therefore, state shall require that individual operators, maintenance organization ATS providers and certified aerodrome operators implement SMS accepted by the state. As a minimum, such SMS shall:

Identifying Safety Hazards

Ensure that remedial actions necessary to mitigate the risk/hazards are implemented and provide for continuous monitoring and regular assessment of the safety level achieved. ICAO provides specialized guidance material for fulfillment of the SARPs. As part of its continuing effort to improve air safety, ICAO has adopted standards for the safe transport of dangerous goods by air. ICAO studies many other important subjects, such as all-weather operations, supersonic operations, application of space techniques to aviation, automated-data interchange systems, and visual aids. ICAO collaborates with the air transport community to continuously improve aviation's safety performance by the development of SARPs, the global strategies outlined in the Global Aviation Safety Plan (GASP), audit programmes and implementing safety programmes to address safety deficiencies. GASP establishes safety objectives and

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[9] *Inghamv. Eastern Airlines, 373 F. 2d (1967) 227 at 236 2nd Cir. Also Henaku, B.D.K., The Law of Global Air Navigation, A Legal Analysis of the ICAO (Leiden: AST, 1998) 197.*

initiatives, and safety management SARPs assist Member States to manage aviation safety risks. These safety management provisions provide proactive strategies for improved safety performance. Safety management systems allow for the proactive identification of hazards to encourage the improvement of safety performance and help to avoid the negative consequences of serious incidents.

ICAO and Climate Change

ICAO's environmental committee considers market based measures, but this is unlikely to lead to global action.

ICAO peruses developing countries to limit or reduce emissions from international aviation, under Kyoto protocol.

ICAO Standards and Recommended Practices

ICAO works with its 191 Member States to develop the SARPs, which are contained in 19 Annexes to the Chicago Convention. Each Annex deals with a particular subject area:

- Annex 1 - Personnel Licensing
- Annex 2 - Rules of the Air
- Annex 3 - Meteorological Services
- Annex 4 - Aeronautical Charts
- Annex 5 - Units of Measurement
- Annex 6 - Operation of Aircraft
- Annex 7 - Aircraft Nationality and Registration Marks
- Annex 8 - Airworthiness of Aircraft
- Annex 9 - Facilitation
- Annex 10 - Aeronautical Telecommunications
- Annex 11 - Air Traffic Services
- Annex 12 - Search and Rescue
- Annex 13 - Aircraft Accident and Incident Investigation
- Annex 14 - Aerodromes
- Annex 15 - Aeronautical Information Services
- Annex 16 - Environmental Protection

- Annex 17 - Security
- Annex 18 - The Safe Transportation of Dangerous Goods by Air
- Annex 19 - Safety Management

One of ICAO's chief tasks is to adopt such international standards and recommendations and to keep them up-to-date through modifications and amendments.[10] Standards may thus include specifications for such matters as the length of runways, the materials to be used in aircraft construction, and the qualifications to be required of a pilot flying an international route. A recommendation in any such specification, the uniform application of which is recognized as desirable in the interest of safety, regularity, or efficiency of international air navigation and to which member states will endeavour to conform. Preparing and revising these standards and recommendations is largely the responsibility of ICAO's Air Navigation Commission, which plans, coordinates, and examines all of ICAO's activities in the field of air navigation. The commission consists of 15 persons, appointed by the council from among persons nominated by member states. If the council approves the text, it is submitted to the member states. While recommendations are not binding, standards automatically become binding on all member states, except for those who find it impracticable to comply and file a difference under Article 38 of the Chicago Convention.

Air Navigation

The important role of ICAO is Air navigation facilities around the world. It is evident that air navigation covers an extremely broad spectrum of activities, ranging from short take-off and landing airplanes to supersonic transports, from security questions to the impact of aviation on the environment, from training and operating practices for pilots to the facilities required at airports.[11] ICAO's program regarding the environment

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[10] *ICAO Doc 9735 AN/960, Safety Oversight Audit Manual, 2nd Edition (2006), Appendix C. And also Jennison, M., "The Chicago Convention and Safety after Fifty Years" XX AASL(1995) 283.*

[11] *Boteva, M., A New Century and a New Attitude towards Safety Oversight in Air Transportation, unpublished Master's Thesis, McGill University, For different modes of implementation of international obligations, and international civil aviation provisions infra November 2000, Ch.5.4.1.*

provides a case in point. Growing air traffic and increased use of jet engines have heightened public awareness of the environmental impact of civil aviation. In 1968, ICAO instituted activities aimed at reducing aircraft noise. Comparable studies of aviation's share in air pollution have resulted in the development of standards relating to the control of fuel venting and of smoke and gaseous emissions from newly manufactured turbojet and turbofan engines for subsonic airplanes. In addition to reducing procedural formalities, ICAO's efforts are aimed at providing adequate airport terminal buildings for passengers and their baggage and for air cargo, with all related facilities and services. Special attention is given to improving the accessibility of air transport to elderly and disabled passengers.[12] The continuous growth in air traffic makes it necessary for airport administrations to review the adequacy of their facilities at regular intervals. When modifications in existing terminals or the building of new ones are contemplated, close coordination and cooperation between planners and users must be established from the earliest moment, even before any design is made. Proper airport traffic flow arrangements, with a sufficient number of clearance channels, baggage delivery positions, and cargo handling facilities, are necessary for the speedy processing of traffic through clearance country Regional Planning for Air Navigation.

From the beginning of ICAO’s history, the need to facilitate international air transport to remove obstacles that would impede the free passage of aircraft, passengers, crew, baggage, cargo, and mail across international boundaries was evident. This need is inherent in the speed of air travel itself; if, for example, customs, immigration, public health, and other formalities require one hour at each end of a transoceanic flight of six hours, the total duration of the trip is increased by 33%. ICAO has therefore developed, over the years, a comprehensive facilitation program that is reflected in the international standards and recommended practices of the Chicago Convention, as well as in the recommendations and statements of the ICAO Council and the Facilitation Division. Broadly

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[12] *Cf. ICAO Doc 9735, App. C, supra note 77 for implementation of Annexes to the Chicago Convention at the national and regional level, infra Ch.5.4.*

speaking, the program aims at eliminating all nonessential documentary requirements, simplifying and standardizing the remaining forms, providing certain minimum facilities at international airports, and simplifying handling and clearance procedures. The program is concerned with such measures as liberalization of visa requirements and entry procedures for temporary visitors the development of machine-readable passports and visas speedy handling and clearance procedures for cargo, mail, and baggage and the elimination, as far as possible, of requirements for documentation or examination in regard to transit traffic.

Regional Development

While worldwide uniformity is desirable for certain matters pertaining to civil aviation, others are best approached on a regional basis, since operating conditions vary a great deal from region to region. In the North Atlantic region, for example, long-range ocean flying predominates, whereas in Europe many international flights are short overland jumps. To deal with these different conditions and to facilitate detailed planning, ICAO has mapped out the following regions Asia/Pacific, Middle East, Europe, Africa, Latin America and the Caribbean, South America, North Atlantic, and North America, which all have Planning and Implementation Regional Groups (PIRGs).[13] At meetings held for each of them, detailed plans are drawn up for the facilities, services, and procedures appropriate to that region. The regional plans specify the air navigation facilities and services that are required, and the locations where they are required, for communications, air traffic control, search and rescue, meteorology, and so on.

ICAO's plans for the nine regions are regularly revised or amended to meet the needs of increasing traffic and to take into account technical developments in civil aviation. ICAO's regional offices are its principal agents in advising and assisting states in regard to implementation. The

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[13] *ICAO Montreal, Canada, 1956, Assembly Resolution A1-31 "Definition of International Standards and Recommended Practices", now consolidated into Resolution A36-13: Consolidated Statement of ICAO policies and associated practices related specifically to air navigation, in Doc 9902, Assembly Resolutions in Force (as of 28September 2007) at II-3.*

offices direct as much of their resources as possible to giving practical help, among other ways through frequent visits to states by members of the technical staff. In addition, ICAO allots funds for long-duration advisory implementation missions to help member countries overcome local deficiencies. Shortcomings are taken up by the regional offices and the ICAO secretariat with the governments concerned. More complex cases may require study by the Air Navigation Commission and, if necessary, by the ICAO Council. The problem of eliminating deficiencies in navigational services and facilities is one that ICAO considers critical. The major difficulties are lack of funds for facilities and services, a shortage of trained personnel, and administrative and organizational difficulties. ICAO has encouraged governments to upgrade their facilities through loans for capital expenditures, technical assistance, and other means. It also produces manuals and other documentation to assist states in setting up aviation training programs for flight and ground personnel and offers advice on maintenance and improvement of technical standards.

Jointly Operated Services

Under the Chicago Convention, every ICAO member state is required to provide air navigation facilities and services on its own territory.[14] Navigational facilities and services must also be provided for air routes traversing the high seas and regions of undetermined sovereignty. The ICAO Council is constitutionally authorized at the request of a member state to "provide, man, maintain, and administer any or all of the airports and other air navigation facilities, including radio and meteorological services, required in its territory for the safe, regular, efficient, and economical operation of the international air services of the other contracting states." The council also may act on its own initiative to resolve a situation that might impair the "safe, regular, efficient, and economical operation" of international air services. Although ICAO has not yet undertaken the actual supervision of any nation's international air navigation facilities and services, two international agreements are in

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[14] *ICAO Doc. 9859, The Safety Management Manual (SMM). And also Onidi, O., "A Critical Perspective on ICAO" 33 Air & Space Law 38(2008).*

effect to furnish such services and facilities in parts of the North Atlantic region through so called "joint-support" programs. Under these joint-support agreements, the nations concerned provide services, facilities, or cash payments based on the use by their own aircraft of the routes involved. The two existing agreements are the Agreement on the Joint Financing of Certain Air Navigation Services in Greenland and the Faroe Islands and the Agreement on the Joint Financing of Certain Air Navigation Services in Iceland. The vast majority of aircraft that utilize the special traffic-control, navigational, and meteorological services furnished from Iceland and Greenland for transatlantic crossings are neither Icelandic nor Danish. Hence, some 20 countries, including Iceland and Denmark, provide the funds necessary for the operation of these services.[15] ICAO administers these two agreements, the Secretary General having certain responsibilities and the ICAO Council having others. A special standing body, the Committee on Joint Support of Air Navigation Services, advises the council in these matters. The operation and costs of the services are constantly reviewed, and international conferences are held. In the early 1970s, charges for the use of the aeronautical facilities and services were imposed on all civil aircraft crossing the North Atlantic. These "user charges" covered only 40% of the costs allocable to civil aviation but were increased to 50% for the years 1975 to 1978, 60% for 1979 and 1980, 80% for 1981, and 100% thereafter.

Technical Assistance

In recognition of the importance of the airplane for international and domestic transport in countries where road and railway services are lacking, and as a means of aiding these countries in their social and economic development, ICAO has, from its inception, operated technical assistance programs through UNDP and other UN organs. UNDP obtains its funds from donor countries and allocates these funds among recipient countries in the form of country; inter country, and interregional projects.

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[15] *Schenkman, J., International Civil Aviation Organization, (Geneva: Librairie E. Droz), (1955) pp 257-258. And also Torkington, C., "Aviation Safety in an International Environment", in Soekkha, H.(ed.) Aviation Safety (Utrecht: VSP BV, 1997) 545.*

The Funds-in-Trust program provides financial assistance for specific projects in the country receiving the technical assistance. The Associate Experts program provides experts from certain countries to work under ICAO guidance. Each civil aviation project may include one or more of the following forms of assistance: experts to provide specialist advice to the civil aviation administration or national airline fellowships to allow nationals to be trained abroad in civil aviation disciplines, often at civil aviation training centres that have been established through ICAO technical assistance; and equipment, such as radio navigational aids or communication facilities, to ensure safe and regular air service.[16] Fellowships have been awarded in many fields, including training as pilots, aircraft maintenance technicians, air traffic controllers, radio and radar maintenance technicians, communication officers, airport engineers, electronics engineers, air transport economists, aeronautical information officers, aeronautical meteorologists, aviation medicine specialists, accident investigation experts, flight operations officers, airport fire officers, and instructors. Major types of equipment provided include air traffic control, radar, and flight simulators; training aircraft; radio communication and radar systems; distance-measuring equipment; very high frequency omni radio ranges; instrument landing systems; non directional beacons; "navaid" flight-test units; airworthiness data-acquisition systems; language laboratories; audiovisual aids; visual approach slope indicator systems; and fire fighting vehicles. Major training institutions assisted by ICAO include civil aviation training centres in Egypt, Ethiopia, Gabon, Indonesia, Kenya, Mexico, Nigeria, Singapore, Thailand, Trinidad and Tobago, and Tunisia.

International Conventions Prepared Under ICAO

The increasing number of incidents of unlawful interference with civil aviation, beginning in the 1960s aircraft hijacking,[17] the placing of bombs

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[16] *Mortimer, L.F., "New ICAO Rules Considered for Long-Range Twin-Engine Aeroplane Flights" (April 1984) ICAO Bulletin at 19 et seq.*

[17] *Buergenthal, supra note 46 at 78. And also Cheng, B., "International Legal Instruments to Safeguard International Air Transport: the Conventions of Tokyo, The Hague, Montreal, and a New Instrument Concerning Unlawful Violence at International Airports", in Conference Proceedings,*

on board aircraft, and attacks on aircraft, passengers, and crew members at airports led to the adoption of three conventions.

The Tokyo Convention of 1963. The Convention on Offenses and Certain Other Acts Committed on Board Aircraft does not define specific offenses, but it does have the virtue of ensuring that there will always be a jurisdiction (namely, that of the state of registry of the aircraft) in which a person who has committed an offense on board an aircraft can be tried. The convention also provides for the powers and duties of the aircraft commander and others respecting restraint and disembarkation of the suspected offender. It provides a detailed code of behaviour for states in whose territory the suspected offender has disembarked and also stipulates the steps to be taken in the event of the hijacking of an aircraft.

The Hague Convention of 1970. The Convention for the Suppression of the Unlawful Seizure of Aircraft defines the offense of unlawful seizure and provides for universal jurisdiction over, and arrest and custody of, the suspected offender. It also stipulates that prosecution or extradition of the suspected offender should take place without many restrictions.

The Montreal Convention of 1971. The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation defines a number of acts of unlawful interference directed against international civil aviation. It provides for universal jurisdiction over the offender and, in general, contains rules for custody, extradition, and prosecution similar to those in the Hague Convention.

All three conventions are concerned with the preservation of the means of international communication and provide specifically that in the case of the unlawful seizure of an aircraft, any contracting state in which the aircraft or its passengers or crew are present shall facilitate the continuation of the journey of the passengers and crew as soon as practicable and shall return the aircraft and its cargo to the person lawfully

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AviationSecurity, Peace Palace, The Hague, published by International Institute of Air and Space Law, University of Leiden. January (1987).

entitled to possession.[18] The cooperative international action contemplated by the Tokyo, Hague, and Montreal conventions is intended to eliminate safe havens for hijackers and saboteurs.

Prevention of Controlled Flight into Terrain (CFIT)

To develop an ICAO CFIT prevention programme on International Civil Aviation and the development of guidance material co-ordination. ICAO has been involved in the current efforts to reduce controlled flight into terrain (CFIT) accidents since 1991. The reaction to similar problems in the late 1960s and 1970s resulted in the introduction of the ground proximity warning system (GPWS). Although this measure significantly reduced the number of CFIT accidents it did not eliminate them. Part of the problem was that the initial version of the equipment generated false and unwanted GPWS warnings, resulting in a lack of reaction to warnings in many cases. In addition, the root causes of the CFIT accidents were not addressed. The ICAO programme for the prevention of CFIT is being conducted in co-ordination with the industry and State regulatory authorities and in co-operation with the Flight Safety Foundation (FSF).The initial objective of the programme is to reduce the annual occurrence of CFIT accidents by fifty per cent by the year 1998. The programme seeks the involvement of all management and operational personnel in civil aviation. The programme includes: education in the CFIT problem review of policies and procedures; training; the improvement of equipment and instruments.

The ICAO World-wide Air Transport Conference in 1994 addressed the task of mapping out guidance to assist States and the industry in moving from a controlled to a more open, competitive and less regulated environment. ICAO is building on the work of the Conference by developing guidance, where needed, on economic regulation for this transition; guidance which will facilitate not just the transition process towards liberalization but will also ensure the opportunity for States to participate in air transport.

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[18] *Milde, M., "Enforcement of Aviation Safety Standards " (1996) 45 ZLW 3 at 9.*

Air Transport Product Distribution

To enhance fair competition among airlines and among computer reservation systems (CRS) and afford international air transport users access to the widest possible choice of options in order to meet their needs. The air transport sector is a leader in the development and application of communications and information technology. In this the computer has become an indispensable tool for airline efficiency, cost control and revenue enhancement, and nowhere more so than in the marketing and selling of its product, aircraft space. The emergence of powerful global computer reservation systems, with significant potential for market dominance, has raised issues of possible competitive abuse; some States and regions, and at the global level, ICAO, have developed regulatory codes to ensure fairness, non discrimination, transparency and accessibility to these systems, with obligations not only on the States but also on the systems themselves and on airlines and the travel intermediaries who use them. ICAO's Code of Conduct on the Regulation and Operation of Computer Reservation Systems, which was most recently revised in June 1996, will be kept under constant review and updated, as necessary, to take account of rapidly evolving technological and commercial developments in airline product distribution, such as the Internet.

Trade in services

To study the applicability to international air transport of the principles and concepts in the General Agreement on Trade in Services (GATS) and promote in the World Trade Organization (WTO-OMC) the mandate, objectives and work of ICAO. The inclusion by the Uruguay Round of trade negotiations of all service industries in the General Agreement on Trade in Services (GATS) has added an additional institutional regulatory focus and approach to liberalization for air transport.[19] While the coverage of air transport by the GATS is restricted to aircraft repair and

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[19] *Milde, supra note 175, Weber, id.; Abeyratne, R.I.R., Aviation in Crisis (Burlington: Ashgate, 2004) at 34-42. And also Belai, H., "Expanding programme to adopt systems approach to future audits" (2003) 58:9 ICAO Journal 4.*

maintenance, selling and marketing and computer reservation systems, the World Trade Organization (WTO-OMC), which administers the GATS, is committed to begin a review of this coverage by the year 2000. Consequently, the future regulatory application of the GATS to air transport will necessitate close monitoring of developments in WTO-OMC and other interested organizations, as well as co-operation with them so that air transport's input and involvement is effective and beneficial to this industry. To improve the quality of and to standardize aviation training on a worldwide basis Safety and efficiency of international civil aviation is the responsibility of the personnel that manage, operate and maintain its systems. These professionals must not only possess high individual skills, but in order for an international system to function safely and efficiently, they must be able to work together as an "international team". To achieve this, it is essential that the team members receive the same high quality of training throughout the world. ICAO is committed to working with its Contracting States to advance worldwide quality standards in civil aviation training.

The Role of ICAO in Regulating the Greenhouse Gas Emissions of Aircraft

Established by the Chicago Convention 1944, the International Civil Aviation Organisation (ICAO), has contributed to the extraordinary development of civil aviation over more than sixty years. Article 2.2 of the Kyoto Protocol stipulates that "the Parties shall pursue limitation or reduction of emissions of greenhouse gases from aviation working through the International Civil Aviation Organization."[20] However, the organisation has failed to deliver effective regulation. ICAO is empowered by the Contracting States to combat the new challenge of climate change and will seek to reposition ICAO's role in the future. The first step toward such an examination is to inquire why aviation emissions have been delegated to ICAO, given the absence of explicit responsibility for environmental matters in the Chicago Convention. There are apparently

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[20] *ICAO Council Working Paper C-WP/10612, "Possible Enhancement of the Implementation of ICAO Annexes on Aviation Safety and Security", 4 June 1997, at para. 2.3.*

good reasons for having turned to ICAO, the features of ICAO from two perspectives: ICAO's technical expertise and its experience in adopting international standards and recommended practices (SARPs) on aircraft engine emissions before Kyoto. The second part will analyse the limitations of ICAO's potential for reducing aviation emissions and the deeper roots of the organisation's failure in ICAO's aims and its rule-making function. By understanding the nature of ICAO's failures in the past, it aims to contribute to the re-positioning of ICAO's role in the future. The organisation ought not be the only authority working on aviation emissions challenges. However, ICAO has useful contributions to make to a more complete and complex regulatory architecture, particularly in respect of its technical expertise and its auditing capacity.

The Role of ICAO in Dispute Resolution

The ICAO is one of the largest specialized organizations of the United Nations. Like the United Nations[21] membership in the Council is based on three considerations: (1) nations "of chief importance in air transport"; 2) nations "which make the largest contribution to the provision of facilities for international civil air navigation"; and (3) other states whose membership on the Council will ensure some measure of geographic parity. Unlike the United Nations Security Council, none of the thirty three members of ICAO council enjoy a veto. The ICAO Council enjoys comprehensive legislative power. Thus, it holds authority to promulgate International Standards and Recommended Practices to the Chicago Convention upon approval by two-thirds of the Council members. It ordinarily becomes effective within three months, unless a majority of Assembly members officially object. Traditionally, ICAO has focused on technical and navigation issues rather than economic aspects of international aviation. With the emergence of United States initiated deregulation, however, a growing number of nations have utilized the multilateral forum of the organization as an area in which to register their disapproval with the disruptive effects of unilateral efforts of the United

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[21] *Jon Bae, "Review of the ICAO Dispute Settlement Mechanism" 4:1 JIDS 65(2013) at 81. And also Chicago Convention 1944.*

States to impose its will upon the international aviation community. Formal protests to United States unilateral initiatives, particularly in the fields of antitrust and ratemaking, have been adopted by ICAO on several occasions since the open skies regime begun. More recently, the threat of competition laws has proliferated. The Trade Practices Commission of Australia attempted to withdraw antitrust immunity from domestic and international airlines. The ICAO Council adopted a Resolution requesting Contracting States to refrain from any unilateral action which would endanger multilateral fares and rate setting systems.

Settling a Dispute Involving an Issue on Sustainable Development before the ICAO

According to Article 84 of the Chicago Convention ICAO has jurisdiction over a potential dispute with respect to the implementation of a renewed EU ETS were such a measure to be reintroduced as it arguably involves interpretation and application of the Chicago Convention. ICAO will most likely consider the principles of Sustainable Development as environmental protection is one of its strategic objectives.[22] The dispute will have to be filed individually against the Member States of the EU as the Union as a whole is not a party to the Chicago Convention. This was illustrated in the Hushkit dispute between the US and the EU. Similar to the Hushkit case, the ICAO will most likely seek conciliation and mediation rather than adjudication.

1) ICAO to settle the potential dispute through mediation and conciliation, which has been a success for all the disputes brought before it.
2) ICAO to settle the potential dispute through adjudication. However, the decision will be based on political grounds.
3) ICAO to dismiss the dispute on jurisdictional grounds.

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[22] *Dimitri Maniatis, "The Settlement of International Aviation Disputes" 20 Ann of Air & Sp L 167(1995) at192-93.*

Current Challenges before ICAO

Since 1944, the Chicago Convention has proved resilient by providing a sufficiently flexible framework to enable ICAO to fulfill successfully the responsibilities assigned to it.[23] Today, however, major challenges are facing international civil aviation. There is a great need for ICAO to adapt within the framework of the Convention to rapidly changing circumstances including:

- Globalization and trans-nationalization of markets and operations.
- Terrorism and use of aircrafts as weapons.
- Emergence of regional and sub-regional trading and regulatory blocks.
- Commercialization of government service providers.
- Diversification of fiscal measures to respond to budgetary needs.- Potential evasion of safety regulation (along with labour, competition and other regulation) as a consequence of blurring of sector all boundaries and responsibilities of related authorities.
- Recognition of and response to environmental concerns.
- Emergence of new technologies.
- Approach of physical limits to infrastructure capacity.

ICAO's role needs to change. Some aspects are not to be pursued further by ICAO. For some aspects of aviation, responsibility may fall to other organisations, at least in the long term. As market access liberalisation becomes more generalised, air transport services will increasingly resemble any other service and will need to be treated as such. In such an environment, the forum to regulate the market aspects of air services in the longer run is the World Trade Organisation (WTO). [24]In the area of aviation and climate change, the inaction of ICAO (characterised by the

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[23] *Tompkins, G., "Enforcement of Aviation Safety Standards XX AASL 319" (1995) at 333. And also Abeyratne, Sarkar, A.K., "International Air Law and Safety of Civil Aviation" (1972) id.at 144, 12And Indian Journal of International Law 200.*

[24] *Augustin, J., "The Role of ICAO '' XVII AASL (1992) 33 at 33.And also Colegrove, K.W., International Control of Aviation (Boston: World Peace Foundation, (1930) at 2.*

failure to reach a consensus at the last Assembly), would justify returning the issue to the United Nations Framework Convention on Climate Change (UNFCCC), which gave ICAO a mandate in this area in the first place. ICAO needs to be reoriented towards its core business focusing on the technical and regulatory aspects of aviation in the areas of safety, security, ATM and the environment. ICAO should produce fewer but clearer technical norms and ensure their proper and uniform implementation throughout the world. [25]This will require a thorough review of existing standards and reform of the ICAO standards process from development through to implementation. ICAO could reassume its role as the genuine worldwide technical rulemaking body setting relevant international standards while also ensuring their effective and uniform implementation. In time, ICAO could effectively become the world regulatory authority. ICAO could become the centerpiece of worldwide efforts to help developing countries in coping with the ever-more demanding standards modern aviation requires. For this to be possible, the technical assistance policy of ICAO should become more effective and more efficient by focusing on assisting States and regional organisations to implement its standards and correct any deficiencies identified by the audits. ICAO needs to build greater confidence with potential donors. This will require far greater transparency and more effective financial control and management of ICAO technical cooperation projects. As a result, ICAO could become the worldwide aviation technical assistance agency, which States and organisations could either associate in their own programmes or call upon to channel and coordinate assistance or implement programmes itself. ICAO needs to be prepared for the emerging organisation and governance of aviation policy, which will see a growing presence of regional actors and an increase in their responsibilities.

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[25] *Faller, E., "The Role of ICAO in Safeguarding International Civil Aviation XVII-I AASL 369" (1992) at 381.*

Conclusions

The Convention on International Civil Aviation (ICAO) has contributed to the extraordinary development of civil aviation over more than 60 years. It discusses ICAO's mandate to standardize and regulate for safety, efficiency and regularity. The governing protocols of ICAO are the Articles of the Convention on International Civil Aviation, (the Chicago Convention). These Articles establish the privileges and restrictions of all Contracting States and provide for the adoption of International Standards and Recommended Practices regulating international air transport. The reason for ICAO coming into being is to be found in the events of the 1940s. The Second World War was a powerful catalyst for the technical development of the aeroplane. At the end of the war, a vast network of passenger and freight operations had been set up but it lacked high level, organisational structure, especially in its international dimension. Just as the aeroplane had been a devastatingly effective instrument of war, it was realised that it could be outstandingly effective in supporting and benefitting a world at peace. In an aviation environment in which so much is changing technology, organization and traffic density, and yet much of consequence remains the same, the human factor being the most important, the challenge to States is to apply the proven elements of the Chicago Convention. ICAO also coordinates assistance and capacity building for States in support of numerous aviation development objectives; produces global plans to coordinate multilateral strategic progress for safety and air navigation; monitors and reports on numerous air transport sector performance metrics; and audits States' civil aviation oversight capabilities in the areas of safety and security. ICAO is empowered by the contracting states to combat the new challenges of climate change and will seek to reposition ICAO role in future. The role of ICAO is very important and effective for promoting civil aviation and it also need to make more effective in future development. It seems appropriate to examine how ICAO could respond to these challenges before considering whether, and if so how, it would be advisable to revise the Chicago Convention and to improve the Organization itself.

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Access to Justice: Concept, Development and State Responsibility to Promote It

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Access to justice is a crucial element for the realisation of human rights and for its advancement. It is not only the most basic requirement of any system of justice or the most basic human rights of any system that purports to guarantee legal rights but also the hallmark of any sane and civilised society. The stability and the development of a state largely depend on the two important elements, namely the rule of law and people's access to justice. At the same time when citizen's rights are respected and protected by the government then it gains significant legitimacy both domestically and internationally. In order to understand the level of people's access to justice, it is important to explore the existence of its means as well as the extent to which people have the access. Although in Bangladesh, different progresses have been made regarding the tools of access to justice, particularly with significant development in case management, updating the procedures but not in a larger scale. This article analyses the concept of access to justice and its recent development with a view to better understanding of this issue. Further this article decorated the state's responsibility to promote peoples access to justice.

Key Words: *Access to Justice, Fundamental Rights, Equitable Distribution, Positive Discrimination, Legal Protection, Legal Awareness, Legal Aid.*

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1. Introduction

The issue of access to justice engulfs a wider connotation. It is viewed differently in different contexts. Traditionally, the term refers to opening up the formal systems and structures of the law to disadvantaged groups in society. But in a wider connection this includes not only removing legal and financial barriers, but also social barriers such as language, lack of knowledge of legal rights, and intimidation by the law and legal institutions. Access to justice is treated as an essential fragment of human development for ensuring democratic governance, reducing poverty and for the purpose of conflict prevention. Access to justice must be ensured if a society were to be truly based on the rule of law. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.

2. The Concept of Access to Justice

Access to justice is the most recurring themes in the legal field over the last century. The concept of access to justice has been undergoing an important revolution. It is a procedural term but the phrase may also mean something quite different, because every procedural regulation, including the creation or encouragement of alternatives to the formal court system, has a pronounced effect on how the substantive law operates – how often it is enforced, in whose benefit and with what social impact.[1] Justice might refer not to an institution or a process, but to a concrete result - that is, 'justice' in the sense of a fair outcome or getting ones due. The Supreme Court of the United States has suggested that it is valid to execute an innocent man, as long as he has had a fair trial.[2]

Ibrahim F.M. Kalifulla considers that the concept of 'Access to Justice' has two significant components. Firstly, it is a strong and effective legal system with rights, enumerated and supported by substantive legislations,

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[1] *Bryant G. Grath and Mauro Cappelletti, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective," Buffalo Law Review 27 (1978): 185.*

[2] *Lawrence Friedman, "Access to Justice: Some Historical Comments," Fordham Urban Law Journal 37, no. 1 (2009): 4.*

and secondly, it is a useful and accessible judicial or remedial system easily available to the litigant people.[3]

Bryant G. Grath and Mauro Cappelletti contemplate that the term 'access to justice' is not easy to define. According to them access to justice is the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. They have focused two basic purposes of the legal system-first, the system must be equally accessible to all and second, it must lead to results that are individually and socially just.[4]

Access to justice has to be situation specific. To maintain the equal level of access to justice the disadvantaged must be brought extra facilities to attain the balance between advantaged and disadvantaged. This is called principle of positive discrimination. Principle of positive discrimination is not wrong per se. Sometimes it is necessary to overcome the lingering disadvantage faced by certain groups. This principle is accepted by our constitution also. Article 27 of Bangladesh Constitution declares that "all citizens are equal before the law and are entitled to equal protection of law." However, the next Article (Article-28) further pronounces that "nothing in this article shall prevent the state from making special provision in favour of women, children or for the advancement of any backward section of citizen."

3. Development of Access to Justice

Within the scheme of access to justice, the state could not remain as an active observer but before twentieth century or in early twentieth century, access to justice used to be considered bourgeois *laissez-faire* model of viewing as a commodity. Like other commodities justice could be purchased by those who could afford it costs. State also remained passive to promote the underprivileged for their legal rights and to prosecute or

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[3] *Ibrahim F.M. Kalifullah, "Rule of Law and Access to Justice," in proceedings of the NJA South Zone Regional Judicial Conference, Tamil Nadu State Judicial Academy, January 31- February 02, 2014 (Tamil Nadu: Tamil Nadu State Judicial Academy, 2014), 12.*

[4] *Bryant G. Grath and Mauro Cappelletti, 182.*

defend them adequately. People's incapacity to make full use of the law and its institutions was not the concern of the state.[5]

From 1945 onwards the concept of human and social rights has been increased dramatically, particularly in Western Europe. Moreover, several countries in making new constitution and social contracts recognised equitable distribution and access in different services to citizens. It became standard that state could play an active role in enforcing the guarantees of such equity. Therefore the right of access to justice supported by the state went hand in hand as a fundamental requirement of a state guaranteeing certain legal rights and protections to all citizens.[6]So gradually the right of effective access to justice has gained a particular attention to arm individuals with new substantive rights. The institution of access to justice therefore is seen as not simply an idealistic aim of a state, but a fundamental requirement in order to derive effective development.

Until the 1970s the phrase 'access to justice' referred only to access to courts but after 1970s it has attained a wider connotation and has still been evolving. Mauro Cappelletti, an Italian leading comparative law scholar launched an immense comparative research project in Florence that produced a multi-volume outcome entitled *Access to Justice,* published in 1978. Mauro Cappelletti's work, perceived an instance of general optimism in the public interest model, an idea of an activist, redistributive, democratising, public service oriented approach to the public sector in general and to private law in particular.

Bryant G. Grath and Mauro Cappelletti first catches on three basic approaches of effective access to justice. The 'first wave' in this new movement was *legal aid;* the second concerned the reforms aimed at providing *legal representation for 'diffuse' interests,* especially in the areas of consumer and environmental protection; and the third and most

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[5] *Ibid., 183.*

[6] *Richard Nash, "Financing Access to Justice: Innovating Possibilities to Promote Access for All," Hague Journal on the Rule of Law 5, no. 1 (2013): 105.*

recent is '*access-to-justice approach.'*[7]In the same year American anthropologist, Laura Nader and Harry F. Todd had done a foundational work entitled *The Disputing Process: Law in Ten Societies.* The descriptive essays of this volume present long-awaited comparative results of the Berkeley Village Law Project containing a series of thought-provoking essays. In this volume a variety of theoretical problems have been arranged in a sequence according to the degree of contact with nation-state law. The collection of essays provides an excellent summery of the range of disputing behaviour and remedy agents.[8]

After two years, Laura Nader produced another revolutionary documentary film 'Little Injustices', comparing access to justice in a small Zapotec community with the American model. In this documentary, she narrates this cross-cultural study of institutionalised conflict resolution. She demonstrates how in a remote Mexican village, face-to-face conflict among a small population demands swift and effective redress for injustices, while in the United States consumers with defective products are lost in a morass of frustrating claims, slow and costly legal action, ineffective public agencies, and unresponsive corporate entities.[9]

Once more, in the same year Laura Nader edited another critical work, *No Access to Law: Alternatives to the Judicial System*. Her work was doubtful as to the possibility to provide law to the people in faceless industrial societies, but it was still motivated by a sincere belief in the possibility to

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[7] *Bryant G. Grath and Mauro Cappelletti, 197.*

[8] *The Disputing Process: Law in Ten Societies by Laura Nader and Harry F. Todd, Jr. (eds.), Columbia University Press, reviewed by Richard Seaglion, Anthropology, University of Pittsburgh and Law Reform Commission, Papua, New Guinea. Association for Political and Legal Anthropology Newsletter 4(1):11-12, 1980.*

https://www.academia.edu/24428833/The_Disputing_Process_Law_in_Ten_Societies_by_Laura_Nader_and_Harry_F._Todd_Jr._eds._Columbia_University_Press._Association_for_Political_and_Legal_Anthropology_Newsletter_4_1_11-12_1980._Review. Accessed on 06 April 2017.

[9] *Laura Nader, "Little Injustices-Laura Nader Looks At The Law."*

https://archive.org/details/LittleInjustices-LauraNaderLooksAtTheLaw. Accessed on 06 April 2016.

bring justice to the people, though already suspicious towards the rise of the ADR industry.[10]

Two years later Mauro Cappelletti edited a collective work entitled *Access to Justice and the Welfare State.* This volume was not intended simply to be another series of access to justice rather it was an attempt to go beyond the previous volume. In this work, Mauro Cappelletti highlighted four issues, which are: a) legal service for the poor, b) the protection of diffuse and fragmented interests, c) alternatives to lawyers, courts and regular court procedures, and d) access to the legal system and the modern welfare state.[11]

In the year of 1985 Scoble and Wiseberg co-edited *Access to Justice: Human Rights Struggles in South East Asia,* showing the advanced potentials of these lines of inquiry. Thereafter almost nothing was produced in this area for almost two decades. In a sense, it is natural that projects of the ambition and magnitude of Laura Nader and Mauro Cappelletti became 'definitive', both as collections of data and as methodological masterpieces. Nevertheless, the degree of silence before a revival of scholarly interest in the field was unusual.[12]Then in 2002, Jonas Ebbesson published a book called *Access to Justice in Environmental Matters in the EU*. This timely book presents the state of the art of access to justice in environmental matters in the European Union. It provides a thematic and comparative introduction of the topic, followed by thorough descriptions of EC law and the law of each EU member state.

