Dhaka University Law Journal

Volume 26 Number 1 June 2015

ISSN 1813-5099

The Dhaka University Studies
Part- F

Dhaka University Law Journal

Volume 26 Number 1 June 2015

University of Dhaka
Bangladesh

Submission

Dhaka University Law Journal is interested in original contributions on contemporary or jurisprudentially important legal issues from scholars and professionals. This is a peer-reviewed journal, and papers and critical essays are published only after the author(s) has/have resubmitted the paper in compliance with reviewers' suggestions and recommendations, if there be any.

Two copies of manuscripts should be sent to the correspondence address, and a copy must also be submitted by email attachment to: <lawfacdu@gmail.com>. A covering-letter giving a short biographical note on the author(s) along with a declaration as to the originality of the work and the non-submission thereof to anywhere else must accompany the manuscripts.

Standard articles written on one side of good quality A4-sized papers, double spaced with wide margins, should be of 8,000-10,000 words including footnotes. The contributions must be in journal style outlined below.

References, Footnotes and Layout

The text must contain appropriate headings, subheadings and authoritative footnotes. The footnotes should be numbered consecutively and typed single spaced at the bottom of each relevant page. Citations conform generally to a Uniform System of Citation. Thus the style should be as follows:

Journal Articles: Single Author

Antonio Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in the Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649, 651. [Here, the pinpoint reference is to page 651 which is preceded by the starting page 649 and a comma and space.]

Journal Articles: Multiple Authors

Taslima Monsoor and Raihanah Abdullah, 'Maintenance to Muslim Women in Bangladesh and Malaysia: Is the Judiciary Doing Enough?' (2010) 21(2) *Dhaka University Law Journal* 39, 47. [Note: honorific titles (and initials) are omitted. However, M, Md, Mohd and any other abbreviated form of Mohammad which are part of author's name should not be removed. 21 is the volume and 2 is the issue no of the journal. 2010 is the publishing year. Year should be placed in square brackets [for journals that do not have volume number.]

Books: Single Author

Shahnaz Huda, *A Child of One's Own: Study on Withdrawal of Reservation to Article 21 of the Child Rights Convention and Reviewing the Issues of Adoption/fosterage/ kafalah in the Context of Bangladesh* (Bangladesh Shishu Adhikar Forum, 2008) 187. [Note: here 187 is the pinpoint reference. This reference is from the first edition of the book. In the case of editions later than the first, the edition number should be included after the publisher's name. It should appear as: 3rd ed]

John Finnis, *Natural Law and Natural Rights*, (Oxford University Press, 2nd ed, 2011) ch 4. [Here, a broad reference is made to chapter 4 of the book.]

Books: Multiple Authors

Richard Nobles and David Schiff, *A Sociology of Jurisprudence* (Hart Publishing, 2006) 49.

Paul Rishworth et al, *The New Zealand Bill of Rights* (Oxford University Press, 2003). [Note: when there are more than three authors, only first author's name should appear and 'et al' should be used instead of remaining authors' names.]

Books: Edited

Tom Ginsburg (ed), *Comparative Constitutional Design* (Cambridge University Press, 2012). [Note: where there are more than one editor, '(eds)' should be used instead of '(ed)'.]

Chapters in Edited Books

Jon Elster,'Clearing and Strengthening the Channels of Constitution Making' in Tom Ginsburg (ed),*Comparative Constitutional Design* (Cambridge University Press,2012)15, 18.

Books: Corporate Author

McGill Law Journal, *Canadian Guide to Uniform Legal Citation* (Carswell, 7th ed, 2010).

American Psychological Association, *Publication Manual of the American Psychological Association* (6th ed, 2010) 176. [Note: a publisher's name should *not* be included where the publisher's and the author's names are the same.]

World Bank, *Gender and development in the Middle East and North Africa: women in the public sphere* (2004).

Theses

Naim Ahmed, *Litigating in the Name of the People: Stresses and Strains of the Development of Public Interest Litigation in Bangladesh* (PhD thesis, SOAS, 1998).

Working Paper, Conference Paper, and Similar Documents

Jens Tapking and Jing Yang, 'Horizontal and Vertical Integration in Securities Trading and Settlement' (Working Paper No 245, Bank of England, 2004) 11–12.

James E Fleming, 'Successful Failures of the American Constitution' (Paper presented at Conference on The Limits of Constitutional Democracy, Princeton University, 14-16 February 2007) 13.

Newspaper

Stephen Howard and Billy Briggs, 'Law Lords Back School's Ban on Islamic Dress', *The Herald* (Glasgow), 23 March 2006, 7. Imtiaz Omar and Zakir Hossain, 'Coup d' etat, constitution and legal continuity', *The Daily Star* (online), 24 September 2005 <http://archive.thedailystar.net/ law/2005/09/04/alter.htm> accessed 9 March 2014.

Internet Materials

International Whaling Commission, *Extending the Global Whale Entanglement Response Network* (28 January 2014) <http://iwc.int/extending-the-global-whale-entanglement-response-n> accessed 9 March 2014. [Note: here the date within parentheses is the last date of update of the web page, and the date after the URL is the date of last access.]

Cases

A (FC) v Secretary of State for the Home Department [2004] UKHL 56.

Additional District Magistrate, Jabalpur v Shivakant Shukla AIR 1976 SC 11207.

A T Mridha v State (1973) 25 DLR (HCD) 335, 339. [Here, the case is reported on page 335, and the pinpoint is to page 339. Full stops should not be used in abbreviations.]

Bangladesh Environmental Lawyers Association (BELA) v Bangladesh [1999] Writ Petition No 4098 of 1999 (pending). [Note: '& others,' '& another' should be omitted.]

Shahida Mohiuddin v Bangladesh [2001] Writ Petition No 530 of 2001 (unreported).

Parallel citations should not be used in citations of Bangladeshi cases. But in citations of United Kingdom Nominate Reports and early US Supreme Court decisions, parallel citations are used.

Statutes (Acts of Parliament)

Evidence Act 1872, s 2. [Note: 'The' should not precede the name of the statute, and comma (,) should not be used before the year]

Evidence Act 2006, s 15 (New Zealand). [Note: when necessary, give jurisdiction in parentheses to avoid confusion.]

Delegated Legislation

Family Courts Rules 1985, r 5.
Financial Institutions Regulations 1994, reg 3.
Abbreviations should be written out in full when they appear first in the text or form the first word in a sentence. Leave out full stops in abbreviations made up of capitals as, for example, SEC, HCD, and JATI.

The abbreviation 'Ibid' should be used to repeat a citation in the immediately preceding footnote. Standing alone, 'Ibid' means strictly 'in the very same place' while 'Ibid, 231' means 'in the same work, but this time at page 231.' Avoid the use of 'Latin gadgets' such as *supra*, *infra*, *ante*, *Id*, *op cit*, *loc cit*, and *contra*, which are not widely understood. For cross reference and other purposes, following introductory signals can be used: See; See, eg,; See also; See especially; See generally; Cf; But see; See above/below n.

Printed by Shuchona, 25/1, Katabon, Dhaka.

Published in January 2017 by the Registrar, University of Dhaka.

This issue contains the papers presented at the British Council Researcher Links Workshop held in Dhaka from 23-26 February 2015.

Subscriptions

The Faculty of Law publishes *Dhaka University Law Journal* (The Dhaka University Studies Part F) twice a year. The subscription rates for individuals for a single issue are Taka 75 (domestic) and $15 (international). Institutional subscriptions for a single issue are Taka 100 (domestic) and $20 (international). Postal costs will be charged separately.
Manuscripts and editorial correspondence should be addressed to:

Editor
Dhaka University Law Journal (Dhaka University Studies, Part-F)
Room No. 110, Kazi Motahar Hossain Bhaban
Faculty of Law
University of Dhaka
Dhaka-1000, Bangladesh
Tel: 58613724, 9661920-73/4348/4349
Fax: 58613724
E-mail: deanlaw@du.ac.bd

1

Dhaka University Law Journal

(The Dhaka University Studies Part-F)

Volume 26 Issue No 1 June 2015

3

Dhaka University Law Journal

(The Dhaka University Studies Part-F)

Volume 26 **Issue No 1** June 2015

8

Contributors

Dr. Nakib Muhammad Nasrullah
Professor
Department of Law, University of Dhaka
&
Adnan Hosaini
LL.B (Honours)
Macquarie University, Australia

Mr. Md. Khurshid Alam
Professor
Department of Law
University of Dhaka

Dr. Md. Towhidul Islam
Professor
Department of Law, University of Dhaka
&
Ms. Ferdous Rahman
Advocate
Dhaka Judge Court

Dr. Jamila Ahmed Chowdhury
Associate Professor
Department of Law, University of Dhaka

Dr. Farzana Akter
Assistant Professor
Department of Law, University of Dhaka

Dr. Raushan Ara
Assistant Professor
Department of Law, University of Dhaka

Dhaka University Law Journal

(The Dhaka University Studies Part-F)

Volume 26 **Issue No 1** **June 2015**

Contents

GATT Article XXIV and Multilateral Trade Liberalisation: A Need for Jurisprudencial Reform

Dr. Nakib Muhammad Nasrullah[1]
Adnan Hosaini[2]

Introduction

'Ensuring that regionalism and multilateralism grow together – and not apart – is perhaps the most urgent issue facing trade policy-makers today' -Renato Ruggiero, former Director-General of the Word Trade Organisation (**WTO**)[3]

Even after nineteen years, these words remain of fundamental importance, as the rapid proliferation of regional trade agreements (**RTAs**) has created a "spaghetti bowl"[4] of trade arrangements that has the potential to endanger the future of the world trade system. The danger arises as RTAs are engineered to discriminate by providing only members with favourable terms of trade. Whilst Article XXIV of the General Agreement on Tariffs and Trade (**GATT**)[5] contains the exception permitting States to negotiate RTAs, such conduct directly contradicts a fundamental tenet of the GATT; the Most Favoured Nation (**MFN**) principle.[6] This principle prevents a state from discriminating against any of its trading partners.[7]However, an RTA, like the North American Free Trade Agreement (**NAFTA**) provides preferential trade arrangements to member States which can decimate the comparative advantage of other States. This contradictory conduct hinders the original mandate of the WTO, which is to liberalise global trade. Ironically, the drafters of the GATT envisaged that RTAs would only be formed in rare circumstances but today all WTO members

---

1 Professor, Department of Law, University of Dhaka
2 LL.B (Honours), Macquarie University, Australia
3 Renato Ruggiero, 'Multilateralism and Regionalism in Trade', (1996) 1 (16) *An Electronic Journal of the U.S. Information Agency* p. 9
4 Jagdish Bhagwati, 'U.S. Trade Policy: The Infatuation with the FTAs' in JagdishBhagwati and Anne O. Kreuger (eds), *The Dangerous Drift to Preferential Trade Agreements* (The AEI Press, 1995) 5.
5 *Marrakesh Agreement Establishing the World Trade Organisation*,opened for Signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*').
6 Ibid, Article I.
7 Id.

except for Mongolia are a party to at least one RTA.[8]In fact, as of January 2013, an astounding 546 notifications of RTAs have been received by the WTO, rendering the original mandate of the WTO; to achieve multilateral trade liberalisation, in tatters.[9]Further compounding this problem is that this almost exponential growth shows no sign of abatement. Consequently, 'nearly five decades after the founding of GATT, MFN is no longer the rule; it is almost the exception.'[10]The proliferation of RTAs is diminishing the value of the MFN principle and the importance of multilateral trade liberalisation. Consequently, it is vital to prevent RTAs from being used in a protectionist manner by reforming the application of GATT Article XXIV.

This paper determines whether RTAs that do not comply with the requirements of GATT Article XXIV are an institutional threat to the multilateral trading system. If this is found to be the case, this paper will propose a solution that can ensure GATT Article XXIV fulfils its envisaged purpose by facilitating the achievement of multilateral trade liberalisation.

The objectives of this paper are best achieved by adopting a doctrinal approach to systematically explain the principles that regulate RTAs. This doctrinal analysis is needed to analyse the legal framework of the Article XXIV as well as examining the deficiencies within the Article XXIV framework that prevents RTAs from facilitating multilateral trade liberalisation. In order to accomplish this paper's objectives, this approach will be reform oriented in order to effectively develop a three-pronged solution designed to ensure that RTAs facilitate multilateral trade liberalisation. A normative analysis will be conducted to assess the feasibility of this proposal.

In the accomplishment of this paper, the whole text is organised in four parts. Part 1 explains the development and key aspects of the GATT. In particular, this focuses on the factors influencing the inclusion of the Article XXIV within the original GATT as well as its requirements. Part II explains the economic, political and strategic reasons underpinning the recent exponential growth in RTAs and evaluates the impact that RTAs have in achieving the WTO's original mandate of multilateral trade liberalisation. Part III outlines the numerous deficiencies that have allowed WTO members to exploit and blatantly disregard substantive provisions of the GATT Article XXIV. It focuses on historical defects, definitional uncertainty and

---

8 World Trade Organisation, *Regional Trade Agreements* (21 April 2013) <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20@Symbol=%20wt/reg*%20and%20n)%20and%20(%20@Title=%20mongolia%20)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#>

9 World Trade Organisation, *Regional Trade Agreements* (10 January 2013) <http://www.wto.org/english/tratop_e/region_e/region_e.htm>.

10 Fred Trost, 'Reconciling Regional Trade Agreements with the Most Favoured Nation Principle in WTO-GATT' (2008) 5 *Macquarie Journal of Business Law* p.43

the ineptitude of the Committee on Regional Trade Agreements (**CRTA**) and the WTO as the major factors perpetuating the creation of illegitimate RTAs. Part IV develops a pragmatic new solution based on incentivising compliance with the GATT Article XXIV to protect the institutional integrity of the WTO. It argues that RTAs can facilitate multilateral trade liberalisation after the implementation of a three-pronged reform.

Part 1

Development of GATT Article XXIV in GATT 1947

Prior to the formation of the GATT in 1947, a considerable proportion of world trade occurred in imperial preference trading blocs, which may have contributed to World War II.[11]Consequently, the conclusion of the War saw a U.S. led movement towards a global trading system. However, the strength of the Commonwealth and its preferential trading system meant that Great Britain remained an advocate for a plurilateral trading system.[12]Nonetheless, the economic clout of the U.S. meant that the philosophy behind the GATT 1947 would be multilateralism with the MFN principle being a fundamental tenet. By their definition, RTAs are prejudiced in nature, as they provide trade concessions to members by excluding and discriminating against non-members and should have no place in a trading system based on multilateralism.[13]Nevertheless, it was argued that RTAs could 'facilitate the [GATT's] stated goal of increasing world trade by encouraging the integration of national economies.'[14]Considering the integration efforts occurring in Europe at the time, this exception to multilateralism was argued as being necessary in ensuring 'European (and international) peace and security.'[15]This derogation from the MFN principle is contained within the Article XXIV. This provision was intended to provide States with an alternative avenue to achieving multilateral trade liberalisation.[16]

---

11 Ibid, 46.

12 Ibid, 47.

13 Colin Picker, 'Regional Trade Agreements v. The WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat' (2005) 26(2) *University of Pennsylvania Journal of International Economic Law* pp.267, 271.

14 David R. Karasik, 'Securing the Peace Dividend in the Middle East: Amending GATT Article XXIV to Allow Sectoral Preferences in Free Trade Areas', (1997) 18 *Michigan Journal of International Law* 527, 532.

15 Gavin Goh, 'Regional Trade Agreements and Australia: A National Perspective' (Report, Australian APEC Study Centre, 2006) p.5.

16 Warren H. Maruyama, 'Preferential Trade Arrangements and the Erosion of the WTO's MFN Principle' (2010) 46 *Stanford Journal of International Law* pp.177, 180.