In the same year, Christina Jones Pauli and Stephanie Elbern edited *Access to Justice: Role of Court Administrators and Lay Adjudicators in the African and Islamic Context*. This edited volume highlights the importance of the perceptions of the litigants and the court personnel for improving access to justice. Non-lawyer support personnel as shown in the examples

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[10] *Ugo Mattei, "Access to Justice. A Renewed Global Issue?" Electronic Journal of Comparative Law 11, no. 3 (2007): 2.*

[11] *Mauro Cappelletti, ed, Access to Justice and the Welfare State, (European University Institute: Springer, 1981), 4.*

[12] *Ugo Mattei, 2.*

in the book are key figures in the processes of access to justice. The book makes an important contribution to identifying basic elements that are overlooked in judicial reform schemes. The training of non-lawyer support personnel should be given priority over or at least the same priority as the training of lawyers.

In 2003, Fazal Karim published his monumental *Access to Justice in Pakistan*, a handbook of Civil and Criminal Procedure with constitutional setting and fairly extensive study of concept of jurisdiction, doctrine of precedent and principles of interpretation. In the year of 2004, Deborah Rhode published from the prestigious Oxford University Press a book titled *Access to Justice*. In this book, Rhode reveals the imbalances of legal assistance in America, from the lack of access to educational services and health benefits to gross injustices in the criminal defence system. She proposes a specific agenda for change, offering concrete reforms for coordinating comprehensive systems for the delivery of legal services, maximising individual's opportunity to represent him/her, and making effective legal services more affordable for all Americans who need them.

In 2004, UNDP developed a Practice Note to focus on capacities to seek and offer remedies for injustice and outlines the normative principles that provide the framework within which these capacities can be developed. The Practice Note also finds different barriers of access to justice and sets out principles for action, approaches and techniques for programming.[13] These are as follows:

(i) Legal protection
(ii) Legal awareness
(iii) Legal aid and counsel
(iv) Adjudication
(v) Enforcement
(vi) Civil society and parliamentary oversight.

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[13] *UNDP, "Access to Justice: Practice Note." 2004. http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf. Accessed on 01 April 2016.*

In recent times, some scholars have also tried to develop the concept in a wider approach. Vivek Maru considers 'access to justice' in five core areas: court reforms, legal services and legal aid, information dissemination and education, alternative dispute resolution, and public sector accountability.[14] The five types of effort significantly work for stimulating access to justice in a countless manner.

Recently access to justice concerns are aimed at promoting and achieving the social inclusion of those excluded from the justice system, and so the meaning of the phrase access to justice is extended to include access to mechanisms that facilitate social inclusion. Broad consensus on the basic guiding principles for such mechanisms has yet to emerge.[15] In general interpretation access to justice could signify the ability of citizens and communities to make the use of courts. The World Bank Poverty Reduction Group, argues for a broader conception of access: '[T]he right of access, in its amplest sense, does not refer to specific cases and users, but rather to participation in the individual and collective benefits accruing from society's provision of the best, and most equitably delivered, justice service it can render.'[16] The Attorney General's Department of Australian Government stated four waves of access to justice namely:[17]

Wave 1: equal access to legal services (lawyers and legal aid) and courts.

Wave 2: correcting structural inequalities within the justice system: changing the law, court procedures and legal practice to make access to justice more meaningful. This includes streamlining the civil litigation

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[14] *Vivek Maru, "Access to Justice and Legal Empowerment: A Review of World Bank Practice," Hague Journal on the Rule of Law 2, no. 2 (2010), 261.*

[15] *Estelle Hurter, "Access to Justice: To Dream the Impossible Dream?" The Comparative and International Law Journal of Southern Africa 44, no. 3 (2011): 408.*

[16] *Linn Hammergren, Envisioning Reform: Conceptual and Practical Obstacles to Improving Judicial Performance in Latin America (University Park Pennsylvania: Pennsylvania State University Press, 2007), 289.*

[17] *In the year of 2009, the Attorney General's Department of Australian Government prepared a guide for future action of access to justice taskforce entitled "A Strategic Framework for Access to Justice in the Federal Civil Justice System." https://www.ag.gov.au/LegalSystem/Documents. Accessed on 14 September 2015.*

system and 'de-mystifying' the law through plain language drafting and community legal education.

Wave 3: emphasis on informal justice and its importance in preventing disputes from occurring and escalating – including greater use of non-adversarial alternatives to legal justice, such as alternative dispute resolution (ADR).

Wave 4: emphasis on competition policy: implementing competition policy in order to allocate justice resources, whether formal or informal, as efficiently as possible through market institutions, such as by reforming legal profession rules to lower the cost of legal services.

The common understanding of the terms 'effective remedy' and 'access to justice' are used as equivalent and interchangeable both in European Union law and in European Human Rights Law. According to them access to justice includes:

(i) The right to an effective remedy before a tribunal;
(ii) The right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law;
(iii) The right to be advised, defended and represented; and
(iv) The right to legal aid for those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.[18]

The American Bar Association discussed the term access to justice in a wider sense. It specifies six elements of access to justice namely:[19]

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[18] *M. Elvira Pinedo, "Access to Justice as Hope in the Dark in Search for a new Concept in European Law,"International Journal of Humanities and Social Science1, no. 19 (2011): 10.*

[19] *In 2012, the American Bar Association published a guide to analyse access to justice for civil society organizations entitled 'access to justice assessment tools.' The statements and analysis contained herein are the work of the American Bar Association's Rule of Law Initiative. www.americanbar.org. Accessed on 27 November 2015.*

Element 1: **Legal Framework**

To what extent is there a legal framework that establishes citizens' rights and duties and provides citizens mechanisms to solve their common justice problems?

Element 2: **Legal Knowledge**

2.1 To what extent are citizens aware of their rights and duties?

2.2 To what extent are citizens aware of mechanisms available to solve their common justice problems?

Element 3: **Advice and Representation**

To what extent can citizens access the legal advice and representation necessary to solve their common justice problems?

Element 4: **Access to a Justice Institution**
4.1 To what extent is the justice institution affordable?
4.2 To what extent is the justice institution accessible?
4.3 To what extent does the justice institution process cases in a timely manner?

Element 5: **Fair Procedure**
5.1 To what extent do citizens have an opportunity to effectively present their case?
5.2 To what extent are disputes resolved impartially and without improper influence?
5.3 Where disputes are resolved by mediation, to what extent can citizens make voluntary and informed decisions to settle?

Element 6: **Enforceable Solution**

To what extent are justice institutions able to enforce their decisions?

Access to justice encompasses all the elements needed to enable citizens seeking redress for their grievances and to demand that their rights are upheld. Such elements include the existence of a legal framework granting

comprehensive and equal rights to all citizens in accordance with international human rights standards; widespread legal awareness and literacy among the population; availability of affordable and quality legal advice and representation; availability of dispute resolution mechanisms that are accessible, affordable, timely, effective, efficient, impartial, free of corruption, that are trusted by citizens and that apply rules and processes in line with international human rights standards; and the availability of efficient and impartial mechanisms for the enforcement of judicial decisions.[20]

The every element of access to justice has influenced the citizens' ability to use justice institutions to solve their common justice problems. Access to justice does not simply mean access to court only rather it means access to the whole justice system. UNDP's Access to Justice Practice note developed human rights based approaches elements of access to justice which includes legal protections, legal awareness, legal aid and counsel, adjudication, enforcement and civil society oversight.

4. State's Obligations under International Legal Frameworks to Promote Access to Justice

The international human rights framework makes it clear that both federal and state authorities have responsibilities in relation to the realisation of human rights.[21] International human rights law put down obligations which states are bound to respect. By becoming parties to international treaties, states assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that states must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires states to protect individuals and groups against human rights abuses. The obligation to fulfill means that states must take positive action to facilitate the enjoyment of basic human rights. Through ratification of international

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[20] *Teresa Marchiori, "A Framework for Measuring Access to Justice Including Specific Challenges Facing Women." 2015, 5.https://rm.coe.int/1680593e83. Accessed on 20 March 2017.*

[21] *Article 50 of the International Covenant on Civil and Political Rights.*

human rights treaties, Governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties.

The adoption of UDHR 1948 for the first time in human history has strengthened the international human rights movements. The Declaration makes obvious the basic civil, political, economic, social and cultural rights that all human beings should enjoy. It is considered as the greatest effort yet made by the mankind to give the society new legal and moral foundations and thus making a decisive stage in the process of uniting a divided world.[22]

The rights enumerated in the UDHR are declaratory in nature and not legally binding upon the state but still it has not lost its importance. Professor Robertson rightly observed that:

There seems to be an agreement that the Declaration is a statement of general principles spelling out in considerable detail the meaning of the phrase 'human rights and fundamental freedoms' in the charter of the United Nations. As the declaration was adopted unanimously, without a dissenting vote, it can be considered as an authoritative interpretation of the charter of the highest order. While the Declaration is not directly binding on United Nations members, it strengthens their obligations under the charter by making them more precise.[23]

UDHR has no binding force but as a signatory to many UN Convention and Protocols Bangladesh has the obligations to ensure people's access to justice. These legal obligations are *ergaomnes* that is they are obligations in whose fulfillment all states have a legal interest because their subject matter is of importance to the international community as a whole.[24] They

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[22] *Official records of the Third Session of the General Assembly, part l, Plenary Meeting of the General Assembly: annexes to the summary records of meetings. UN, 1948.P. 854.*

[23] *A.H. Robertson, Human Rights in the World (Manchester: Manchester University Press, 1972), 27.*

[24] *Ergaomnes is a Latin phrase which means 'towards al' or 'towards everyone'. In legal terminology, ergaomnes rights or obligations are owed toward all. For instance a property right is an ergaomnes entitlement, and therefore enforceable against anybody infringing that right.*

are also responsible in this regard under the United Nations Charter to promote universal respect for, and observance of, human rights and fundamental freedoms.[25]

The right of access to justice also places a set of obligations on states parties to ensure 'that no individual is deprived, in procedural terms, of his/her right to claim justice'.[26] States are to ensure the rights and freedoms of all individuals in their territory and subject to their jurisdiction, regardless of their status. Article 2(2) of the ICCPR, requires that state parties take the necessary steps to give effect to rights by legislating and building a system of laws and remedies that develops all human rights. This requirement is unqualified and of immediate effect: "A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State."[27]Article 2(1) of the ICESCR outlines that states have the obligation to progressively realise its duties. The ICESCR indicates that states must take steps to realise their obligations and that these steps must be deliberate, concrete, targeted and appropriate.[28]

As the Human Rights Committee explains, "the enjoyment of Covenant rights is not limited to citizens of states parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the state party."[29] In determining the general legal obligations of state party, the

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[25] *Human Rights Committee, General Comment 31, paragraph 2. Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004). https://www1.umn.edu/humanrts/gencomm/hrcom31.html. Accessed on 25 October 2015.*

[26] *Human Rights Committee, General Comment No. 32, pp. 2-3.Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007). https://www1.umn.edu/humanrts/gencomm/hrcom32.html. Accessed on 25 October 2015.*

[27] *United Nations Human Rights Committee General Comment No. 31, CCPR/C/21/Rev.1/Add. 13 (2004) para 14.*

[28] *United Nations, 'General Comment No. 3', Committee on Economic, Social, and Cultural Rights contained in document E/1991/23 (1990), para 2.*

[29] *Human Rights Committee, General Comment 31, paragraph 10. Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).*

Human Rights Committee aptly remarked that the obligations of the Covenant in general are binding on every state party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level national, regional or local are in a position to engage the responsibility of the state party.[30]

Further, as reflected in Article 27 of the Vienna Convention on the Law of Treaties, state parties "may not invoke the provisions of its internal law as justification for its failure to perform a treaty." The Special Rapporteur on the Independence of Judges and Lawyers has stated, "Access to Justice requires the establishment of a judicial system that guarantees rights, and of parallel measures such as mechanisms and programmes to facilitate free legal assistance."[31]

With this end of view it can be said that as a signatory to the international legal instruments every state is obliged to ensure access to justice. International law contains the obligation to promote access to justice in accordance with international obligations of states and the requirements of national law or as provided for in the applicable statutes of international judicial organs. The international legal obligations should be carried out in accordance with national legal requirements and procedures and supports the concept of complementarity.[32] Bangladesh has a legal obligation to recognise these principles - they are not simply aspirational but must become concrete in practice.

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https://www1.umn.edu/humanrts/gencomm/hrcom31.html.Accessed on 25 October 2015.

[30] *Human Rights Committee, General Comment 31, paragraph 4. Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).*

https://www1.umn.edu/humanrts/gencomm/hrcom31.html. Accessed on 26 October 2015.

[31] *Leandro Despouy, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers', A/HRC/8/4, 13 May 2008 at para. 23.*

[32] *In international law the principles of complementarity governs the relationship between the ICC and national legal orders. Article 17 of the Rome Statute allows the ICC to step in and exercise jurisdiction where states are unable or unwilling genuinely to investigate or prosecute, without replacing judicial systems that function properly.*

5. Bangladesh's Responsibilities under National Legal Frameworks to Promote Access to Justice

Constitution is the supreme law in Bangladesh. The constitution pledges in its preamble that "it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation– a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens." The constitution ensures right of equality before the law and citizens to be treated in accordance with the law. Article 27 of the constitution declares, in unequivocal terms, that "all citizens are equal before law and are entitled to equal protection of law."

Article 14 of the constitution states that "[i]t shall be a fundamental responsibility of the State to emancipate the toiling masses the peasants and workers and backward sections of the people from all forms of exploitation." Equality before the law includes that all citizens must be guaranteed the right of equal access to an independent and impartial court or tribunal for the determination of their disputes or claims without discrimination. Equal access means that such ability should not be limited or restricted to certain social classes or groups. It becomes an important issue when that access is restricted, in particular, for women and other marginalised groups.

The provision of equality before law must be considered with the fundamental principles of state policy found in part II of the Constitution. These principles encourage ensuring equality of opportunity to all citizens (Article 19.1), and removal of social and economic inequalities between citizens (Article 19.2). Article 28(1) of the constitution also declares that state shall not discriminate against any citizen on grounds of religion, sex, caste or race. The constitution of Bangladesh has not inserted the term 'access to justice' directly but through the plain interpretation of 'equality before law', 'equal protection of law' and equal access to an 'independent and impartial court or tribunal' it is clear that the right of access to justice is a constitutional right. And being a constitutional obligations Bangladesh as a country is duty bound to promote access to justice.

6. Conclusion

The concept of access to justice, primarily, necessitates a potential system securing appropriate legal remedies within the justice sector. Judiciary, being an integral part of an effective judicial system, has a greater role in ensuring access to justice. In complying with obligations to protect, states should make available fair and effective protective mechanisms as well as easy complaints procedures and remedies. To comply with the obligations to fulfill human rights, states should develop preventive measures, public awareness and education programmes, and gender-sensitive training for judicial and law enforcement officers.

Bangladesh constitution always respects the international norms. Article 25(1) says that: the State shall base its international relations on the principles of … respect for international law and the principles enunciated in the United Nations Charter, … ....This article has no binding force and no one can go to the Supreme Court for enforcement of its violation but it has two important consequences. First, by virtue of Article 8(2) of the Constitution, the principles of Article 25 were to be 'fundamental' to the governance and law-making of the state, and secondly they were to be 'a guide to the interpretation' of the Constitution and other laws. Hence, interpretation of the Constitution and national laws must be in conformity with the basic principles of international law.[33]

[33] *Professor Nurul Islam and Others vs. Bangladesh and Others [2000] 52 DLR 413.*

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Child Trafficking in Bangladesh: Socio-legal Perspective

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To avail a secured childhood is the birthright of every child. While Children are the weakest and most vulnerable segment in the society, a safe environment of upbringing is essential for the better future of them. Approximately 1.2 millions of children fall victim of child trafficking every year in both industrialized and developing countries. Poverty, discrimination, lack of education, lack of awareness, weakness of law enforcement, exclusion, violence, existing social structure, economic system, cultural condition and geographical settings are the root causes of child trafficking in Bangladesh. Children are trafficked both within and between countries for forced labour, prostitution, forced marriage, domestic work, begging, camel jockeying, used by armed groups and many other forms of exploitation. The Major purpose of this paper is to analyze present status, network, process, causes and impacts of child trafficking in Bangladesh. At the same time, the researchers have made an endeavor to focus on the existing legal systems that are working to protect the children of Bangladesh from trafficking. The researchers have also set some suggestions based on the findings of the study.

Key words: *Trafficking, children, development, poverty, violence, labour, prostitution and child marriage.*

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Introduction

All children should enjoy the right to education; have time to play and freedom from all forms of exploitation. Unfortunately, this is not the case of millions of children in the world who are victims of trafficking. The issue of child trafficking has become a major phenomenon both in the national and global arena. Trafficking is known to be the modern way of slavery affecting children all over the world and indeed a growing concern in Bangladesh. A major portion of these trafficked children are girls who become the victim of sexual abuse or commercial sexual exploitation. There are other forms of exploitation as forced labour, forced marriage, domestic work, begging, camel jockeying and serving in the armed groups. Trafficking exposes children to violence and leads to the grave violations of their rights. They are forced to migrate to different territories, denied of the expected standard of livelihood, suffer degradation and kept in inhumane conditions. Child trafficking is a crime under international laws and a violation of children's rights. International communities are striving halt the rampage of child trafficking but the task is seemingly a difficult one to be accomplished because of the clandestine and dynamic nature of the crime. Bangladesh government has taken various initiatives including framing of different laws and policies to combat child trafficking as part of the international community. This paper is aimed to examine the concept of trafficking and child trafficking, routes and process of trafficking, socio-economic causes and impacts as well as the legal protection system of this issue. At the same time, the researchers also tried to recommend a few suggestions to stop child trafficking in Bangladesh as well as other developing countries.

Objective of the Study

The study presents the causes, consequences and the legal framework designed to prevent child trafficking in Bangladesh. The major objectives of this study are as follows:

i. To focus the general picture of child trafficking in Bangladesh.

ii. To identify the causes and consequences of child trafficking around the country.

iii. To examine the legal framework which are working to restrain child trafficking.

iv. To propose a set of recommendations as a way forward.

Methodology

This is a qualitative study and only secondary data have been used. The study has two parts; the first part provides an overall status, causes and consequences of child trafficking in Bangladesh. For this, a review of relevant available documents, articles and web-based information have been used. The second part provides the existing policies and legal frameworks to identify the scope to prevent the issue. This involves reviewing all relevant national laws in this regard. This part shows us the scopes of using the national legal framework. Finally, the recommendation part provides a brief idea of what needs to be done to restrain child trafficking in Bangladesh.

Limitation

Major limitations of this study are as follows:

i. Only secondary data has been used in this study.

ii. National laws are explained in this study. No discussion about international laws, instruments and policies have been made.

iii. No case study or comparative method has been used in this work.

Definition of the Key Terms

Child

The age limit for considering a person as child is not same in accordance with the policy frameworks of different countries and institutions of the world. A child is an individual who is under the age of 18 years according

to the United Nations Convention on the rights of the Child (CRC) 1989[1] and the ILO Convention on the Worst Forms of Child Labour, 1999.[2] The UN Convention against Transnational Organized Crime, 2000 defines that child shall mean any person under eighteen (18) years of age.[3] According to the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002- child means a person who has not attained the age of 18 years.[4] According to the section 2(63) of the Labour Act, 2006 of Bangladesh, children shall include all individuals under the age of 14 and 14–18 age group children shall constitute adolescents in accordance of section 2(8).[5] The Domestic Violence (Prevention and Protection) Act 2010, section 2(5), defines- child means a person below the age of eighteen years.[6] According the National Children Policy 2011 of Bangladesh-children shall include all individuals under age eighteen (18).[7] The Prevention and Suppression of Human Trafficking Act 2012, section 2(14), mentioned that child means a person who has not completed the age of eighteen (18) years.[8] Section 4 of the Children Act, 2013 of Bangladesh defines that person under eighteen (18) years shall be treated as children.[9] However, in this study child shall be considered as eighteen years of age that has been mentioned the above international and national conventions, instruments and laws. Below this ceiling all male and female human being shall be considered as child.

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1 *United Nations, The United Nations Convention on the Rights of the Child, 1989, (New York: UN, 1989).*

2 *International Labour Organization, The Worst Forms of Child Labour Convention, 1999, No. C182 (Geneva: ILO, June 1999).*

3 *United Nations, The UN Convention Against Transnational Organized Crime, 2000, (New York: UN, 2000).*

4 *SAARC, The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002 (SAARC: Katmandu, 2002).*

5 *Government of the People's Republic of Bangladesh, The Labour Act 2006, (Dhaka: Ministry of Labour and Employment, 2006).*

6 *Government of the People's Republic of Bangladesh, The Domestic Violence (Prevention and Protection) Act, 2010, (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 2010).*

7 *Government of the People's Republic of Bangladesh, National Children Policy 2011, (Dhaka: Ministry of Women and Children Affairs, 2011).*

8 *Government of the People's Republic of Bangladesh, The Prevention and Suppression of Human Trafficking Act, 2012, (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 2012).*

9 *Government of the People's Republic of Bangladesh, The Children Act, 2013, (Dhaka: Ministry of Women and Children Affairs, 2013).*

Child Trafficking

The variances in the conviction as to who will be considered as a child has rendered the concept of child trafficking remain unclear. No uniform definition of child trafficking is accepted all over the world. According to the Prevention and Suppression of Human Trafficking Act, 2012, of Bangladesh, section (1) "human trafficking" means the selling or buying, recruiting or receiving, deporting or transferring, sending or confining or harbouring either inside or outside of the territory of Bangladesh of any person for the purpose of sexual exploitation or oppression, labour exploitation or any other form of exploitation or oppression by means of– (a) threat or use of force; or (b) deception, or abuse of his or her socio-economic or environmental or other types of vulnerability; or (c) giving or receiving money or benefit to procure the consent of a person having control over him or her. (2) If the victim of trafficking is a child, it shall be immaterial whether any of the means of committing the offence mentioned in clause (a) to (c) of sub-section (1) is used or not.[10]

The most widely accepted definition of 'trafficking in persons' is found in the Protocol to Prevent Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000. According to the Article 3- (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall included, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be

[10] *Government of the People's Republic of Bangladesh, The Prevention and Suppression of Human Trafficking Act, 2012, op.cit.*

irrelevant where any of the means set forth in subparagraph (a) have been used; (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article and (d) "Child" shall mean any person under eighteen years of age.[11]

It is globally accepted definition of child and human trafficking and in this study child trafficking will be treated those activities which are mentioned above.

Situation of Child Trafficking in Bangladesh

Human Trafficking in Bangladesh is believed to be extensive both within the country and outside the country like India, Pakistan and Middle East. In this country, the incident of trafficking is not an uncommon one and mostly known as 'Pachar'. Due to economic, social and geographical position of the country, 'Manob Pachar' or human trafficking has been surged in this region which includes trade of human person.[12] In the sub-region of southern Asia, Bangladesh is considered one of the main origin points for trafficking and also as a transit country for traffickers moving people to other destination. As the whole process of trafficking remains under cover, unavailability of accurate data has made it more difficult to assess the actual scenario of child trafficking in this region.

According to the Global Report on Trafficking in Persons, 2018, around 59% of the total number of trafficked persons is female and mostly served for sexual exploitation inside and outside the country. The report shows that in 2016, 37% of the victims were male among the total estimated number of trafficking. But this is not a concrete scenario of trafficking because in many cases, trafficking of male victim does not get the attention of media or simply the stories are not available in the present social context of the country. Media coverage report from 1990 to 1999

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11 *United Nations, United Nations Convention on the Rights of the Child, 1989, op.cit.*

12 *Asian Development Bank, Combating Trafficking of Women and Children in South Asia, Regional Synthesis Paper for Bangladesh, India, and Nepal, April, 2003, pp. 18-19.*

indicates a total 3397 number of children have been trafficked from Bangladesh. From them 1714 are girl child and 1683 are boy child and the height number of trafficked children were 927 in 1997. As mentioned earlier, media do not cover all cases, mostly those that are reported to the police station[13] come to light. The illegal trafficking of Bangladeshi Children started for first time with the large scale migration of both male and female labourers to the Middle East. About 10000-20000 women and girls are trafficked annually from Bangladesh to abroad and most of them are children.[14]

The volume of trafficked children in Bangladesh is getting increasingly further. A reported 200000 Bangladeshi women and children have been taken out of the country in the past 10 years. At least 20000 Bangladeshi women and children are trafficked India, Pakistan and Middle East countries. About 50000 Bangladesh girls are trafficked to or through India every year.[15]

Bangladesh National Women Lawyers Association (BNWLA) in a study undertaken in 1997 that 300000 Bangladeshi Children work in the brothels of India and 4700 children were rescued from traffickers in the previous five years. 4500 women and children are trafficked to Pakistan per year. 1000 child trafficking cases were documented in the Bangladesh media press during the year 1990 to 1992 and 69 children were reported being rescued at the border during a three months study in 1995.[16] Although the total number of trafficked children is unknown, newspaper reported that the number of trafficking children was 49 in 2014 and 148 in 2015. The frequency of rescue while or after trafficking had also increased 99% in 2015 than 2014. Most of the cases of trafficking and rescue happened wild

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13 *Shamim, I. Trafficking in Women and Children: Situation Analysis, Combating Child Trafficking of Women and Children in South Asia, Centre for Women and Child Studies Dhaka, 2001, Country Paper, Dhaka, July 2002, pp. 24-25.*

14 *Huda, S. Sex Trafficking in South Asia, International Journal of Gynocology and Obstetrics, (2006), 94(3), pp. 374-381;http://www.reseachgate.net/publication/6938429_Sex_trafficking_in_South_ Asia.*

15 *Bangladesh Institute of Peace and Security Studies, Issue Brief, Human Trafficking: A Security Concern for Bangladesh, Dhaka, August 2001, p. 3.*

16 *Bangladesh National Women Lawyers Association (BNWLA), Combating Trafficking of Women and Children in South Asia, Country Paper, Dhaka, July 2002, p. 11.*

trafficking from sea at the Bay of Bengal (BSAF, 2015). Total 60 children have been rescued in 2016 and 25 children in 2017 which is nearly 60% less than the year 2016.[17] The number of child trafficking and rescued has also increased to 28% in 2018 than 2017 and total number of rescued children are 32.[18]

Routes of Trafficking

In South Asia, Bangladesh is the main countries of origin for trafficking, while India and Pakistan are considered countries of destination or transit to other region, commonly the Gulf States of Southeast Asia. Kolkata in India is regarded as a major transit point for other destinations. International routes of trafficking are- Bangladesh to India, Bangladesh to India then Pakistan, Bangladesh to India then Middle East, Bangladesh to Pakistan then Middle East.[19]

Bangladesh has a 4222 km. long border with India and a 288 km common border with Myanmar. Twenty-eight (28) of the 64 districts of Bangladesh have common borders with India and two have borders with Myanmar.[20] The Benapol border of Jashore is used as one of the easiest way out to India. With so many exits and escape routes with the neighboring countries, the Monitoring and policing any unlawful activities; be it trafficking of humans or smuggling, is a gigantic task, and the traffickers take advantage of this situation. The most preferred route, used by them is the land route followed by air and waterways. There are as many as 18 transit district for trafficking.[21]

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17 *Bangladesh Shishu Adhikar Forum (BSAF), State of Child Rights in Bangladesh-2015, (BSAF: Dhaka, 2017), pp. 17-18.*

18 *Bangladesh Shishu Adhikar Forum (BSAF), State of Child Rights in Bangladesh-2018, (BSAF: Dhaka, 2019), pp. 29-31.*

19 *Rukhsana Gazi, Ziaul Haque Chowdhury at.al, Trafficking of Women and Children in Bangladesh, An Overview, ICDDR, B: Center for Health and Population Research, Mohakhali, Dhaka-1212, 2001, pp. 33-38.*

20 *Sabiha Yeasmin Rosy, Trafficking in Women in Bangladesh: Experiences of Survivours and challenges of Their Reintegration, Faculty of Psychology, Department of Health Promotion and Development, University of Bergen, Norway, 2013, p. 5.*

21 *Rukhsana Gazi, Ziaul Haque Chowdhury at.al, Trafficking of Women and Children in Bangladesh, An Overview, op.cit., pp. 33-38; Md. Razidur Rahman, Human Trafficking in South Asia (Special*

Though the traffickers play a major role in the entire trafficking process, many other people directly or indirectly also contribute. Family members, community leaders, and teachers influence motivations and decisions for a person to leave their community and then become caught up in trafficking. Those who benefit from trafficking are also implicated, including various labour agents, promoters, brokers, border police, hoteliers, transport agents, brothel owners and clients, factory owners and household members who use these trafficked children as domestic workers.[22]

Causes of Child Trafficking in Bangladesh

Push factor for child trafficking are economic hardship, abuse home environment, gender discrimination, social exclusion dysfunctional family, social acceptance of child labour and early marriage and so on. Against the backdrop of the economic condition of the family, children from the marginal social sects are pushed to be trafficked either willingly or forcibly. There are these alluring fake promises of jobs or marriage by the traffickers, illusion of a better life in the cities and safe work and illusion of escaping abuses away from home which serve as pull factors attracting victims into trafficking.[23] Pull factors encourage young people or those are already living in dangerous circumstances to seek out more secured or sustaining positions in life then they find it available in their own communities. The root causes of child trafficking are multiple and complex. There are push and pull factors, which are mainly responsible for internal and external trafficking of children in Bangladesh. The push factors could be identified in many ways. Low employment opportunity, social vulnerability, economic vulnerability, urbanization and migration, etc. are considered to be the push factor for child trafficking. On the other hand wage employment or bounded labour, labour migration, poverty

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Preferences on Bangladesh, India and Nepal): A Human Rights Perspective, IOSR Journal of Humanities and Social Science, Volume 20, Issue 3, Ver. VI, 2015 e-ISSN:2279-0837, p. 3.

22 *Asian Development Bank, Combating Trafficking of Women and Children in South Asia, Manila, 2003, pp. 18-19.*

23 *Sabiha Yeasmin Rosy, Trafficking in Women in Bangladesh: Experiences of Survivours and challenges of Their Reintegration, op.cit., pp. 39-43.*

violence against children, child marriage, prostitution, cultural myths, etc. are considered to be pull factors for child trafficking from Bangladesh.[24]

Bangladesh is one of the most vulnerable countries for child trafficking because of its large number of population, large scale of rural-urban migration, and the large population living in conditions of chronic poverty, recurrent natural disaster and gender inequality. During disaster situation like river bank erosion, over flood, and such other situation, lack of shelter for girl children and their security are the great problems. The traditional social structure, economic system, cultural condition and geographical setting of Bangladesh make children become easy victim of human traffickers. The traffickers lure the poor families of the rural areas of Bangladesh with the false promise of employment, marriage without dowry and better quality of life. A huge portion of the population in Bangladesh is illiterate and unemployed. As a result they are economically insolvent.[25] The traffickers take this chance for trafficking. The children of economically insolvent families become easy target this way, as they come to believe in the fake promises of the traffickers of getting a better life for these children. Parent's illiteracy, illness or death of one of the main family bread winners, large family in poverty, early school drop-out, domestic violence, son/male preference, absence of workplace inspection or policing, special demand of child labour, drug addiction, homelessness are the major factors that contribute creating child trafficking in Bangladesh. Love affairs, globalization and impact of technological development and easy access of social media communication are also leading factors for child trafficking in Bangladesh.[26]

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[24] *Rukhsana Gazi, Ziaul Haque Chowdhury at.al, Trafficking of Women and Children in Bangladesh, An Overview, op.cit., pp. 20-22; Sabiha Yeasmin Rosy, Trafficking in Women in Bangladesh: Experiences of Survivours and challenges of Their Reintegration, op.cit., p. 39-43.*

[25] *Md. Razidur Rahman, Human Trafficking in South Asia (Special Preferences on Bangladesh, India and Nepal): A Human Rights Perspective, op.cit., ,pp. 3-4.*

[26] *Rukhsana Gazi, Ziaul Haque Chowdhury at.al, Trafficking of Women and Children in Bangladesh, An Overview, op.cit., pp. 18-22; Sabiha Yeasmin Rosy, Trafficking in Women in Bangladesh: Experiences of Survivours and challenges of Their Reintegration, op.cit., pp. 39-43.*

Consequences of Child Trafficking

Violation of child rights is the violation of human rights and child trafficking is the violation of human rights of children. The trafficking children are compelled to involve in sex-trade with the high risk of getting infected by sexually transmitted deceases (STD), domestic work, harmful industrial work, debt bondage labour, forced marriage, camel jocking, adoption trade and sometimes trafficked victims are killed for organ harvesting. The specific consequences are- (i) The young children are being victim of deception with the false hope of employment and marriage without dowry and ultimately many of them are involve in sex trade, (ii) Many of the children are compelled to forced marriage, forced begging, camel jockeying due to coercion, (iii) Spreading of Sexually transmitted diseases including HIV/AIDS due to expansion of sex industry, (iv) Women and children are subject of forced labour and slavery like practices, (v) Many children are being victim of debt bondage labour and (vi) Sometimes trafficked victims are killed for organ harvesting.[27]

Recent Progress in Combating Trafficking

With all the economic and socio- cultural limitations of a developing country, Bangladesh has made remarkable achievements in fighting human trafficking over the past few years. The TIP report 2020 has ranked Bangladesh in the Tier 2 list from the Tier 2 Watch list.[28] Growing number of Criminalization and conviction of the offenders is one of the reasons behind the success in combating human trafficking. Bangladesh has established seven anti-trafficking tribunals to try and offend the trafficking agencies as well as the individual offenders working in collaboration with national and international trafficking groups. The Prevention and Suppression of Human Trafficking Act, 2012 has stringent penalties for sex trafficking which played an effective role in criminalizing the offenders. The report shows that, Bangladesh government has investigated

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[27] *Rukhsana Gazi, Ziaul Haque Chowdhury at.al, Trafficking of Women and Children in Bangladesh, An Overview, op.cit., pp. 38-39; Sabiha Yeasmin Rosy, Trafficking in Women in Bangladesh: Experiences of Survivours and challenges of Their Reintegration, op.cit., p. 16.*

[28] *Department of State, United States of America, Trafficking in Persons Report, 2020, p. 93.*

403 cases under the Act, has prosecuted 312 offenders of which 256 cases were for sex trafficking and 56 for forced labour. The report further shows that, 39 cases have been dealt by the Tribunals among which 25 traffickers have been convicted in 9 cases and 17 of them were sentenced with imprisonment for life, 68 suspected traffickers got acquittal in 30 cases.[29]

The elevation into tier 2 of Bangladesh also indicates that Bangladesh is comparatively in a better position in trafficking combating than the neighboring countries situated in the south-east sub-region of trafficking. Bangladesh, India and Nepal are in Type 2 list where Pakistan, Sri Lanka, Bhutan and Maldives are on Watch 2 List at present.

Despite this progression, Bangladesh is still far from achieving the minimum standard of elimination of human trafficking. There are still lack of clarity in reports of cases, lack of proper collaboration of government agencies, NGOs and media coverage and insufficiency in taking protective measures by the Bureau of Manpower and Employment Training (MBET) while recruiting manpower for the overseas making ample room for illegal operation of sub agents. The Government is relentlessly working on the implementation of 2018-2022 anti-Trafficking national action Plan initiated by the Ministry of Women and Children Affairs. But there are insufficient rehabilitation Centre for the victims and lack of identification of potential victims, lack of measures against the commercial sex establishments and proper training of the officials which are slowing down the pace for achieving complete elimination of human trafficking in Bangladesh. Moreover, the recent Rohingya refugee crisis has made the situation more complicated with an estimated number of one million Rohingya influx made after 2017 in Bangladesh. Bangladesh government is struggling to provide them with proper security and protection. These people specially the women and girls are constantly being victimized and exploited because of the vulnerable situation prevailing in the Rohingya Camps.

[29] *Department of State, United States of America, Traficking in Persons Report, 2020, op.cit., p. 95.*

Anti-Trafficking Laws and Polices of Bangladesh Government

Bangladesh is a party to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others, 1949, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, UN-Convention on the Rights of the Child, 1989, the Optional Protocol to Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against, Transnational Organized Crime, 2002, the SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia, 2002 and many special sessions of the General Assembly on women, children and human rights, trafficking and migration, the international and regional commitments to combat human trafficking, particularly trafficking in women and children. These commitments are consistent with a number of provision of the Bangladesh Constitution, including the fundamental rights of equality and equal protection (Article 27); right to free and compulsory education (Article 17); right to public health and morality (Article 18); right to be free from discrimination on the basis of religion, race, sex or place of birth (Article 28); right to protection of law (Article 31); prohibition of forced labour (Article 34); torture to cruel, inhuman, or degrading treatment (Article 35); and freedom of movement (Article 36).[30] These commitments are also reflected in various national plans, and policies including the National Children Policy 2011, National Plan of Action Against the Sexual Abuse and Exploitation of Children Including Trafficking, 2002. National Plan of Action for Children 2004-2009. National Action Plan to Prevent Violence Against Women and Children 2013-2015.

[30] *Government of the People's Republic of Bangladesh, The Constitution of the People's Republic of Bangladesh (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 2011).*

Trafficking of Children and related activities can be prosecuted under several laws.

Dowry, child marriage, child labour, oppression and domestic violence are pull factors creating child trafficking in Bangladesh. In this point of views, the Dowry Prohibition Act, 1980, the Prevention of Oppression Against Women and Children Act, 2000, the Births and Deaths Registration Act, 2004, the Labour Act, 2006 and the child Marriage restraint Act 2017 are playing vital role directly or indirectly to prevent Child trafficking in Bangladesh. But the Prevention and Suppression of Human Trafficking Act, 2012 is the leading law which is playing vital role to prevent child trafficking in Bangladesh.

The Panel Code of 1860

The Panel Code of 1860, as amended in 1991, provides criminal penalties for kidnapping, abduction, slavery, forced labour, rape, wrongful confinement, selling or buying children for prostitution, and other offences, with punishment of seven years or more and/or fines.[31]

The Dowry Prohibition Act, 1980

The Dowry Prohibition Act, 1980, section 4 mentioned that if any person demands directly or indirectly, from the parents or guardian of a bride or bridegroom, as the case may be, dowry, he shall be punishable with imprisonment which may extend to five years and shall not be less than one year, or with fine, or with both. If this Act applies properly then it will help to stop dowry that will directly or indirectly play effective role to prevent child trafficking in Bangladesh.[32]

The Prevention of Oppression against Women and Children Act, 2000

The Prevention of Oppression Against Women and Children Act, 2000, section 6(1) mentioned that if any person fetches a child from abroad or

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[31] *Government of the People's Republic of Bangladesh, The Panel Code, 1860 (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 1973).*

[32] *Government of the People's Republic of Bangladesh, The Dowry Prohibition Act, 1980 (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 1980).*

dispatches or smuggles abroad for any illegal or immoral purpose, or sell or purchases or keep a child in his procession, custody or security for such purpose, he/she shall be punished with death or rigorous transportation for life and also with fine.[33]

The Births and Deaths Registration Act, 2004

The Births and Deaths Registration Act, 2004, section 18(i) and (iii) mentioned that the birth certificate issued under this Act shall be deemed to be one of the primary evidences of age and birth related information of a person to any office or court or school-college, government and non-government organization. The birth certificate shall be used to prove the age of a person in such cases: (a) Issuance or passport; (b) Registration of marriage; (c) Admission in the educational institutions; (d) Appointment in government or non-government organization; etc. If it apply properly and every child register legally then it will be easy to measure the actual age of every child. It will help to stop child marriage, child labour and other forms of child abuse. So, the Births and Deaths Registration Act is very important protective instrument for prevent child trafficking in Bangladesh.[34]

The Labour Act 2006

The Labour Act 2006, section 284 mentioned that if any person employees any child or adolescent to work he shall be punished with fine which may extend 5000 taka. If the parent or guardian of a child makes an agreement in respect of the child, he shall be punished with fine which may extend to 1000 taka according to the section 285. Though there is no strong section of this Act to stop child labour but if it applies properly then it will play effective role to stop child labour and that will help to prevent child trafficking in Bangladesh.[35]

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[33] *Government of the People's Republic of Bangladesh, The Prevention of Oppression Against Women and Children Act, 2000 (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 2000).*

[34] *Government of the People's Republic of Bangladesh, The Births and Deaths Registration Act, 2004 (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 2004).*

[35] *Government of the People's Republic of Bangladesh, The Labour Act 2006, op.cit.*

The Prevention and Suppression of Human Trafficking Act, 2012

The Prevention and Suppression of Human Trafficking Act, 2012, is the leading Act that is working to prevent child trafficking in Bangladesh. Section 6(2) of this Act fixed that if any person committed human trafficking he or she shall be punished not exceeding imprisonment for life time but not less than 5 (five) years or rigorous imprisonment and with fine not less than taka 50 (fifty) thousand. Each member of organized trafficking group shall be punished with death or an imprisonment for life or rigorous imprisonment for a team not less than 7 (seven) years and with fine not less than taka 5 (five) lac in the light of section 7. A person shall be punished with rigorous imprisonment for a term not exceeding 7 (seven) years but not less than 3 (three) years and with fine not less than taka 20 (twenty) thousand, if any person allowing his property for the purpose of trafficking according to the section 8. Section 10(1) mentioned that if any person kidnaps, conceals or confine any other person with intent to commit the human trafficking, he or she shall punished with rigorous imprisonment for a term not exceeding 10 (ten) years but not less than 5 (five) years and with fine not less than taka 20 (twenty) thousand. A person shall be punished with imprisonment for life time or with rigorous imprisonment for a term not less than 5 (five) years and with fine not less than taka 50 (fifty) thousand, if he or she steals or kidnaps a newborn baby with intent to commit the offence of trafficking according to the section 10(2). Section 11 fixed that if any person bring any other person into Bangladesh or transfers the person inside the territory of Bangladesh for engaging in prostitution or any other forms of sexual exploitation, he or she shall be punished for the offence with rigorous imprisonment for a term not exceeding 7 (seven) years but not less than 5 (five) years and with fine not less than taka 50 (fifty) thousand. For the purpose speedy trial of the offences under this Act, the Government may establish an Anti-Human Trafficking Offence Tribunal consisting of a judge of the rank of a Sessions Judge or Additional Sessions Judge in any district in the light of section 21(1) of this Act. Section 24(1) mentioned that the Tribunal shall conclude the trial within 180 (one hundred and eighty) working days from the date on which a charge for the offence of human trafficking. This Act

is playing vital role to prevent all forms of human trafficking in Bangladesh. So it is very important to apply this Act properly to prevent child trafficking in Bangladesh.[36]

Overseas Employment and Migration Act 2013

This law has provided that, the government will be the controlling authority for sending workers for emigration. It has kept mandatory provision for holding license for the recruiting agencies. The license will be granted by the government and the government will also exercise the power of suspension and cancellation of license on the mentioned grounds in accordance with the law. The Act has also takes protective measures for the migrant by providing rule of registration. Persons intended to migrate as worker has to register with the bureau and get migration clearance from it. There is also provision for establishment of Labour Welfare Wing in the Bangladesh Mission of any country, if required. This law has envisioned a bunch of rights for the migrant workers and set down the legal measures to avail such rights. Imprisonment upto five years and a penalty of not more than one lakh Bangladeshi Taka have been prescribed for illegal sending of migrant workers. Punishment has also been provided for unauthorized publishing of advertisements, for arranging departure except from the specified places and non-compliance with the provisions of the law. There are certain loopholes can be traced in the Act, such as the Bureau of Manpower, Employment and Training has been made liable for the protection of the migrant workers though no definite set of guidance or accountability tools of the bureau has been provisioned in the law.[37]

The Child Marriage Restraint Act, 2017

Child marriage is a form of child trafficking in Bangladesh. According to the section 7 of the Child Marriage Restraint Act, 2017 in Bangladesh, if any adult male or female contacts child marriage, he or she shall be punished with imprisonment which may extend 2 (two) years, or with fine

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[36] *Government of the People's Republic of Bangladesh, The Prevention and Suppression of Human Trafficking Act, 2012 op.cti.*

[37] *Government of the People's Republic of Bangladesh, The Overseas Employment and Migration Act 2013 (Dhaka: Ministry of Law, Justice and Parliamentary Affairs, 2013).*

which may extend to 1 (one) lakh taka, or in both. If parent or guardian of a minor arrange his or her child marriage, he or she shall be punished with imprisonment which may extend to 2 (two) years but not less than 6 (six) months, or with fine which may extent to 50 (fifty) thousand taka, or with both according to the section 8. If any person solemnizes or conducts a child marriage the same punishment will applicable for him according to the section 9. If any Marriage Registrar registers a child marriage, he will punish the same and at the same time his license or appointment shall be cancelled according to the section 11. This Act is effective to restrain child marriage in Bangladesh and it will help to prevent child trafficking in Bangladesh.[38]

Recommendations

Child Trafficking results in the utter violation of child rights that stops the opportunity for the children to develop their better future. It is a major problem in South Asia and Asia- Pacific region. So it is essential to take initiatives to prohibit child trafficking in other South Asian and Asia-Pacific countries including Bangladesh. On the basis of this study researchers have sets some recommendations to prohibit child trafficking in Bangladesh which is given below:

- Raise greater public awareness about the cause, consequences and the protection systems of prohibiting child trafficking in Bangladesh. Promote cooperation and partnership among various government agencies such as police, Border Guard of Bangladesh, welfare and medical service provider. Involve non-governmental organizations, the private sector and civil society in the preventions, prosecution, and repatriation and reintegration aspects of child trafficking.
- Government should take initiatives of special schooling programme for poverty-stricken areas. At the same time

[38] *Government of the People's Republic of Bangladesh, The Child Marriage Restraint Act, 2017 (Dhaka: Ministry of Women and Children Affairs, 2017).*

government should provide allowances for the poor families and accelerate the food for education programme at the large scale.

- Improve information sharing between state agencies at the local and national level is essential. Government should establish a data bank on child trafficking including incidence rates, trafficking patterns in countries of origins, transits and destination, and investigation information as well as number of cases prosecuted.
- Promote exchange of information, best practices and lesson learned among the countries of South Asia and Asia-Pacific region. Develop anti-trafficking information materials for dissemination to diplomatic and consular mission in concerned countries, including information on where to seek assistance.
- Government should take initiatives to ensure free and compulsory birth registration and free birth certificate for every child.
- Existing laws and regulations against child trafficking must be place and rigorously enforced by the law enforcement agencies.

Conclusion

Child trafficking is today a major social and political concern both globally as well as nationally. It has also become the fastest growing criminal enterprise in the world which is extremely alarming in South Asia, especially for a poverty stricken country like Bangladesh. Child trafficking is both a cause and consequence of the violation of human rights. Several human rights are violated in the trafficking process including the very right to life, the right to liberty and human dignity, and security of person, the right to freedom from torture or cruelty, inhuman or degrading treatment, the right to a home and family, the right to healthcare and everything that makes for a life with dignity. Bangladesh government enacted different Acts, Laws and Ordinances relating to the issue of child trafficking. Besides The Existing Penal laws such as the Penal Code of 1860 and the Dowry Prohibition Act, 1980 contemporary laws like the Prevention of Oppression Against Women and Children Act, 2000, the Births and Deaths Registration Act, 2004, the Labour Act, 2006, the Prevention and Suppression of Human Trafficking Act, 2012 and the

Child Marriage Restraint Act, 2017 have been enacted to directly or indirectly prohibit child trafficking in Bangladesh. Bangladesh government has also taken some programmes to prohibit child trafficking. These Acts, Laws, Ordinances and policy measures are playing vital role to decrease the issue of child trafficking. Though the desired goal is yet to achieved, it can be expected that the combined efforts made by the governmental as well as non-governmental agencies will pave the way for complete elimination of child trafficking in the near future.

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A Critical Analysis of Suit for Declaration of Title

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In the vast civil suit pasture, 'suit for declaration of title', commonly known as 'title suit' is the most popular form in our country. It is filed under section 42 of the Specific Relief Act, 1877. Under this section the plaintiff can file suit praying for declaratory reliefs against the defendant. In doing so, the plaintiff must have legal entitlement or title as to the legal character or right to property. However, granting declaratory reliefs is a discretionary power of the Court. There is no hard and fast rule for exercising such discretion. The plaintiff must prove his entitlement to the reliefs he prayed before the Court for declaration. This declaration is binding upon the litigating parties (whether contesting or not) and also upon them who are claiming thereto through the litigating parties by dint of section 43 of the said Act. Whether section 42 is exhaustive to entertain all kinds of declaratory suits is a subject matter of never ending controversy. It is neither possible to summarize all forms of declaration suits nor possible to speculate all the likely circumstances coming within its purview. Nevertheless, section 42 is wide open entertaining different kinds of declaratory reliefs. In the context keeping this controversy aside, this article aims to analyze the 'suit for declaration of title' critically examining the requirement for 'title', 'entitlement', 'legal character' and 'right to property' for seeking declaratory prayers in a title suit subject to 'discretion of the Court'.

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Introduction

There is no formal definition of 'the suit for declaration of title' or 'title suit' under any statute. In general, suit for declaration of title always denotes a civil suit filed under section 42 together with section 5 of the Specific Relief Act, 1877 (henceforth referred to as *'the Act')* praying declaratory reliefs. Of all provisions of the said Act, section 42 is the most frequently invoked in civil litigations in Bangladesh.[1] Under this section, declaration of title suit is filed for declaratory relief. 'Declaratory relief' and 'declaration of title' are different. The second one is the part of the former synthesis which offers various kinds of reliefs in the nature of declaration that includes declaration of title. Though most of the civil suits seeking declaratory reliefs are generally registered as 'title suit' in our country, however not all the declaratory prayers are for declaration of title, such as, partition suit, other class suit and others[2].

In this context, 'title' shortly refers to 'entitlement' so far reliefs are concerned, in which the party seeking relief is entitled to or not. Any right or legal character in which a person is entitled can file a title suit. However, 'entitlement' refers to a wider scope than 'title'. Under the circumstances, whether title suit under section 42 can embrace all kinds of declaratory reliefs is still open for controversy. It's not even required with hard and fast rule, rather openness of the declaratory prayers with the discretionary power of the Court keeps section 42 time worthy and well espousal. This is one of the main reasons behind that still the application of section 42 has not fallen blur despite the promulgation of several new enactments e.g. Artha Rin Adalat Ain, 2003, Companies Act, 1994, Bank Company Act, 1991, etc. restraining the jurisdiction of civil court to some extents. However, the wide scope of declaratory relief exercisable with the discretionary power of the Court under section 42 is playing key role in civil litigation protecting the rights of the civilians irrespective of the

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[1] *Probir Neogi, The Law of Specific Relief (first published 2011, Mullick Brothers) 553.*

[2] *Example : praying that some documents are not binding, a committee is illegal, not entitled to the disputed post or committee, not entitled to publish plaintiff's name, a negotiable instrument is not binding, etc.*

controversy whether this section is exhaustive for entertaining all kinds of declaratory reliefs.

This paper will embark on an analysis of the 'suit for declaration of title' critically examining the requirement for 'title', 'entitlement', 'legal character' and 'right to property' for seeking declaratory prayers in a title suit subject to 'discretion of the Court'.

Legal Originator

When a suit is filed for declaration of title, it is basically the relief which is sought for in the form of declaration. The declaration is like praying for something to be declared in favor of the party who is praying so (generally plaintiff) against the party who will be bound by the declaration (generally the defendant). For example: if the plaintiff is praying for declaring his or her title of ownership on certain land against the defendant, the plaintiff will pray for declaring the title of ownership from the Court. If the plaintiff is praying for declaring his or her dismissal from service by the defendant is illegal and the same should not be binding upon him or her, then he or she will pray for declaring his or her dismissal from service is illegal and not binding upon him or her.

Suit for declaration of title denotes a suit of civil nature filed under section 42 whereupon the relief is fundamentally rooted in section 5 of the same Act. Section 5 provides the types of specific reliefs can be given.[3] The provision of section 5(d) provides the specific relief by determining and declaring the rights of parties otherwise than by an award of compensation. Sections 42 and 43 elaborate this relief further. Section 42 provides that any person entitling to any legal character or property can

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[3] *Section 5 : Specific relief is given-*

(a) by taking possession of certain property and delivering it to a claimant;

(b) by ordering a party to do the very act which he is under an obligation to do;

(c) by preventing a party from doing that which he is under an obligation not to do;

(d) by determining and declaring the rights of parties otherwise than by an award of compensation; or

(e) by appointing a receiver.

file suit for declaration of title. It allows a person to file declaration suit for his entitlement to any legal character or to any right as to any property against any person denying or interested to deny his title to such character or right.[4] Two very important words i.e. the elixirs of this section are 'entitlement' and 'title' along with 'legal character' and 'right as to any property', which are to be examined elaborately, as hinted above, for proper understanding the nature and scope of suit for declaration of title.

About 'Title' or 'Entitlement'

No definition of 'title' is provided under any statute. Sub-section (4) of section 2 of the Sale of Goods Act, 1930 gives the definition of "document of title to goods" and it includes "a bill of lading dock-warrant, warehouse keeper's certificate, whar-fingers" certificate, railway receipt, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented". This definition is only confined to the documents which can proof the title of goods so far relating to the possession or control of goods or proper authorization for delivery. In view of the definition of 'document of title to goods' is given in Sub-section (4) of section 2 of the Sale of Goods Act, a consignee would be entitled to the goods as the owner.[5]

The Cambridge Dictionary describes 'title' from legal perspective as the legal right to own a piece of land or a building, or a document that proves

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[4] *Section 42 of the Specific Relief Act, 1877 reads out "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:*

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation - A trustee of property is a "person interested to deny" a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee."

[5] *Mul Chand Chuni Lal vs. The Union of India (UOI)[1966] AIR 395 (SC), The Union of India vs. The West Punjab Factories [1974] ILR 2 Punjab and Haryana 429.*

this right, such as if you wish to sell the property, you will first have to prove your title to it.[6] The Collins English Dictionary describes 'title' as he or she legal ownership of something, especially land or property.[7] The Business Dictionary defines as the "union of the legal rights of ownership, possession, and custody, evidenced by a legal document (instrument) such as a bill of sale, certificate of title, or title deed. A legal title empowers its holder to control and dispose of the property and serves as a link between the title holder and the property itself."[8] The Black's Law Dictionary provides that "in real property law title is the means whereby the owner of lands has the just possession of his property."[9] The Merriam-Webster provides different definitions for legal title from different perspectives, in general as, the means or right by which one owns or possesses property broadly: the quality of ownership as determined by a body of facts and events.[10] It goes on defining 'after-acquired title', 'clear title', 'equitable title', 'good title', 'Indian title', 'just title', 'legal title', 'lucrative title', 'marketable title', 'onerous title', 'paper title', 'paramount title', 'particular title', 'record title', 'tax title', 'universal title'.[11]

On the other hand, 'entitlement' is defined as something that we have a right to do or have, or the right to do or have something.[12] The Merriam Webster defines 'entitlement' as "1(a) the state or condition of being entitled :right, (b) : a right to benefits specified especially by law or contract, (2) : belief that one is deserving of or entitled to certain privileges and (3) : a government program providing benefits to members of a specified group also : funds supporting or distributed by such a

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6 *<https://dictionary.cambridge.org/dictionary/english/title>Accessed 8 August 2019.*

7 *<https://www.collinsdictionary.com/dictionary/english/title> Accessed 8 August 2019.*

8 *<http://www.businessdictionary.com/definition/title.html>Accessed 9 August 2019.*

9 *The Black's Law Dictionary provides a long definition of title from various perspectives. However, title is the mean whereby a person's right to property is established.*

Black's Law Dictionary Free Online Legal Dictionary (2nd Ed).

<https://thelawdictionary.org/title-legal/> Accessed 11 August 2019.

10 *<https://www.merriam-webster.com/dictionary/title>Accessed 14 August 2019.*

11 *Ibid.*

12 *<https://dictionary.cambridge.org/dictionary/english/entitlement>Accessed 8 August 2019.*

program".[13] The Collins English Dictionary defines the entitlement as an entitlement to something is the right to have it or do it.[14] The Black's Law Dictionary defines as "in general, that which is entitled. (1) Old age pension, social security, unemployment stipend stating a distribution or privilege or right to an economic benefit. Typically granted by contract or law. Meeting the required qualification triggers the entitlement. (2) Reference to a precedence or established procedure defends a right or claim. (3) Benefits to members of a particular group in a Government scheme. (4) Offer to the holder of a security, or physical transfer of cash or stock shares as a payment."[15]

In a title suit, the title or entitlement is determined. In many cases the words 'title' or 'entitlement' are used interchangeably. Generally, the word 'title' refers to 'ownership'. The word 'entitlement' may not always mean ownership because without being the absolute owner of something a person can be entitled thereto.[16] 'Entitlement' has got wider application and meaning than 'title'. It depends on the situation. The word 'entitlement' would necessarily give a wider meaning to the word 'title'.[17]

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13 *<https://www.merriam-webster.com/dictionary/entitlement>Accessed 11 August 2019.*

14 *<https://www.collinsdictionary.com/dictionary/english/entitlement>Accessed 8 August 2019.*

15 *Black's Law Dictionary Free Online Legal Dictionary (2nd Ed).*

<https://thelawdictionary.org/entitlement/>Accessed 8 August 2019.

16 *Such as, a tenant has possessory right over the lease property and he has got the entitlement to take legal action if someone tries to evict him illegally. Anyone is entitled to challenge any statute if he becomes aggrieved by any provision of it. Any legal status or standing can entitle a person to invoke a legal right. It depends on each situation and legal position.*

17 *Though not exactly relevant here, however in an India case (writ petition on an income tax issue) a convincing explanation has been made differentiating between the words 'title' and 'entitlement'. It was explained that "In our view, the word "title" in sub-section (3) of section 269UG should be considered not merely as relating to the "ownership" of the part or whole of the consideration but as referable to the "entitlement" of the persons to receive the consideration. The word "entitlement" would necessarily give a wider meaning to the word "title", thereby taking in even a dispute as to the entitlement of the person challenging the provisions of the Act or the order of vesting earlier passed by the authorities. The position is that when a person challenging the vires of the provisions relating to compulsory acquisition under the Income Tax Act, is consequentially challenging the validity of the order of vesting, or is independently challenging the validity the order of vesting, it would, in our view, be not unreasonable for the Income Tax Department to say that such a person is not unconditionally entitled to receive the apparent consideration within the period specified in section 269UG and that there is a dispute as to the entitlement of the person to receive the consideration. In such an event, it would be open to the Department not to tender the apparent consideration under*

The party claiming entitlement to any right or legal character or property must prove the entitlement or title to such right or legal character. For that reason it is said that in a title suit the plaintiff has to prove his case. Thus, the burden of proof ultimately lies upon the plaintiff in a civil suit. However, it's the Court's discretion to declare such entitlement.

Legal Character or Right

A suit for declaration is maintainable under section 42 as to any legal character or to any right as to any property of the plaintiff if the defendant denies or is interested to deny his or her title to such character or right. If the above conditions are satisfied, the plaintiff does not need to ask for any further relief than a mere declaration.[18]

The concept of 'legal character' in section 42 is wide enough to include the status of a person. In order to entitle the plaintiff to bring a suit under section 42, it is not necessary that the defendant should actually deny the plaintiff's legal character. If the claim which might be set up by the defendant is a hindrance to the plaintiff in the exercise of his or her rights or would expose him or her to liability if he or she disregarded, it he or she might come to Court for a declaration that the claim so set up by the defendant was not well founded.[19] Thus, 'legal character' denotes a personal and special right not arising out of contract or tort, but of legal recognition. For example, rejection of plaintiff's application for allotment

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section 269UG but to deposit the same before the appropriate authority under sub-section (3). If a person is questioning the validity of the provisions relating to compulsory acquisition or the order of vesting he could not claim to receive the apparent consideration as a matter of right or unconditionally even before a decision is rendered as to the vires of the provisions or as to the validity of the order of vesting, if a deposit could, therefore, be made under section 269UG, the provisions relating to revesting in the apparent manner under section 269UH(2) would not be attracted."

Sooni Rustam Mehta and Ors. vs. Appropriate Authority, Income Tax Department [1991] 2 ALT 560.

[18] *Divisional Forest Officer, Dhaka vs. Md. Shahabuddin and others [2008] 5 ADC 91.*

[19] *Noor Jehan Begum vs. Eugene Tiscenko [1942] AIR Cal 325.*

may create legal recognition enforceable against a person whose similar application is accepted.[20]

'Legal character' is nicely explained in the case of Burmah Eastern Ltd. vs. Burmah Eastern Employees' Union[21], wherein, legal character is used as synonymous with the expression 'status'. However, this 'status' or 'character' should be conferred by law. It was held that the expression 'legal character' or 'status' denotes a character or status conferred by law on an individual or a number of individuals, viewed as a unit of society and not shared by the generality of the community but only by individuals, placed in the same category of character. The character itself must be conferred by law on persons viewed from the standpoint of membership of the community.[22]

Therefore, the character i.e. the status of the plaintiff must have legality for seeking relief. The relationship between the 'legality' and the 'character of the plaintiff' along with 'the relief claimed thereon' must have direct nexus and close connection. It depends on the plaintiff, the subject matter and the relief sought for. Therefore, it is ultimately each fact and situation that determines the legal status or legal character of the parties. In addition, it's not the parties only who determine their characters. Parties express their position and status with their facts. It's the Court who is to decide the 'status' or 'character'. It leaves the power of the Court discretionary and wide. But it does not permit an unrestricted right of instituting all kinds of declaratory suits at the will and pleasure of parties. The right is strictly limited. This is patent. The plaintiff cannot allege any infringement of a right to property.[23] This discretionary power is to be exercised cautiously and not going beyond the setting norms and

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[20] *MirpurMazar Co-operative Market Society Ltd vs. Secretary, Ministry of Works, Government of Bangladesh and ors [2000] 52 DLR 263.*

[21] *[1967] PLD Dac 190.*

[22] *Ibid.*

[23] *Ibid.*

principles developed through judicial pronouncement throughout the years. A discussion on this point is delineated afterwards.

Apart from legal character, the person having right to any property also entitles a person to file suit for declaration under section 42. Right to any property means and includes any right to any kind of property. Since under the Act, there is no definition of 'right' or 'property' or 'right to property', therefore right may include any kind of rights which gives the claimant a proper standing for praying declaratory relief. Property may include immoveable and moveable of any kind. Definitions of 'immoveable property' and 'moveable property' are provided under the Transfer of Property Act, 1882, the General Clauses Act, 1897, the Registration Act, 1908 and others. An absolute owner of a property if gets dispossessed and his title gets clouded, then the owner can file declaration suit for decreeing title in his or her favor for making the same free from all clouds and disputes. A leaseholder can file suit if he is dispossessed illegally. Anyone having right to any property can file title suit.

This right may be present or future, but not too remote. A remote possibility of acquiring title in any property (which is not certain yet) cannot create any standing for seeking declaratory relief. The right must be existing interest and entitlement at the very time of seeking relief. A mere contingent right which may never develop into an actual right is not enough for a suit for declaration of title. The main contention is that unless the claimant has the right to title, he or she cannot pray for declaration of title. For getting and proving something in his or her favor he or she must have had it, perhaps for once, perhaps recently has been deprived of his right, but in all cases he or she must have right and he or she has to prove it, because in the civil suit the party seeking relief must prove his case. The Court applying its discretion determines the right of the claimant with regard to the relief prayed before it. In exercise of this sound discretion, the Court should make a declaration as to the right which exists though

exercise of it may be contingent on something in future.[24] The Court has always the discretionary power to reach at the decision regarding right (present or near future) of the parties in the subject matter of the suit. Even legitimacy of a child born or in womb can be determined through declaration suit.[25] However, the spirit is that the right over the declaratory prayer along with the very subject matter of the suit must exist and the nexus is not too remote in any way. Be that as it may, although section 42 is not exhaustive and declarations independent of that provision is even permissible but a suit for declaration, however, would not lie when the plaintiff is neither entitled to any legal character or status nor clothed with any right.[26]

Discretionary Power

Relief under section 42 is discretionary which cannot be claimed as of right. Section 42 does not postulate all types of declarations but only a declaration that the plaintiff is entitled to legal character or to any right as to any property and it warrants this kind of relief only under certain special circumstances. Relief enshrined under section 42 is a discretionary relief and the said discretion is to be exercised on sound judicial principles.[27]

The yardsticks for such discretion though has not been defined under this section or anywhere in the Act, the very words 'against any person denying' or 'interested to deny' the title of the plaintiff to the legal character or right implicate the benchmark for exercising such discretion. The Court must satisfy itself with the legal character or right of the plaintiff along with the fact that his right has been denied or interested to be denied by the defendant. The relationship between the plaintiff and the defendant is 'denial'. On the plaintiff's part, the plaintiff has to prove his

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[24] *Bombay Burma Trading Corp. vs. Smith [2000] ILR 17 Bom 197.*

[25] *MankuwarAsaram vs. Mt. Bodhi Mukundi and others[1957] AIR MP 211.*

[26] *Shafi A. Choudhury vs. Pubali Bank Ltd. and others [2002] 22 BLD 423.*

[27] *Government of Bangladesh, represented by Secretary, Housing and Settlement Bangladesh Secretariat &others vs. ASM Firojuddin Bhuiyan [2001] 53 DLR 522.*

or her legal right or status, and on the other hand, on the defendant's part, the plaintiff has to prove that the defendant has denied or is denying his or her legal right or status.

In fact, in order to entitle the plaintiff to bring a suit under this section, it is not necessary that the defendant should actually deny the plaintiff's legal character. If the defendant is interested to deny the plaintiff's legal character the plaintiff may come to Court for a declaration that; he is entitled to the legal character. If the claim which may be set up by the defendant is a hindrance to the plaintiff in the exercise of his or her rights or will expose him or her to liability if he or she disregards it he or she may come to Court for a declaration that the claim which may be so set up by the defendant is not well founded.[28]

More so, the entitlement to the title must be proved before the Court that at its discretion can award such entitlement of the plaintiff as to the title he or she prayed for. Though it is the Court's discretion, however if the plaintiff could prove his case, then Court may leave with no discretion except decreeing title to the plaintiff against the defendant. Court's discretion ultimately lies upon the satisfaction that whether the plaintiff can prove his or her title to a reasonable extent which entitles him or her more to the title of that legal right or character or property than the defendant (contesting or non contesting). Even, a suit where a 'negative declaration'[29] is sought for is maintainable under section 42.[30] This section does not really bar a negative declaration as such if otherwise its conditions and terms are fulfilled, as the section does not debar to get a negative declaration provided the conditions for obtaining such declaration are satisfied with.[31]

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[28] *Noor JehanBegum vs. Eugene Tiscenko [1942] AIR Cal 325.*

[29] *For example : Setting aside of a judgment and decree (may be ex partee) or any instruments is not binding upon the plaintiff or the defendant is not entitled to hold such instrument, etc.*

[30] *NurulApser vs. MafizurRahmanChoudhury and others[1988] 40 DLR 226.*

[31] *Bipin Chandra Roy vs. Bunchuki Barmani [1985] 37 DLR 49.*

A declaration sought under section 42 being a discretionary relief should not have been granted to the plaintiff who had come with unclean hands.[32] In these circumstances, the plaintiff's conduct should not be unfair, inequitable, fraudulent or *malafide*. Whilst refusing an injunction on the above ground, it would not be a sound exercise of the discretion, vested in the Court under section 42, to grant the plaintiff the other relief claimed, namely, declaration of his or her title to the trees.[33] It is not a matter of absolute right to get a declaratory decree. It is discretionary with the Court to grant it or not and in every case the Court is to exercise a sound judgment as to whether it is reasonable or not under the circumstances of the case to grant the relief asked for. Where the conduct of the plaintiffs indicates that the suit is filed for some other motive and not in good faith, the Court is entitled to refuse to exercise its discretion in favour of the plaintiffs.[34] No equitable relief such as a declaration would be granted when the plaintiff is shown to have acted fraudulently.[35]

This discretionary relief may not extend to consequential relief[36] or further relief which the plaintiff should have been prayed for. The court has to see what is the nature of the suit and of the reliefs claimed, having regard to the provisions of section 7 of the Court Fees Act, 1870. If a substantive relief is claimed, though clothed in the garb of declaratory decree with a consequential relief, the court is entitled to see what is the real nature of the relief, and if satisfied that it is not a mere consequential relief but a substantial relief it can demand the proper court fee on that relief,

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[32] *Muhammad Amin etc. vs. Mian Muhammad[1970] PLD B J 5.*

[33] *Gadadharadoss Vavaji vs. Suryanarayana Patanaik and others in Muhammad Amin etc. vs. Mian Muhammad [1970] PLD B J 5.*

[34] *S. M. Zahiruddin and others vs. Muhammad Ghyasuddin Ahmad and others [1967] PLD Dacca 761.*

[35] *Muhammad Amin etc. vs. Mian Muhammad [1970] PLD B J 5.*

[36] *The expression "consequential relief" in section 7(iv)(c) of the Court Fees Act means some relief which would follow directly from the declaration given, the valuation of which is not capable of being definitely ascertained and which is not specifically provided for anywhere in the Act and cannot be claimed independently of the declaration as a substantive relief.*

Kalu Ram vs. BabuLal and Ors [1932] AIR All 485.

irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief.[37]

Similar view has been taken in our jurisdiction as well. It has been held that if the provisions of these two sections 39 and 42 are read together it will be seen that they overlap each other and in some cases it may be difficult to express any definite opinion as to whether it falls exclusively under section 39 or section 42 and that there is hardly any difference between a prayer to adjudge a document void or voidable and a prayer for declaration that the document is so. Keeping in view the language and terms in which the first part of each of these two sections has been expressed, namely the part relating to a mere declaration of nullity of a document, the Court has expressed the view that a suit for declaration that the instrument is void and that it has not affected the plaintiff's right or the defendant has not acquired any right thereby is a suit falling under both the sections. Even if some auxiliary reliefs are added to the plaint, such as the document has been brought about by fraud, forgery and false personation, still the suit will retain its character as a suit for mere declaration.[38]

Thus, in a suit under this section the plaintiff may seek merely a decree for nullity of the instrument, which is the main and substantive relief, but if he prays for its cancellation also which is consequential relief, then he will have to pay for it. But cancellation of the instrument is not indispensably necessary in all cases. The Court is also not required to grant the relief of cancellation whether ever it adjudges the instrument void though the plaintiff seeks its cancellation, for both the reliefs of declaration of nullity and cancellation are within the discretion of the Court.[39]

The relief of possession was not discretionary being an independent relief.[40] A relief for the cancellation of a decree, or to be more accurate, for

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37 *Kalu Ram vs. Babu Lal and Ors [1932] AIR All 485.*

38 *Daibaki Lal vs. Iqbal Ahmed [1965]17 DLR 119.*

39 *SufiaKhanamChowdhury vs. FaizunNessa Chowdhury [1987] 7 BLD 55.*

40 *Mst. Zeb-un-Nisa and others vs. Ch. Din Muhammad and others [1941] AIR Lah. 97.*

the setting aside of a decree, is not a declaratory relief only. The effect is not merely a declaration as to a person's character or status as contemplated by section 42, but the effect will be to render the decree void and incapable of execution and will free the plaintiff from all further liability under it. The claim, therefore, is not merely for a declaratory relief falling under Schedule II, Article 17 (iii). Nor does the relief fall under section 7 (iv) (c) of the Court Fees Act, as already discussed earlier. There is no prayer for a declaration that the decree is void, or for a declaration of any sort, so the relief that the decree be set aside cannot be regarded as a "consequential" relief in any sense of that word.[41]

Thus, it appears that the absence of having any statutory definition for 'title suit' by way of defining 'entitlement' and 'title' makes the scope much wider adding value to the discretionary power of the Court. However, Court's discretion i.e. judicial discretion should always be exercised reasonably which is to be guided by law, equity, good conscience and principles of natural justice. It can be said that the scope of section 42 is certainly wide enough not limiting down the hands of the Judges to use their discretion in each very case for deciding that whether the plaintiff is entitled to get the decree as per his or her declaratory prayers he or she sought for. There are many cases where the Court has refused to pass any decree in favour of the plaintiffs. Likewise, there are many cases where the Court has passed decrees. Both are uncountable. However, lots of cases over the years almost set guidelines for maintainability of a title suit. Generally, Courts follow those guidelines in its own way applying the power of discretion.

The scope of section 42 under the discretionary power of the Court is widening day by day. Whether section 42 is exhaustive in entertaining all kinds of declaratory suits is a never ending controversial issue. It was held that section 42 merely gives statutory recognition to well recognized types of declaratory relief and it does not exhaust all types of declaratory

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[41] *Kalu Ram vs. BabuLal and Ors [1932] AIR All 485.*

relief.[42] For example: there are other alternative forums e.g. village court, administrative authority, arbitration process, appeal board, tribunal, etc who can also pass declaratory reliefs within their jurisdiction. It may kind of ousting the jurisdiction of the civil court. There are also many examples wherein the Court refuses to pass declaratory reliefs. Likewise, there are other forms of suits where Court can pass declaratory reliefs or similar kind. Writ petition is a popular example wherein in certiorari form; the petitioner can pray for declaring any action of public authority to be declared to have been done illegally, without lawful authority and is of no legal effect.[43] Thus, in spite of having wide scope and jurisdiction section 42 is not exhaustive, and declaratory suit not contemplated in the Specific Relief Act can be instituted otherwise.[44] Letting the controversies relating to comprehensiveness of section 42 or entertainment of all types declaratory reliefs under section 42 be resolved with time or unresolved till eternity, there is no doubt that the Court enjoys wide discretionary power under this section while passing or denying any relief to the plaintiff against the defendant.