The Objectives of GATT Article XXIV

The 'overriding and pervasive purpose for the Article XXIV'[17] is to increase 'freedom of trade…through voluntary agreements [leading to] closer integration between the economies of the countries parties to such agreements'.[18]The potential for regionalism to expedite multilateral trade liberalisation is only be possible when a balance is struck that limits 'the scope for discriminatory preferential arrangements, while leaving adequate room for legitimate [RTAs].[19] Consequently, RTAs are only WTO-compliant upon the satisfaction of the following two prerequisites:

1. 'substantially all the trade'[20] between members of the RTA is liberalised 'within a reasonable amount of time' (internal criterion/first test);[21] and
2. the level of trade barriers faced by non-members does not 'on the whole' exceed the trade barriers in existence prior to the formation of the RTA (external criterion/second test).[22]

These prerequisites are well drafted because a proper application by the WTO or the CRTA should theoretically ensure that RTAs which satisfy these criteria will facilitate multilateral trade liberalisation. The underlying rationale behind these conditions is to ensure that RTAs are 'trade-creating as opposed to trade-limiting.'[23] The "substantially all the trade" prerequisite compels the RTA to liberalise a high proportion of trade between the members and ensure that the RTA is not used in a protectionist manner.[24]The rationale underpinning the external criterion is an attempt to preserve the MFN principle by safeguarding the rights of non-members.[25]

If RTAs comply with the above requirements, it is believed that there will be 'elimination between constituent territories of duties and other restrictive regulations of commerce'.[26] Sadly, only one notified RTA has been deemed as Article XXIV

17 Appellate Body Report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 October 1999) [57].
18 *General Agreement on Tariffs and Trade 1994*, Article I:4.
19 Maruyama, above note 16, 180.
20 *General Agreement on Tariffs and Trade 1994*, Article XXIV: 8.
21 Ibid, paragraph 5.
22 Id.
23 Goh, above note. 15, 9.
24 Jong Bum Kim and Joongi Kim, 'The Role of Rules of Origin to Provide Discipline to the GATT Article XXIV Exception (2011) 14(3) *Journal of International Economic Law* 613, 616.
25 Ibid, 617.
26 *Marrakesh Agreement Establishing the World Trade Organisation*,opened for Signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A Article XXIV: C.

compliant.[27] Instead, RTAs have remained self-contained, exclusive trading arrangements with little to no intention of transforming into multilateral trade agreements.[28]It was hoped that the adoption of the Understanding on the Interpretation of Article XXIV of the GATT[29] would remind members that the purpose of RTAs was to facilitate the achievement of multilateral trade liberalisation.

The WTO, the CRTA and the adoption of the GATT Understanding

The GATT Understanding relating to Article XXIV was adopted at the Singapore Ministerial Conference of 1996, shortly after the WTO had been established.[30]It was thought that clarification of contested provisions in Article XXIV through the GATT Understanding, coupled with reiterating that the purpose of RTAs was to complement the multilateral trading system,[31] would assist trade liberalisation. Unfortunately, the GATT Understanding 'is essentially technical and has not really altered the relationship of RTAs to the multilateral trading system.'[32]Moreover, the formation of the CRTA as a regulatory body responsible for ensuring the legitimacy of RTAs was seen as another way to assist the WTO achieve trade liberalisation.[33]Whether or not the CRTA and the GATT Understanding successfully liberalise trade will be assessed in Part III of this paper.

Part II

RTA's –Growth, Burden and Benefit in trade liberalisation

This part of this paper outlines the underlying factors that have influenced the almost exponential growth in global RTAs. These factors will be used to assess whether RTAs in their current form pose a threat to the future of the multilateral trading system.

Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 Preamble.

27 Kim and Kim, above note 24, p.639.

28 Amin Alavi, 'Preferential Trade Agreements and the Law and Politics of GATT Article XXIV' (2010) 1(1) *Beijing Law Review* pp.7- 9.

29 *Marrakesh Agreement Establishing the World Trade Organisation*,opened for Signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A Article XXIV: C. Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 ('*GATT Article XXIV Understanding'*).

30 Peter Hilpold, 'Regional Integration According to Article XXIV GATT – Between Law and Politics' (2003) 7 *Max Planck Yearbook of United Nations Law* p. 237.

31 *GATT Article XXIV Understanding.*

32 Picker, above note, 13, p. 283.

33 World Trade Organisation, *Committee on Regional Trade Agreements*, WTO Doc WT/L/127 (6 February 1996, adopted).

Why the sudden popularity?

The rapid proliferation of RTAs is due to numerous economic, political, strategic and non-economic factors. Indeed, the recent surge in RTA popularity has been likened to street gangs because even if 'you [do] not like them, if they are in the neighbourhood, it is safer to be in one.'[34]This fear of being left behind exerts a 'pressure for inclusion' upon States and has been referred to as the "domino-theory".[35] Mike Moore, former Director-General of the WTO summed up the situation when he stated 'despite all I've written about the perils of unilateralism and bilateralism, I'd be doing it if I were in government [as] there is a terrible cost to being left out.'[36]In fact, it has been argued that the opportunity cost for States like the U.S. when they fail to negotiate RTAs means that they 'cannot afford to not be party to such agreements'.[37]

The commercial rationale underpinning the increase in RTAs is the ability to provide exporters with preferential access to important markets.[38] This provide greater efficiency gains for a State by reducing trade barriers and accelerates the achievement of economies of scale. RTAs can also be utilised as a deregulation mechanism to 'simultaneously expand trade flows, remove longstanding barriers to internal and external competition and improve global competitiveness'.[39]In addition, members can negotiate the Article XXIV inconsistent RTAs, which allow States to protect sectors like agriculture and textiles.[40]

RTAs have also been utilised as a political mechanism to ease security concerns and to strengthen important relationships. For instance, the U.S. envisages that providing countries in the Latin America and the Middle East with preferential trade terms will expedite economic and political stability. This will 'strengthen democracy and

34 Alan Winters, (Speech delivered at the Seminar on Regional Trade Agreements, Geneva, 30 June 1999).

35 Hipold, above note30,p. 222.

36 Mike Moore, 'Preferential not Free Trade Deals' *Gulf News* (online) 23 April 2007 <http://gulfnews.com/opinions/columnists/preferential-not-free-trade-deals-1.173593>

37 Donald Calvert, 'How the Multilateral Trade System Under the World Trade Organisation is Attempting to Reconcile the Contradictions & Hurdles Posed by Regional Trade Agreements' (Masters Capstone Thesis, George Mason University, 2002) 6.

38 Maruyama, above note, 16, p.189.

39 Id.

40 Hilpold, above note 30, p.224.

prevent political recalcitrance.'[41] RTAs can also be used as a tool to reward allies for their continued support and can compensate for an ineffective foreign policy.[42]

Furthermore, States negotiate RTAs from a strategic perspective as a way to increase their competitive advantage. For many developing nations, this comparative advantage attracts foreign direct investment and provides exporters with preferential access to larger markets.[43] Conversely, RTAs can also be used to nullify the comparative advantage created by another state through an RTA. This is known as the "me too effect".[44] This strategy is best exemplified by the actions of New Zealand. Australia had entered into an RTA with Thailand which provided its exporters with lower tariffs on similar agricultural products.[45] To redress this comparative disadvantage and ensure that its exporters were on equal footing, New Zealand negotiated a similar RTA with Thailand.[46]

The above analysis indicates that RTAs are only negotiated with the intention of benefitting members. There is no consideration of the impact of the RTA on the multilateral trading system or even on other WTO members. This contravenes the underlying purpose of GATT Article XXIV. Nonetheless, RTAs may facilitate trade liberalisation. However there are debates over whether they hinder or facilitate the achievement of multilateral trade.

RTAs – burden or benefit?

Edward Hudgins argues that regionalism can effectively achieve multilateral trade liberalisation. He believes that any trade liberalisation, no matter how small is beneficial.[47]Put simply, a reduction in trade barriers leads to increased trade gains with an associated increase in global welfare.[48]Reducing these trade barriers is also significantly easier at a regional level with RTAs being much easier to implement. Hudgins argues that RTAs will trigger a positive domino effect by forcing protectionist States to liberalise as a result of political and economic pressure.[49]

---

41 Stephen Walsh, 'Addressing the Abuse of the WTO's Exemption for Regional Trade Agreements' (2004) 1 *The European Law Students' Association Selected Papers on European Law* p. 73.

42 Id.

43 Id.

44 Meredith Kolsky Lewis, 'The Free Trade Agreement Paradox' (2005) 21 *New Zealand Universities Law Review* p. 569.

45 Ibid, 570.

46 Id.

47 Edward Hudgins, 'Regional and Multilateral Trade Agreements: Complementary Means to Open Markets' (1995) 15 *The Cato Journal* p. 7.

48 Dr Rafael Leal-Arcas, 'Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism' (2011) 11(2) *Chicago Journal of International Law* p. 624.

49 Hudgins, above note 47, p.7.

Moreover, Freund purports that the regionalism has been the key driver of trade liberalisation, which he believes evidences the fact that it is a better mechanism for the enhancement of global welfare.[50]

However, this is only accurate when RTAs satisfy the two prerequisites of the Article XXIV and adhere to the MFN principle. As the WTO trade system is based on the principle of non-discrimination, it is rendered meaningless when States negotiate RTAs that have the effect of establishing discrimination as the norm.[51]The ability to hand select which areas to liberalise allows States to protect key sectors like agriculture, which does anything but liberalise trade.[52]This problem is compounded by the fact that the proliferation of "illegal" RTAs reduces state enthusiasm for engaging in multilateral trade discussions.[53]

Illegitimate RTAs often have the effect of diverting resources away from the global trading system.[54]This "trade diversion" misallocates global resources and denies 'customers [an] undistorted choice of foreign goods and services.'[55] If members outside the RTA can produce goods more efficiently, there is a global decline in efficiency when members expand production and more efficient non-members are forced to reduce production levels.[56] The impact of NAFTA is demonstrative of such a situation. The preferential treatment given to goods produced in NAFTA countries decimated the comparative advantage of cheap labour that was possessed by many Asian nations.[57] This was because many producers relocated their production from Asian nations to NAFTA countries. The increase in NAFTA production is caused by the diversion of pre-existing trade from Asian nations rather than an increase in global trade.[58] The redistribution rather than creation of trade indicates that illegitimate RTAs can be detrimental in the global pursuit of multilateral trade liberalisation. Indeed, some RTAs 'have not even succeeded in creating more trade among members'.[59]

---

50 Caroline Freund, 'Different Paths to Free Trade: The Gains from Regionalism' (2000) 115(4) *The Quarterly Journal of Economics* pp. 1334-6.

51 YouriDevuyst and AsjaSerdarevic, 'The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap' (2007) 18 *Duke Journal of Comparative & International Law* p. 18.

52 Maruyama, above note 16 p.191.

53 Leal-Arcas, above note 48,p 624.

54 Robert Lawrence, 'Regionalism and the WTO: Should the Rules be Changed?' in Jeffrey Schott (eds), *The World Trading System: Challenges Ahead* (Peterson Institute, 1996) 43.

55 Walsh, above note 41, p.70.

56 Lawrence, above note 53, p. 43.

57 Ibid, 48.

58 Id.

59 Maruyama, above note 16, p.191.

The sheer volume of illegitimate RTAs forces exporters to 'comply with complex, confusing and divergent regulations of commerce such as rules of origin'. Consequently, when RTAs fail to comply with the prerequisites of Article XXIV, any hope of harmonising trade requirements becomes virtually impossible.[60] The imposition of "rules of origin" requirements raises protection levels by providing members with an incentive to 'maintain the protection and reduce...[the] willingness to liberalise externally.'[61] For instance, Caribbean nations have been harmed as textile and agricultural sales to the United States have been lost to Mexico as a result of the NAFTA.[62]This also makes it considerably harder to merge RTAs in order to create larger free trade areas.

A hallmark of the envisaged WTO trade system is transparency. However, illegitimate RTAs reduce transparency as WTO members cannot be sure about what RTAs exist. This is especially problematic given the significant volume already in existence as well as the numerous RTAs presently being negotiated.[63]There is also an intrinsic unfairness in the negotiation process which tends to marginalise less developed countries, as they often do not possess a comparative advantage that is attractive to other WTO members.[64]

Consequently, it can be argued that illegitimate RTAs are inherently harmful in so far as they 'solidify protectionist measures towards non-member countries'.[65] Members are also forced to engage in discriminatory trade arrangements, limiting the effectiveness of the market mechanism to distribute resources efficiently.[66] This contradicts the overarching purpose of the GATT.

Clearly, RTAs are extremely popular amongst States despite the numerous problems they cause in the pursuit of multilateral trade liberalisation. Before an analysis of the deficiencies is conducted, it must be explained why free trade is so important. The reason lies with the fact that States willing to embrace multilateral trade

---

60 Walsh, above note 41, p.70.
61 Lawrence, above note 54, p.50.
62 TT's Article XXIV' in Kym Anderson and Richard Blackhurst (eds), *Regional Integration and the Global Trading System* (Palgrave McMillan 1993) 13.
63 Leal-Arcas, above note 48, p. 624.
64 Ibid, 626.
65 Calvert, above note 37, p.7.
66 JagdishBhagwati, 'Multilateralism and Regionalism in the Post-Uruguay Round Era: What Role for the US?' in Olga Memedovic, ArieKuyvenhoven and Willem Molle (eds), *Multilateralism and Regionalism in the Post-Uruguay Round Era: What Role for the EU?* (Kluwer Academic Publishers, 1999) 34.

liberalisation are more likely to 'garner greater economic growth in both the short and long term.'[67]

Seeking economic growth? – Multilateral trade liberalisation is the answer

Empirical studies have shown that multilateral trade liberalisation leads to greater short-term and long-term economic growth than RTAs.[68]This is because when States reduce or eliminate trade barriers on a non-discriminatory basis, there is a direct correlation with higher wealth, higher wages and a reduction in unemployment within the State.[69]Growth occurs at a much quicker rate when States pursue multilateral trade liberalisation,[70] with an associated increase in efficiency and a reduction in costs.[71]Contrastingly, RTAs, 'if anything, lead to slower growth, especially in the short run'.[72]Therefore, it is in the best interests of all WTO members for States to strive towards achieving global free trade.

Nonetheless, regionalism and multilateralism do not have to be mutually exclusive concepts. With RTAs now being an ingrained element of the global trading system, it is vital to develop a solution that allows multilateralism and regionalism to successfully co-exist and flourish together. To that end, part IV of this paper will propose a solution which strengthens the framework regulating RTAs. This will ensure that RTAs can be a springboard towards global free trade and to attaining the associated benefits of multilateral trade liberalisation.

Part-III

Deficiencies of GATT Article XXIV, the CRTA and the WTO in regulating RTAs

The proliferation of illegitimate RTAs and the associated focus on regionalism is preventing the liberalisation of the global trading system. This part outlines the deficiencies of GATT Article XXIV, the CRTA and the WTO that are preventing RTAs fulfilling their envisaged role as a facilitator of trade liberalisation. This is vital as a basis for assessing the proposed reform will be the ability to eliminate or mitigate the deficiencies outlined below. The deficiencies mails concern historical defects none definitional unartuinttry issues relating CRTA.

---

67 Walsh, above note 41, 70.

68 Athanasios Vamvakidis, 'Regional Trade Agreements Versus Broad Liberalisation: Which Path Leads to Faster Growth? Time Series Evidence', (Working paper IMF WP/98/40, IMF Research Department, 1998) 5.

69 Centre for International Economics, 'Benefits of trade and trade liberalisation (Report, Department of Foreign Affairs and Trade', 2009) 5.

70 Vamvakidis, above note 68, p. 17.

71 Centre for International Economics, 'Benefits of trade and trade liberalisation (Report, Department of Foreign Affairs and Trade', 2009) p. 5.

72 Vamvakidis, above note 68,p.17

Historical defects

It is not unfair to say that GATT Article XXIV was destined to be ineffective from the outset. This is because consensus amongst members has always been required before any action can be taken against a member that has violated Article XXIV. Such an absurd requirement allowed a 'violating country to veto any condemnation of its violative behaviour.'[73] The effect of this provision was to immediately erode any power possessed by Article XXIV and is a major reason why very few RTAs are actually Article XXIV compliant.[74]This meant that 'the position of RTAs within the multilateral system was essentially unchecked by the time the GATT was replaced by the WTO.'[75]

Definitional uncertainty

As mentioned earlier, an RTA is only legitimate upon satisfying two prerequisites. The first is contained within paragraph 8 of the Article XXIV and dictates the level of internal trade liberalisation within the RTA.[76] The second is contained within paragraph 5 and intends to ensure that the RTA does not have a detrimental impact on other States.[77]These provisions were drafted because RTAs were recognised as having the ability to benefit the multilateral trade system after eliminating internal protectionism and external barriers to trade.[78]Despite the best of intentions, the ambiguous language of these paragraphs and a lack of certainty regarding vital criteria has predisposed this provision to regular exploitation.