Though the Court has wide discretion, it is not expected to misuse. Fruitless suit should not be entertained. A suit otherwise barred by law or having no prima facie case/cause of action is not tenable in the eye of law. It is an abuse of the process of the Court if a fruitless suit with frivolous grounds is let as maintainable under the arbitrary use of discretion of the Court in collusive practice with the parties involved therein. When the Court finds that a suit is without cause of action or the same is filed with malafide intention and unclean hand, the Court can reject the plaint and dismiss the suit. The Court can also exercise its jurisdiction by rejecting a plaint when Court is satisfied that the suit was filed for abusing the process

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42 *M/s. Supreme General Films Exchange Ltd. vs. Brijnath Singhji De [1976] 1 SCR 237.*

43 *Though the word 'certiorari' has not been used under Article 102 of the Constitution of People's Republic of Bangladesh, the provisions of Article 102(2)(a)(ii) contemplate the writ of certiorari which is a well recognized form of judicial review in our country.*

44 *Vemareddi vs. Konduru Sesh[1967] AIR SC 436.*

of court.[45] A suit may not be maintainable when the continuation of the same would only consume the time, energy and money of all the parties.[46] The Court may deny any suit to continue under section 42 which is absolutely a frivolous suit without having any cause of action or without any grievance of any of the plaintiff as to any legal character or legal right.[47] The Court cannot allow any misconceived, frivolous and vexatious suit to continue more under section 42.[48] It was held that the question of want of cause of action apart, the Court finds reasons to hold that the suit itself is frivolous designed to grab government property and it has no prospect whatsoever to succeed, and it is in that sense that the plaint may be rejected in exercise of our inherent power under section 151 of the Code.[49] To uphold the solemnity and ensure the proper application of section 42, both the judges and the lawyers should perform their duties in accordance with law. Lawyers should not over burden the Court by bringing false or frivolous declarations suits under this section only to pamper the *malafide* and fraudulent intention of their clients.

It is to be remembered seriously that section 42 does neither allow the judges nor the lawyers representing their litigating parties to take its fruit whimsically, arbitrarily, unfairly, unreasonably or without clean hands. Though there are higher Courts too for examining this use of discretion in

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[45] *In an appropriate case, a plaint may also be rejected even under section 151 of the Code as was held by the Appellate Division in the case of Guiness Peat (Trading) Ltdvs. Md. Fazlur Rahman[1992] BLD 247– "a resort to section may be made in the interest of justice in an exceptional case where the suit is foredoomed and it is allowed to be proceeded with, it will amount to an abuse of the process of the Court.*

Islami Bank Bangladesh Ltd. and others vs. Abdul Jalil and others[2000] 20 BLD 509.

[46] *It was held that from a reading of the plaint the fate of the instant suit becomes clear if the present suit is allowed to proceed further it would only consume the time, energy and money of all the parties concerned in such facts and circumstances of the case this court cannot allow such frivolous, vexatious and malafide suit to continue further.*

Islami Bank Bangladesh Ltd. and others vs. Abdul Jalil and others[2000] 20 BLD 509.

[47] *Chairman, Board of Intermediate and Secondary Education, Dhaka and others vs. Motijheel Model High School & others[1994] 46 DLR 485.*

[48] *Md. Azizul Islam and Ors. vs. Sheikh Shamsur Rahman and others [2002] 10 BLT 274.*

[49] *Gopinath Das and others vs. Government of Bangladesh & others [2012]64 DLR 167.*

the subsequent stages of suit i.e. appeal, revision, civil petition, civil appeal, review, it is mostly the responsibility of both the lawyers and the judges before the original jurisdiction Court to file an appropriate suit under section 42 for giving proper relief to the litigants. Several vexatious and groundless cases are filed as an intentional attempt to frustrate other litigations, to deviate the main purpose, to sleep over the opposite party, to take defence or to make excuses in the form of defence, etc. This is totally disgraceful. It is like mockery with the judiciary and abusing the provision of law. To prevent so, the judges should be cautious applying judicious mind while passing decree in accordance with law, justice and good conscience.

Effect of Declaration

Section 43 states the effect of declaration. It goes with and is an integral part of the scheme of declaratory decrees as provided under section 42. Section 43 can be treated as an extension to section 42. It is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.[50] The decree awarded through title suit is binding upon the litigating parties. The parties may include their successors, attorneys, legal representatives or subsequent lawful title holders who do not have any independent claim, and they are claiming through the same parties who were in the litigation. A suit hit by section 43 is not maintainable.[51] The result of a declaratory decree on the question of status affects not only the parties actually before the Court but generations to come, and, in view of that consideration, the rule of 'present interest' as evolved by case law relating to disputes about

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[50] *Illustration : A, a Hindu, in a suit to which B, his alleged wife, and her mother, are defendants, seeks a declaration that his marriage was duly solemnized and an order for the restitution of his conjugal rights. The Court makes the declaration and order. C, claiming that B is his wife, then sues A for the recovery of B. The declaration made in the former suit is not binding upon C.*

[51] *AbdusSamad Khan and others vs. Md. Wazed Ali Fakir and other [1992] 44 DLR 495.*

property does not apply with full force.[52] The rule laid down in section 43, is not exactly a rule of res judicata. It is narrower in one sense and wider in another.[53] One question arises that whether section 43 extends to the privity[54] of contract.[55] Sometimes it goes more than privity of contract.[56]

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[52] *Razia Begum vs. Sahebzadi Anwar Begum and Ors [1958] AIR 886 (SC).*

[53] *B. Lalita Devi and Ors.vs. The Special Court under A.P. Land Grabbing (Prohibition) Act and Ors [1993] 1 ALT 204.*

[54] *Privity is a doctrine in English contract law that covers the relationship between parties to a contract and other parties or agents.*

Beswick-v-Beswick [1968] AC 58.

[55] *"In the law of estoppel one person becomes privy to another (1) by succeeding to the position of that other as regards the subject of the estoppel, (2) by holding in subordination to that other..... But it should be noticed that the ground of privity is property and not personal relation. To make a man a privy to an action he must have acquired an interest in the subject-matter of the action either by inheritance, succession, or purchase from a party subsequently to the action, or he must hold property subordinately."*

Razia Begum vs. Sahebzadi Anwar Begum and Ors[1958] AIR 886 (SC).

[56] *It was held in Razia Begum vs. Sahebzadi Anwar Begum and Ors [1958] AIR 886 (SC) that "When a court makes a declaration in respect of a disputed status, important rights flow from such a judicial declaration. Hence, a declaration granted in respect of a legal character or status in favour of a person is meant to bind not only persons actually parties to the litigation, but also persons claiming through them, as laid down in section 43 of the Act. It is, thus, a rule of substantive law, and is distinct and separate from the rule of res judicata or estoppel by judgment. The doctrine of res judicata, as it has been enunciated in a number of rules laid down in section 11 of the Code of Civil Procedure, covers a much wider field that the rule laid down in section 43 of the Specific Relief Act. For example, the doctrine of res judicata lays particular stress upon the competence of the court. On the other hand, section 43 emphasizes the legal position that it is a judgment in personam as distinguished from a judgment in rem. A judgment may be res judicata in a subsequent litigation only if the former court was competent to deal with the later controversy. No such considerations find a place in section 43 of the Specific Relief Act. Again, a previous judgment may be res judicata in a subsequent litigation between parties even though they may not have been so nomine parties to the previous litigation or even claiming through them. For example, judgment in a representative suit, or a judgment obtained by a presumptive reversioner will bind the actual reversioner even though he may not have been a party to it, or may not have been claiming through the parties in the previous litigation. When a declaratory judgment has been given, by virtue of section 43, it is binding not only on the persons actually parties to the judgment but their privies also, using the term 'privy' not in its restricted sense of privy in estate, but also privy in blood. Privity may arise (1) by operation of law, for example, privity of contract; (2) by creation of subordinate interest in property, for example, privity in estate as between a landlord and a tenant, or a mortgagor and a mortgagee; and (3) by blood, for example, privity in blood in the case of ancestor and heir. Otherwise, in some conceivable cases, the provisions of section 43, quoted above, would become otiose. The contention raised on behalf of the appellant, which was strongly supported by the third respondent through Mr. Pathak, as stated above, is that a declaratory judgment would not bind anyone other than the party to the suit unless it affects some property, in other words, unless the parties were privy in estate. But such a contention would render the provisions of section 43 aforesaid, applicable only to declarations in respect of property and not declarations in respect of status. That could not have been the intendment of the statutory rule laid down in section 43. Sections 42 and 43, as indicated above, go together, and*

It binds the upcoming or other interested parties who are claiming through the litigating parties. It is not only for avoiding multiplicity of litigations but also reducing the burden of the Courts for setting one dispute again and again. It is also for maintaining the chain of title and order of litigating parties. It is more like settling disputes more comprehensively and permanently, and also discouraging the parties to come before the Court with the same dispute again which were already settled earlier.

Title Suit: Declaration Prayer along with Consequential Relief (Prayer in Declaratory Suit)

When mere declaration prayer shall not bring any effective result for the plaintiff, he or she must seek consequential or further relief. Relief means a substantial and immediate remedy in accordance with the title which the Court has been asked for declaration, and therefore, the consequential relief is necessary for effecting the substantial relief the plaintiff has prayed in the suit in which he is entitled to. Likewise, without proving title i.e. the plaintiff is not entitled to the consequential relief attached to the title in a title or declaratory suit. Basically, for bringing comprehensiveness in a suit and for securing meaningful and effective relief section 42 asks the parties to file civil suit with declaratory prayer along with further relief. Under section 42, a suit for mere declaration of any legal character or any right to property is maintainable and the plaintiff in such suit need not ask for any further relief; and the object of the proviso is only to avoid multiplicity of the suit where further relief can be sought for at the time of institution of the suit.[57]

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are meant to be co-extensive in their operation. That being so, a declaratory judgment in respect of a disputed status, will be binding not only upon the parties actually before the court, but also upon persons claiming through them respectively. The use of the word 'only' in section 43, as rightly contended on behalf of the appellant, was meant to emphasize that a declaration in Ch. VI of the Specific Relief Act, is not a judgment in rem. But even though such a declaration operates only in personam, the section proceeds further to provide that it binds not only the parties to the suit, but also persons claiming through them, respectively. The word 'respectively' has been used with a view to showing that the parties arrayed on either side, are really claiming adversely to one another, so far as the declaration is concerned. This is another indication of the sound rule that the court, in a particular case where it has reasons to believe that there is no real conflict, may, in exercise of a judicial discretion, refuse to grant the declaration asked for oblique reasons."

[57] *Fazlul Karim vs. Agrani Bank [1993] 45 DLR 375.*

Suit for declaration of title simpliciter without any prayer for consequential relief in the form of confirmation or recovery of possession is not maintainable being hit by proviso to section 42 of the Specific Relief Act.[58] In a declaration suit of land the specification of land should be very definite and clear. If the land in suit is vague, unspecified and that relief sought is in respect of undivided portion of land of particular plot(s) in that case suit seeking mere declaration of title is not maintainable, and there should claim consequential relief.[59]

A declaratory suit in a service matter without a prayer for consequential relief is not maintainable.[60] In a suit for declaration that plaintiff's dismissal was illegal and not binding without asking for consequential relief for enforcing the declaratory decree, omission to pray for consequential relief for enforcing declaratory decree renders it unenforceable in law.[61] The prayer for declaration was not followed by any consequential relief by way of any mandatory injunction and direction against the defendant to allow the plaintiff to continue in the service of the defendant and also by way of any claim for arrear wages and compensation. Omission to pray for any consequential relief for the purpose of enforcing a declaratory decree would be hit by the proviso of section 42 of the Specific Relief Act. Upon that ground the declaratory decree passed by the Courts below becomes unenforceable which in turn

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[58] *Kamar Begum Roy vs. M. Khalilur Rahman[1991] 11 BLD 124.*

[59] *Law as in Order 7, Rule 3 of the Code of Civil Procedure requires the plaintiff to give clear description of the land in suit so that the land in suit is identifiable. In the instant case it is seen that the particulars of the land as in schedule 'Ga' to the plaint is vague and unspecified. The plaintiffs have sought for declaration of title in respect of unspecified, vague and undivided land. If the land in suit is vague, unspecified and that relief sought is in respect of undivided portion of land of particular plot(s) in that case suit seeking mere declaration of title is not maintainable. Since plaintiffs' suit was not maintainable as they filed a mere declaratory suit in respect of unspecified as well as undivided portion of the land and as such even if any adjudication is made as regard the relief sought as to the decree obtained in Title Suit No. 206 of 1976 would be of no purpose since in the absence of seeking consequential relief of recovery of possession mere declaration of title as regard the land described in the schedule 'Ga' cannot be allowed.*

Ershad Ali Howlader vs. Santi Rani Dhupi and other[2007] 27 BLD 8 (AD).

[60] *General Manager, Sonali Bank and others vs. Md. Nurul Haque Khan [1988] 8 BLD 403.*

[61] *Manager, Personal Division vs. Md. Shazahan Miah [1983]35 DLR 224.*

would make the decree a nullity.[62] There were conflicting decisions on this issue, however now it is settled that a service matter a simple declaratory suit without a prayer for consequential relief is not maintainable.[63]

In a suit claiming right or entitlement to money, a suit lies for recovery of money. Mere declaration cannot be granted.[64] Mere declaration in the form that the plaintiff is entitled to money may not be maintainable in the eye of law and may not bring any effective result for the plaintiff. Along with declaration the plaintiff has to seek for further relief in the form of payment of money.[65] Same rule applies in case of claiming title to shares. Share means capital, means money. Since the fact of transfer is admitted, although pleaded forgery but since no relief has been sought for praying for setting aside the Exhibit 'X', the suit is not maintainable in its present form.[66] Therefore, after executing "Share Transfer Certificate" by the plaintiff in favour of the defendant No. 7, suit for declaration of ownership and for getting possession of shares by the plaintiff against the defendant Nos.1-4 was not maintainable in law. Furthermore, since it was asserted by PW1, during examining him in Court, that said document was procured

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62 *Ibid.*

63 *It was held that "there is another decision to that effect reported in 15 B.L.D. 249, but unfortunately there is a Division Bench Judgment reported in 11 B.L.D. 528, wherein their Lordships dissented from the judgment reported in 35 D.L.R.'s case and held that a simple declaratory suit in a service matter without prayer for consequential relief is maintainable but in arriving at such a decision their Lordships of the Division Bench lost sight of the fact that the 35 D.L.R.'s case was taken before the Appellate Division in the form of Special Leave to Appeal No. 229 of 1983 wherein their Lordships of the Appellate Division affirmed the judgment of the High Court Division observing that since the plaintiff's prayer for declaration was not followed by consequential relief the learned Judge committed no illegality in holding that omission to pray for any consequential relief for the purpose of enforcing the declaratory decree is hit by the proviso to section 42 of the Specific Relief Act and by that judgment the legal position has been settled by the Appellate Division and there is no scope for this Court to depart from that decision and in that view of the matter the Court held that the decision reported in 11 BLD 528, is a decision in per curium and not a binding precedent and that decision is not a good law so far that relates to the proposition that in a service matter a simple declaratory suit without a prayer for consequential relief is maintainable."*

Basharatullah vs. Managing Committee for New Academy and another [1997] 17 BLD 68.

64 *M/S. Malik Huq vs. Md Shamsul Islam Chowdhury [1961] 13 DLR 228(SC).*

65 *Ibid.*

66 *Syed Moazzem Hossain (Md.) vs. Tahsia Khanam and Others[2013] 65 DLR 11.*

taking resort to forgery, suit ought to have been filed under section 39 of Specific Relief Act and not under section 42 of the Act.[67]

It is now well-settled that each suit seeking relief within the scope of section 42 must be decided on its own merits and its own peculiar circumstances and that no hard and fast rule can be laid down for all cases.[68] Though where the plaintiff's entitlement to any legal character or right to any property is well established, he or she may be awarded to declaratory relief against any denial or intention of denial of the same by the defendant at the discretion of the Court, however for avoiding the multiplicity of suits and also for giving effect of the declaratory reliefs some consequential reliefs need to be sought where required in appropriate cases, otherwise a good claim may meet unsuccessful result.

Conclusion

A suit for declaration under section 42 as to any legal character or to any right as to any property can be filed by the plaintiff against the defendant when the defendant denies or is interested to deny his or her title to such character or right. This suit is registered as title suit as discussed in the beginning. Title suit is one of the most practiced forms of civil nature suit in our country. It has been using as a tool of establishing right, title and entitlement of a person (both natural and juristic) popularly since the enactment of the Act. Even after gaining popularity of new form litigations including writ, company matter, artharin suit, public interest litigation, etc, the use of title suit praying declaratory relief under section 42 has not lost a bit. More so, the scope of this section has not blurred yet though several enactments barred the jurisdiction of civil court e.g. Artha Rin Adalat Ain, 2003, Companies Act, 1994, Bank Company Act, 1991, etc. Therefore, the discretion of the Court to award declaratory decree to the plaintiff by deciding his or her title or entitlement remains wide and open. There is no hard and fast rule for exercising this discretion and determining the scope

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[67] *Ibid.*

[68] *Mirpur Mazar Co-operative Market Society Ltd vs. Secretary, Ministry of Works, Government of Bangladesh and ors [2000] 52 DLR 263.*

of applying section 42. Nevertheless, in no way it can be taken that this discretion can be used whimsically, arbitrarily, *malafide* or without judicious mind.

There are higher Courts who also are to examine this use of discretion in the subsequent stages of suit. Therefore, it is the responsibility of both the lawyers and the judges to fit a suit under section 42 for giving proper relief to the claimant. Filing vexatious, unnecessary, false or frivolous suits under this section is definitely a horrible misuse of this section. Many are seen to file useless, frivolous and unnecessary suits by misusing this section as an attempt either to frustrate other litigations or to deviate the main purpose or to sleep over the opposite party or to take defence or to make excuses in the form of defence, etc. This is totally unexpected. It is like play with the judiciary and abusing the provision of law. A lawyer shouldn't play with the Court by allowing his or her client to misuse the wide scope of section 42, and the judges should not also entertain this. The judges should also apply judicious mind while passing decree. It is sacredly the joint responsibility of the judges and the lawyers to uphold the solemnity of the law and protect the rule of law from being misused. The wide scope for securing the rights of the parties by way of declaratory relief through their title and entitlement should be used in appropriate cases for securing the rule of law and rights and interests of the parties. This is the spirit of a 'suit for declaration of title' or 'title suit' under Section 42 of the Act.

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Sentencing in Criminal Cases in Bangladesh: Pronouncements as Guideline

Md. Mohidul Islam*

The cardinal and very objective of criminal judicial system are to address the offence committed by an accused, redress the grievances of the victim by inflicting punishment to the accused. The Code relating to a particular offence defines an incident into offence and prescribes punishment for the particular offence. In Bangladesh, like other countries criminal laws give the definition of an offence and provide the punishment for committing such offence. It is apparent in Bangladesh; no specific guideline has been published yet in dealing in sentencing. In recent days a specific direction regarding to punishment of murder has been pronounced by Bangladesh Supreme Court. In dealing other offences, there has no guideline issued by Bangladesh Supreme Court. In the absence of such guideline, Judges of this Country has been applying their discretion in sentencing in accordance with the pronouncements of Bangladesh Supreme Court.

I. Introduction

In the case reported in *4 SCOB (2015) AD 20*, His Lordship Mr. Justice Mohammad Imman Ali dragged a scenario through which we have travelled so far that 'there being no sentencing guidelines, the tendency is for trial Judges to award the highest possible sentence provided by the

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law'.[1] How the criminal justice system of this country has been travelling? An easy answer to this question can be termed as Judicial Discretion. Learned Judges of this Country have been dealing the area of sentencing in the absence of guidelines with their very capability to use the discretion by analyzing each fact of a case. In this foregoing article, I will deal with matters, such as, absence of specific guidelines how effect the process of sentencing; how this absence has been thrown out through judicial pronouncements by Apex Court; factors influencing in sentencing in Bangladesh etc.

II. Sentencing Guideline and its absence

In the absence of specific guidelines for sentencing in Bangladesh, what can be the scenario, has been drawn by Hussain M Fazlul Bari[2] in his article named 'An Appraisal of sentencing in Bangladesh: between conviction and punishment'. The author had also put emphasis on case-laws, but made regret for not being practiced thorough the Country.

> In absence of sentencing guidelines as well as sentence hearing, the judges often award the sentences mechanically in the exercise of their individual sense of yawning discretion. Consequently, diversity of sentencing decisions arises for similar category of offences. In practice, a wide range of mitigating and aggravating factors stemming from the case-laws, though not developed in a coherent fashion, essentially dominate the our sentencing practice.[3]

While the Judges of our Country facing the problems in the absence of sentencing guidelines, the Supreme Court of India in the Case of *Soman Versus State of Kerala*, Criminal Appeal Nos.1533-1534 OF 2005 pronounced-

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[1] *Rokia Begum alias Rokeya Begum Versus The State, 4 SCOB [2015] AD pp.20, 24, para-20*

[2] *Hussain M Fazlul Bari is an Additional District Judge at Bangladesh Judicial Service*

[3] *Hussain M Fazlul Bari, 'An Appraisal of sentencing in Bangladesh: between conviction and punishment', (Bangladesh Journal of Law, Dhaka, 14: 1 & 2 (2014) <http://www.biliabd.org/article%20law/Vol-14/Hussain%20M%20Fazlul%20Bari.pdf> accessed on 01 September 2019*

> Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges. In State of Punjab v. Prem Sagar this Court acknowledged as much and observed as under– "2. In our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts except making observations with regard to the purport and object for which punishment is imposed upon an offender, have not issued any guidelines. Other developed countries have done so. At some quarters, serious concerns have been expressed in this behalf. Some committees as for example Madhava Menon Committee and Malimath Committee have advocated introduction of sentencing guidelines.[4]

This Court also made an attempt to describe the points to be measured in the time of sentencing which were developed in various cases such as proportionality, deterrence, rehabilitation. Finally, the Court made conclusion by presenting the following-

> From the above, one may conclude that: (1) Courts ought to base sentencing decisions on various different rationales– most prominent amongst which would be proportionality and deterrence. (2) The question of consequences of criminal action can be relevant from both a proportionality and deterrence standpoint. (3) Insofar as proportionality is concerned, the sentence must be commensurate with the seriousness or gravity of the offence. (4) One of the factors relevant for judging seriousness of the offence is the consequences resulting from it. (5) Unintended consequences/harm may still be properly attributed to the offender if they were reasonably foreseeable. In case of illicit and underground manufacture of liquor, the chances of toxicity are so high that not only its manufacturer but the distributor

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[4] *Sonam Versus State of Kerala, Criminal Appeal Nos. 1533-1534 of 2005, Para-12 <https://indiankanoon.org/doc/27726153/> accessed on 01 September 2019*

> and the retail vendor would know its likely risks to the consumer. Hence, even though any harm to the consumer might not be directly intended, some aggravated culpability must attach if the consumer suffers some grievous hurt or dies as result of consuming the spurious liquor.[5]

Now coming back to the point, it is expedient to say that like India and Pakistan, Bangladesh has no Prescribed or Structured or Officially Published Sentencing Guidelines. I repeat, Criminal Justice System of Bangladesh has no Officially Published Sentencing Guidelines. It is imperative to say that I would state the word Officially rather than Prescribed or Structured.

Though the judicial system of this Country has yet to reach the sentencing policy or Guidelines, the Supreme Court of Bangladesh made such advancement in sentencing policy through pronouncing judgments. Pronouncements are not amalgamated rather spattered in various law reports which is time consuming to measure the situation of the case in hand with the pronouncements. Pronouncements are not authority of fact; it varies case to case. Only the settled principles in particular area can be applied irrespective of its fact. However, it must be borne in our mind that the judgments passed by the aforesaid Court are mandatory over the subordinate Courts as per article 111 of the Constitution.[6]

III. Proper and appropriate sentence

In the case of *The State vs Ershad Ali Shikder and others*, Mr. Justice A K Badrul Haque made focus on-

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[5] *Sonam Versus State of Kerala, Criminal Appeal Nos. 1533-1534 of 2005, Para-22 <https://indiankanoon.org/doc/27726153/> accessed on 01 September 2019*

[6] *Article 111 of the Constitution of People's Republic of Bangladesh denotes As:*

The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate it.

> Imposition of proper and appropriate sentence is amalgam of many factors, such as nature of offence, the circumstances, mitigating and aggravating, the record of the offender, if any.[7]

Mr. Justice Syed Md. Ziaul Karim while discussing about the imposition of sentencing, pointed out two factors which had to be used to impose the proper sentence. These two factors were stated as 'aggravating factor and mitigating factor'.[8]

In order to assess the seriousness of an offence, a Judge has to ascertain some points. Mr. Justice Aftab Alam of Supreme Court of India in the case of *Sonam Versus State of Kerala,* Criminal Appeal Nos. 1533-1534 of 2005 quoted the below to ascertain the seriousness of an offence. It was the case of alcohol mixed with methanol. By consuming that alcohol 31 people died, 6 lost their vision and more than 500 people developed with serious sickness.

> In Sentencing and Criminal Justice, 5th Edition, Cambridge University Press, 2010, Andrew Ashworth cites the four main stages in the process of assessing the seriousness of an offence, as identified in a previous work by Andrew Von Hirsch and Nils Jareborg. (See Pages 108 – 112)
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> 1. Determining the interest that is violated (i.e. physical integrity, material support, freedom from humiliation or privacy/autonomy).
> 2. Quantification of the effect on the victim's living standard.
> 3. Culpability of the offender.
> 4. Remoteness of the actual harm.[9]

The nature of the offender (whether he is a habitual offender, hard criminal) and even the long stay in condemned-cell may raise a ground for mitigating sentence.

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[7] *The State vs Ershad Ali Shikder and others, 8 MLR (HC) 132, Para-98*

[8] *The state VS. Abul Kalam,3 SCOB [2015] HCD 74, 91, para-96, 7 SCOB [2016] HCD 40*

[9] *Sonam Versus State of Kerala, Criminal Appeal Nos. 1533-1534 of 2005, Para-15 citing Andrew Ashworth , 'Sentencing and Criminal Justice', (5th Edition, Cambridge University Press, 2010) <https://indiankanoon.org/doc/27726153/> accessed on 01 September 2019*

> Record indicates that he is not a hard criminal and has been languishing in the condemned-cell for about fifty five months with suffering of mental agony of death within the death-cell. Taking an account of aggravated and mitigating circumstances ends of justice will be met if the death sentence is altered to one of imprisonment for life.[10]

Nature of the offence, victims, and its affect in the society or even to the nation has to be taken in consideration at the time of sentencing. It may sometime seem to be harsh; but if the killing paralyzes the nation, death penalty may seem to be a lesser punishment. Punishment should meet the expectation of the society. Mr. Justice Md. Abdul Aziz once said as:

> God, the Almighty, likes and loves the tolerant and crown with success. A murderer is always a murderer and a terrorist is always a terrorist and is enemy to mankind and humanity and an offender in the eye of law. To protect and shelter such killers is a great crime, a great sin and sin spares none.[11]

IV. Mitigating sentence

Appellate Division, while mitigating the sentence of *Rokia Begum* also endorsed the same view taken in the case reported in 3 SCOB [2015] HCD 74. But this situation, i.e. inordinate delay has not been due to any fault of the convict.

> Where the period spent in the condemned cell is not due to any fault of the convict and where the period spent there is inordinately long, it may be considered as an extenuating ground sufficient for commutation of sentence of death.[12]

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[10] *The state VS. Abul Kalam,3 SCOB [2015] HCD pp. 74, 92, 7 SCOB [2016] HCD 40, Para-100*

[11] *Criminal Appeal Nos. 55-59 of 2007with Jail Appeal No. 02 of 2007 with Criminal Miscellaneous Petition No. 08 of 2001 with criminal Review Petition No. 03 of 2000*

[12] *Rokia Begum alias Rokeya Begum Versus The State, 4 SCOB [2015] AD pp. 20, 27, para-31*

In the aforesaid case, his Lordship incorporated the principles inaugurated in the case reported in 32 BLD (AD) 247, mitigating circumstances-

(1) The condemned prisoner has no history of prior criminal activity.
(2) The condemned prisoner is not likely to commit any further act of violence.
(3) She has been in the condemned cell since 8.8.2001, i.e. more than 11years during which period the hangman's noose has been dangling in front of her eyes.[13]

V. Heinousness and brutality

'Heinousness' and 'brutality' of the offence committed, pre-planned offence, diabolical offence, impact on society may be some of the factors which aggravates the sentence. In this society, to whom we cherish our life, we owe them too much. It is the Judges, to whom the task of meeting the litigant to justice has been enshrined. How justice can be met? In a true sense, the term Justice may be varied in case to case. So, it is Judges to ensure the justice in a very changing society.

An accused planned to hijack a baby taxi by killing the driver and finally succeeded to accomplish his plan. Mst. Justice NajmunAra Sultana in the case, reported in 4 SCOB (2015) AD 11 describes the aggravating factors as follows-

> The offence which these two condemned prisoners committed is most heinous and brutal. These two condemned prisoners along with other accused Mir Hossain, with cool brain, made a plan to hijack a baby taxi by killing the driver and according to that pre-plan they hired the C.N.G. baby taxi of the deceased as passengers and took the baby taxi to alonely place and thereafter they murdered the baby taxi driver brutally. This type of crime is on the increase in our society. For hijacking a baby taxi or any other vehicle the hijackers do not hesitate for a moment to take the life of the innocent driver of the vehicle which is very much precious for the near and dear ones of that poor

[13] *Ibid.,Nalu Vs. The State, 32 BLD (AD) 247*

> driver. This type of killers/murderers cannot and should not get any mercy from the court of law. There is no reason for showing any leniency or mercy to this type of offenders who are enemy for the whole society. So we are unable to accept the submission of the learned advocate for the condemned prisoners to reduce the sentence of death to life imprisonment. In our opinion this is a fit case for imposing death sentence on killers.[14]

A plain reading of the aforesaid judgment some of the factors may be brought to light, such as-

(1) Pre-planned offence
(2) Killing brutally
(3) Increasing crime in society
(4) Impact on the society

Chief Justice of Bangladesh Mr. Justice Surendra Kumar Sinha (the then), in the case of *Blast and others Vs Bangladesh and another*, re-endorsed the 'brutality' and 'heinousness' of the offence must be in the drive wheel to exaggerate the sentence.

> Let us now consider the merits of the case in Civil Appeal No.116 of 2010. The appellant was sentenced to death by the Bishesh Adalat. On consideration the evidence this Division found that the victim Sumi Akter's whereabouts could not be traced out. Her mother Rahima Begum along with P.W.6 Abdur Rob searched from door to door. The house of the condemned prisoner Sukur Ali was found under lock and key and on entering into the house, the dead body of the of the victim was found inside the house and it was detected that her wearing ornaments were missing and marks of injuries with emission of reddish liquid from her genital organ were found. The appellant was caught read handed by the people from Tepra and he was brought to the place of occurrence and before the witnesses, he had admitted the incident of rape and killing of the victim. The victim Sumi Akter was

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[14] *ShahidUllah @ Shahid and others Vs the state, 4 SCOB [2015] AD pp. 11, 15,para-15*

> only 7 years old. The killing was brutal and diabolical. There was no extenuating ground to commute his sentence and accordingly his sentence was confirmed. We find no ground to review his sentence.[15]

VI. Age of the offender

There may have been situation of killing by an 18 years old boy or 35 years aged man. Apart from the evidence produced before the Court, how can both the offenders be sentenced to death or the similar treatment? An 18 years old boy, who may not even imagine the beauty and reality of the life, the precious life; he should be given a chance. In the case reported in 4 SCOB (2015) HCD 139, Mr. Justice Md. Farid Ahmed Shibli pointed out the young age, previous record of offence etc.

> It appears from the record that no condemned-appellant had earlier involvement with any other criminal offence and that was why in the police reports their P.C & P.R. have been shown as 'Nil'. It reveals that the condemned-appellants had no complicity in any other crime during their past life and they were the boys of tender- age. Taking those extenuating facts and circumstances into account, we think, justice will be met if we sentence the condemned appellants with life imprisonment and fine in place of the death sentence.[16]

In the case reported in 7 SCOB [2016] AD 42, Appellate Division made a diversion from their previous sentence on the ground of age and absence of previous record. It should also be mentioned that the accused Shukur Ali had been sentence to death penalty by the decision reported in 1 SCOB (2015) AD 1. 'Brutal' and 'diabolical killing' was the ground which was stated in Paragraph no 53[17]. But the factor age and absence of previous record override the factor of brutality and Shukur Ali had been sentenced

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15 *Blast and others Vs Bangladesh and another, 1 SCOB [2015] AD pp. 1, 15, para-53*

16 *The State Vs Rafiqul Islam and others, 4 SCOB [2015] HCD pp.139, 170,para-171*

17 *Blast and others Vs Bangladesh and another, 1 SCOB [2015] AD pp. 1*

to imprisonment for life[18]. On the other hand, a case reported in 62 DLR (AD) 281, where the age of the accused overrode the concept of brutality.

> In the case in hand, we find that the petitioner has no significant history of prior criminal activity and that he was aged 14 years at the time of commission of the offence and 16 years at the time of framing of charge. The petitioner has been in the condemned cell since 12.07.2001, that is, more than 14 years. Considering all aspects of the case, we are of the view that the death sentence of the petitioner be commuted to imprisonment for life.[19]

VII. Factors instigates or relating to offence

In sentencing, there should be a critical analysis of fact whether the offender turned himself into the offence or the state or any other factors are liable for this. The real scenario of being offender should be brought to light to analyze the offenders' fate in sentencing. How Justice can be done, if the injustice had been happened to the offender from the very beginning.

If it is the education which eradicates the ignorance and invites the light, it will be imperative to inquire into effort has been given to provide such light to the accused. The social status, livelihood of the accused, absence of parents or guardians in the life, failure of the others in providing rights, insecurities of the accused should have to be brought in the judgment to ascertain an appropriate sentencing. Factors turning into a person to an accused should have addressed and responded in sentencing.

In recent days, High Court Division in *Oyshee Rahman Case*[20], at the time of converting death penalty into imprisonment for life, made some observation which is reproduced below-

> ...from the family history of the condemned prisoner it is also found that her father was a police officer and mother was working in destiny

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[18] *BLAST & anr Vs Bangladesh &ors, 7 SCOB [2016] AD pp. 42, 45, para-17*

[19] *Ibid.*

[20] *Death Reference No. 99 of 2015, Criminal Appeal No. 10281 of 2015, Jail Appeal No. 2016 of 2015*

> [a private business organization] which indicates her parents were busy with their livelihood and also evident in the case that in her early life sufficient care did not take place by her parents although they could realize it at a later stage when her life had already been ruined by addiction and other things. And that is why, it can be said that parents or guardians are the only teachers of their children at the beginning of children's their early lives. Parents should encourage their children to different books as it can prevent them from slipping into a wrong path. Children can be prevented from heading down the wrong path only by getting them involved in good environment and also good family atmosphere. The amount of time the parents spend their children or they got involved in domestic chores is not very significant for the betterment of the children. They are to spend enough time for their children with a good environment in the early lives so that children can approach towards the good things for their future lives.

VIII. Nature and effect of offence

The nature and its effect in the society should also be considered at the time of sentencing. Now a day, our country is facing problems, i.e. drugs, adulteration, trafficking etc. The main target of the drug is our youth, the future of our country. It is demolishing the yearly aged dreams of parents, the shining beauty of the country. Its effect is so far reaching that it can collapse the country can make a vacuum in the future leadership. These types of offence should be dealt with great importance and should not be dealt with lenient view. It can easily be found from the records of the Court, what type of offences are the society facing. This type of offences dealt promptly and with no mercy if they are grave in nature. It is already pronounced by our Appellate Division that there is no reason for showing any leniency or mercy to this type of offenders who are enemy for the whole society.[21]In the aforesaid case, the Appellate Division while

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[21] *ShahidUllah @ Shahid and others Vs the state, 4 SCOB [2015] AD pp. 11, 15, para-15*

discussing about the offence of planned hijacking of a baby taxi by killing the driver, made the above comment.