Paragraph 8: The "substantially all the trade" requirement

The "substantially all the trade" (**SAT**) requirement was designed to ensure maximum liberalisation of internal trade barriers with the intention that the RTA would transform into a multilateral trade agreement.[79]In addition, the SAT requirement was seen as a mechanism limiting the use of RTAs in a protectionist manner.[80]However, the extent of liberalisation necessary to satisfy the test has never reached a consensus.[81]A further problem is that a literal reading of the requirement allows for some internal trade to be subject to trade barriers. Consequently, two

73 Picker, above note 14, p.282.
74 Ibid, 283.
75 Ibid, 282.
76 *General Agreement on Tariffs and Trade 1994*, Article XXIV: 8.
77 Ibid, paragraph 5.
78 Ibid, paragraph 4.
79 Calvert, above note 37, p. 14.
80 Kim and Kim, above note 25,p. 616.
81 Devuyst and Serdarevic, above note 51, p. 25.

differing interpretive approaches have emerged.[82] The first favours a quantitative approach where liberalisation must exceed a certain statistical threshold to satisfy the SAT requirement.[83] Unfortunately, this approach reinforces the literal interpretation by providing States with the option of not liberalising key sectors if the threshold has been satisfied. Such an approach directly contravenes the overarching purpose of the GATT and impedes the achievement of multilateral trade liberalisation. To minimise the potential for exploitation if this approach was accepted, Australia and Japan have proposed that the SAT threshold should be 95%.[84]The second approach is qualitative in nature and is intended to prevent the exclusion of any sectors from internal trade liberalisation.[85]These definitional problems have been compounded by the failure of the GATT Understanding to adequately define the term. Consequently, given the ambiguity of the requirement, the disagreement over approaches was inevitable. Regrettably, this remains a key factor that has limited the ability of the CRTA to ensure that all RTAs comply with Article XXIV.

The WTO Panel in the *Turkey-Restrictions on Imports of Textile and Clothing Products* (**Turkey-Textiles**)[86] case offered their interpretation of the SAT requirement. The panel held that 'the ordinary meaning of the term "substantially" in the context of sub-paragraph 8(a) appears to provide for *both* qualitative and quantitative components'.[87] This interpretation was accepted by the WTO Appellate Body.[88] Nonetheless, it has been argued that requiring a combination of both a quantitative and qualitative approach has 'only exacerbated the confusion and debate surrounding the SAT requirement.'[89]

Paragraph 5: The economic test and its elements

The external criterion or second test was drafted as a way to guarantee that non-members of an RTA would not be detrimentally impacted by ensuring that 'the duties and other regulations of commerce…shall not on the whole be higher or more

82 *Compendium of Issues Related to Regional Trade Agreements*, WTO Doc TN/RL/W/8/Rev.1**,** (1 August 2002) (Background Note by the Secretariat) paragraph, 68

83 *Negotiating group on rules – submission on regional trade agreements – paper by Turkey*, WTO Doc TN/RL/W/32, (22 November 2002) (Discussion Paper) paragraph, 16.

84 *Liberalisation Process and Provisional Conditions in Regional Trade Agreements*, WTO Doc WT/REG/W/46, (5 April 2002) (Background Survey by the Secretariat) paragraph, 9.

85 Calvert, above note 37, p.15.

86 Panel Report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R (31 May 1999).

87 Ibid, paragraph 9.148.

88 Appellate Body Report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 October 1999) [45-47].

89 Calvert, above note37, p.16.

restrictive than the general incidence...applicable in the constituent territories prior to the formation.'[90] The general objective of this provision is indisputable; however, the failure to define fundamental terms undermines the ability to determine whether an RTA complies with this economic test. For instance, it can be argued that an interpretation of the words 'on the whole' permits an increase in tariffs in particular areas if offset by reductions in other areas.[91]Such an interpretation would see increased trade diversion by encouraging States to protect key sectors like agriculture and would also decimate the comparative advantage possessed by many developing nations in sectors like agriculture.[92]Unfortunately, the GATT Understanding relating to Article XXIV does nothing to reject this approach.

Further definitional uncertainty

Furthermore, the WTO has also failed to define 'other regulations of commerce' (**ORC**).[93] This continues to plague the effective application of Article XXIV particularly as non-tariff barriers have become considerably more prominent in RTAs.[94]The Panel in *Turkey-Textiles* stated that ORC 'could be understood to include any regulation having an impact on trade'.[95] This interpretation meant that quantitative restrictions could not be imposed as they are prohibited under GATT Article XI and XIII.[96] However, the Appellate Body held that Article XXIV can 'justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible "defence" to a finding of inconsistency' with paragraph 5.[97]This surprising decision has meant that Article XXIV, which was originally conceived as a mechanism to prevent the introduction of barriers to trade, can now be used to legally justify the imposition of trade barriers.[98]

The drafting of Article XXIV reflects an attempt to appease the varying interests of members but is also one that is clearly inadequate. The overriding purpose was to ensure RTAs were used in a manner that increases multilateral trade liberalisation.

---

90 *General Agreement on Tariffs and Trade 1994*', Article XXIV: 5(a)-(c).

91 Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (29 April 1996) [6].

92 Walsh, above note 41, p.96.

93 Ibid, 97.

94 *Committee on Regional Trade Agreements – Annotated Checklist of Systemic Issues*, WTO Doc WT/REG/M/16 (26 May 1997) (Note by the Secretariat) [60].

95 PanelReport, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R (31 May 1999) [9.120].

96 *General Agreement on Tariffs and Trade 1994*', Article XI and XIII.

97 Appellate Body Report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 October 1999) [45].

98 Picker, above note 13, p.290.

However, the failure to clearly define or subsequently clarify, crucial terms within Article XXIV has meant that they remain 'as impossibly vague as [they] sound'.[99]Consequently, it is unsurprising that Article XXIV, which may actually promote rather than eliminate the use of trade barriers, is 'one of the most controversial provisions in the GATT'[100] where 'ambiguity, rather than precision has reigned.'[101]

Even if these terms were clearly defined and could ensure that RTAs comply with Article XXIV, it would be meaningless without a body that possessed effective enforcement powers. The regulatory body tasked with is onerous role is the CRTA.

CRTA and the WTO – A study of ineptitude

The CRTA was established by the WTO so that there would be one permanent entity responsible for ensuring RTA compliance with GATT Article XXIV102 Unfortunately, the CRTA has failed spectacularly. The 2012 report of the CRTA to the General Council continues the sad trend of the CRTA failing to adhere to its work programme.103 The backlog of unsubstantiated RTAs continues to grow at an alarming rate. This has caused the CRTA 'examination mechanism to be brought to near-paralysis'.104The major cause of this problem is the failure to eradicate a number of the 'systemic issues'105 within RTAs and the WTO. This is compounded by the general hesitation of States to 'provide information or agree to conclusions that could later be used or interpreted [adversely] by a dispute settlement panel.'106Consequently, the CRTA has only ever completed one examination of an RTA in its 17 year history and there has never been a formal sanction against a non-compliant RTA.107This has led to the CRTA being

99 Kenneth Dam, *The GATT: Law and International Economic Organisation* (University of Chicago Press, 1970) 274.

100 Id.

101 Ibid, 275.

102 *Committee on Regional Trade Agreements*, WTO DocWT/L/127, (7 February 1996) (Decision of 6 February 1996) paragraph, 1.

103 *Report (2012) of the Committee on Regional Trade Agreements to the General Council*, WTO Doc WT/REG/22 (26 November 2012) (Committee on Regional Trade Agreements Annual Report) para 15; *Report (2011) of the Committee on Regional Trade Agreements to the General Council*, WTO Doc WT/REG/21 (21 November 2012) (Committee on Regional Trade Agreements Annual Report) para 15.

104 *Compendium of Issues Related to Regional Trade Agreements*, WTO Doc TN/RL/W/8/Rev.1, (1 August 2002) (Background Note by the Secretariat) pargraph, 17.

105 Jo-Anne Crawford and Sam Laird, 'Regional Trade Agreements and the WTO' (Paper presented at the North American Economic and Finance Association, Boston, 6-9 January 2000) p.9.

106 Trost, above note 10,p. 63

107 *Committee on Regional Trade Agreements*, WTO Doc WT/REG/W/37, (2 March 2000) (Synopsis of "Systemic" Issues Related to Regional Trade Agreements) para 21.

characterised as 'moribund'.108 Even if the CRTA was to find that an RTA was not Article XXIV compliant, it cannot effectively enforce the decision.109 Disappointingly, the WTO has been of little assistance and has even acknowledged that it 'does not have rules and procedures for examination of RTAs that function adequately'.110 The shortcomings of the WTO have played a significant role in the ineffectiveness of the CRTA Concerning its with ficelim pacedure and revise and enforcement mechanism.