Food adulteration is demolishing our country in a very speedy way. A healthy generation can never be sustained in such kind of adulteration. Only fine can never be an appropriate sentencing in respect of their effect in the country. Exemplary punishment should be inflicted on the accused.

IX. Plea bargaining

In the petty cases, the concept of plea bargaining should be dealt with. If an offender of petty cases with his consciousness admitted his or her guilt, he may be convicted in accordance with the section 243 of the Code of Criminal procedure, 1898. Now, the question arises, if an offender who admitted his or her guilt, how he or she should be treated. 'It is to be noted that there is also no definite plea-bargaining stage in vogue in our crippled criminal justice system'[22]. In my opinion, a lesser sentence like fine should be imposed on the said accused. This process can be measured as the tool to honour the accused's good conscience, who admitted his or her guilt despite of thinking about the punishments and also the trial to come to an end in a short time.

> Although this may happen in practise in Bangladesh, there are no rules anywhere for how this should be handled. Most countries that have a formal procedure for plea-bargaining usually require a statement from the victim to say that they have no objection to the accused being allowed to plead to a lesser charge, and they require that the Court consider the plea carefully before accepting it – if they believe the accused is being allowed to get away with a very serious offence, they are allowed to reject the plea…..[23]

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[22] *Hossain M F Bari, 'Sentencing hearing: An elusive right of the accused', The Daily Star (Dhaka, 14 January 2014) <https://www.thedailystar.net/sentencing-hearing-an-elusive-right-of-the-accused-6728> accessed on 21 September 2019*

[23] *Greg Moran of Greg Moran and Associates, 'Criminal Justice in Bangladesh, A best practise Handbook for members of the criminal justice system'(November 2015, Justice Sector Facility, UNDP Bangladesh) p. 77*

It is apparent that, present Code of Criminal Procedure 1898 though prescribed guilt pleading, not plea-bargaining. It is expedient to utter that guilt pleading walks with plea-bargaining. Without developing the concept of plea-bargaining, guilt pleading will be needless. Although 'A guilty plea is merely part of the process of a criminal trial, whereas plea-bargaining is an agreement to plead guilty by the accused'[24]. Having said that concept and practice of plea-bargaining has been asserted by Mr. Justice Kazi Ebadul Hoque in his article titled 'Plea Bargaining and Criminal Work-load'.

> ……. Moreover amended provision of section 35A of the Code of Criminal Procedure gives ample opportunity to employ plea-bargaining. If an accused deprived of the privilege of bail, especially indigent ones, spends long period in jail custody he may be persuaded to enter a guilty plea in exchange for his release from jail custody. This initiative can be taken by the prosecutor or the Magistrate or Judge in case the accused is undefended. If the accused is defended by a lawyer such initiative can be taken by the defence lawyer with the consent of his client when he finds little chance of success in a trial. When out of several accused in a case some are on bail and rest in custody for long time those on bail might be interested in a trial but it is in the interest of those in custody to enter in a guilty plea in exchange for an assurance of release from custody. In such a case those on bail might be tried after convicting and releasing those in custody on the basis of their guilty plea without waiting for completion of others' trial.[25]

<https://www.undp.org/content/dam/bangladesh/docs/Projects/jsf/Best%20Practice%20Handbook%20(Final%20Draft).pdf> accessed on 21 September 2019

[24] *Md. Pizuar Hossainand Tureen Afroz, 'Plea-Bargaining: Socio-Legal Impacts on the Criminal Justice System of Bangladesh', (Australian Journal of Asian Law, 2019, Vol. 19 No 2, Article 3: 1-19<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3398654> accessed on 21 September 2019*

[25] *Kazi Ebadul Hoque, 'Plea Bargaining and Criminal Work-load',(Bangladesh Journal of Law, Dhaka, 7: 1 & 2 (20003)<http://www.biliabd.org/article%20law/Vol-07/Kazi%20Ebadul%20Hoque.pdf> accessed on 21 September 2019*

X. Habitual offender

It is already entered in this discussion, the habitual offender, should be a great factor in dealing of sentencing process. An accused who is repeatedly engaged him with the offence, that accused should not be given any lenient view. That accused had already proved that he or she had not been worthy to be corrected.

Habitual offender and an accused in the hit of the moment should be not weight at the same scale and same award or punishment should not be inflicted on them. A survey suggested that 39.66% Judges also endorsed that habitual offender has been an influential factor in sentencing.[26]

XI. Impairment

How far the alleged offence impaired anything? This factor should also be considered at the time of sentencing. In other words, the Doctrine of Proportionality should be followed. We must see that the wrongdoer has not gone unpunished and justice has been done, seen to be done. A blow in cheek and a hit in cheek by stick must not be measured as same. The sentence should not be the same.

It has to be considered by the Legislature that mischief amounting to 10001 (ten thousand one) taka to more cannot be compensated with 10000 (ten thousand) taka. In some penal laws related to actual loss or impairment never match the sentence in that regard. It is immaterial the actual loss, a Magistrate of First Class cannot sentence an accused with more than 10000 (ten thousand) taka as fine.

XII. Long period of custody

Long period of custody, being a woman, mother of minor boy can be used as factor to mitigate the sentence. Mr. Justice Md. Farid Ahmed Shibli while disposing a criminal appeal pointed out the aforesaid factors which

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[26] *Tureen Afroz, 'Sentencing practices in Bangladesh'(Bangladesh Journal of Law, Dhaka, special issue) <http://www.biliabd.org/article%20law/Vol-7%20 special% 20issue/ Dr.%20 Tureen%20 Afroz.pdf> accessed on 21 September 2019*

were very much relevant to said case. Mother of a minor boy, this factor should be considered with great importance for the very betterment of his child, which should not be thrown away. Even the father of three minor children had met the privilege in sentencing, where his sentence to death had been mitigated to imprisonment for life.[27]

> On perusal of the record, it is noted that the accused-appellant has been in jail since 13.04.2009 and her period of custody till to date will be around 5 years 8 months. Being an woman and mother of a minor boy named Zihad, the accused-appellant deserves a compassionate view of this Court of Appeal. Taking the above facts, and other extenuating circumstances into consideration, we are of the opinion that a sentence of Rigorous Imprisonment for 5 (five) years and a fine of Tk. 1,000/= in default to suffer simple imprisonment for 1(one) month will squarely meet the demand of justice.[28]

XIII. Uncertainty of the real offender

An interesting factor has been pointed out by Mr. Justice Mohammad Imman Ali in the case of *Sohel Dewan & others Vs State*. Several accused fired the victim, but it is doubtful which accused succeeded to reach the body of the victim. If the assistance of section 34 of the Penal Code is in need of to dispose of the offence, nor the death penalty, but the imprisonment for life is an appropriate sentence.

> In the facts of the case before us, where there is some inkling of a doubt as to which of the shots from the firearms of the accused caused the death, or conversely which one of the three accused who fired the shots missed his target, the application of sections 302/34 of the Penal Code was correct, but the question remains as to whether the death sentence would be appropriate. We are inclined towards the view that where the conviction is not under section 302 of the Penal Code simpliciter, and where the complicity of the accused is proved by the

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[27] *State Vs Azam Reza, 62 DLR (AD) 406*

[28] *Rahima Begum Vs the state, 5 SCOB [2015] HCD pp. 84, 90, para-35*

aid of section 34 of the Penal Code, then the sentence of death would not be appropriate.[29]

XIV. Effect of hurt

It is imperative in the side of the Court to consider the injured or impaired part of the body at the time of sentencing. The nature of the injury may also describe the motive. An organ which is recognized as vital or important part of the body, any attack at that part, should be taken into consideration and that type of attack should not be met with lesser sentence.

Having regards to the facts and discussions made above we are of the view that the convict Kalam had inflicted dagger blow on the throat of the deceased which is considered as most vital part of a human being causing the murder of the deceased and considering the direct evidence and other materials on record the trial Court rightly found Kalam guilty under section 302 of the Penal Code and considering the gravity of the offence and involvement of the accused with the occurrence of the murder of the deceased Sohel sentenced him to death. We find no extenuating circumstances to commute his sentence from death to any other sentence.[30]

XV. Economic condition of the parties

Another factor should be considered is that the economic condition of the parties, the economic condition of the family of the accused. How far the sentence of the accused will be hampered the economic condition of the family of the accused. Can they survive without his economic support? If the accused is only earning member with a huge family, at that time this factor should be considered with importance. But this must not and shall not override the brutality of the accused. It shall also not be considered in the case of habitual offender.

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[29] *SohelDewan&ors Vs State,6 SCOB [2016] AD pp. 70, 73, para-16*

[30] *State Vs Kalam alias AbulKalam, 6 SCOB [2016] HCD pp. 43, 55, para-68*

XVI. Conclusion

At the very end of this, I would like to conclude as in the absence of the guidelines, pronouncements have taken the place in respect of sentencing. If guidelines come to exist, it may accelerate the Judges to follow it with importance and it may also make analogy regarding to sentencing. Sentencing is one of the steps where the Judges use their discretion. We have the judgments to follow in the exact situation. Discretion, which the Judges cherish, is not a power or authority, but a solemn and sacred duty vested on the Judges, which can be shown in acting judicially. Though Mr. Justice Mohammad Imman Ali made a comment which is as follows- 'no sentencing guidelines, the tendency is for trial Judges to award the highest possible sentence provided by the law'.[31]Whether guideline exists or not, shall be immaterial, if the Court debacles with non-application of discretion. 'The legislature cannot make relevant circumstances irrelevant, deprive the court of its legitimate jurisdiction to exercise its discretion not to impose death sentence in appropriate cases. Determination of appropriate measures of punishment is judicial and not executive functions. The court will enunciate the relevant facts to be considered and weight to be given to them having regard to the situation of the case'.[32]

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[31] *Rokia Begum alias Rokeya Begum Versus The State4 SCOB [2015] AD pp.20, 24, para-20*

[32] *BLAST & others Vs. Bangladesh & others, 1 SCOB [2015] AD pp.1, 14, para-50*

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An Outline of 'Consent' in Rape Jurisprudence: From General to the Specifics in Bangladesh

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Consent is perhaps the most contentious issue in rape cases- the prosecution tries to prove the nonexistence of consent while the respondent tries to shade doubt on the claim by attempting to prove the existence of consent. The Penal Code 1860 and the Nari O Shishu Nirjaton Daman Ain 2000 elucidate rape in a way that puts consent at the center (albeit, without defining the term 'consent'). This article aims at evaluating the contradictory statutory conceptions of consent and at seeing our statutory rape law through the specs of those conceptions. Next, the article investigates the judicial attitude and tries to show a dichotomy of the statutory conceptions of consent on one hand and judicial explanation of consent on the other.

I. Introduction

Some scholars claim that sexual consent finds its genesis in sexual autonomy,[1] while others opine that it is sexual agency from which sexual consent derives.[2] Regardless of whether it is sexual agency or autonomy that sexual consent derives from, it magically transforms a normal conduct into a heinous crime. Hence, upon intertwining agency and autonomy, if a

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[1] *Kimberly Kessler Ferzan, 'Consent, Culpability, and the Law of Rape' (2015-2016) 13 Ohio State Journal of Criminal Law 397, 409.*

[2] *Deborrah Tuerkheimer, 'Sex without Consent' (2013) 123 Yale Law Journal Online 335-339 <https://www.yalelawjournal.org/forum/sex-without-consent> accessed on 28 October 2019.*

consenter's identity is depicted as that of 'an 'autonomous moral agent,' (s)he can be conceived […] as [a] very powerful moral magician.

As Heidi Hurd eloquently explains:

> 'To be an autonomous moral agent is to have the ability to create and dispel rights and duties. To respect persons as autonomous is thus to recognize them as the givers and takers of permissions and obligations […]. By recognizing their capacity for self-legislation-for the creation and dissolution of rules that uniquely concern them-one gives meaning to the historic philosophical claim that persons are free inasmuch as they will their own moral laws. One very powerful means by which persons will their own moral laws-by which they alter the moral landscape for themselves and for others-is by granting or withholding consent to other's actions.'[3]

Upon dissecting the core of rape as a crime, we may find two aspects: one having bearing on the nature of the crime committed and another with regard to the psychological state of the person accused of rape; the former is wrongdoing, the latter is culpability.[4] In an incident of rape, the defendant commits something wrongful, and acts with *culpa*. This article is only concerned with the former aspect, namely wrongfulness. An assessment of 'wrongfulness' brings us close to another metaphysical conception, namely, permissibility.[5] Permission is the authorization of an act, as opposed to request which is merely the communication of an affirmative desire to act.[6] There is lack of consensus among the scholars regarding the relationship between culpability, wrongdoing and permissibility. One group of scholars is of the opinion that permissibility follows culpability and other thinks that it follows wrongfulness of the

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[3] *Heidi M. Hurd, 'Justification and Excuse, Wrongdoing and Culpability' (1999) 74 Notre Dame Law Review 1551-1558 ("Moral wrongdoing consists of doing an action that violates the maxims of our best moral theory-whatever that theory may be, be it consequentialist or deontological")*

[4] *Ferzan, 'Consent, Culpability and the Law of Rape' (n 1) 399*

[5] *ibid 406*

[6] *ibid*

act.[7] The opinion that permissibility follows culpability implies that permissibility depends on the particular act's nature as wrongful and not on the defendant's culpability which is merely a psychological state of the accused.[8] We submit that the former view explains the dynamics in sexual relationships better. In order to understand and determine permissibility of an act, understanding or determining *culpa* is immaterial; it is rather the act of will of an individual or his or her choice of concurring in mind and spirit that makes the actions in question permissible.[9]

This Article is an attempt to see rape through the specs of the said concurrence, otherwise known as consent, as it makes its appearance in the rape law discourse. The first part of this Article discusses different statutory conceptions of consent that import different meanings. The second part concerns the tradeoffs that happen to be at play on account of those paradigmatically different conceptions of consent and contextualizes the more general discussion on the statutory conceptions in Bangladesh. The third part delves deeper into the judicial attitude towards consent by analyzing Bangladeshi case laws and submits that consent (if it is seen at all) is seen in Bangladesh as expressional and not as attitudinal.

II. An ontology of consent

The entire discourse of consent in rape law in general is so full of confusion as well as complexities that drawing or determining even only its edge may seem cumbersome at times. As it was rightly put by Turkheimer, "it is virtually axiomatic that nonconsensual sex is rape; the challenge outstanding is to define consent."[10] Given the complexities

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7 *Alan Wertheimer, Consent to Sexual Relations (Cambridge University Press, 2003) 146-147 (Alan Wertheimer, in contrast, appears to think that an action is not permissible because the actor is legally or morally culpable)*

8 *Ferzan, 'Consent, Culpability and the Law of Rape' (n 1) 400*

9 *Joshua Dressler, 'Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform' (1998)46 Cleveland State Law Review 409 ("If a female 'concurs in mind and spirit' with the act of intercourse, her interest in autonomy has not been violated. The attendant social harm of rape is absent")*

10 *Deborrah Tuerkheimer, 'Rape On and Off Campus' (2015) 65 Emory Law Review 1*

involved, we submit that it is better to discuss different statutory conceptions of consent at length than to attempt to define consent.

One of the statutory conceptions of consent is 'factual consent' implying a situation where the consenter consents to sexual intercourse (whether in mind or expression) because (s)he unconditionally desires or prefers it for himself/herself, 'without it necessarily being the case, however, that [the] choice itself constitutes a defense to rape'.[11] 'Legal consent' as a contesting conception to the factual one, implies a situation when a consenter consents to sexual intercourse under conditions that the jurisdiction in question 'deems sufficient […] to constitute a defense to rape'.[12] A statute may say that a minor individual's consent is no defense to rape. Such a statute basically sees consent factually, meaning, that an individual, in fact consents to sexual intercourse; however it is the age of the consenter which conditions the consent and makes it ineligible to count as a defence.[13] Contrarily, when a statute says that minors are too young to consent, the statute means that irrespective of how minors may 'go about choosing sexual intercourse for themselves, [they] lack the competence that the [statute in question] deems necessary for their choices to constitute a defense to statutory rape.'

One of the statutory conceptions of consent is connected with the subjective mental state of the consenter, which is termed as 'factual attitudinal consent';[14] the expression or manifestation of the said mental state is termed as 'factual expressive consent'.[15] When a statute says that consent is the choice that a woman subjectively experiences and not what she manifests or expresses through acts or words, that statute can be said

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[11] *Peter Westen, 'Some Common Confusion about Consent in Rape Cases' (2004-2005) 2 Ohio State Journal of Criminal Law 333, 335*

[12] *Ibid*

[13] *Ibid 336*

[14] *Peter Westen, The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct, (Routledge, 2004)*

[15] *Ibid 5*

to consider consent as factual attitudinal consent.[16] On the other hand, when a statute defines consent as 'words or overt actions by a person indicating [..] agreement to perform a particular sexual act', that statute in fact sees consent as expressional and not attitudinal as such.[17]

The infamous cases of *Burnham* and *Bink* are significant to understand the aforementioned two conceptions of consent through facts.[18] Burnham was a woman who was forced by her putative husband to become a prostitute. She subjectively felt humiliation but nonetheless agreed to do it in fear and on the face of threats. In *Bink*, the case concerned a complainant, who was sexually molested by his fellow inmate in New York jail, named Bink. The complainant, instead of seeking protection, asked the police to come with him and witness the next incident of him getting sexually violated. The complainant pretended not to consent to Bink but subjectively wanted the act to be performed on him once again so that the police could watch it happen. In Burham's case, there was factual expressional consent (to the persons that the woman encountered as a prostitute and who eventually violated her). However, there was no factual attitudinal consent, meaning the woman, subjectively, did not consent to the act. In the latter case, in the second incident of violation, the complainant subjectively was wanting the act to be committed on him and objectively showed lack of consent.

Yet another statutory conception of consent is 'prescriptive consent,' implying 'instances of actual consent, whether attitudinal or expressive, that occur under [..] conditions [that] suffice for the choices to themselves constitute defenses to rape'.[19] Prescriptive consent cannot be a defence in rape cases. Consent given under fear of death or grievous hurt is an ideal example of prescriptive consent, so is consent given under misconception

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16 *Regina v Ewanchuk (1999) 1 SCR 330*

17 *Minnesota Statutes 2019, Section 609.341(4); similar approach is taken under the newly amended Penal Code 1860 of India brought by Criminal Law (Amendment) Act 2013 which provides in Explanation 2 of Section 375 that 'consent means unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act [...].*

18 *People v Burnham (1985) 176 Cal App 3d 1134*

19 *New York v Bink (1981) 444 NYS 2d 237*

or misinformation. In order for sexual intercourse to not be rape, it is therefore required that the consenter consents 'under conditions of sufficient freedom' and without being misinformed [by not being mistaken that consentee is the consenter's husband].'[20] There can also be imputed consent, implying imputation of consent by law- for instance, in cases of marital rape exemption.[21]

The statement that 'consenter consented to sexual intercourse' can have two competing meanings: one denoting that the consenter *actually* 'chose sexual intercourse, regardless of whether (s)he did so attitudinally or expressively (or both), and regardless of whether (s)he did so factually ([…] in a way that does not [of] itself constitute a defense to rape) or legally (under […] conditions that […] the jurisdiction at hand deems sufficient to justify leaving the choice to the consenter). Another meaning of 'the consenter consented to sexual intercourse' is the opposite, meaning that 'although the woman did not *actually* choose sexual intercourse for herself, the law will treat her as if she did.' The former is actual consent and the later is imputed consent.

III. Contextualizing the statutory conceptions of consent in Bangladesh

The two statutory laws that have bearing on rape and consent are the Penal Code 1860 and the *Nari o Shishu Nirjaton Daman Ain,* 2000 of (Amended-2003). The later is a special law and hence has its own overriding effect. Section 2(e) of the said Act says that 'rape' means rape stated under section 375 of the Penal Code 1860 (Act XLV of 1860) subject to section 9 under this Act. Despite the general legal maxim for special laws to prevail over the general ones, this definition specifically declares the superseding authority of section 9 with the help of the words 'subject to,' when it comes to discussing 'rape'. The major change brought

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[20] *Westen, The Logic of Consent(n 14)177*

[21] *Heidi M. Hurd, 'Was the Frog Prince Sexually Molested? A Review of Peter Westen's The Logic of Consent' (2005) 103 Michigan Law Review,1329 (Heidi Hurd claims that "coerced consent is no consent at all"); Kenneth W. Simons, 'The Conceptual Structure of Consent in Criminal Law' (2006) 9 Buffalo Criminal Law Review577*

about by the explanation in terms of age and marital status of the victim,[22] *prima facie* gives the impression that the definition of rape given in Penal Code subsists, subject to these changes that the special law provides. Thus, in order to understand the definition of rape, recourse needs to be had, to the Penal Code.

Section 375 of our Penal Code runs as follows:

A man is said to commit 'rape' who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

Firstly. Against her will.

Secondly. Without her consent.

Thirdly. With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

Fourthly. With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. With or without her consent, when she is under fourteen years of age.

Explanation. Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception. Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.

Our definition of rape is gender-specific; it defines and punishes the rape of a woman by a man only. The section or the Statute does not define

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[22] *Under the explanation to section 9(1) of Nari o Shishu Nirjaton Daman Ain, without wedlock, whoever has sexual intercourse with a woman not being under sixteen years of age, without her consent or with her consent obtained by putting her in fear or by fraud, or with a woman not being above sixteen years of age, with or without her consent, he shall be said to commit rape. On the contrary, Penal Code 1860 provided in the exception to section 375 that sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.*

consent. Consent, however, can be defined as an act of reason accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing power and capacity to withdraw one's assent according to one's will or pleasure.[23]

The definition of rape in our jurisdiction does not use a force standard specifically. The definition contains one exception, one explanation, and five descriptions. A fascinating faction of the section is the first description, namely, 'against the will'. Against the will and without the consent may seem to be synonymous; however they are not as such. The expression 'against her will' implies that the act is committed despite the opposition of the person to the doing of the act, whereas 'without her consent' implies only a passive attitude without active opposition.[24] Therefore, it can be conveniently said that all acts committed against the will of a person, is committed against that person's consent; however all acts committed against the consent of a person are not necessarily committed against their will.[25] By implying active opposition to the act done, the words 'against her will' basically accommodate force standard. One of the ways to determine 'active opposition' is to search for verbal or physical resistance. However, as far as 'without her consent' is concerned, and when that implies an act of reason accompanied by deliberation and a passive attitude as opposed to an active opposition, the second description cannot be said to accommodate a force standard as such. The second description has wide import and in absence of a definition of consent in the statute, it can be said to include both attitudinal and expressional conception of consent. Against her will and without her consent are not conjunctive requirements for an offence of rape to occur, they are disjunctive and therefore, we submit that the law leaves room to judge a case without applying force standard or requiring resistance always. The third description explains rape as sexual intercourse with the woman's

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[23] *Rao Harnarain Singh v State (1958) AIR 123*

[24] *Khalilur Rahman v State of Rajsthan, (1991) 1 Crimes (Rej) 99*

[25] *Muhammad Mahbubur Rahman, Nari o ShishuNirjatan Daman Ain (New Warsi Book Corporation, 2005) 93*

consent, when the consent is obtained by putting her in fear of death, or of hurt. This description is both a description and an exception. It basically negates the defence of consent to statutory rape when the said consent is obtained by putting the consenter in fear of death or hurt. We submit that the third description requires an objective definition of consent; implying the expressional conception rather than the attitudinal one. It basically implies that submission of the body is not a defence of rape under the fear of death or of hurt.[26]

The fourth description gives a situation where the consenter consents on the face of impersonation by the assailant of her husband. The third and fourth conceptions of consent are what Peter Westen calls and we discussed previously, 'prescriptive consent'.

The fifth conception of consent of the section sees consent factually. The section does not negate the consenting ability of an underage person. An underage person can consent to sexual intercourse, whether attitudinally or expressionally; however, that consent even though given in fact, cannot be used in law as a defence of rape. The original Penal Code of 1860 did not outlaw sexual intercourse for persons below a certain age; it was the amendment brought in by the Age of consent act 1891 which first outlawed sexual intercourse for persons below a certain age and considered the same as an offence punishable under the law.[27]

The exception exempts marital rapes without mentioning the word 'consent'. It is our submission that the exception in fact imputes consent in cases where the consenter is married to the consentee and holds situation-specific instances of showing or giving consent as immaterial in existence of marriage.

There is a significant issue to be concerned about with regard to the explanation of rape under section 9 of the *Nari o Shishu Nirjaton Daman Ain* 2000 (Amended-2003). This explanation suggests that rape is sexual

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[26] *State of Himachal Pradesh v Mango Ram, (2000) SOL 478*

[27] *Dagmar Engels,'The Age of Consent Act 1891: colonial ideology in Bengal' (1983) 3(2) South Asia Review 107, 108*

intercourse either 'without consent of the woman' or with consent obtained by putting her in fear or by fraud. This explanation thereby omits the requirement of 'against her will' and provides that for a sexual intercourse to be construed as rape, an intercourse has to happen either without consent or with consent that is vitiated by fear or fraud. It is unclear from the Bangla text of the Law as to whether the intention of the legislature was to omit the words 'against her will' or to merely see 'will and consent' as synonymous. However, when the explanation uses the Bangla equivalent for the word 'consent' twice and does not do so in case of 'will', it remains confusing as to whether the intention of the legislature was to make the Penal Code definition subsist subject to this major change with regard to omitting the 'will' standard in addition to the change brought about in terms of age of the victim.

An anatomical analysis of section 375 does not give us the impression that resistance requirement is a must in order to prove rape. Moreover, an analysis of 'consent' as it appears in the statute, too does not give the impression that it requires objective manifestation of consent in every case (for example, through marks of resistance). The word 'consent' has not been defined in law and this creates scopes for interpreting the same in different ways.

Defining consent as an objective or expressional conception involves certain other irreconcilabilities. Our jurisdiction outlaws sexual intercourse elicited by force or threat and considers the same as rape. Supposing a situation when sex becomes rape when one person is subjected to sexual intercourse by force or by threats of grave bodily injury, death or grievous hurt as such; when force is applied, and when on the face of it, women do everything they can to prevent it (in other words, resist to the utmost, failingly), the intercourse will fall within the purview of rape. On the face of force, the forced does not act upon will or does not cooperate for that matter. However, when it is the threat of serious bodily hurt or death, the subject may out of fear cooperate and act upon will. In both cases, sex will amount to rape. And if lack of consent is taken to import resistance requirement, then the former case can be considered as rape but not can

the second one be because it will fall short on the resistance requirement. We submit that the use of consent in the third conception of consent ('with her consent, when her consent has been obtained by putting her in fear of death, or of hurt') has the implication of diluting the normative strength of consent itself. When the explanation under section 9(1) uses the word consent twice and perceives the second consent as vitiated when the same is obtained by putting the consentee under fear or by fraud, the same conclusion can be drawn therefrom. However, that too, does not legally imply requirement of resistance.

A better understanding of the utility of section 375 is possible with the help of a foreign case, *Commonwealth v. Berkowitz*.[28] In this case, the defendant went on to get involved with sexual intercourse with the complainant who verbally communicated her lack of consent by saying 'no'. Berkowitz neither used force, nor did he threaten the complainant. The Pennsylvania Supreme Court found in favour of the accused because the statute required force to prove rape. The Court found that '[a]s to the complainant's desire to leave the room, the record clearly demonstrates that the door could be unlocked easily from the inside, that she was aware of this fact, but that she never attempted to go to the door or unlock it.'[29] The judgment certainly was legally sound considering the requirement of Pennsylvanian statute. The statute provided for lack of consent as an element to constitute the offence of indecent assault. Therefore, the Supreme Court found the accused guilty of the lesser offense of indecent assault.

If Berkowitz were a case from our jurisdiction, it could be legally considered as rape under section 375 because lack of consent is an element of rape thereunder. And the term 'consent' does not have a definition provided in law that could restrict its interpretation and could legally create a bar in reducing it to a verbal no.

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[28] *(1994) 537 PA A.2d 1161*

[29] *ibid 148*

IV. The conception of consent as determined by the higher judiciary in Bangladesh

An analysis of the reported judgments from the higher judiciary gives the impression that the standard that is widely applied in rape cases is 'against her will' or consequentially the force standard to be proved by instance of resistance. Analysis also suggests that, even if 'without her consent' description is pressed upon, the same is done by seeing consent as an expressional model involving outward manifestation (i.e. deducible from outcries or marks of violence).This endeavor is not to ask whether for all the above-mentioned cases the evidences and circumstances did not and/or could not lead the Court to find a definite conclusion on the happening of the alleged occurrence(s). This endeavour is in no way to advocate that the decisions made were not supposed to be so made, rather only to find out the standard applied (force standard) and the standard ignored (consent standard).

It has often been observed by the higher judiciary that upon being raped, vital parts of the body[30] of the victim 'should have' marks of violence.[31] In one instance, when the victim claimed that she offered resistance to the alleged accused, injuries were searched for because 'before the victim could be subdued and completely overpowered by the aggressor, the struggle should inevitably have left marks on...her body.'[32] Similar stance was taken in several other cases.[33] In addition to scratches and bruises, in one case, signs that 'the victim would be likely to experience difficulty in walking and pain in micturition,'[34] with extraordinary marks of violence were sought,[35] when the victim claimed to have been raped by a 'macho-hero of youthful exuberance.'

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30 *Akhter Hossain and others v State, (1999) 4 BLC 236 (especially the face, breast, chest, throat, neck the lower part of the abdomen, the limbs and the back)*

31 *Masud Mia v State, (2004) 56 DLR 352*

32 *ibid*

33 *Abdul Aziz v State, (1997) 2 BLC 630,Saleh Muhammad v the State, (1996) 18 DLR 67; Mansur Ali v State, (2000) 5 BLC 374*

34 *Masud(n 30)*

35 *ibid*

Another thing which the Court looks for is an outcry raised by the victim (yet another instance of an outward manifestation); such an outcry ('a cry for help and not weeping'[36]) which could enable witnesses to know about the occurrence.[37] One victim unknowingly gave birth to 'suspicion'[38] by saying that she had not raised an outcry. The claim of being gagged,[39] or being scared of weapon,[40] allegedly shown by the accused, could not outweigh the need of searching for outcries in a case in which in the Court's consideration, making an outcry seemed possible immediately before being so gagged or scared.[41] In one case where the victim claimed to have been gagged, it was seen as 'inexplicable' as to 'how the victim could physically be rendered helpless that in a split second her mouth was gagged and she could not raise a cry for help'.[42]

Sometimes, the absence of an outcry supersedes the existence of injuries. In one case, bite marks, scratches, bruises and congestion of blood in private parts- all were considered as 'marks that might have been sustained by a woman who laid on the ground for the purpose of sexual intercourse on her own accord and with consent'- apparently because there had been no outcry heard and the absence thereof was mentioned as the 'first noticeable thing'.[43] In absence of outcry, it was opined that 'the possibility that everything happened with [the alleged victim's] consent had to be borne in mind'.[44] In another instance, in absence of an outcry audible to 'independent witnesses'[45] rupture of hymen on the body of an alleged victim, was not considered as suggestion of rape, despite the doctor's statement made to that effect. In cross examination, the same doctor

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36 *SohelRana v State, (2005) 57 DLR 591*

37 *Shan Khan v State, (1966) 18 DLR 91*

38 *Masud(n 30)*

39 *Shan Khan(n 36)*

40 *MafizuddinMandal v State, (1962) 14 DLR 821*

41 *Md Abdul Khaleque and others v State (1960) 12 DLR 165*

42 *Shan Khan (n 36)para 4*

43 *Md Abdul Khaleque(n 40)*

44 *ibid*

45 *The witnesses were children of 10 and 16 years and were relatives of the victim.*

opined that the injury might have been sustained in various other ways, besides being raped, such as by penetration of fingers or fall on a pointed hard substance. The Court relied on one of the 'alternative ways' (a fall) through which the injury might have been sustained other than through forcible intercourse.[46]

On another occasion, it appeared to the Court that some of the accused persons whom the husband suspected as having an illicit affair with his wife, were falsely alleged as rapists, for in absence of independent witnesses hearing outcries of the victim, it 'seemed' that the circumstances (which was that the girl involved quite frequently lived with her mother coming away from her husband's house) point to her having been in extramarital affair(s). The reason behind her raising the claims of rape, according to the Court, 'might perhaps' had been that on the occasion in question, 'marks' which 'could have been the result of passion' had appeared on her face which she could not possibly hide.'[47]

In yet another instance,[48] the prosecution's story in brief was that because they had consensual sex after the first time (which was non-consensual in the alleged victim's opinion) for 15-16 times; because after the first time, the accused told her that he would marry her. The prosecution maintained that the alleged rapist was a neighbor of the alleged victim who proposed marriage to her and upon being refused, he went on to be on a lookout to establish illicit relationship with her. On the date of occurrence, in absence of family members, the defendant allegedly entered the house and by pressing her mouth, committed rape on her. At the end, he consoled her by saying that he would marry her. Taking advantage of her weakness he made physical contact with her frequently and subsequently she became pregnant and pressurised him for getting married. Finding no other alternative she told the matter to her mother. Analysing the materials on record the court found in favour of the defence and among others, the

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[46] *Rashid Ahmed v State, (1958) 10 DLR 532*

[47] *Md Abdul Khaleque(n 40)*

[48] *SohelRana(n 35)*

Court asked 'should she not try to resist him…..to save her virtue which was more precious to a maiden than the life itself' on the first instance. This statement implies that the standard applied was force or resistance standard.

This article no how opines contrary to the decision reached by the Court in question. The concern lies with only the standard applied. The application of force standard was so pervasive that the fact that force and consent are mutually exclusive,[49] got lost somewhere. The aforementioned case in question had several occasions of intercourse of which the complainant brought the very first one to the Court, which happened, in her opinion, without her consent. Jurisprudentially how and why subsequent actions of the victim negates the first act's being criminal was not discussed. Even if not for the case at hand, an objective judicial analysis of giving and withdrawing of consent could have been, in our understanding, made. Only the resistance requirement was hard pressed.

The emphasis upon marks of violence and outcries shows that the judiciary in Bangladesh holds consent as an expression[50] and not an attitude[51]and the insistence upon resistance may be called the result of application of 'against her will' standard. In absence of any definition of consent provided in the laws, the Courts may consider taking a mixed approach encompassing both expressional and attitudinal definitions depending on the facts of the cases.

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[49] *Anurag Soni v State of Chhattisgarh (2019) SC Para 10 (Court implied that 'resistance' and 'consent' are mutually exclusive by saying that ''consent', for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent'*

[50] *The objective expression of choice and not a subjective experience thereof; i.e. the Minnesota legislature defines "consent" as consisting of "words or overt actions by a person indicating . . . agreement to perform a particular sexual act.*

[51] *The subjective mental or emotional attitude on the woman's part; i.e. the Canadian rape statute, in making it an offense for a person to have sexual intercourse with another without the latter's consent, defines 'consent' as a choice the latter person subjectively experiences-as opposed to a choice she objectively manifests.*

V. Conclusion

Legal requirements of resistance find their genesis in, '[..] fears that women will consent to sexual intercourse or, at least, appear to consent, and yet later maintain that they did not'.[52]Therefore, in order to provide an objective evidence of rape, resistance requirements were put in the laws, to aid the victim as a corroboration to what the alleged rape victim claims. One of the areas that the reform movement of the 1970s targeted, was the annihilation of the resistance requirement. The wave of reform touched the sub-continent as well during early 2010s when the Criminal Law (Amendment) Act 2013 of India brought an amendment to The Indian Penal Code 1860 by providing a proviso to the Explanation 2 of section 375. The Proviso stated that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact be regarded as consenting to the sexual activity. This proviso is not present in our Penal Code; neither does our law categorically require evidence of resistance in rape cases.

Even if the law does not require evidence of resistance in black and white, jurisdictions do not do away with it entirely. There is no jurisdiction in the world which has abolished resistance requirements in the truest sense of the term, nor could any jurisdiction do so.[53] However, over-emphasis on resistance requirement has certain downsides that cannot be judiciously overlooked.

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International Climate Change Regime and its Compliance in Bangladesh: A Strategic Overview

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Being the most vulnerable countries in South Asia as well as on earth, Bangladesh has taken many steps to combat climate change effects and it needs to do more. Due to the geographical location as well as carbon emission of the industrialist countries, Bangladesh is facing some fatal natural calamities like Cyclone, river erosion, drought which make the people of this country homeless and environmental migrant. However, the world is seriously concerned to tackle the adverse impacts of climate change as the natural calamities are increasing day by day. The states have formulated some instruments like United Nations Framework Convention on Climate Change, Kyoto Protocol; Paris Agreements and those are the three milestones that have been adopted by the majority of the nations. Pursuant to its constitutional mandate, Bangladesh has formulated some plans and policies in compliance with the above instruments against all odds. It is one of the earliest countries to adopt those policies and comply accordingly.