Notification procedures

One of the fundamental reasons for the ineffectiveness of the CRTA is the failure of the WTO to eliminate the uncertainty pertaining to the notification requirement of Article XXIV. The confusion arises as a result of the vagueness of the provision which states 'any contracting party deciding to enter into an [RTA]…shall promptly notify the [WTO].'[111] This provision does not clarify whether notification must occur prior to the formation of the RTA or shortly after the RTA has been implemented. It has been suggested that the use of the words 'deciding to enter' suggests that notification must occur prior to the formation of the RTA.[112] Nonetheless, the failure of the WTO to eliminate the ambiguity in the provision has meant that many RTAs are in force long before the WTO is notified. For instance, the RTA in the *Turkey-Textiles* case was notified to the WTO two months after the RTA was implemented.[113]In this case, the EU argued that 'it might be impracticable for parties to an RTA to notify their agreement before its implementation.'[114] Moreover, there are numerous instances where States feel that it is in their best interests to not even notify the WTO of the existence of the RTA.[115]

This behaviour is of paramount concern to CRTA representatives as late notification or failure to notify the WTO significantly 'hinders any examination

108 World Trade Organisation Director General SupachaiPanitchpakdi, 'The Doha Development Agenda: Challenges Ahead' (Speech delivered at the Fourth European Union-Association of Southeastern Asian Nations Think Tank Dialogue, Brussels, 25 November 2002) <http://www.wto.org/english/news_e/spsp_e/spsp07_e.htm>

109 Devuyst and Serdarevic, above note 49, p.73.

110 *World Trade Organisation Annual Report 2001*, (23 May 2001) (World Trade Organisation Annual Report 2001) p. 40.

111 *General Agreement on Tariffs and Trade 1994*', Article XXIV: 7(a).

112 Walsh, above note 41, p.79.

113 Appellate Body Report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 October 1999) [15].

114 Ibid, 49

115 Karasik, above note 14, p.544

process.'[116]Furthermore, this conduct means that the CRTA cannot adequately plan meetings, the WTO wastes resources and there is a considerable delay before the first round of an RTA examination can take place.[117]

Paragraph 7(a) of Article XXIV also requires an RTA contracting party to 'make available to [the WTO] such information regarding the [RTA] as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.'[118]Member obligations under this provision are yet again vague and can be exploited. The WTO has not specified a time period within which members are obliged to provide the necessary information. Nor has it be an made expressly clear the extent of information that members are required to provide.[119] The inability of the CRTA to receive timely information that is substantial enough to make an assessment regarding the legitimacy of an RTA is a substantial impediment. This problem is further compounded by the fact that there are no consequences for not complying with this provision of Article XXIV.[120]As a result, the WTO review and enforcement mechanism is rendered virtually redundant.

A redundant review and enforcement mechanism

State disregard for these provisions will continue unless other States challenge conduct through the WTO dispute settlement process. However, the WTO's regulation of Article XXIV is based on a reactive enforcement model, which is entirely appropriate when a strong disciplinary mechanism exists. But the WTO disciplinary mechanism is extremely weak and WTO members 'have little fear that they will be embarrassed by some [WTO] body finding them in violation of their international obligations.'[121]This has been evidenced in the *Turkey-Textiles* decision where Turkey received no penalty for their imposition of qualitative restrictions, which contradicted principles of the GATT.[122]Furthermore, the impact of a WTO decision that finds an RTA to not comply with the Article XXIV exception is not completely known. In fact, such is the weakness of the WTO's review and enforcement mechanism; it would not be unsurprising if States were to intentionally ignore any adverse decision.[123]

---

116 Zakir Hafez, 'Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs', (2003) 79 *North Dakota Law Review* p. 916.
117 Calvert, above note 37, p.19.
118 *General Agreement on Tariffs and Trade 1994*', Article XXIV: 7(a).
119 Walsh, above n 41, 73.
120 Hafez, above note 116, p. 916.
121 Ibid.
122 Appellate Body Report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 October 1999) p. 64
123 Devuyst and Serdarevic, above note 51, p.69.

Nonetheless, the potential for a WTO dispute settlement body to make an adverse finding that prevents States from forming RTAs down the track has meant that States are not willing to use the dispute settlement process. Jagdish Bhagwati articulately summed up the present situation by stating that forcing WTO members to comply with Article XXIV 'is like asking criminals to decide their own sentencing.'[124] With most WTO members being a party to "illegal" RTAs,[125] the enforcement of Article XXIV would likely be 'hypocritical and perhaps self-incriminating.'[126] The impact of this repeated and very public failure to ensure conformity with Article XXIV 'casts a large shadow over the WTO and its legitimacy as a "rule of law" international organisation'.[127]If the WTO review and enforcement mechanism is not strengthened, there is a very real possibility that the legitimacy of the WTO will continue to be eroded.[128]

The deficiencies highlighted above are crippling the legitimacy of the WTO and the pursuit of multilateral trade liberalisation. More and more WTO members are being forced to focus their efforts on regional, instead of multilateral initiatives.[129] Even Japan, once labelled 'the staunchest multilateralist,'[130] has deviated from its belief that RTAs 'should be the last trade policy option'.[131]Indeed, Japan is currently in the process of negotiating 7 separate RTAs,[132] highlighting the magnitude of this situation.

Therefore, it is of paramount importance for Article XXIV and the WTO system to be clarified, strengthened and amended to combat these deficiencies by mitigating the proliferation of illegitimate RTAs.

---

124 Jagdish Bhagwati and Arvind Panagariya, *The Economics of Preferential Trade Agreements* (AEI Press, September 1996) 67.

125 Karasik, above note 14, p.543.

126 Kevin Wechter, 'NAFTA: A Complement to GATT or a Setback to Global Free Trade?' (1993) 66 *Southern California Law Review* 2611, 2620.

127 Picker, above note 15, p. 289.

128 Id.

129 Calvert, above note 37, p.32.

130 Takashi Terada, 'The Making of Asia's First Bilateral FTA: Origins and Regional Implications of the Japan-Singapore Economic Partnership Agreement' in Timothy Tsu (eds) *Japan and Singapore* (McGraw-Hill, 2006).

131 Id.

132 Ministry of Foreign Affairs Japan, *Free Trade Agreement (FTA) and Economic Partnership Agreement (EPA)* (27 May 2013) <http://www.mofa.go.jp/policy/economy/fta/>

Part IV

Reform - A practical solution?

It has been said that 'any law that is rarely complied with is a bad law'.[133]Yet, GATT Article XXIV is not a bad provision; it has merely been applied poorly. It has been widely acknowledged that there is sufficient scope within the Article XXIV for it to successfully regulate RTAs after implementing reforms. Numerous reforms have been proposed by WTO members and academics alike but with little success. This is because a consensus has proved too difficult to reach. Under this part, a new three-pronged reform proposal inspired by some of these previous proposals is made with assessing its feasibility and likelihood for successful implementation.

The three-pronged reform

The purpose of this reform proposal is to develop a feasible solution so that the WTO can ensure that GATT Article XXIV is used only as a mechanism to facilitate the achievement of multilateral trade liberalisation. Each prong of this proposed reform is designed to eliminate, or at the very least mitigate, the deficiencies outlined in part III. This reform proposal will focus on striking a balance between eliminating the creation of illegitimate RTAs but also leaving enough scope for the creation of RTAs that comply with Article XXIV and can facilitate multilateral trade liberalisation. However, given the difficulties associated with WTO law reform, there is no guarantee that this proposal will be implemented. Nonetheless, it is hoped that the reasonable nature of the reform will encourage its acceptance by States.

Prong 1 - Definitional clarity

The key to this reform proposal is incentivising compliance with the requirements of Article XXIV. This can only occur when the scope of fundamental definitions within Article XXIV are sufficiently clarified. Therefore, the first step of the proposed reform is to clarify the definitions of "SAT"[134] and "on the whole".[135]This prong of the reform is not of itself original, but its proposed implementation and the how it can be used effectively alongside the two prongs is unique.