Introduction

Arguably, climate change is one the biggest challenges the world is facing in the twenty first century. Climate change means a change of climate

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which is attributed directly or indirectly to human activity that alerts the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.[1]The impact of climate change was not in discussion even in 30 years ago. In the last twenty years, the world is facing serious catastrophic events like global warming, tropical cyclone, heat weaves, flood, rising sea level, forest blazing, erosion, salinity intrusion etc. If the temperature increases at the current rate Global warming is likely to reach 1.5°C between 2030 and 2052.[2]If the global warming is limited to 1.5 degree the sea level rise will continue by 2100.[3]According to the report of Al Jazeera[4], the temperature is 0.1 degree higher the previous warmest June of 2016. Carbon emission has hit the high in the last few years. Eventually the people are being the victim of the forced migration. Not only this, climate change affects the ocean to a great extent. It affects marine biodiversity to a wide range of impacts that include sea level rise, elevated sea temperature, extreme weather and intensification of water column stratification.[5] If the temperature continues, marine life may reduce 17% by the year of 2100.[6] Climate change exacerbates land degradation, specifically in low-lying coastal areas, river deltas, dry lands. Over the period 1961-2013, the annual area of dry lands in drought has increased, on average by slightly

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1 *Article 1, United Nations Framework Convention on Climate Change (UNFCCC), 1992.*

2 *IPCC, 2018: Summary for Policymakers. In: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. In Press.*

3 *Ibid.*

4 *After hottest June, earth heading for warmest month ever, www.aljazeera.com, published on 17.07.19*

5 *Chou, LM, Implications of expected climate changes in the East Asian Seas region: an overview. RCU/EAS, Technical Report Series No. 2. Regional Coordinating Unit, East Asian Seas, UNEP (Bangkok). (ed) 1994P196.*

6 *Climate change: warming ocean may reduce sea life by 17%, www.aljazeera.com, published on 12.06.19*

more than 1% per year, with large inter-annual variability.[7] Larger portion of the poor people of this earth live in Asia. The marginalized and poor in South Asia are already deprived of sufficient food, fresh drinking water, sanitation and adequate healthcare.[8]

Bangladesh, a country of South Asia, is one the most vulnerable countries of the world affected by the adverse impact of climate change. This economically challenged state faced two devastating cyclones named Sidr[9] and Aila[10] along with three mid-level cyclones in the last decade. The Cyclone Sidr claimed the lives of 3406 people in the coastal area of Bangladesh and the cyclone Aila killed 190 people of Bangladesh.[11] Being severely victimized by the impact of climate change, Bangladesh, being the most vulnerable country of climate change as well as having constitutional mandate[12] shows respect to the International Climate Change Law and tries to cope up with the policies made pursuant to the subject matters of Climate Change Law.

International Climate Change Regime

The UN Framework Convention on Climate Change, 1992, Kyoto Protocol 1997 and the Paris Agreements are the rudiments of international climate change law. Those are the primary sources of international climate change regime. The UNFCCC, Kyoto Protocol, and the Paris Agreement,

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7 *IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse gas fluxes in Terrestrial Ecosystems Summary for Policymakers.*

8 *UNISDR/UNDP (2012). Review Paper – Status of Coastal and Marine Ecosystem Management in South Asia. Inputs of the South Asian Consultative Workshop on " Integration of Disaster Risk Reduction and Climate Change Adaptation into Biodiversity and Ecosystem Management of Coastal and Marine Areas in South Asia" held in New Delhi on 6 and 7 March 2012. New Delhi: UNDP. 173 pages.*

9 *This cyclone hit the country's coastal belt on November 15, 2007 in Bangladesh.*

10 *This Cyclone hit on the 15 districts of Southwestern part of Bangladesh on May 25, 2009.*

11 *Md. Abdul Mannan, "Overview of Disaster Management in Bangladesh, A project report" published under Ministry of Disaster Management and Relief, Government of the People's Republic of Bangladesh.*

12 *The Constitution of the People's Republic of Bangladesh, Article 25 available at: http://bdlaws.minlaw.gov.bd/act-367.html (last visited on September 27, 2019)*

as treaties, are legally binding documents.[13] Among them, UNFCCC 1992 is the earliest instruments dealing with the climate change resulting from greenhouse effect.[14] The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.[15] The Kyoto Protocol was adopted to ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases[16] listed in Annex A do not exceed their assigned amounts.[17] The Paris Agreement on Climate Change is the first document that unites the nations in a single platform to tackle climate change. It was adopted to hold the increase in the global average temperature to below 2˚C above pre-industrial levels while pursuing efforts to limit it to 1.5˚C by reducing emission.[18] In addition, the other features of this agreement includes limit the emission of Green House Gases to the same level that nature can absorb normally, review the contribution of every country to cutting emission in every five years, climate financing by the rich countries to the poor countries.

Besides, there are some secondary sources of international climate change law. The above three are the bases of international climate change law while some political agreements as well as decision of the parties are

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[13] *Daniel Bodansky, JuttaBrunnee ,LavanyaRajamani, International Climate Change Law, Oxford University Press, (1st ed. 2017) ,P. 17.*

[14] *Abdullah Al Faruque, Environmental law: Global and Bangladesh Context, p. 110*

[15] *Article 2, United Nations Framework Convention on Climate Change (UNFCCC), 1992.*

[16] *Greenhouse gases includes Carbon dioxide (C02),Methane (CH4),Nitrous oxide (N20),Hydrofluorocarbons (HFCs),Perfluorocarbons (PFCs), Sulphur hexafluoride (SF6).*

[17] *The Kyoto Protocol on Climate Change, 1997Article 3 available at https:// unfccc.int/ resource/ docs/ convkp/ kpeng.pdf (last visited on September 19, 2019)*

[18] *The Paris Agreement on climate Change 2015 Article 17 available athttps://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf(last visited on September 17, 2019)*

enriching international climate regime.[19] These political agreements and decision of the parties helped from different context to form the bedrock of international climate regime. The conference of the parties (COP) has both binding and non-binding effect depend entirely on the will of the states who take part in the conference.[20] Similarly, Copenhagen Accord works as a political agreement and a significant document came out as an output from climate discussion.[21]Additionally, there are some guidelines emerged from the persuasion of the protocol. Marrakesh Accord was the outline to fulfill the targets set out in the Kyoto Protocol. Though the above secondary sources have no legal force but those work as the ancillary of the primary sources of international climate change regime.

Laws and Policies Combating Climate Change in Bangladesh

Bangladesh signed the United Nations Framework Convention on Climate Change on the 9th of June 1992, ratified it on 15 April 1994 and it entered into force on 14 July 1994. The country also ratified the Kyoto Protocol on 22 October 2001 and it came into force on 16 February 2005. Lastly, Bangladesh signed the Paris Agreement on 22 April 2016, ratified it on 21 September 2016 and it entered into force on 04 November 2016. Besides, Bangladesh has introduced notable plans, policies, and funds to make the country climate resilient. Some projects and plans focus both adaption and mitigation while some emphasize on either adaption or mitigation.

Like most of the climate vulnerable countries in the world, Bangladesh had introduced the National Adaption Programme of Action (NAPA) in 2005 as a response to the decision of the Seventh Session of the Conference of the Parties (COP7) of the United Nations Framework Convention on Climate Change (UNFCCC), held on 29th October -10th

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19 *Daniel Bodansky, JuttaBrunnee ,LavanyaRajamani, International Climate Change Law, Oxford University Press, 1st ed. 2017, P 20.*

20 *AnnecoosWiersema, Conference of the Parties to Multilateral Environmental Agreements: The New International Law Makers, Proceedings of the Annual Meeting (American Society of International Law),Vol. 103, International Law As Law (2009), p. 74*

21 *Bodansky, DanielBrunnee, JuttaRajamani,Lavanya, International Climate Change Law, Oxford University Press, 1st ed. 2017, P 21.*

November, 2001 in Marrakech, Morocco. That was the first adaption plan Bangladesh had ever taken. That plan was suggested 15future adaption strategies.[22] Later in 2008, The Government has adopted the Bangladesh Climate Change Strategy and Action Plan which was finalized in 2009. This plan has been adopted in pursuant to the Bali Action Plan.[23]

However, in 2010, the Climate Change Trust Fund Act has been enacted to redress the adverse impact of climate change on Bangladesh and to take measures on other matters relating thereto.[24]

Later the Government also formulated Climate Change Trust Fund Policy in 2010 to supplement the parent Act. In 2012, The Government of Bangladesh has enacted the Disaster Management Act aims to mitigate overall disaster, conduct post disaster rescue and rehabilitation program with more skill, provide emergency humanitarian aid to vulnerable community by bringing the harmful effect of disaster to a tolerable level through adopting disaster risk reduction programs and to enact rules to create effective disaster management infrastructure to fight disaster to make the activities of concerned public and private organizations more coordinated, object oriented and strengthened to face the disasters.[25] In addition, the Government formulated some regulations and policies in respect of Climate Change Trust Fund.

Implementation of the Laws and Policies in Bangladesh

Bangladesh is one of the earliest countries to adopt the law and policies to combat climate change as it is the most vulnerable country which is already facing the devastating impact of climate change. The adverse impacts like sea level rise, salinity of water, changing rainfall patterns,

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[22] *National Adaption Programme of Action, Final Report, November 2005, Executive summary, page XVI.*

[23] *Bali Action Plan was adopted on the 13th Conference of the Parties (COP13) to the UNFCCC, held on 03th -14th December, 2007 in Bali, Indonesia.*

[24] *The Preamble of the Climate Change trust Act, 2010(Act no LVII OF 2010) available at http://bdlaws.minlaw.gov.bd/act-1062.html (last visited on September 29, 2019)*

[25] *The purpose of the Disaster Management Act, 2012(Act no. 34 of 2012) available at http://bdlaws.minlaw.gov.bd/act-1103.html (last visited on September 30, 2019)*

flood, drought and natural disasters are frequently happening in Bangladesh. Over the last three decades, the Government of Bangladesh has adopted various policies and invested over $10 billion to increase Bangladesh's resiliency.[26]

National Adaptation Programme of Action (NAPA) 2005

The NAPA (2005) recognized 15 priority activities, including common awareness raising, capacity building, and project implementation in vulnerable areas, mainly focuses on agriculture and water resources.[27] Basically, NAPA was not a plan rather it reflected only urgent and immediate priorities for adaptation.[28] Bangladesh Climate Change Strategy and Action Plan 2009 is the expansion of the National Adaptation Programme of Action.

National Adaption Plan (NAP)

Under Cancun Adaption Framework, UNFCCC familiarized the National Adaption Plan in 2010. It assists the National Adaption Programme of Action for its proper implementation in developing countries. In 2015, Government of Bangladesh with the support of the Government of Norway and UNDP formulated the Roadmap for Developing a National Adaptation Plan for Bangladesh.[29] This Roadmap is considered the first step towards formulating a National Action Plan which will elaborately focus on Water resources, Agriculture, Communications, Physical infrastructure, Food and health security, Disaster risk reduction,

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Bangladesh Climate Change Strategy and Action Plan 2009, page 1 available at https://moef.portal.gov.bd/sites/default/files/files/moef.portal.gov.bd/page/7022053a_0809_4e4b_a63b_60585c699de2/climate_change_strategy2009.pdf (last visited on September 28, 2019)

[27] *MoF(2018), Journey with Green Climate Fund, Bangladesh's Country Programme for Green Climate Fund, NDA Secretariat, Economic Relations Division, Ministry of Finance, Government of the People's Republic of Bangladesh 2018 available at https:// erd.portal.gov.bd/ sites/ default/ files/ files/erd.portal.gov.bd/page/1a7e22cf_6faf_488a_86ff_d57855ea38cc/Bangladesh_GCF-CP_Draft.pdf (last visited on September 21, 2019)*

[28] *Ibid*

[29] *Available at https://www.adaptation-undp.org/projects/NAP-Bangladesh-GCF (last visited on October 30, 2019)*

Livelihoods and Urban habitation.[30] However, for better performance NAP process should contain the following criteria: transparency and accountability, proper coordination, evidence based future idea and participatory, consistency and mainstreaming, integrated financial plan, observation and evaluation.[31]

Bangladesh Climate Change Strategy and Action Plan 2009

Bangladesh Climate Change Strategy and Action Plan (BCCSAP) classify the action to combat climate change through six main pillars and 44 adaption programmes. The whole action plan is based on the six pillars; (1) Food, security, social protection and health (2) Comprehensive disaster management (3) Infrastructure (4) Research and knowledge management (5) Mitigation and low carbon development (6) Capacity building and institutional development. This action plan largely follows the four key areas of Bali Action Plan; adaption, mitigation, technology, financial resources and investment. This Action was primarily focus on the adaption but later it includes mitigation issues to reduce the emission of greenhouse gases.[32]

Bangladesh Climate Change and Gender Action Plan (BCCGAP) 2013

The Bangladesh Climate Change and Gender Action Plan was formulated to integrate gender concerns in the climate change issues and ensure the participation and contribution of the different stakeholder groups of the society. In the objective part of the BCCGAP, it is stated that this plan was introduced 'to mainstream gender concerns into climate change-related policies, strategies and interventions ensuring access to, participation in, contributions towards and benefits for the diverse group of stakeholders

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30 *Ibid*

31 *Khan, M Zakir Hossain. "National Adaption Plan for Bangladesh: A Paradigm Shift" Dhaka Tribune, April 13, 2017 (last visited October 22, 2019)*

32 *Haque, Saleemul, "Updating Bangladesh's climate change strategy and action plan" The Daily Star,April 11, 2018available at https://www.thedailystar.net/opinion/politics-climate-change/updating-bangladeshs-climate-change-strategy-and-action-plan-1560916(last visited on October 2, 2019)*

for the sustainable and equitable development of Bangladesh.'[33] This plan includes gender consideration into the four pillars among the six pillars mentioned in Bangladesh Climate Change Strategy and Action Plan 2009. The four pillars are- (a) food security, social protection and health; (b) comprehensive disaster management; (c) infrastructure and (d) mitigation and low carbon development. The other pillars were integrated with the above four pillars as crosscutting topics. Specific contribution and participation of women were highlighted in the plan.[34]

Seventh Five Year Plan (2016- 2020)

The Seventh Five Year Plan was designed for climate resilient and sustainable development by enhancing total factor productivity. In this plan, ten issues will be implemented for Climate Change adaption namely, promote a whole-of government approach for climate change readiness, enhance understanding, knowledge, capacity and coordination, prioritize programmes and projects, improved implementation, monitoring and shared learning, enhance CCA financing, integrate gender sensitivity in project design, food security, social protection and health, managing hazards and disasters, infrastructural functioning and maintenance, curbing internal migration and displacement.[35] In this plan, Government of Bangladesh has also included climate change mitigation heading under six different issues namely, Enhance understanding on LCD, Improve capacity in analyzing available opportunities, Enhance capacity of energy saving sectors,: Improvement in Coordination and Communication among

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[33] *Bangladesh Climate Change and Gender Action Plan. Ministry of Environment of Forest, Government of the People's Republic of Bangladesh, Dhaka, Bangladesh. xvi+122 pp. 2013 available at http://nda.erd.gov.bd/files/1/Publications/CC%20Policy%20Documents/CCGAP%202009.pdf (last visited on September 30, 2019)*

[34] *Sharif, Ibrat, Nasir, Naznin Khanum, Roufa and Khan, AS Moniruzzaman, CLIMATE CHANGE ADAPTATION POLICIES IN BANGLADESH: GAP ANALYSIS THROUGH A GENDER LENS, BRAC University Journal, Vol. XI, No.2, 2016,pp. 11-15*

[35] *Seventh Fifth Year Plan FY 2016-FY2020 available at http:// nda.erd.gov.bd/ files/ 1/ Publications/ CC%20Policy%20Documents/7FYP_after-NEC_11_11_2015.pdf(last visited on September 21, 2019)*

Institutions, Ensuring investment in research and innovation, roadmap for Nationally Appropriate Mitigation Actions (NAMA).[36]

The Climate Change Trust Fund Act 2010

After the enactment of the Climate Change Trust Fund Act 2010, the Government has established a Climate Change Trust Fund (hereinafter mentioned as BCCTF).[37] It is the maiden climate fund in response to the adverse impact on climate change in Bangladesh. As per Climate Change Trust Act, 2010, a maximum of 66% of the allocated amount as well as the interests accrued on the remaining 34% kept as fixed deposit can be allocated to CCTF projects.[38] Bangladesh Climate Change Trust Fund Authority implements projects and disburses fund through Palli Karma Sahayak Foundation (PKSF), a Government development organization[39]. BCCTF has provided BDT 25, 06, 44,000/- to PKSF for funding to 63 NGOs under this project. PKSF is funding the selected NGOs visiting their field level activities and evaluating their performance under their specific project.[40] As on 30 November, 2016 PKSF has disbursed BDT 23.85 crore among 61 NGOs for plantation, sanitation, Food security, capacity building and various kinds of research activities.[41] Till 2014, over 70% allocated amount were used only in infrastructure, third pillar of the Bangladesh Climate Change Strategy and Action Plan (BCCSAP) while the most vulnerable sectors such as agriculture, livelihoods, and health were received the least allocation.[42] There are some controversies regarding the allocation spending on infrastructure issue as political influence and special funds have been used for establishing general

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36 *Ibid*

37 *Article 3 of the Climate Change Trust Fund Act, 2010.*

38 *Section 10(b) of the Climate Change Trust Fund Act, 2010.*

39 *Palli Karma Sahayak Foundation is a Government development organization which is committed to alleviate poverty through creating employment opportunity in Bangladesh. Available at http://pksf-bd.org/web/?s=BCCTF (last visited on September 28, 2019).*

40 *Ibid*

41 *Ibid*

42 *Firoz, Remeen "An Analysis of the BCCSAP Projects Implemented in Bangladesh" Dhaka Tribune, February 16, 2018 (last visited on October 15, 2019)*

infrastructures.[43] Moreover, a report published by Transparency International Bangladesh claimed that the BCCTF projects are financially transparent but their work quality is not up to the mark.[44] The Government should closely monitor the implementation of projects and ensure the quality of the works done by the projects.

Bangladesh Climate Change Resilience Fund (BCCRF)

Bangladesh Climate Change Resilience Fund was formed as a part to implement the Bangladesh Climate Change Strategy and Action Plan, 2009. It was a multi donor trust fund primarily worked with the four development partners Denmark, the European Union (EU), Sweden and the UK Department for International Development (DFID). Later, Switzerland became a development partner in December 2010 and the Department of Foreign Affairs and Trade (DFAT) and US Agency for International Development (USAID) joined in 2012. The Fund activities continued till 30th June 2017.[45] The investment projects of BCCRF disbursed $71.13 million till 31st December 2016.[46] This fund had two staged governance system one is Governing Council and a Management Committee. The Governing Council provided strategic direction and guidance to the BCCRF while the Management Committee gave technical advice in the development of work programme and ensured that it worked within the framework of implementation manual.[47] The Governing Council was formed with the representatives of different ministries,

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43 *Ibid*

44 *Haque AK Enamul, Bari Estiaque, Shammin Rumi, Assessing Synergy between Climate and Development Projects Which one is more effective, efficient and transparent?, Asian Centre for Development, 2019 available at https:// www.ti-bangladesh.org/ beta3/ images/ 2019/ cfg/ Synergy_CC_Dev/ Synergy_CC_Dev_Full_Report.pdf (last visited on October 29, 2019)*

45 *Government of the People's Republic of Bangladesh, Finance Division, Ministry of Finance, Climate financing for Sustainable Development, Budget Report, 2018-19, Dhaka 2018 available at https://mof.portal.gov.bd/sites/default/files/files/mof.portal.gov.bd/page/9c4bdcc4_172a_4b26_9fca_5e1bc23484df/English_for%20approval%20%2802_05_2018%29%2018_19%20%281%29.pdf (last visited on October 30, 2019).*

46 *Ibid*

47 *Available at https://www.worldbank.org/en/news/feature/2012/05/22/bangladesh-climate-change-resilience-fund-bccrf (last visited on October 29, 2019)*

development partners and civil society.[48] Bangladesh Bank observed the management of the funds received from the development partners of the BCCRF.[49] Since the donors did not want to distribute the fund directly to the Bangladesh Government, the World Bank was selected to manage the money. But, due to declination of the World Bank to manage the fund, Bangladesh lost around 13 million pounds from the development partners.[50] Relevantly, The World Bank charged 3.4% for overall trust fund and project management.[51] However, the BCCRF is no more in existence as the World Bank and the donors did not extend the trusteeship.

Green Climate Fund(GCF)

Pursuant to the Article 11 of the UNFCCC, parties established a climate fund named Green Climate Fund at COP16, held in Cancun, Mexico in 2010.[52] It is the largest dedicated fund for combating climate change impacts in the world. This fund has allocated 50% for adaption investment and 50% for migration investment. The GCF is controlled by the Green Climate Fund Board which acts under the guidance of Conference of the Parties (COP).[53] This fund works to support programmes, policies, projects and other activities in developing country parties. In addition, GCF was designed by a transitional committee formed as per the decision of taken in COP16. There is a position of trusteeship in the Green Climate Fund to manage the finance of the Green Climate Fund, maintain financial records and prepare financial statements and other reports required by the

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48 *Ibid*

49 *Government of the People's Republic of Bangladesh, Finance Division, Ministry of Finance, Climate financing for Sustainable Development, Budget Report, 2018-19, Dhaka 2018 available at https://mof.portal.gov.bd/sites/default/files/files/mof.portal.gov.bd/page/9c4bdcc4_172a_4b26_9fca_5e1bc23484df/English_for%20approval%20%2802_05_2018%29%2018_19%20%281%29.pdf (last visited on October 30, 2019).*

50 *Available at https://www.thedailystar.net/backpage/dhaka-loses-%C2%A313m-climate-funds-1312921 (last visited on October22, 2019).*

51 *Available at https://www.worldbank.org/en/news/feature/2012/05/22/bangladesh-climate-change-resilience-fund-bccrf (last visited on November 03, 2019).*

52 *Available at https://unfccc.int/process/bodies/funds-and-financial-entities/green-climate-fund (last visited on November 06, 2019).*

53 *Ibid*

Board of the Green Climate Fund.[54] At present there is no permanent trustee of this Fund. World Bank is working as an interim trustee as per the invitation of the Conference of the Parties. GCF started its initial resource mobilization in 2014, and quickly gathered pledges worth US$ 10.3 billion.[55] Lion's shares of these funds come from developed countries and little portion from some developing countries, regions, and one city (Paris).[56] The target groups of this Fund are highly vulnerable to the effects of climate change, in particular Least Developed Countries (LDCs), Small Island Developing States (SIDS), and African States.[57] The main objects of this Fund are to create a climate resilient environment in the climate vulnerable countries, compensate the lower carbon emission countries and energize the global response to combat climate change.

In Bangladesh, Economic Relation Division (ERD) is the National Designated Authority (NDA) works as the country representative of the Green Climate Fund. ERD as the National Designated Authority recommends funding proposal and programs relating to national climate strategies and plans to the GCF Board.[58] After becoming NDA in 2014, Economic Relation Division recognized six as National Implementing Entities (NIE), among them, only Infrastructure Development Company Limited (IDCOL) and Palli Karma Sahayak Foundation (PKSF) has got accredited by the GCF Board.[59] Till May 2018, Bangladesh received grant

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[54] *See Decision no. 109 of the Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010.*

[55] *Available at https://www.greenclimate.fund/who-we-are/about-the-fund (last visited on November 06, 2019).*

[56] *Ibid*

[57] *Ibid*

[58] *Government of the People's Republic of Bangladesh, Economic Relations Division, Ministry of Finance, GIZ, Information Booklet Green Climate Fund, Dhaka 2015available at https://erd.portal.gov.bd/sites/default/files/files/erd.portal.gov.bd/page/1a7e22cf_6faf_488a_86ff_d57855ea38cc/Information%20Booklet%20on%20GCF.pdf (last visited on November 10, 2019).*

[59] *Government of the People's Republic of Bangladesh, Finance Division, Ministry of Finance, Climate financing for Sustainable Development, Budget Report, 2018-19, Dhaka 2018 available at https://mof.portal.gov.bd/sites/default/files/files/mof.portal.gov.bd/page/9c4bdcc4_172a_4b26_9fca_5e1bc23484df/English_for%20approval%20%2802_05_2018%29%2018_19%20%281%29.pdf (last visited on October 30, 2019).*

amounting $85.42 million on three climate change projects from GCF.[60] In total, GCF Board has approved 42 new projects worth of US$8,056 million in 2018.[61]

Conclusion

In line with the progress of international climate change regime, the prompt action of Bangladesh is always admirable. Basically, it is a global responsibility of every state to minimize the harsh impact of climate change. The developed countries should be more concerned in respect of sustainable development and climate resilience and they have to come forward to minimize the effect of climate change in different corners of the world because the lion's share of the liabilities lies on them as the developed countries are responsible for the maximum amount of carbon emission. Regional cooperative organizations can jointly combat and mutually finance each other to come out from the primary losses and lessen the damage. For example, ASEAN has prioritized the situation of the climate change in its summit held in Singapore in 2007. Though the topic was discontinued but they have started to think about it. Making a Regionally Determined Contribution can be a strong stance for the member states countries to inspire more aspiring Nationally Determined Contributions.[62]Likewise, SAARC[63] can be a strong platform among the South Asian Nations to make the collective effort to think about the climate change and its adverse impacts on the South Asia. Being a member state of SAARC, Bangladesh would be benefitted if the issues of climate change were introduced. It should be borne in mind that Climate change is no more a geopolitical issue rather it should be handled

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[60] *Ibid*

[61] *Amin, Mehedi Al "Green climate fund (GCF): 19 projects worth $ 1billion approved" Dhaka Tribune, October 23, 2018 (last visited on October 25, 2019).*

[62] *AriefWijaya, ShiraIdris, Asean Countries Must Act Together to Confront Climate Change, World Resources Institute (blog), November 16, 2017Available at http//:www.wri.org/blog/2017/11/asean-countries-must-act-together-confront-climate-change.*

[63] *The South Asian Association for Regional Cooperation is the regional intergovernmental organization of eight states in South Asia. It was founded in Dhaka on 8 December 1985. See also http://www.saarc-sec.org (last visited on November 22, 2019).*

transnationally. The concern of the world nations in respect to climate change would make the earth a better place to live by adapting as well as mitigating the impact on climate change.

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Administrative Tribunals in Bangladesh: Investigating Legal Pitfalls and Factual Challenges in Proper Dispensation of Justice Compared to India and Pakistan and the Possible Ways Out

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Administrative Tribunal in Bangladesh is a new adjudicating body established to serve as an alternative institutional mechanism in order to ensure prompt, effective, inexpensive, flexible and expert adjudication as well as expeditious disposal of service disputes of civil servants by ousting jurisdiction of ordinary courts on such matter. However, this paper tries to explore that the adjudicating mechanism of such Tribunal is affected by intricate legislations, non-compliance in full of the Constitutional mandate, deviation from equality principles, unavailability of a dynamic procedure as to the recruitment of personnel of expertise and special skill as well as unsecured terms and conditions of them keeping their personal independence detained in the cage, non-existence of any established system of appointing panel advocate a variety of the jurisdictional lacking and faults as well as functional and procedural defects. To explore such findings, this paper attempts to examine whether the legal provisions of the Administrative Tribunals Act, 1980 and Rules framed there under are adequate in the proper and expeditious disposal of the service litigants' grievances through the critical analysis of these provisions

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compared to especially that of India and Pakistan as well as the empirical scrutiny of the practical scenario of such Tribunals in Bangladesh. This paper, in fine, feels necessary for serious modifications of those legal provisions and tackling those challenges and therefore puts forward the possible ways out.

I. Introduction

In this contemporary world, every successive government aims at making welfare to the people. With the increase of the population, there has been a significant increase in the functions and duties of the government, in consequence of which the executive has been granted tremendous powers which has resulted in the increase of legislative powers and output, generated more and more litigations and also simultaneously imposed restriction on the freedom of the people which causes a constant frictional force and parallelism between the individual and executive.[1] The recent development of welfarism has created new rights and duties and contributed to unexpected augmentation in governmental activities which results in the creation of many new areas of disputes of special nature between individuals, community and state agencies.[2] Most of these disputes are different in nature and of technical kind, which requires expert adjudication following a realistic approach rather than a theoretical or legalistic approach but the adjudicating mechanism of the ordinary courts is expensive and full of intricate legislations bristling with technicalities and formalities and their members are neither adequately trained nor equipped to deal with such technical matters at hand.[3] In this respect, Lord Denning aptly depicts, "the ordinary court is not a suitable forum".[4] Therefore, it was keenly felt to establish an appropriate and suitable forum

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1 *BinayakSubudhi and Praveer Sharma, 'Central Administrative Tribunals: A Boon or a Bane for Indian Justice System'[2017] 3:5 Journal on Contemporary Issues of Law 1.*

2 *M.P Jain and S.N. Jain, Principles of Administrative Law (4th edn, N.M. Tripathi Private Ltd, Bombay, 1986) 181.*

3 *K.C. Joshi, Administrative Law (3rd edn, Allahabad Law Agency, Allahabad, 1984) 88.*

4 *Lord Sir Alfred Denning, Freedom under the Law (1st edn, Stevens & Sons Ltd, London, 1949) 77.*

to settle these disputes of special nature fairly and effectively, which ultimately led to the creation of Administrative Tribunals with the task of undertaking judicial and quasi-judicial functions,[5] a proper forum to ensure cheapness, accessibility, freedom from technicality, informality, flexibility, expert knowledge, expedition, policy oriented decision and privacy, if necessary, in the dispensation of justice.[6] Hood Phillips and Paul Jackson rightly encapsulate that "The reasons why parliament increasingly confers powers of adjudication on special tribunals rather than on the ordinary courts may be stated positively as showing the greater suitability of such tribunals, or negatively as showing the inadequacy of the ordinary courts for the particular kind of work that has to be done."[7] Thus the growth and development of Administrative Tribunals represents an output of the reaction against the highly individualistic and utterly technical and formalistic approach of the Courts, progresses a movement from 'judicial justice' to 'administrative justice with a view to tackling the rigors of judicial process and behavior,[8] and portraits such adjudicating body of resolving disputes of special nature as is established to relieve the ordinary courts from the ever mounting pressure of litigation.[9] In fact, its development and proliferation are essentially a twentieth century phenomenon[10] as Robson reiterates, "Administrative Tribunals do their work more rapidly, more cheaply, more efficiently than ordinary courts…possess greater technical knowledge and fewer prejudices against Government…give greater head to the social interests involved…decide

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5 *Kautilya, Administrative Law (1993) 83.*

6 *H.M. Seervai, Constitutional Law of India: A Critical Commentary, (N.M. Tripathi Private Ltd, Bombay, 1967) 896.*

7 *O. Hood Phillips and Paul Jackson, Constitutional and Administrative Law, (7th edn, Sweet & Maxwell Ltd, London, 1978) 577.*

8 *Concept and Evolution of Administrative Tribunals in India, available at https://www.google.com/search?q=Concept+and+Evolution+of+Administrative+Tribunals+in+India&oq=Concept+and+Evolution+of+Administrative+Tribunals+in+India&aqs=chrome..69i57.1334j0j7&sourceid=chrome&ie=UTF-*

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9 *Sanjay Gupta and Smriti Sharma, Judicial Analysis of the Powers and Functions of the Administrative Tribunals, [2014] 3:1 Christ University Law Journal 83.*

10 *S.M. Hassan Talukder, Administrative Tribunals in Bangladesh: A Legal Analysis, (Bangladesh Law Research Centre, Dhaka, 2011) 1.*

disputes with conscious effort at furthering social policy embodied in the legislation."[11]

Therefore, the Bangladesh Constitution[12] has mandated the setting up of Administrative Tribunals. By virtue of this mandate, Parliament has enacted the Administrative Tribunals Act, 1980[13] for establishing Administrative Tribunals to deal exclusively with and resolve service litigations of the persons in the service of the Republic or of a statutory public authority and to play a monumental role in the redressal of their grievances. Administrative Tribunals exist not only in Bangladesh, but also in other countries such as India, Pakistan, French, and Germany etc. But Administrative Tribunals in Bangladesh becomes infected with a variety of legal loopholes and factual challenges in the performance of their jurisdictional functions despite having the constitutional mandate and legislative intent to ascertain pragmatic and expeditious disposal of service disputes.

This paper aims at investigating the legal pitfalls of Administrative Tribunals in Bangladesh and exploring the administrative challenges in the more efficient and proper operation of the functions of the Administrative Tribunals. To fulfill the aim of this paper, the authors have attempted to search whether stringent adherence to the Constitutional mandate and principles has been fully observed by the Parliament in granting the jurisdictions of Administrative Tribunals in Bangladesh, and to scrutinize the compliance with the reasons for which the Administrative Tribunal was established. This paper has taken the help of decided cases and critically analyzed, so far as practicable, the like provisions of India, Pakistan, French and Germany in a comparative context, as the case may

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[11] *Quoted in Emmanuel Zafor, 'Administrative Law' (Lahore) 61. See also M.A. Fazal, 'Judicial Control of Administrative Action in India, Pakistan and Bangladesh' [1990].*

[12] *Adopted by the Bangladesh Constituent Assembly on 04 November, 1972 and came into force on 16 December, 1972. To gather a useful knowledge on the history of Bangladesh's Constitution-making, see Abul Fazl Huq, 'Constitution Making in Bangladesh'[1973] 46: 1 Pacific Affairs, 59-76.*

[13] *Act No. VII of 1981. This Act entered into force on 01 February, 1982. See Vide Notification No. S.R.O. 30- L/82/JIV/1T- 3/81, Dhaka, 12 January, 1982.*

be. In concluding this paper, the authors have tried to search the possible ways out in order to overcome the legal pitfalls and challenges.

II. Establishment of Administrative Tribunals in Bangladesh: A Critical Look

A. Constitutional Outline of Administrative Tribunals

During post-independence period, Bangladesh has ushered in a new era of development of tribunal system through the adoption of its new constitution as the framers of the 1972 Constitution of Bangladesh incorporated in it for the first time provisions as to the establishment of Administrative Tribunals in order to ascertain speedy and efficacious disposal of cases relating to service matters, by ousting the jurisdiction of the ordinary courts in this connection.[14] Resultantly Article 117[15] of the Constitution of Bangladesh ventured a constitutional set up with regard to the establishment of Administrative Tribunals for resolving disputes as to the terms and conditions of service of civil servants throughout the country. Pursuant to such constitutional mandate, the Bangladesh legislature was empowered to enact law providing for the establishment of Administrative Tribunals to exercise jurisdiction regarding matters related to the terms and conditions of persons in the service of the Republic; the acquisition, administration, management and disposal of any property vested in or managed by the Government and service in any nationalized enterprise or statutory public authority; and any law mentioned in the First

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[14] *S.M. Hassan Talukder, 'Administrative Tribunals in the Subcontinent: A Study in their Origin and Development' [2007] 18:2 Dhaka University law Journal, Studies Part-F 97.*

[15] *Constitution of the People's Republic of Bangladesh 1972, art 117(1) postulates- "Notwithstanding anything hereinbefore contained, Parliament may be law establish one or more administrative tribunals to exercise jurisdiction in respect of matter relating to or arising out of-*

(a) the terms and conditions of persons in the service of the Republic, including the matters provided for in Part IX and the award of penalties or punishment;

(b) the acquisition, administration, management and disposal of any property vested in or managed by the Government by or under any law, including the operation and management of, and service in any nationalized enterprise or statutory public authority;

(c) any law to which clause (3) of article 102 applies."

Schedule to the Constitution.[16] And the jurisdiction of any other court is ousted to entertain any proceedings or make any order concerning such matters falling within the jurisdiction of such tribunal save as the provisions for appeals from, or the review of, decisions of such tribunal.[17]

B. Legislative Set up of Administrative Tribunals

In fulfillment of the constitutional mandate, eight years later of the enforcement of the Constitution, the Parliament enacted the Administrative Tribunals Act, 1980 which empowered the Government to establish one or more Administrative Tribunals to deal with matters and disputes especially pertaining to service matters of civil servants. Not only this, in order to supplement the provisions of the Act to ensure the smooth operation as well as fulfillment of the objectives of such tribunals in Bangladesh, under the provisions of section 12(1)[18] of the Act, the Government has adopted relevant rules i.e. the Administrative Tribunals Rules, 1982, the Officers and Staff (Administrative Tribunal) Recruitment Rules, 1985, and the Officers and Staff (Administrative Appellate Tribunal) Recruitment Rules, 1985.

In exercising of the powers conferred by section 3(1)[19] of the Administrative Tribunals Act, 1980, the Government, by a notification, established an Administrative Tribunal in Dhaka on 01 February, 1982, for the whole of Bangladesh, which was formed for the first time in the history of Bangladesh with undertaking the herculean task of resolving disputes regarding service matters of civil servants. Since the formation of

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[16] *Though the Bangladesh Constitution provides for the establishment of Administrative Tribunals to deal with different matters as mentioned in article 117, but Administrative Tribunals dealing only with service matters have been established.*

[17] *Constitution of the People's Republic of Bangladesh 1972, art 117(2) provides that 'Where any administrative tribunal is established under this article, no court shall entertain any proceedings or make any order in respect of any matter falling within the jurisdiction of such tribunal: Provided that Parliament may, by law, provide for appeals from, or the review of, decisions of any such tribunal.*

[18] *Administrative Tribunals Act 1980, s 12(1) says-"The Government may, by notification in the official Gazette, make rules for carrying out the purposes of this Act."*

[19] *Administrative Tribunals Act 1980, s 3(1) reiterates thus "The Government may by notification in the official Gazette, establish one or more Administrative Tribunals for the purpose of this Act."*

the first tribunal, ten years later, the realization that the single tribunal could not be able to deal with the increasing number of cases expeditiously necessitated to establish the second Administrative Tribunal at Bogura on 30 may, 1992. Not being such tribunals enough to ensure speedy justice, nine years later, the Government established five more tribunals and as such, the total number of tribunals stands at seven in the whole of Bangladesh, whose territorial jurisdictions the Government in exercise of the powers conferred by section 3(2)[20] of the Act can specify the area within which each tribunal shall exercise jurisdiction and accordingly have been specified, altered and re-fixed.[21] The seven Administrative Tribunals have been conferred territorial jurisdictions over 61 out of 64 administrative districts in Bangladesh with the exclusion of three administrative hilly districts i.e. Khagrachari, Rangamati and Bandarban though, as claimed by the Registrar of the Administrative Appellate Tribunal in an interview with the authors, placed under the jurisdiction of Administrative Tribunal located at Chattogram.

C. Composition of Administrative Tribunals: Single Member Tribunal

Section 3(3) of the Administrative Tribunals Act, 1980 lays down provisions regarding the composition of Administrative Tribunals in Bangladesh and makes it a single member tribunal comprised of one member who shall be appointed by the Government from among persons who are or have been District Judges.[22] Thus unlike the Service Tribunal of Pakistan comprised of a Chairman and such member or members not exceeding three as the President may from time to time appoint[23] and the Administrative Tribunal of India consisted of a Chairman and such number of Vice-Chairman and Judicial and Administrative Members as

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[20] *Administrative Tribunals Act 1980, s 3(2) provides, "When more than one Administrative Tribunal is established, the Government shall, by notification in the official Gazette, specify the area within which each Tribunal shall exercise jurisdiction."*

[21] *Notification S.R.O. No. 288-Law/2001, dated 22 October, 2001.*

[22] *Administrative Tribunals Act 1985, s 3(3)*

[23] *Service Tribunals Act 1973, s 3(3)*

the Government may deem fit,[24] the Administrative Tribunal in Bangladesh is a single member tribunal. Furthermore, unlike the Service Tribunal of Pakistan[25] or the Administrative Tribunal of India[26] concerning the working of tribunals by benches, the Administrative Tribunal in Bangladesh has no bench to perform its undertakings in an effective, fair and efficient manner and to ensure its smooth and fruitful functioning in the disposal of cases.

D. Qualifications of the Members of Administrative Tribunals: Negation of Expertise and Special Skill

As per section 3 (3) of the Administrative Tribunals Act, 1980, the Government can appoint as the member of the Administrative Tribunal only a person who is or has been a District Judge. So a single member tribunal is composed of a District Judge[27] who is expected to resolve relevant disputes in a satisfactory and efficient manner.

But, it is pertinent to mention here that in Pakistan the Chairman of the Service Tribunal is required for being appointed from among the persons who are, or have been, or are qualified to be, judges of High Courts although there exist no prescribed basic qualifications of other members (not exceeding three) in the relevant Act.[28] Likewise Pakistan, the Chairman of the Administrative Tribunal of India is to be appointed from among the persons who is, or has been, a judge of a High Court but the

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[24] *Administrative Tribunals Act 1985, s 5(1)*

[25] *Initially there was no legal provision as to the working of the service tribunal by benches in the Service Tribunals Act, 1973. In 1978, a new section 3A was inserted to the Act by the Service Tribunals (Amendment) Ordinance, 1978. It depicts that "The powers and functions of a Tribunal may be exercised or performed by Benches consisting of not less than two members of Tribunal, including the Chairman, constituted by the Chairman.*

[26] *Administrative Tribunals Act 1985, s 5(1) read together with s 5(2) provide that "….subject to the other provisions of this Act, the jurisdiction, powers and authority of the Tribunal may be exercised by Benches thereof. A Bench shall consist of one Judicial Member and one Administrative Member.*

[27] *In judicial sphere, a district Judge is the head of the Judiciary at the district level having, indeed, at least 15 years' experience in the judicial service. See the Civil Courts Act, 1887 (Act no. xii of 1887).*

[28] *Unlike the Chairman, the basic qualifications of the members of the Service Tribunal of Pakistan have been determined by the Service Tribunals Act, 1973. This issue has been kept in the hands of the President. See sec. 3(3), Service Tribunals Act, 1973.*

Vice-Chairman of the Tribunal, who has held that office for at least two years, can also be appointed as the Chairman of the Tribunal.[29] Unlike Pakistan, in India the Judicial member of the Administrative Tribunal is required to be a person who is, or has been, or is qualified to be, a judge of a High Court; or has been a member of the Indian Legal Service and has held a Grade I post of that Service for at least three years.[30] The Administrative Member of the Tribunal is to be a person who has held the post of an Additional Secretary to the Government of India for at least two years or any other post under the Central or a State Government carrying a scale of pay which is not less than that of an Additional Secretary to the Government of India; or has held the post of a Joint Secretary to the Government of India for at least three years.[31]

Unlike India and Pakistan, in Bangladesh there is no legal provision as to the appointment of a person who is, or has been, a judge of the High Court Division of the Supreme Court as the member of the Administrative Tribunal, and only a District Judge who is actually qualified to be a judge of the Bangladesh Supreme Court[32] can be the member of such Tribunal. But it should be worthy of mention that in India, if the Vice-Chairman of the Administrative Tribunal can be recruited as its Chairman then a carrier civil servant in the rank of Secretary or additional secretary, like a Judge of the High Court, becomes eligible for being appointed as the Chairman of such Tribunal whereas in Pakistan a civil servant with no academic legal qualification can be recruited as a judge of the High Court[33] and as such, shall be qualified to be the Chairman of the Service Tribunal, but in Bangladesh, only a judicial officer having legal qualification can only be appointed to the single member Tribunal. Resultantly the Administrative Tribunal in Bangladesh can suffer from vacuum of consisting of a carrier

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29 *Administrative Tribunals Act 1985, s 6(2)*

30 *Ibid.*

31 *Ibid.*

32 *Constitution of the People's Republic of Bangladesh 1972, art 95(2)(b)says that a person shall be qualified for appointment as a judge of the Bangladesh Supreme Court if he or she has held judicial office for not less than 10 years in the territory of Bangladesh.*

33 *Constitution of the Islamic Republic of Pakistan 1973, art 193(2) (b)*

civil servant having expertise, skill, wisdom and intellectuality on the administration to resolve the administrative disputes especially service disputes expeditiously in an efficient manner.

E. Unsecured Terms and Conditions of the Office of the Members of Administrative Tribunals:

With regard to the terms and conditions of the office of members of Administrative Tribunals, section 3(4) of the Administrative Tribunals Act, 1980, encapsulates that a member of an Administrative Tribunal shall hold office on such terms and conditions as the Government may determine. This provision is incongruous with personal independence of the judges meaning that judges are not dependent on Governments in anyways that might manipulate or influence them in arriving at decisions in individual cases.[34] However, pursuant to section 3(4) of this Act, the Government is yet to devise and adopt any distinctive Rules as to the terms and conditions of the members of such tribunals and as such, they are being regulated by the Government Rules, framed under Article 133[35] of the Bangladesh Constitution, applicable to person in the service of the Republic. In this respect, the observations of the Supreme Court of Bangladesh in Masdar Hossain case[36] require to be noticed that pursuant to Articles 115, 116 and 116A (Part VI) of the Bangladesh Constitution, judicial service is recognized and treated separately and cannot be part of the civil, administrative or executive service of the Country. Therefore, as there are separate provisions for judicial officers, Article 133 of the Constitution cannot be invoked for the judicial officers not being persons in the service of the republic and hence, the Rules regarding their

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[34] *J.A.G Griffith, The Politics of The Judiciary (1977) 27. Quoted in, M. Ershadul Bari, 'Importance of an Independent Judiciary in a Democratic State' [1993] 4:1 Dhaka University Studies part-F 2.*

[35] *Constitution of the People's Republic of Bangladesh 1972, art 133 reiterates that "Subject to the provisions of this Constitution Parliament may by law regulate the appointment and conditions of service of person in the service of the Republic: Provided that it shall be competent for the President to make rules regulating the appointment and the conditions of service such person until provision in that behalf is made by or under any law, and rules so made shall have effect subject to the provisions of any such law."*

[36] *Secretary, Ministry of Finance v. Masdar Hossain [2000] DLR 86 (AD).*

appointment and conditions of service cannot be framed there under. It is also noticeable that as the defense service is under Part IV of the Constitution, so is judicial service under Part VI. In such a situation, the defense service has been correctly organized by separate Acts and Rules. Likewise, pursuant to the provisions of Part VI, the judicial service shall have to be organized and the Acts and rules made thereunder and the Apex Court has rendered specific guidelines therefor.[37] However in 2007, the Non-party Care-taker Government has adopted appropriate Rules[38] for the members of the judicial service and magistrates exercising judicial functions in consonance with those guidelines.

Likewise Bangladesh, the Chairman and members of the Service Tribunal of Pakistan hold office on such terms and conditions as the Government may determine and the law is silent on any security of tenure of the members[39] but in India, the tenure of the office of the Chairman and Vice-Chairman of the Administrative Tribunal has been fixed as five years or 65 years of age, whichever is earlier and 62 years for members.[40] In France, the members of the *Counseil d' Etat*and in Germany, professional judges are appointed for life and cannot be removed from their offices arbitrarily. These factors have made France and German Administrative Courts judicial bodies of repute inspiring confidence.[41] Therefore, it is axiomatic that the members of the Administrative Tribunals in Bangladesh should have a term of office specified for a number of years or until a certain date of retirement in order to make them feel secure enough to furtherance the dispensation of justice freely and without the intervention of the executive. In such situation, the security of tenure of the members of Administrative Tribunals in Bangladesh appears to be unsatisfactory and incompatible

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37 *Ibid*

38 *These rules are the Bangladesh Judicial Service Commission Rules, 2007; the Bangladesh Judicial Service (Pay Commission) Rules, 2007; the Bangladesh Judicial Service (Constitution of Service, Appointment to Service, Suspension, Dismissal and Removal) Rules, 2007; and the Bangladesh Judicial Service (Posting, Promotion, Grant of Leave, Control, Discipline and Other Conditions of Service) Rules, 2007.*

39 *Service Tribunals Act 1973, s 3(4)*

40 *Administrative Tribunals Act 1985, s 8*

41 *Pirzada Mamoon Rashid, Manual of Administrative Laws (1998) 53-54.*

with their personal independence,[42] which creates barrier to proper dispensation of justice.

III. Jurisdiction of Administrative Tribunals in Bangladesh: Exploring Jurisdictional Lacking

A. Non-observance in Full of the Constitutional Article 117-Mandate and Denial of Equality Principles:

The preamble to, and section 4 of, the Administrative Tribunals Act, 1980, originally enacted, has confined the jurisdiction of the Administrative Tribunals as aforesaid in Article 117 of the Bangladesh Constitution merely to deal with disputes relating to the terms and conditions of persons in the service of the Republic and, as such, it precluded the Administrative Tribunals from exercising jurisdiction in respect of matters relating to or arising out of the terms and conditions of any person in the service of any nationalized enterprise or statutory public authority; the acquisition, administration management and disposal of any property vested in or managed by the Government; and any law mentioned in the First Schedule to the Bangladesh Constitution.[43] Thus the Administrative Tribunal exercised exclusive jurisdiction to decide disputes relating to service matters of merely Government servants. Such confining of the tribunal's jurisdiction led the judiciary to adjudge that Administrative Tribunals possess exclusive jurisdiction as to service matters of Government servants, and civil courts have no jurisdiction in this respect[44] and thereby jurisdiction of civil courts has been ousted.

Subsequently in 1984, the Administrative Tribunals Act, 1980 was amended by The Administrative Tribunals (Amendment) Ordinance,

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[42] *As to personal independence of the judges, the International Bar Association says that it means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control. See, Md. Abdul Halim, Constitution, Constitutional Law and Politics: Bangladesh Perspective, (4th edn, CCB Book Centre, Dhaka, 2008) 341.*

[43] *S.M. Hassan Talukder, 'Jurisdiction of Administrative Tribunals in Bangladesh: An Analysis and Evaluation' [2007] 18:1 Dhaka University Law Journal, Studies Part-F 79, 80.*

[44] *Md. Habibur Rahman v. A G, Works and WAPDA,[1987] BLD 44 (HCD)*

1984[45] which only extended the jurisdiction of the tribunal to hear and determine disputes relating to the terms and conditions of persons in the service of the statutory public authorities. So still now the Administrative Tribunals have no jurisdiction to resolve disputes relating to the terms and conditions of any person in the service of any nationalized enterprise; the acquisition, administration management and disposal of any property vested in or managed by the Government; and any law mentioned in the First Schedule to the Constitution.[46] By amendment, newly incorporated provision in section 2 of the original Act defined statutory public authority meaning an authority, corporation or body specified in the schedule added for the first time to the Act[47] but the newly inserted schedule did not incorporate into it all the statutory public authorities, though the schedule was amended for many times.[48] At the very beginning, the Schedule included only some financial institutions, and subsequently excluded[49] the Rupali Bank perhaps in the consideration of its privatization, and thus, at present, only persons in the service of some specified financial institutions,[50] with the exclusion of some other statutory public authorities[51] which are not financial institutions although the Bangladesh

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45 *Ordinance No. LX of 1984, published in the Bangladesh Gazette on 25 September, 1984.*

46 *The Preamble to the Administrative Tribunals Act, 1980 provides that An Act to provide for the establishment of Administrative Tribunals to exercise jurisdiction in respect of matters relating to or arising out of the terms and conditions of service of persons in the service of the Republic or of any statutory public authority. And section 4(1) of the Act says that "An Administrative Tribunal shall have exclusive jurisdiction to hear and determine applications made by any person in the service of the Republic or of any statutory public authority……"*

47 *Administrative Tribunals Act 1980, s 2(aa)*

48 *The Schedule was added by section 5 of the Administrative Tribunals (Amendment) Ordinance, 1984 (Ordinance*

No. LX of 1984). The Schedule was subsequently amended by the Administrative Tribunals (Second Amendment) Act, 2006 (Act No. XLI of 2006) and the Administrative Tribunals (Amendment) Act, 2011 (Act no.VI of 2011).

49 *The pending cases relating to the persons of the service of the Rupali Bank were to be returned for presenting the proper courts by ousting the jurisdiction of the Administrative Tribunals on the commencement of the Administrative Tribunals (Amendment) Ordinance, 1988 (Ordinance No. 20 of 1988).*

50 *See Schedule, Administrative Tribunals Act, 1980.*

51 *These excluded non-financial statutory public authorities are, among others, Bangladesh Water Development Board, Bangladesh Power Development Board, Bangladesh Inland Water Transport Authorities and Bangladesh Rural Development Board.*

Civil Aviation Authority is included,[52] as well as the exclusion of private financial institutions, are amenable to the jurisdiction of the Administrative Tribunals of Bangladesh. It is not clear respecting the rationale of such vesting the jurisdiction of the Tribunal with such exclusion of other statutory public authorities although Article 117 of the Bangladesh Constitution does not recognize any such differentiation, just given the very general expression of statutory public authority.[53] On the other hand, it is also evident that persons serving in the financial statutory public authorities, though entitled to prefer an appeal as to the correctness of the decision of the Administrative Tribunal to the Administrative Appellate Tribunal, are deprived of other remedies such as review and revision, which are available to those who, in the service of non-financial statutory public authorities, shall have the opportunity of so many remedies i.e. appeal, review and revision and who can also prefer a reference on a point of law to the High Court Division so as to achieve fair justice.[54] Thus discrimination is being made among those persons and as such, these provisions are deviated from the constitutional equality principles and equal protection of law as enshrined in Articles 27[55] and 29[56] of the Bangladesh Constitution. In addition to this, the legislature of Bangladesh did not fully comply with the constitutional mandate with regard to vesting jurisdiction in the Administrative tribunals and resultantly, has empowered the tribunals with limited jurisdiction though there is larger scope in constitutional provisions.

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[52] *Only one non-financial public authority i.e. the Bangladesh Civil Aviation Authority established under the Civil Aviation Authority Ordinance, 1985 (Ordinance No. XXXVIII of 1985) was included in section 2 of the Administrative Tribunals (Amendment) Act, 2006 (Act no. XXXI of 2006).*

[53] *Talukder (n 10) 53.*

[54] *Talukder (n 43) 82.*

[55] *Constitution of the People's Republic of Bangladesh 1972, art 27provides that "All citizens are equal before law and are entitled to equal protection of law."*

[56] *Constitution of the People's Republic of Bangladesh 1972, art 29(1)says that "There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic."*

B. Paradox over Jurisdiction to Decide Constitutional Validity of Service Laws

By dint of the Constitutional dispensation especially Articles 44(2)[57] and 117(2)[58], it is permitted to establish an alternative mechanism in place of the High Court Division giving the power of judicial review concerning the terms and conditions of service of the Republic and other public institutions. Resultantly the Parliament has created the Administrative Tribunal as an effective alternative institutional mechanism for judicial review of administrative actions as to service matters. And after its creation, the Tribunal has to exercise those jurisdictions relating to service matters and its propriety which the High Court Division had exercised and thereby the service jurisprudence has been developed to the satisfaction of the aggrieved persons or litigants.[59] But, it undoubtedly goes saying that the Parliament's power is restricted to the extent of conferring upon the Administrative Tribunal the powers of judicial review of administrative actions only and not more than that.[60] In this connection, referring the relevant constitutional provisions is felt necessary. More particularly, Articles 102(5)[61] of the Constitution must be read with Article 117(2) thereof altogether. Article 102(5) enumerates that a tribunal, to which Article 117 applies, is exempted from writ jurisdiction of the High Court Division of the Supreme Court of Bangladesh. Article 117(2) also depicts that no court has power to entertain any proceeding or make any order

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[57] *Constitution of the People's Republic of Bangladesh 1972, art 44(2)provides that "Without prejudice to the powers of the High Court Division under article 102, Parliament may by law empower any other court, within the local limits of its jurisdiction, to exercise all or any of those powers."*

[58] *Administrative Tribunals Act 1985, s 5(1).*

[59] *Government of Bangladesh and others v. Sontosh Kumar Shaha and others,[2016] SCOB (AD). The author judge of this judgment was Justice Surendra Kumar Sinha, the former Chief Justice of Bangladesh. Mr. Justice Sinha has reiterated major part of this Judgment at his a recently published book. See Justice Surendra Kumar Sinha, A Broken Dream: Rule of Law, Human Rights and Democracy, (Kindle Edition, 2018) 162.*

[60] *Surendra Kumar Sinha, A Broken Dream: Rule of Law, Human Rights and Democracy, (Kindle Edition, 2018)166.*

[61] *Constitution of the People's Republic of Bangladesh 1972, art 102(5) provides that "unless the context otherwise requires, "person" includes a statutory public authority and any court or tribunal, other than a court or tribunal established under a law relating to the defense services of Bangladesh or any disciplined force or a tribunal to which article 117 applies."*

against the decisions of the Administrative Tribunals. Thus the accumulated impact of these two provisions is that no writ is maintainable against the decisions of the Administrative Tribunals. Thus, the jurisdiction of the High Court Division has been ousted. This ouster clause included in any provision by an Act of Parliament is not maintainable in case of exercising the power of judicial review of legislative actions. This is because the power of judicial review of legislative actions is restricted to the High Court Division of the Supreme Court of Bangladesh.[62] Likewise India, in Bangladesh this power has been assigned to the Supreme Court by the constitution as will be evident from articles 7(2) 26(2), 44(1), 101 and 102(1) but it has not been conferred upon the District Courts and the Tribunals created by ordinary or subordinate legislations prejudicing the jurisdiction of the High Court Division.[63] There is no doubt that the conferment of this power being the inalienable right of a citizen cannot be curtailed by any subordinate legislation and the curtailment of such power by setting up a tribunal paralleled to the High Court Division will be hit by the 'basic structure doctrine' of the Constitution.[64] So this power cannot be conferred upon any Tribunal by the Parliament in exercise of legislative power or by the High Court Division or the Appellate Division in exercise of its power of judicial review.[65] It is only the High Court Division of the Supreme Court of Bangladesh which can exercise the power to examine the compatibility of any law in exercise of its derivative power from the constitution because this power has been given by constitution itself. In the case *Mujibur Rahman v. Bangladesh*[66] it was held that:

> *"The Tribunals are not meant to be like to the High Court Division or subordinate court over which the High Court Division of the Supreme Court exercises both judicial review and superintendence. The Tribunals are not in addition to the*

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62 *Government of Bangladesh and others v. Sontosh Kumar Shaha and others,[2016] SCOB (AD).*

63 *Sinha (n 60) 167, 170.*

64 *Anwar Hossain Chowdhury v. Bangladesh,[1989] DLR 165 (AD).*

65 *Sinha (n 60) 162, 168.*

66 *[1992] DLR 111 (AD).*

> *court described in Chapters I and III of Part VI. There is no command nor any necessary intendment in the constitution that the Tribunal or Appellate Tribunal is to be construed as a forum substitute, alternate or co-equal to the High Court Division".*

Therefore, it is undoubtedly axiomatic that notwithstanding ouster of the jurisdiction of the High Court Division by any legislative provision or even under article 102 itself, the High Court Division is yet entitled to exercise its power of judicial review to examine the constitutionality of the law, if the *vires* of any law is challenged or if there is violation of fundamental rights, in connection with the terms and conditions of service of a public servant or an employee of a statutory corporation.[67] This view has been observed in many notable cases.[68] It will not be adequate if the petition contains evasive statements of infringement of his fundamental rights or stray statements that an administrative action is found without jurisdiction or *malafide*[69] or *coram non judice*.[70] In this case, the tribunal is competent enough to deal with the question of malafide or collusion or arbitrariness and decide the same satisfactorily and thereby the tribunal can strike down the action taken against all the aggrieved individuals.[71]

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67 *Sinha (n 60) 170.*

68 *Ehtesham Uddin v. Bangladesh, [1981] DLR 154 (AD); Ismail Hoque v. Bangladesh, [1982] DLR 125 (AD);*

Mostaque Ahmed v. Bangladesh, [1982] DLR 22 (AD); and Helal Uddin Ahmed v. Bangladesh, [1993] DLR 1 (AD).

69 *In the legal phraseology, the term 'malafide' carries a special importance and is not derived from fanciful imagination or even apprehensions. But there must require to have specific evidence of biasness and activities which cannot be contemplated as bonafide otherwise. However, it would not tantamount to be malafide by itself if a bad motive or intent of the authority is not in existence. See the observations given in the case Government of Bangladesh and others v. Sontosh Kumar Shaha and others, [2016] SCOB (AD). See also, Sinha (n. 60) 170.*

70 *"Coram non judice" is a Latin term which gives meaning as "not in the presence of a judge". It is a legal term typically used to refer to a legal proceeding held without a judge, in an inappropriate forum such as before a court which lacks the power to hear and decide a case in question or without appropriate jurisdiction. See Sinha (n. 60) 171.*

71 *Sinha (n. 60) 160, 170, 171.*

Furthermore, in the case *Secretary Ministry of Establishment v. Shafi Uddin Ahmed*,[72] the Apex Court reasoned that the Administrative Tribunal doesn't possess the power to strike down an order for infringement of fundamental rights or any other law and that the right to move the High Court Division under article 102(1) for enforcement of fundamental rights is a fundamental right itself and is guaranteed under Article 44(1) of the Bangladesh Constitution[73] and that the right of judicial review under article 102(2) is neither a fundamental right nor a guaranteed one.[74] Furthermore, in the case *Md. Shamsul Islam Khan v. Secretary*,[75] it was held that a government service holder willing to challenge the *vires* of law on the ground of infringement of fundamental rights may seek remedy under article 102 of the Constitution but in all other cases his remedy lies before the Administrative Tribunal under Article 117(2) thereof.[76]

It is emphatically admissible that the Administrative Tribunal in Bangladesh is not exercising the jurisdiction of the High Court Division as its constitutional successor. It cannot decide the constitutionality of any rule or order touching service matters.[77] Thus a public servant who intends to invoke fundamental rights for challenging the *vires* of law or striking down any law on the ground of its constitutionality, writ petition would directly be maintainable, but if the remedy is available under the Administrative Tribunal without striking down the statutes or rules thereunder, the writ petition would be incompetent.[78] But the decisions of the Administrative Tribunals, being illegal and *malafide*, can be challenged through exercising writ jurisdiction.[79] In concluding this point,

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[72] *[1997] MLR 257 (AD).*

[73] *Khondker Delwar Hossain v. Bangladesh Italian Marble Works, [2010] DLR 298 (AD).*

[74] *See also, Government of Bangladesh v. Md. Abdul Halim Mia, [2004] MLR 105 (AD); Government of Bangladesh v. M. Salauddin Talukder,[2007] BLT 60 (AD).*

[75] *[2000] BLT 64 (AD).*

[76] *See also, Delwar Hossain Mia v. Bangladesh, [2000] DLR 120 (AD).*

[77] *Mujibur Rahman v. Bangladesh, [1992] DLR 111 (AD).*

[78] *Abul Bashar v. Bangladesh and Others, [1995] BLC 77 (AD); and Khalilur Rahman v. Md. KamrulAhasan, [2006] MLR 5 AD.*

[79] *Government of Bangladesh v. Nizamuddin Howlader, [1985] DLR 102 (HCD).*

it can be logically narrated that the Administrative Tribunals have not been given the power to decide the constitutionality of any law, rule or order touching service matters and as such, one has to approach High Court Division of the Supreme Court of Bangladesh for getting redress in this respect.

C. Confusion over Jurisdiction to Grant Interim Order

Though the power to grant interim order[80] or injunction as an exceptional measure, whose absence results mostly in making the purpose of seeking relief futile, carries much more significance to the proper dispensation of justice;[81]Administrative Tribunal in Bangladesh has, under the existing laws, no power to grant interim relief regarding a case pending before it for final adjudication.[82] Because neither does the Administrative Tribunals Act, 1980, nor the Administrative Tribunals Rules, 1982, confer on the Administrative Tribunal any such power.[83] Butin India, the Administrative Tribunals have been empowered to make interim orders in proper cases subject to fulfillment of certain legal requirements.[84] Furthermore, in Pakistan though there exists no specific provisions empowering the Service Tribunal to pass orders suspending operation of the challenged action or decision, the tribunal suspended the operation of the impugned order till the decision of the appeal in a notable case.[85] Therefore, the Indian and Pakistani administrative adjudication in different ways in this

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80 *'Interim order is an extraordinary remedy given in emergent cases with the intent of preserving the subject matter of the litigation in status-quo for the time being. Equitable considerations necessitate for the issuance of such order which, in general, is granted pursuant to reasons and sound judicial principles. It is not a grace or on default of an individual and hence it is granted for the ends of justice, which is indispensable with a view to preventing the abuse of the process of law, or preventing wastage or maintaining the circumstance as on date or from recurrence of certain incidents which were existing as on the date of submitting such application. See Government of Bangladesh and others v. Sontosh Kumar Shaha and others, [2016] SCOB (AD). See also, Sinha (n. 60) 168-169.*

81 *Talukder (n 10) 94.*

82 *Kamrul Hasan v. Bangladesh and Others, [1997] DLR 44 (AD).*

83 *Khaled Hamid Chowdhury, "Jurisdictional Issues under the Administrative Tribunals Act, 1980", [1998] 50 DLR.*

84 *Administrative Tribunals Act 1985, s 24.*

85 *Munawar Hussain Bhatti v. WAPDA, [1983] PLC 86 (CS).*

respect are more comprehensive than that of Bangladesh so far as it is associated with the issuance of interim orders in emergent cases with a view to preserving the subject matter of the litigation in status-quo for the time being.

Despite the jurisdictional absenteeism or silence as to any provision giving the Tribunal the power to grant any interim order, the Tribunal is not said to be powerless since it possesses all the powers of a civil court. And in proper cases, it may invoke its inherent power.[86] This power outfits the legislative recognition of a well-settled principle that every tribunal has inherent power to act *ex debitojustitiae* i.e. to do that real and substantial justice. Such power can be exercised to act in accordance with justice, equity and good conscience when in any case grave injustice results from the ordinary rules of procedure and there is no other remedy or when no other power is available under the procedural law or if any legislation contains no definite provisions to meet the necessity of any case.[87] Therefore, though the Administrative Tribunals Act did not specifically empower the tribunal to issue any interim order, it can exercise its inherent power and thereby it can pass interim order in appropriate cases i.e. to prevent the abuse of the process of court or the mischief being caused to the applicant affecting his right i.e. right to promotion or other benefit. But the Tribunal shall give the opposite party an opportunity of being heard before granting such order.[88] However, in urgent cases, which necessitates to make an interim order with a view to preventing the abuse of the process and such loss as is irrecoverable by means of pecuniary compensation in the incident of not passing such order, the Tribunal can grant interim order as an extraordinary measure for a limited period not

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[86] *'Inherent power is a power to make such order as may be necessary for the ends of justice and to prevent the abuse of the process of the court or tribunal. This power can be exercised to fill up the lacuna left by the legislature while enacting law or where the legislature is unable to foresee any circumstance which may arise in a particular case resulting in miscarriage of justice or where no other remedy is available. Nothing can limit or affect such inherent power of the court or tribunal'. See the observations given in the case of Government of Bangladesh and others v. Sontosh Kumar Shaha and others, [2016] SCOB (AD).*

[87] *Sinha (n 60) 172-174.*

[88] *Ibid 160, 172.*

exceeding fifteen days from the date of the order unless the aforesaid conditions have been complied with before the expiration of the duration, and the Tribunal having all the trappings of a civil court shall pass any further order upon hearing the parties.

D. Ambiguity on Jurisdiction to Redress Grievances due to Administrative Inaction

Generally an Administrative Tribunal in Bangladesh can admit no application unless the aggrieved person has exhausted all other remedies available to him under the relevant service laws.[89] So the legal requirement is that a person aggrieved by any order of any administrative authority has to challenge such order to the higher administrative authority which exists to set aside, very or modify any action or order under any law for the time being in force as to the terms and conditions of the service of the republic or of any statutory public authority. No application can be entertained to the Administrative Tribunal until such appropriate higher authority has taken a decision on the matter.[90] Only after the decision has been taken by such higher authority which requires to dispose of the matter within six months[91] from the date of making order or taking decision, he can go to the Administrative Tribunal for redressing his grievances.[92] There is also time limit of two months[93] from the date of preferring the application within which the higher authority takes the decision, whereas such time limit is three months[94] in Pakistan and six months[95] in India. If no decision or order is made by the higher authority within the prescribed period, it can be interpreted as administrative inaction. After the expiry of such period in an unresolved state, that application is deemed to have been disallowed by the higher authority for the purpose of moving the

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89 *Moulvi Gholam Moula v. Bangladesh, [1992] DLR 195.*

90 *Administrative Tribunals Act 1980, s 4(2) first proviso.*

91 *Administrative Tribunals Act 1980, s 4(2) third proviso.*

92 *Md. Osman Gani v. Government of Bangladesh,[1997] BLD 306 (AD).*

93 *Administrative Tribunals Act 1980, s 4(2) second proviso.*

94 *Service Tribunals Act 1973, s 4(1).*

95 *Administrative Tribunals Act 1985, s 20(2).*

Administrative Tribunal.[96] To an application against inaction, the aforesaid six month-periods also would not be attracted, since the period of limitation would not commence unless an order is made.

Now the question is whether the Administrative Tribunal has jurisdiction to redress grievances caused to a person in the service of the Republic or of any statutory public authority due to such administrative inaction of the higher authority. In this context, the observations given in the case *Dr. Kshama Kapur* v. *Union of India*[97] keep relevancy to mention here in which the court reasoned that an application made to the Tribunal by a person aggrieved by any order pertaining to any matter within the jurisdiction of the Tribunal for the redressal of his grievance should not ordinarily be entertained unless he had exhausted all the remedies available under the service rules. But if the higher administrative authority didn't pass any order on the appeal or representation preferred under the relevant rules within six months after the presentation, such application could be made invoking the jurisdiction of the tribunal against such administrative inaction in which the complaint is not against any order made by the higher authority. These provisions being procedural cannot have the upshot of curtailing the jurisdiction of the Tribunal. Therefore, taking such Indian jurisprudence into account, it can pertinently be incorporated that the tribunals in Bangladesh has also the jurisdiction to entertain applications against administrative inaction and give proper remedy in respect of service-related-grievances even in the absence of an order made or decision taken by the higher authority.

E. Can Administrative Tribunals Take Remedial Measures for the Aggrieved owing to Inter-departmental Conflict?

The existing laws are silent on whether a person in the service of the Republic or of any statutory public authority who is aggrieved due to inter-departmental conflict is entitled to get remedy through the Administrative Tribunal. Going to search the answer of this query, it can be noted that the

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[96] *(n 94).*

[97] *[1986] ILR 4007 (Kar).*

observations given in the case *Matiur Rahman (Md)* v. *Bangladesh, through the Secretary, Ministry of Establishment, Government of the People's Republic of Bangladesh and Others*[98] are substantial as the apex court adjudged that owing to non-adherence to the lawful order of the hierarchy of the government authority by one branch of the department of the Government, if any person becomes aggrieved, he can certainly come before this court and pray for direction or declaration to materialize or abide by the lawful order of the Government, but the Administrative Tribunal is of no competence to do so. Therefore, it is evident that the jurisdiction of the Tribunal is very much confined. Pertinently to mention here that the Supreme Court of Bangladesh reasoned in the case of *Qazi Nazrul Islam* v. *Bangladesh House Building Finance Corporation*[99] that the Administrative Tribunal in Bangladesh "has been established with limited jurisdiction and limited power. The Tribunal gratuitously granting relief acts in excess of its jurisdiction". So it can be drawn that the Tribunal cannot redress the grievances caused to the government service holders or statutory public authority service holders due to inter-departmental conflict.

F. Power of Administrative Tribunals to Punish for Obstructing in the Performance of its Function and for Contempt of itself

Every authority or body exercising judicial functions can invoke jurisdiction to punish a person who intervenes with or intends to obstruct the administration of justice by any means so that that judicial authority can be able to undertake its functions in a pragmatic and desired fashion. For this, the Administrative Tribunals Act, 1980 has empowered the tribunal by its section 9 to punish those who obstruct it in the performance of its functions without any reasonable justification and lawful excuse.[100]

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98 *[1998] DLR 357 (HCD).*

99 *[1993] DLR 106 (AD).*

100 *Administrative Tribunals Act 1980, s 9 enunciates that "A Tribunal shall have power to punish any person who, without lawful excuse, obstructs it in the performance of its functions with simple imprisonment which may extend to one month, or with fine which may extend to five hundred Taka, or with both."*

Resultantly, the Administrative Tribunal or the Administrative Appellate Tribunal shall invoke power to sentence a person liable for creating obstructions in carrying out its undertakings with simple imprisonment up to one month, or with fine up to five hundreds taka, or with both.[101]

It should be emphatically mentioned here that like Pakistan, there existed no legal provisions in the Administrative Tribunals Act, 1980, as originally enacted, as to the power of the Administrative Tribunal or the Administrative Appellate Tribunal to penalize an act of scandalizing or prejudicing its proceedings. Subsequently, by the Administrative Tribunals (Amendment) Ordinance, 1988, section 10 A was newly inserted to the original Act empowering only the Administrative Appellate Tribunal to punish a person for contempt of its authority or that of any Administrative Tribunal, as if it were the High Court Division of the Supreme Court.[102] But, unlike the Administrative Tribunal in India which has been authorized to exercise the same jurisdiction and powers regarding contempt as that of the High Court,[103] the Administrative Tribunal in Bangladesh has not been conferred the powers and authority to punish for contempt of itself. Furthermore, it is also pertinent to stress here that Unlike India[104], as the Administrative Tribunals Act, 1980 is silent on the procedure which is to be followed in case of contempt proceedings and on the matter as to which form of punishment will be inflicted on the convicted persons, it appears that in dealing with such a contempt case, the relevant provisions of the Contempt of Courts Act, 2013[105] should be followed by the Administrative Appellate Tribunal in Bangladesh.