Luckily, the WTO Panel and Appellate Body in *Turkey-Textiles* held that the SAT requirement encompassed 'both qualitative and quantitative components'.[136]This decision limits the potential for WTO members to exploit the SAT requirement.

---

133 McMillan above note 62, p.15.
134 *General Agreement on Tariffs and Trade 1994*, Article XXIV: 8.
135 Ibid,paragraph 5.
136 PanelReport, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R (31 May 1999) [9.148].

Nonetheless, further clarification of the requirement is necessary. The WTO Panel and Appellate Body failed to specify what percentage of trade between members must be liberalised to satisfy the quantitative requirement. This paper proposes that the 95% coverage threshold suggested by Australia and Japan should form part of the requirement.[137]Thus, WTO members would no longer be able to protect sensitive sectors and almost all trade between RTA members would have to be free. Such an amendment would ensure that RTAs are closer to fulfilling their purpose of liberalising trade.

Moreover, for the SAT requirement to be effective, the definition of "on the whole" in paragraph 5 of Article XXIV must also be clarified. No longer should this provision be interpreted in a manner that can justify increasing tariffs in sensitive sectors by offsetting the increase by reducing tariffs in other sectors.[138] As a minimum, this provision should be amended to require 'any increases [in tariffs] to be offset within the same sector'.[139] This clarification would ensure that non-members of the RTA are not any worse off than prior to its formation. Furthermore, this paper proposes that the text of paragraph 5 should be amended from 'shall not on the whole be…'[140] to "shall be reduced on the whole…"Such an amendment has significant benefits for all WTO members. Firstly, it would mitigate 'some of the trade diversionary tendencies of RTAs'.[141] Secondly, it would clearly evidence the use of RTAs as a mechanism that can facilitate the achievement of multilateral trade liberalisation whilst also highlighting the potential for greater gains through global trade liberalisation.[142] Lastly, it would virtually eliminate the instances of WTO members creating RTAs to protect sensitive sectors.

The clarification of these key terms should be done by the WTO drafting a "Further Understanding on the Interpretation of Article XXIV of the GATT", which would be a supplement to the earlier GATT Understanding. This would be the safest way to guarantee the success of these amendments to paragraphs 5 & 8 of Article XXIV. The clarification of fundamental terms within Article XXIV provides States with the requisite level of certainty in relation to their obligations.

If the proposed Further Understanding was not able to garner the necessary consensus amongst WTO members, the WTO Panel or Appellate Body should

---

137 *Liberalisation Process and Provisional Conditions in Regional Trade Agreements*, WTO Doc WT/REG/W/46, (5 April 2002) (Background Survey by the Secretariat) para 24.

138 Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (29 April 1996) [6].

139 Walsh, above note 41, p.96.

140 *General Agreement on Tariffs and Trade 1994*, Article XXIV: 5.

141 Walsh, above note 41,p. 96.

142 Ibid, 96-7.

instead, issue a report that confirms the amendments to paragraphs 5 & 8 as outlined above. However, this process could only occur if the adjudicatory system of the WTO is strengthened considerably.

Prong 2 – Strengthen the role and powers of the CRTA and the WTO

The second prong of this reform proposal requires the powers of the CRTA and the WTO to be reinforced and strengthened. James Mathis has suggested that the CRTA review process can be improved by introducing different stages which must be complied with before the RTA is assessed at the next stage.[143]The review process would end if members do not meet the requirements of a particular stage.[144]However, this proposal is not sufficient in itself. Reform of this provision will only be truly effective when two further requirements are met.

GATT Article XXIV does not expressly require members of an RTA to notify the CRTA of any changes to the RTA.[145] This meants that members can make substantive changes to provisions within their RTA, which may detrimentally impact non-members as well as the pursuit of multilateral trade liberalisation. The WTO has attempted to address this potential problem through the Doha Round Transparency Mechanism which requires changes to an RTA to be notified 'as soon as possible after the changes occur'.[146] Yet, this measure should be furthered. To that end, the first additional requirement in this prong of the author's reform proposal is the creation of a permanent and effective monitoring scheme.[147]The second requirement of this proposal requires the CRTA to be notified of an RTA's existence prior to its implementation.[148] This paper acknowledges that these requirements have the potential to restrict the trade autonomy of WTO members.[149]However, this can be minimised by the WTO appointing representatives to regulate every aspect of the formation, implementation and review process of all RTAs.

This proposal requires the appointed representatives of the WTO to provide feedback and guidance on all aspects of the RTA process.[150] Once members notify the CRTA of their intention to form an RTA, the WTO representative would be responsible to facilitate the creation of an Article XXIV compliant RTA. The WTO representative will be a source of information to members and can guarantee

143 James Mathis, *Regional Trade Agreements in the GATT/WTO* (Asser Press, 2002) 406.
144 Id.
145 *General Agreement on Tariffs and Trade 1994*', Article XXIV.
146 *Transparency Mechanism for Regional Trade Agreements*, WTO Doc WT/L/671 (18 December 2006) (Decision on Transparency Mechanism) para 1-4.
147 Devuyst and Serdarevic, above note 51, 52-3.
148 Walsh, above note 41, p.82.
149 Ibid.
150 Picker, above note 13,p. 309.

members only create RTAs that can facilitate the achievement of multilateral trade liberalisation. Furthermore, the WTO representatives can assess whether any changes to the RTA are compliant with Article XXIV.

The fourth and final requirement of the second prong is to strengthen the WTO adjudication system. This requires the WTO Panel and WTO Appellate Body to be the 'final arbiter of disputes'.[151] In addition, it is vital for the WTO Panel and WTO Appellate Body to develop some judicial consistency when making determinations.[152] This will create the requisite level of jurisprudence in relation to RTAs that can assist members, WTO representatives and the CRTA. Moreover, the security associated with consistent legal decision-making will incentivise compliance amongst WTO members.[153]

Prong 3 – Obligations of RTA members

Clarification of the definitions of contentious terms such as 'substantially all the trade' and 'on the whole' coupled with the appointment of a WTO representative to oversee the creation of RTAs provides an extremely strong foundation. The third prong of this proposal requires all newly formed RTAs to completely comply with all the requirements of Article XXIV. In relation to RTAs already in existence, members must work with their appointed WTO representative to ensure their RTA complies with the clarified requirements of Article XXIV. Compliance must occur within a 5 year period otherwise the RTA shall be deemed as non-compliant.[154]Should States fail to comply with this requirement, it would trigger Thomas Cottier's non-compliance sanction. This obligates members of the RTA to extend MFN treatment to any other State wishing to accede to the RTA.[155]Alternatively, if members of illegitimate RTAs are unwilling to undertake either of these options, another State can challenge the legitimacy of the RTA through the jurisprudentially stronger WTO Panel or WTO Appellate Body. It is proposed that the consequences of finding an RTA to be illegitimate should be the imposition of MFN provisions within the RTA to render it a mechanism that can facilitate the achievement of multilateral trade liberalisation.[156] Lastly, this reform proposes that all RTAs must be amended within 10 years of creation. The

151 Ibid, 308.
152 Id
153 Walsh, above note 41,p. 90.
154 Picker, above note 13, p.306.
155 Thomas Cottier, 'The Erosion of Non-Discrimination: Stern Warning Without True Remedies' (2005) 8(3) *Journal of International Economic Law* 595, 599-600.
156 JoostPauwelyn, 'Legal Avenues to "Multilateralizing Regionalism": Beyond Article XXIV' (Paper presented at the Conference on Multilateralising Regionalism, Geneva, 10-12 September 2007) 34.

amendment would require RTA member to include an MFN provision and allow any WTO member to accede to the RTA. This will guarantee that RTAs fulfil their envisaged purpose as a mechanism for the achievement of multilateral trade liberalisation.

There is little doubt that this paper's reform proposal involves significant changes to the framework of the GATT. However, it can be argued that substantial changes are necessary to protect the legitimacy of the WTO and its instruments. Nonetheless, it is of paramount importance to assess the feasibility and likelihood of success for these proposed changes.

Will it be effective?

The aim of the proposal is to reconcile RTAs and GATT Article XXIV with the achievement of multilateral trade liberalisation because, when utilised correctly, RTAs can be an effective mechanism in the pursuit of global free trade.