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101 *Ibid.*

102 *Administrative Tribunals Act 1980, s 10A provides that "The Administrative Appellate Tribunal shall have power to punish for contempt of its authority or that of any Administrative Tribunal, as if it were the High Court Division of the Supreme Court."*

103 *Administrative Tribunals Act 1985, s 17.*

104 *Ibid.*

105 *This legislation was replaced by the Contempt of Courts Act, 1926.*

G. Silence as to Power of the Administrative Tribunals to Reduce the Penalty Imposed in the Disciplinary Proceedings

Like India, in Bangladesh the Administrative Tribunals Act, 1980, is silent on the jurisdiction of the Administrative Tribunal to intervene with the quantum of penalty and reduce the penalty inflicted by a higher or competitive administrative authority when found excessive or disproportionate having regard to the gravity of the misconduct proved in the departmental proceedings. In the absence of such legal provision investing the power to make interference with the quantum of penalty, the question arises as to whether the administrative tribunals can intervene with the quantum of punishment imposed in the disciplinary matters?[106] In searching the answer to this monumental question, the observations made by the Indian Supreme Court in the case *Union of India v. Parma Nanda*[107] are worthy of enunciation that:

> *"The tribunal has ordinarily no power to interfere with the punishment awarded by competent authority in departmental proceedings on the ground of penalty being excessive or disproportionate to the misconduct proved, if the punishment is based on evidence and is not arbitrary, mala fide or perverse. It was further observed that the jurisdiction of the tribunal to interfere with the disciplinary matters or punishment could not be equated with an appellate jurisdiction. The tribunal cannot interfere with the findings of the inquiry officer or competent authority where they are not arbitrary or utterly perverse."*

The same observations ware followed in the cases *Union of India* v. *J.R. Dhamin*[108] and *Commandant, T.N. Special Police, 9th Battalion*v. *D Paul*[109] as well. However, in the recently case *Hombe Gowda Education*

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106 *Available at http://14.139.60.114:8080/jspui/bitstream/123456789/679/54/Administrative%20Tribunals.pdf (Last visited on 15 September, 2018)*

107 *[1989] SCC 177.*

108 *[1999] SCC 403.*

109 *[1999)] SCC 789.*

Trust v. *State of Karnataka*,[110] the apex court of India has taken a slightly different stand and observed: It is undoubtedly open to the tribunal to replace one punishment by another; but it is also stereotyped that the jurisdiction of the Tribunal is confined in this behalf. The Tribunal can exercise the jurisdiction to reduce, or interfere with, the quantum of punishment only when, inter alia, it appears to be grossly disproportionate. Such kind of intervention by the tribunal should be on arriving at an unearthing that no reasonable person could impose such punishment. Furthermore, the Tribunal may exercise its jurisdiction when the competent authority didn't consider the relevant facts, as a result of which could have direct bearing on the question of quantum of punishment.[111] Nonetheless, in order to provide service litigants for appropriate remedy and proper dispensation of justice, the Administrative Tribunals in Bangladesh should also be rendered the jurisdiction to intervene with the quantum of penalty and reduce the penalty inflicted by a higher or competitive administrative authority when found excessive or disproportionate having regard to the gravity of the misconduct proved in the departmental proceedings.

H. Does the Jurisdiction of Administrative Tribunals Extend to Civil Servants in the Defense Services?

Section 4(3) of the Administrative Tribunals Act, 1980, as originally enacted, excluded a person in the defense services of Bangladesh from the expression 'person in the service of the Republic'. It is also noticeable that as a person in the defense services of Bangladesh is excluded from the jurisdiction of the Administrative Tribunals, the disputes relating to service matters of a person in Bangladesh Rifles, [presently the changed name 'Border Guards of Bangladesh (BGB)], which is a para-military force not under the Defense Ministry but under the Home Ministry of Bangladesh, could be resolved by the Administrative Tribunal. But subsequently through amending the original Act by section 2 of the

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110 *[2006] SCC 430.*

111 *Ibid.*

Administrative Tribunals (Amendment) Ordinance, 1982[112], a person in the service of Bangladesh Rifles placed in the exclusion clause of section 4(3) of the Administrative Tribunals Act, 1980. So the jurisdiction of the Administrative Tribunal is ousted to resolve service disputes of a person in both the defense services and Bangladesh Rifles.

Although the Administrative Tribunal was excluded to resolve service disputes of a person in the defense services of Bangladesh, the Tribunal's jurisdiction to deal with disputes as to the terms and conditions of the civilian employees in defense services was not barred. In this respect, the observation made by the Appellate Division of the Bangladesh Supreme Court in the case *Md. Ishaquddin Ahmed* v. *Commandant, School of Armour and Center, Bogra Cantonment, Bogra and Others*[113] is worthy of note as the court adjudged that civilian employees in defense services can well invoke the jurisdiction of the Administrative Tribunal for legal remedies in service matters. In another case,[114] the court more clearly reasoned that civilian employees in the defense services not being any member of the defense services hold civil posts and as such, now they have to move the Administrative Tribunal for redress of their grievances and cannot move the High Court Division of the Bangladesh Supreme Court in writ jurisdiction.

IV. Procedure of Administrative Tribunals in Bangladesh: Any Procedural Barrier to Get Quick Remedy?

Tribunals don't require applying the court procedures and, as such, they are not bound to follow the procedure requisite for civil courts unless so enumerated in the enabling Act. They can adopt their own procedures for smoothly undertaking their functions. Accordingly, the procedure to be adhered by the Administrative Tribunal in Bangladesh to resolve disputes pertaining to service matters of civil servants has been enshrined in the

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112 *Ordinance No. XXIII of 1982.*

113 *[1999] DLR 144 (AD).*

114 *Sirajul Islam Thakur v. Bangladesh, [1994] DLR 318 (HCD).*

1980 Administrative Tribunals Act and the 1982 Administrative Tribunals Rules framed thereunder.

A. Precondition to be Fulfilled for Invoking the Tribunal's Jurisdiction

In Bangladesh, the right to go to Administration Tribunals is only available to those people who are employed in the service of the Republic or of any statutory republic authority. But, before a person in the service of the Republic or of any statutory republic authority can move to the Administrative Tribunal for redress of his grievance, he should fulfill these criteria- i) he should have availed all the remedies available to him under service laws; and ii) he should have a *locus standi* in the subject matter.[115] Therefore, an Administrative Tribunal shall not ordinarily admit an application unless that person has exhausted all other remedies available to him under the relevant service laws. Similarly in Pakistan and India, there also exists such a precondition of exhausting all available departmental remedies. But in making decision on the departmental appeals or revisions, the higher departmental authority is permitted to take time of two months in Bangladesh whereas three months[116] in Pakistan and six months[117] in India. Such legal requirement to invoke a departmental remedy before going to administrative courts is nowhere in France and Germany.[118] This is because in most of the cases, service litigants become victimized due to legally unwanted delay of two months of the departmental authority in giving authorization to file a service suit and ousting the right to direct access to justice before the Administrative Tribunal. Resultantly, the Tribunal is whittled down in proper dispensation of justice to service litigants.

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115 *Administrative Tribunals Act 1980, s. 4(2).*

116 *Service Tribunals Act 1973, s 4(1).*

117 *Administrative Tribunals Act 1985, s 20(2).*

118 *Rashid (n 41) 56.*

In recent years, in so far as the writ petitions filed in public interest[119], a tendency has grown up to extend the scope of the expression *'locus standi'* though, the Administrative Tribunal, being the creature for the specific purposes of service matters under the Act of 1980, cannot admit cases filed in public interest.[120] In this regard, in *Kazi Shamsunnahar & others* v. *Commandant PRF, Khulna and others*[121] it was held that– no person other than the person in the service of the republic or of any statutory public authority can prefer an application pertaining to service matters before Administrative Tribunals. So it is very clear that no other person except service litigants cannot file a suit before the Tribunal on ground of public interest.

B. Filing and Disposal of Application as to Service Disputes

Like India[122] and Pakistan,[123] in Bangladesh a person in the service of the Republic or of any statutory public authority is entitled to make an application in writing to the Administrative Tribunal in person or through a duly authorized legal practitioner.[124] Such application can be rejected by the Tribunal if it is submitted strictly not complying with the proper manner enumerated in sub-rules (1), (2), (3), (4) and (5) of rule 3[125] of the Administrative Tribunals Rules, 1982, and is not barred by the Administrative Tribunal Act, 1980; but before rejecting it, the Tribunal may give an opportunity to those who failed to make the application as per

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119 *In legal sphere, public interest litigation theory recognizes maintainability of legal actions by a third party (not personally aggrieved) in unique situations.*

120 *Talukder (n 10) 65.*

121 *[1997] BLC 569 (AD).*

122 *An application can be filed to the Administrative Tribunal either by the applicant in person or by a duly authorized legal practitioner. See Central Administrative Tribunal (Procedure) Rules 1985, r 4(1).*

123 *Either the appellant in person or his advocate can file a memorandum to the Service Tribunal. See Service Tribunals (Procedure) Rules 1974, r 5(1).*

124 *Administrative Tribunals Rules 1982, r 3(1).*

125 *The filing of application and contents thereof are laid down mainly in sub-rules (1), (2), (3), (4) and (5) of rule 3 of the Administrative Tribunals Rules, 1982.*

those rules.[126] The Tribunal has also been empowered, under section 7B as inserted by subsequent amendment to the original Act, to alter or amend the pleadings at any stage of the proceedings and even at the stage before the Appellate Division of the Supreme Court,[127] though there was no scope to alter or amend the application in spite of any fatal defect disclosed aftermath.

It is pertinent to mention here that after the application being admitted and on the day fixed for hearing of the application, if neither of the parties to the dispute appears but notice to appear have duly been served upon the parties, the Tribunal may make an order dismissing the application.[128] If on the date so fixed, notwithstanding the duly service of notice, the applicant appears but the opposite party does not appear, the Tribunal may hear the application ex parte.[129] Again, if the opposite party appears but the applicant does not appear, the Tribunal may make an order dismissing the application but shall make an order granting relief to such extent as it deems fit where it seems that the relief claimed by the applicant should be permitted in response to the admission made by the opposite of the claim of the applicant.[130] These provisions are similar to the provisions of Order IX of the Code of Civil Procedure, 1908 as well as those of Rules 15 and 16 of the 1982 Administrative Tribunal (Procedure) Rules of India[131] and Rule 19 of the 1974 Service Tribunals (Procedure) Rules of Pakistan.[132] Furthermore, the Tribunal, being satisfied on the sufficient cause presented for the parties' non-appearance, may make, on the application made by the

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126 *Ali Emdad v. Labour Director and Others, [1998] BLD 137 (AD).*

127 *The Administrative Tribunals (Amendment) Act, 1997 has newly added section 7B to the original Act, which provides that "The Tribunal may, at any stage of the proceedings, allow the applicant to alter or amend his application in such manner and on such terms as it thinks fit."*

128 *Administrative Tribunal Rules 1982, r 6(4).*

129 *Ibid r6(5).*

130 *Ibid r 6(6).*

131 *Administrative Tribunal Rules 1982, r 15 and r 16 deal with the procedure required for disposal of application by the Administrative Tribunal.*

132 *Administrative Tribunal Rules 1982, r 19 deals with the procedure required for disposal of appeal by the Service Tribunal.*

aggrieved, an order setting aside these orders[133] which are identical with the provisions of Rule 13 of Order IX of the Code of Civil Procedure, 1908. The Tribunal, in appropriate cases, may postpone the hearing of the application to a fixed future day.[134] Anyway, the Tribunal shall give its decision in writing with reasons therefore,[135] and shall not alter or modify such decision or order once given or made except for the purpose of correcting a clerical or arithmetical mistake or any error arising from any accidental omission.[136] It is also evident that under the prevalent laws, Administrative Tribunal in Bangladesh doesn't hold the power to grant interim relief concerning a case pending before it for final adjudication.[137] And also neither does the existing laws confer on the Administrative Tribunal any such power.

In adjudicating disputes, the tribunals are not bound by the procedure enshrined by the Code of Civil Procedure, 1908. The tribunals are vested with the same powers as of the civil courts under the Code of Civil Procedure 1908. In order to hear an application, the Administrative Tribunals in Bangladesh may summon and enforce the attendance of any person and examine him on oath, the discovery and production of any document, require evidence on affidavit, requisition any public record or a copy thereof from any office, issue commissions for the examination of witnesses or documents and such other matters as may be prescribed by the Act or rules made there under.[138] But the Administrative Tribunal is not empowered to determine its procedure in the absence of specific provisions in the Act or in the rules framed thereunder.[139] Despite this, the procedure to be laid down by the Appellate Tribunal must be complied

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133 *Administrative Tribunals Rules, 1982, r 6(7).*

134 *Ibid r 6(8).*

135 *Ibid r 6(9).*

136 *Ibid r 6(10).*

137 *Kamrul Hasan v. Bangladesh and Others, [1997] DLR 44 (AD).*

138 *Administrative Tribunals Act 1980, s 7(1).*

139 *Administrative Tribunals Act 1980, s 7(8). It provides that "where, in respect of any matter no procedure has been prescribed by this Act or by rules made thereunder, a Tribunal shall follow the procedure in respect thereof as may be laid down by the Administrative Appellate Tribunal."*

with the principles of natural justice[140] since these principles are part of the law of the country.[141] Moreover, an Administrative Tribunal can strike down an order for infringement of the principles of natural justice, though it cannot strike down any bar or rule on the ground of its constitutionality.

It is also noteworthy here that the newly incorporated section 7A to the original Act has efficaciously served humanitarian cause rendering the legal representatives of the deceased applicant the right to sue and continue the proceedings in order to obtain pensionary benefit which, in the event the order of dismissal or removal is declared illegal, will entitle the applicant as if he retired or died while in service.[142]

C. Procedure as to Execution of Decrees and Orders of the Tribunals

The Administrative Tribunal shall execute its decisions and orders as per the provisions of the Code of Civil Procedure, 1908 as far as practicable.[143] In this respect, the court held in the case *Munshi Mozammel Hossain* v. *Post Master, Faridpur*[144] that the Tribunal can function as an executing court and as such, can execute its own decisions or orders and also the decisions and orders of the Administrative Appellate Tribunal adhering to the decree-execution related provisions of the Civil Procedure Code. This provision renders procedural exhaustiveness for the Tribunals to ensure proper dispensation of justice for service litigants.

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[140] *Natural justice is a concept of common law and is expressed as 'procedural due processes in the American context. Generally it is explained in two basic principles namely i) nobody shall be a judge in his own cause, ii) Nobody shall be condemned without giving an opportunity of hearing. Afterwards, a third rule as reflected in A.K. Kripak vs. Union of India, [1970] AIR 150 (SC) was enshrined, which implies that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. In addition, in legal parlance there are also some ancillary rules i.e. right to notice, right to present case and evidence, no evidence taken at the back of the other party, reasoned decisions, rule against dictation. See Talukder(n. 10) 70.*

[141] *Abdul LatifMirza v. Government of Bangladesh, [1982] DLR 173 (AD).*

[142] *SeeAdministrative Tribunals Act 1980, s 7(A). The Administrative Tribunals Act, 1980, as originally enacted, did not provide for such right of pensionary benefits. Afterwards in 1997, this Act was amended by the Administrative Tribunals (Amendment) Act, 1997 inserting section 7A to the Act, 1980 to rectify the situation.*

[143] *Administrative Tribunals Rules 1982, r 7.*

[144] *[1991] DLR 415 (HCD).*

D. Legal Representation through Inspection of any Record or Document

With the permission of the Tribunal, any party to a dispute may inspect any record or document in the custody of the Tribunal, other than a record or document as to which the state may claim privilege and such inspection shall be made in the presence of the officer of the Tribunal as it may specify.[145] This provision is undoubtedly conducive to ensure proper representation by any party to a dispute.

E. Appeal against the Decisions of Administrative Tribunals in Bangladesh

1. Establishment and Composition of the Administrative Appellate Tribunal

The Administrative Tribunals Act, 1980 also empowers the Government to establish an Administrative Appellate Tribunal. This Tribunal is required to be established by a gazette notification.[146] The Appellate Tribunal consists of one chairman and two other members to be appointed by the Government.[147] The requisite qualifications and experiences for appointment of chairman and members are also reiterated in the Act. The chairman has to be a person who is, or has been, or is qualified to be a judge of the Supreme Court of Bangladesh. As for the two members, one has to be person who is or has been an officer in the service of the Republic not below the rank of Joint Secretary to the Government and the other member has to be a person who is or has been a District Judge.[148] These provisions ensure the majority of the judicial officers including chairman in the Appellate Tribunal. However, inclusion of a carrier civil servant with professions judges in the Appellate forum holding the features of mixed-up tribunal is more likely to be conducive since it brings

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145 *Administrative Tribunals Rules 1982, r 8.*

146 *Administrative Tribunals Act 1980, s 5(1). Such notification establishing Tribunal was, for the first time, issued on 22 August, 1983. See notification No. S.R.O. 58-L.82-JIV/1T-1/81.*

147 *Administrative Tribunals Act 1980, s 5(2).*

148 *Ibid.*

expertise and inside information of the working of the administrative departments.

It is pertinent to mention here that the provision of the Administrative Tribunals Act, 1980, as it is, made the Appellate Tribunal dependent on the Government for their terms and conditions of service which adversely affects their personal independence in determining the appeals and cannot enable them to perform their functions without fear or favor[149] as the Government determines the terms and conditions of their appointment.[150] So it can undoubtedly be admitted that such provisions intervening with the personal independence of the Tribunals' judges as well as creating fear in their minds by the government and facilitating favor and pity for the government lead the Tribunals astray to ascertain proper dispensation of justice for service litigants.

2. Jurisdiction of the Administrative Appellate Tribunal

The Administrative Tribunals Act, 1980, section 6 invests the Administrative Appellate Tribunal with the jurisdiction (which is of not original jurisdiction but of appellate nature) to hear and determine appeal against any order or decision of the Administrative Tribunal.[151] Unlike in India[152], where only the Supreme Court of India has been empowered to hear and determine appeal against the decisions of the Administrative Tribunal on the grounds of, as case law suggests, illegality, error of law and infringement of principles of natural justice, the Supreme Court of Bangladesh has not been empowered to exercise the appellate jurisdiction over the Administrative Tribunal. Even in this respect, Bangladesh has not followed the example of Pakistan where appeal against the decisions of the

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149 *S.M. Hassan Talukder, 'Appeal against the Decisions of Administrative Tribunals in Bangladesh: An Analysis and Evaluation' [2008] 19:1 Dhaka University Law Journal, Studies Part-F 10.*

150 *Administrative Tribunals Act 1980, s 5(4). This sub-section was not originally enacted provision. The original provision clearly fixed the term of office of the Chairman and members of the Administrative Appellate Tribunal as three years or until the attainment of the age of sixty years and as such they could be able to carry out their undertakings without fear or favor and not interfering with their personal independence.*

151 *Administrative Tribunals Act 1980, s 6(1).*

152 *Administrative Tribunals Act 1985, s 14(1).*

Service Tribunal lies before the Supreme Court subject to granting leave to appeal only on a substantial question of law of public importance.[153] Apart from this, the existing laws i.e. the Act of 1980 and the Rules of 1982 are silent on whether all orders are appealable or not. It may be argued that all orders are not appealable as the provisions of the Code of Civil Procedure, 1908,[154] has been made applicable to the proceedings before the Administrative Tribunals and the Administrative Appellate Tribunal.[155] It will be incompatible with the legislative intent if all orders are regarded as appealable. Where not explicitly depicted, it will be congruent with the purpose of the law to adjudge that only the orders which are substantive in nature or finally made are appealable and the orders which are not substantive and in no manner affect the interest of any party in determining the main dispute or merit of the cases are not appealable.[156]

The Administrative Appellate Tribunal has also the jurisdiction to hear and determine an appeal against the order of punishment passed by the Administrative Tribunal[157] but an appeal against the order of punishment passed by the Administrative Appellate Tribunal lies before the Appellate Division of the Supreme Court of Bangladesh.[158] Furthermore, the Appellate Tribunal enjoys wide powers as it may, on appeal, confirm, vary, modify or set aside any order or decision of the Administrative Tribunal[159] subject to the provisions of section 6A of the Act of 1980 by which Article 103[160] of the Bangladesh Constitution has been made

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153 *Constitution of the Islamic Republic of Pakistan 1973, art 212(3).*

154 *Under the Code of Civil Procedure, 1908, all orders are not appealable and the lists of appealable orders are contained in Order 43 of the first Schedule to this Code.*

155 *Administrative Tribunals Act 1980, s 7(1).*

156 *Khandakar Md. Abu Bakar, The Laws on Service in Bangladesh, (2nd edn,MahfuzaKhondaker, Rangpur, 1998), 64-65.*

157 *Administrative Tribunals Act 1980, s 6(2).*

158 *Administrative Tribunals Act 1980, s 6A.*

159 *Administrative Tribunals Act 1980, s 6(3).*

160 *Constitution of the People's Republic of Bangladesh 1972, art 103 provides-*

(1) The Appellate Division shall have jurisdiction to hear and determine appeals from judgments, decrees, orders or sentences of the High Court Division.

applicable to the decision of the Appellate Tribunal, meaning that the Appellate Division of the Supreme Court possesses the power on leave to hear and determine appeals from decisions or orders or sentences of the Appellate Tribunal. In this respect, the Apex Court of Bangladesh adjudged that "under the new dispensation that Article 103 of the Constitution shall apply in relation to Administrative Appellate Tribunal, the petitioners have only the right to seek leave for appeal."[161] Thus, the decision of the Appellate Tribunal becomes final subject to the provisions of section 6A of the Act and thereby a civil servant has got an opportunity to ascertain the appropriateness of the decisions or orders given or made by the Appellate Tribunal as to service matters through the higher judiciary.

3. Time Limit for Filing Appeal Application

Sections 6(2) and 6(2A) of the Administrative Tribunals Act, 1980, provides for time limit for appeal. An appeal to the Administrative Appellate Tribunal may be preferred by any person aggrieved by an order or decision of the Administrative Tribunal within four months from the date of making of the order or decision.[162] This time limit can be relaxed as after the expiry of that fixed time an appeal may be admitted within six months from the decision or order of the Administrative Tribunal and not

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(2) An appeal to the Appellate Division from a judgment, decree, order or sentence of the High Court Division shall lie as of right where the High Court Division- (a) certifies that the case involves a substantial question of law as to the interpretation of this constitution ; or (b) has sentenced a person to death or to 62 imprisonment for life, or (c) has imposed punishment on a person for contempt of that division; and in such other cases as may be provided for by Act of Parliament.

(3) An appeal to the Appellate Division for a judgment, decree, order or sentence of the High Court Division in a case to which clause (2) does not apply shall lie only if the Appellate Division grants leave to appeal.

(4) Parliament may by law declare that the provisions of this article shall apply in relation to any other court or tribunal as they apply in relation to the High Court Division.

[161] *Bangladesh Bank v. Administrative Appellate Tribunal,[1992] DLR 239 (AD).*

[162] *Administrative Tribunals Act 1980, s 6(2). The original Act provided for time limit of two months which has been extended to three months by the Administrative Tribunals (Amendment) Act, 1997. Finally four months has been specified by the Administrative Tribunals (Amendment) Ordinance, 2008.*

later than that if the appellant satisfies the Appellate Tribunal on showing sufficient cause of delay.[163] However, the Tribunals have legal force to bind all the parties by their decisions and orders. Such legal force is derived from the provisions of section 8 of the Administrative Tribunals Act, 1980. It entails that subject to the decisions and orders of the Appellate Division, all decisions and orders of the Administrative Appellate Tribunal shall be binding upon the Administrative Tribunals and the parties concerned.[164] It also reiterates that all decisions and orders of an Administrative Tribunal shall be binding on the parties concerned subject to the decisions and orders of the Appellate Division or of the Administrative Appellate Tribunal, as the case may be.[165] It is also pertinent to mention here that like Bangladesh, there is no Administrative Appellate Tribunal in India and Service Appellate Tribunal in Pakistan to hear and determine appeal against the decision or order of the Administrative Tribunal respectively. However, Administrative Tribunals in Bangladesh are heavily burdened to some extent and the rate of disposal of cases is not high.[166] The disposal rate of the Appellate Tribunal is also very low.[167] So it can be uttered that the Tribunals, being affected with different drawbacks as earlier explicated and faced with a variety of factual challenges are not functioning properly and efficaciously.

V. Understanding Practical Scenario and Factual Challenges in the Functioning of Administrative Tribunals

The authors have visited Administrative Tribunal-01, 02, 03, Dhaka in several occasions in 2014, and have taken interviews from the learned

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163 *Administrative Tribunals Act 1980, s 6(2A).*

164 *Administrative Tribunals Act 1980, s 8(1).*

165 *Administrative Tribunals Act, 1980, s 8(2).*

166 *For instance, the number of filing cases in the Dhaka Administrative Tribunal is 215, 191, 177and 133 in 2009, 2010, 2011and 2012 (till July) respectively. Among these cases 200 cases have been disposed in 2009, 95 in 2010 and 60 in 2011.*

167 *For instance, the number of filing appeals in the Administrative Appellate Tribunal is 319, 256, 293, 162 in 2009, 2010, 2011, 2012 (till July). It is seen that 80% of the decisions of the Administrative Appellate Tribunal prevails in the decision of the Appellate Division of the Supreme Court of Bangladesh.*

judges of the Tribunals, Registrar of the Administrative Tribunal 01, Sections officers of the Tribunals, parties to the Tribunals, and from the learned lawyers of the Supreme Court of Bangladesh who are presently practicing in the Tribunals. The authors had examined pros and cons of several cases during that time. The authors' venture was to experience problems and prospect of the Tribunal in respect of the operation practically. Moreover, attempt was made to find out how many cases prevailed the remedies. It was witnessed that panel advocate filed the time petition again and again for submitting written statement or adjournment of hearing, as a result of which it causes dilatory in the disposal of cases which brings failure to the atmosphere of enforcing rights of the litigants and the reasons of creating such special adjudicating body. The authors' observation can be summed up in the following points:

- Administrative Tribunals in Bangladesh are heavily burdened to some extent and the rate of disposal of cases is not high. The disposal rate of the Administrative Appellate Tribunal is also very low. However, it is seen that 80% of the decisions of the Administrative Appellate Tribunal prevails in the decision of the Appellate Division of the Supreme Court of Bangladesh.
- Though a person who is or has been a Distract Judge is appointed as member of the Administrative Tribunal, but s/he cannot enjoy all facilities which a District Judge can enjoy. For example, there is no housing facility for members of the Administrative Tribunal.
- There are no specific laws or rules regulating the appointment of panel advocate. At present they are appointed by the Ministry of Laws, Justice and Parliamentary Affairs. Therefore, political identity, in contrast to merit and qualifications, becomes decisive factor in case of appointing panel advocate.
- For every working day of the suit a panel advocate gets only 300/= taka. Actually this lower fee is core factor in trend of excessively filing time petition for submitting written statement or adjournment of hearing as delay makes money for them.

- Absence of interaction between panel advocate and government department or ministry etc. When a case is filed against a department or ministry of the Government and tribunal issued notice to such department on ministry, they inform solicitor wing of the High Court Division of the Supreme Court about this, and then solicitor wing select a panel advocate to defend such department or ministry etc. One Deputy Commissioner of Audit, Khulna opined that this procedure of selecting a panel advocate is also against the spirit of establishing tribunal, because the selected advocate may not have expertise or may not be aware of departmental proceedings of a particular department.
- Another important drawback is lack of equal facilities for support stuffs. In contrast to support staffs of the High Court Division and Secretariat, support staffs of Administrative Tribunal, though all are appointed by the same procedure, enjoy fewer facilities. They have no promotion facilities, no housing facilities, no regular transfer facilities; even their salary is lower than others. Therefore, they are in lack of incentive or inspiration for work.
- Lack of proper logistic support like inadequate support staff is also a problem in proper functioning of Tribunals. For example, The Administrative Tribunal-02 had only 4 staffs in 2014 and the situation has not improved yet. Although, there is an option to appoint staffs on the basis of “No work, no Pay” but amount of payment for such work is very low, namely 120 taka per day, consequently no one is interested to work on the basis of “No work, No Pay”. One member of administrative tribunal-02, in personal interview with the authors, said that she wrote to the authority to increase the amount to 200 Taka at least, but authority didn’t response to her proposal.

VI. Possible Ways Out and Concluding Observations

From the aforesaid enumeration, it is evident that at present, the Administrative Tribunals are moving with lack of far reaching goal and ambition along with unexpected burden of a good deal of legal pitfalls and administrative challenges. So the unsatisfactory position of the legislations pertaining to Tribunals calls for urgent reforms to install prompt, effective

and expeditious means of adjudication with full strength in order to overcome those loopholes and challenges. It is high time to legislate to step in and introduce modifications at least with the line of the following possible ways out.

Ways Out to Tackle Legal Pitfalls

1. Like France and Germany, the legal requirement of exhausting all available departmental remedies before going to the Administrative Tribunals by an aggrieved person should be abrogated with a view to assuring quick settlement of cases.
2. In contrast to the Service Tribunal in Pakistan or the Administrative Tribunal in India, Administrative Tribunal in Bangladesh, being a single member Tribunal, has no scope to perform its undertakings in Benches and cannot always be desired for assuring fair justice, effective and expeditious disposal of cases. Therefore, the Administrative Tribunals Act, 1980 should be amended with a view to enabling all Administrative Tribunals in Bangladesh to discharge their functions in Benches.
3. In the absence of the legal provisions as to the qualifications of a District Judge who should be appointed as a Member of the Tribunal, the Bangladesh Government legally enjoys unfettered powers in such appointment. Therefore, the Act should be amended keeping the provisions of appointing the most efficient, learned, expert and impartial District Judges in order to ensure fair and expeditious justice as denial of speedy disposal of cases by such specialized personnel would amount to adopting a blinkered and narrow-minded approach.
4. Unlike India, where the members of the Administrative Tribunals of India hold office for a period of five years or until the attainment of the age of 62 years, the members of the Administrative Tribunals in Bangladesh have no such security of tenure. The Government determines such terms and conditions, a result of which they have to hinge upon the whims of the Government for their terms of office, which is incongruous with their personal independence. Therefore, in the dispensation of justice freely and without fear, the security of

tenure like the Indian provisions must be ensured for the Members of the Tribunals by amending the Act as uncertainty of tenure and unsatisfactory service conditions leading to unsatisfactory functioning of the Tribunals impede to the proper development of such adjudicating system.

5. As only the Government service holders and specified statutory public authority service holders are entitled to go to the Administrative Tribunal, it is the violation of the constitutional rights to equality as guaranteed for all the persons including the persons in the service of statutory public authorities. Therefore, the Schedule to the Act should be amended eradicating discrimination.
6. By amending the Act pursuant to the Constitutional mandate, the Administrative Tribunals should be granted the jurisdiction to resolve disputes relating to the terms and conditions of any person in the service of any nationalized enterprise; the acquisition, administration management and disposal of any property vested in or managed by the Government; and any law mentioned in the First Schedule to the Constitution.
7. A public service litigant can only prefer an appeal as to the correctness of the decision of the Administrative Tribunal to the Administrative Appellate Tribunal and, as such, is deprived of the other remedies, such as review. Therefore, the Act should be amended by inserting such other remedies for a service litigant.
8. Like the Indian Administrative Tribunal, the Administrative Appellate Tribunal in Bangladesh may be granted the jurisdiction to decide constitutionality of any rule or order touching service matters in order to facilitate the smooth functioning of the Appellate Tribunal and ensure effective and expeditious justice.
9. Since only seven Administrative Tribunals are over-burdened with huge backlog of cases which causes dilatory in the disposal of cases, a substantial number of Administrative Tribunals covering a separate Tribunal in the hilly districts of Khagrachari, Rangamati and Bandarban should be established with a view to ascertaining prompt dispensation of justice.

10. As the Administrative Tribunal cannot give any relief to a person in the service of the Republic or of any statutory public authority who is aggrieved because of interdepartmental conflict, the Act should contain such remedial measures by amendment in order to develop service jurisprudence.
11. As the Administrative Tribunals Act is silent on the exercise of jurisdiction of the Administrative Tribunal to intervene with the quantum of penalty and reduce the penalty inflicted by a higher administrative authority when found excessive or disproportionate having regard to the gravity of the misconduct proved in the departmental proceedings, the Act should be amended by incorporating such provision in order to provide service litigants for appropriate remedy and proper dispensation of justice.
12. Unlike India, the Administrative Tribunals in Bangladesh have no power to grant stay or injunction as an ad-interim measure of which absence makes remedy jurisprudence frustrated. Though the Tribunal enjoys inherent powers in the absence of such ad-interim measure, invoking the power to grant interim order or injunction plays a monumental role for the appropriate dispensation of justice. Therefore, the Act should be amended by granting such power to the Tribunal.
13. In order to assure pragmatic judgment on appeal, it is recommended that the judicial member of the Administrative Appellate Tribunal should be recruited from amongst the District Judges who are of acute intellect, high legal acumen, integrity and impartiality. Furthermore, the Supreme Court should be made the authority in place of the executive authority for the transfer, posting and promotion of Members of the Tribunals so that they can discharge their functions without any fear or favor by stringently complying with their professional conduct.
14. Like the Administrative Appellate Tribunal in Bangladesh, the Administrative Tribunal should be given the power to punish for contempt of its authority in order to ascertain prompt, effective and desired materialization of its decisions because this power commands utmost respect both from all persons appearing before the Tribunals

and their lawyers. Apart from this, as the government authorities are being accused in most of the contempt cases, a liaison officer may be appointed in the Ministry of Public Administration of the Bangladesh Government like Pakistan in order to supervise the materialization of the decisions of the Tribunals. Alternatively, a watchdog committee which must be independent, autonomous and permanent body consisting of men of the highest integrity, legal background and deep knowledge of administration should be constituted to oversee the working of the Tribunals.

Ways Out to Tackle Other Challenges

1. The Members of the Administrative Tribunal being District Judge they should be provided all facilities including housing facility like other judges of equal rank so that they become enthusiastic and encouraged to perform their undertakings effectively.
2. Specific laws or rules regulating the appointment of panel advocate should be made. The merit and qualifications not political identity should be the determining factor in such appointment, which can be hoped to facilitate the proper functioning of the Administrative Tribunals. The procedure of selecting a panel advocate should be changed because the selected advocate may not have expertise or may not be aware of departmental proceedings of a particular Department against which a case is filed. In addition, the reasonable fees should be fixed for panel advocate, which can restrain them from filing excessively time petition and thereby can make prompt and expeditious disposal of cases.
3. Support staffs of the Administrative Tribunals should be provided the same facilities as are given to support staffs of High Court Division and Secretariat so that they get inspired for facilitating the proper functioning of the Tribunals.
4. Proper logistic support covering reasonable wages should be provided to the staffs in the proper functioning of the Tribunals.
5. The Government of Bangladesh should initiate an ambitious Plan Scheme in order to massively modernize and computerize the

activities of the Administrative Tribunals in Bangladesh through a new dynamic website, Case Information System, Video Conferencing etc. On the completion of this project, the service litigants, lawyers and public in general will get access to the orders and decisions of the Tribunals on just time besides the efficient management and maintenance of records and expeditious disposal of cases.

In fine, it can be logically explicated that the legislative intent behind the establishment of Administrative Tribunals in Bangladesh is to provide effective, in expensive, flexible, fair, efficient adjudication as well as expeditious and public-oriented justice in the redressal of the grievances of the civil servants with a view to easing the congestion of pending litigations in the ordinary civil courts. Nonetheless, the adjudicating system of such tribunals is affected by intricate legislations bristling with different types of legal pitfalls and factual challenges, as mentioned above in details. Therefore, it requires a stringent adherence to those aforesaid ways out in order to adjudicate the service disputes as per the underlying philosophy of establishing such tribunals. Resultantly such bold steps would develop service jurisprudence and facilitate the establishment of a true welfare state making benefits for the individuals and the society at large. These Tribunals would go a long way as an effective and supplementary dispute resolution mechanism for resolving service disputes and at the same time, would gain public confidence as well as herald the era of quick settlement mechanism by delivering prompt legal justice to the individuals including the service litigants in an expertise, efficient and expeditious manner.

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