This proposal is designed to improve the problematic CRTA and WTO review and enforcement mechanism by ensuring all RTAs are negotiated under the guidance of a WTO representative. This would guarantee compliance with Article XXIV as definitional clarity is assured, whilst also minimising the barriers to global free trade. As a result, the work undertaken by the CRTA is minimised, which would allow the CRTA to clear the backlog of RTA investigations. Furthermore, the involvement of WTO representatives throughout the formation, implementation and review process can act as a permanent and effective monitoring mechanism.

Additionally, the proposed reform is designed to provide legal security for legitimate RTAs. The burden of proving the legitimacy of an RTA that is challenged in the WTO dispute resolution process lies with RTA members.[157] This burden of proof can be easily discharged if the RTA has been assessed as compliant.[158] Consequently, the proposed reform can successfully mitigate the impact of the deficiencies outlined in part III. However, the proposal may have some drawbacks that will be discussed below.

An inadvertent short-term impact of the proposed reform could be that trade discussions will focus largely on ensuring RTAs comply with the strengthened requirements. This could divert resources away from multilateral trade liberalisation discussions. However, somewhat analogously, the introduction of Antidumping and Countervailing Duty orders saw a short-term increase in 'litigation of the old dumping/subsidies orders, but once the backlog was dealt with, the activity level

157 Appellate Body Report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 October 1999) [34-36]

158 Walsh, above n 41, 90.

abated'.[159] Similarly, in the long run, these reforms can ensure that RTAs facilitate multilateral trade liberalisation.

It may be argued that the proposed reform will increase the formation of RTAs as contested provisions will be clarified and the appointed WTO representatives will make the formation and implementation process more efficient. However, as long the RTAs comply with the proposed requirements, they will be used to achieve free trade, particularly as an MFN provision will inserted into the agreement within 10 years of formation.

In addition, it can be argued that the reform is excessive, especially as the WTO Panel and WTO Appellate Body have, on the one occasion they have been required to do so, found an RTA provision to not comply with Article XXIV.[160]However, the current system is based on a complaint-based model which requires a WTO member to bring an action. Instead, the proposed reform will be a proactive measure that attempts to address any disputes before they arise.

The biggest obstacle to this reform proposal will be gaining support from the major WTO members; the U.S. and the EU, which is an RTA in itself. This is, particularly, because the proliferation of RTAs by these two States has been described as a race for RTA supremacy.[161] Garnering the necessary consensus to implement the proposed modifications could prove extremely difficult. However, by raising this proposed solution at WTO meetings, the discussion generated from any WTO member objections could be used to develop an acceptable solution for all stakeholders.[162]Moreover, the proposed reform has been designed in a way where each of the three prongs can be implemented separately. Thus, clarifying the definitions of "SAT" and "on the whole" is unlikely to be controversial and can garner the necessary consensus amongst WTO members.

Nonetheless, this proposed reform is not particularly onerous and is based on incentivising compliance, which gives it the potential to be implemented in its entirety. From a practical perspective, the proposal would mitigate the deficiencies outlined in part III by strengthening the enforcement mechanism and substantive requirements. This would reinforce the legitimacy of the WTO by ensuring that RTAs fulfil their purpose of facilitating multilateral trade liberalisation.

---

159 Picker, above n 13, 313.

160 PanelReport, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R (31May 1999); Appellate Body Report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 October 1999);

161 Mathis, above n 143, 132.

162 Picker, above n 13, 317.

Conclusion

The world trade system is at a crossroads. If the proliferation of RTAs continues, there is a very real possibility that multilateral trade liberalisation will be rendered a failed ideal. It is for this very reason that WTO members must ensure that RTAs fulfil their envisaged purpose by facilitating the achievement of multilateral trade liberalisation. This will only be possible when the substantive provisions of Article XXIV are sufficiently clarified and the institutional framework of the CRTA and WTO is strengthened so that an effective enforcement mechanism exists. This paper has achieved its stated objectives by determining that illegitimate RTAs are an institutional threat to the multilateral trading system. Implementation of this paper's pragmatic three-pronged solution can effectively ensure that RTAs fulfil their envisaged purpose by facilitating the achievement of multilateral trade liberalisation.

WTO members should understand that reform of Article XXIV would have significant short-term and long-term benefits for all members as multilateral trade is more likely to 'garner greater economic growth in both the short and long term.'[163]It is a positive sign that WTO members, at the Fourth Ministerial Conference in Doha, recognised the potential role RTAs may play in increasing trade liberalisation and fostering economic development. It is now up to WTO members to fulfil their promise to launch negotiations designed to clarify and improve the underlying principles of Article XXIV. It is hoped that the reform proposed by this paper will facilitate discussion amongst academics and members in order to ensure RTAs facilitate the achievement of multilateral trade liberalisation. It will be interesting to see what reforms, if any, are implemented and whether they successfully foster multilateral trade.

163 Walsh, above n 41, 70.

Members' Remedies in Bangladesh and the United Kingdom: Convergence and Diversity in Corporate Governance Regulations

Md. Khurshid Alam*

1. Introduction

The company law of every legal system is generally designed to recognize a corpus of corporate rights. And the most important part of this corpus relates to the rights of the members. As such, the company laws of both Bangladesh and the United Kingdom (UK) recognize some important rights of the members, and provide mechanism for remedying or redressing to the violation of these rights. In general, the remedies that are available to members under the Companies Acts of the respective countries are called statutory remedy of the members. There are, however, some other remedies which a member can seek to enforce a personal right (such as right to vote). These remedies are available under the guise of general law remedies of both the countries.

In respect of remedying the members, the Companies Act of Bangladesh and the UK has been grown with a considerable convergence. It is thus found that both of these legal systems have recognized a special type of corporate rights aimed at the protection of minority shareholders. Apart from this, the Companies Act of both the countries also provide for the mechanism of winding up of the company from the part of the members on the ground that it is 'just and equitable' to do so. There is, however, some point of divergences between the laws of the UK and Bangladesh regarding legal means and methods of remedying the members of a company.

It thus appears, for example, that the company law of Bangladesh offers an enlarged space for the protection of minority members' right by using the term 'prejudice' which creates a wider connotation compared to the term 'unfairly prejudicial' as used in the Companies Act of the UK. In contrast, the UK law may be found to offer more flexible condition of applying for the remedy against unfair prejudice by making not the specific number of share-holders but the control over the affairs of the company as the decisive or determining factor. This article which contains a comparative analysis of the legal regimes of the UK and Bangladesh regarding member's remedies does, however, shows that they share many points in common than they actually differ. In what follows, the article makes an attempt to examine and draw a comparison between the various remedies of the members under English and Bangladesh company law, and finally offers policy recommendations for corporate governance regulations.

---

* Professor, Department of Law, University of Dhaka.

General Principles of Members' Remedies under Company Law

Under common law, a company operates under majority rule. In other words, the governance of companies is generally based on the principles of majority rule. This does not, however, mean that the company law recognizes the tyranny of the majority. In turn, the company law recognizes as a corollary to the majority rule that there must be some protection for minority shareholders.[1]In the words of Palmer: "A proper balance of the rights of majority and minority shareholders is essential for the smooth functioning of the company." The entire fabric of company law is thus founded upon two seemingly contradictory principles: i) respect for majority power, this being necessary to ensure effective management of the company; and ii) The protection of minority shareholders. Most of the corporate rights and remedies of the members are related to or originated from the objective of striking a delicate balance between these two principles, that is, safeguarding the company's legitimate business from being obstructed by tiresome complaining minorities on the one hand, and restraining unfair and wrongful acts which the majority can exploit to its own advantage thereby prejudicing the legitimate interests of the minority, on the other hand.[2]

In general, the company law is found to meet this end by providing the remedies that are available to individual members where there has been a breach of duty. However, the member's remedies are not limited altogether to cover the situations involving a breach of duty; it also involves the cases in which the majority shareholders are doing nothing illegal, but are conducting themselves in an "oppressive" manner by using their majority power to suppress the dissent. This kind of remedy is generally named as oppression remedy or remedy for the protection of minority. Thus, it is clear that members' remedies are available either in the case of breach of duty or in the case of oppression by the majority. Given this, the members of a company may generally be entitled to the following kinds of remedies under the jurisdictions of both Bangladesh and the UK:

a) Injunction Remedy**:** A member may seek injunction to prevent a director, member or other person from contravening the provisions of the Companies Act. Roughly put, an injunction is an order of the court which requires a person to do or refrain from doing, a particular action. Under the company law, the

1 The majority rule means that those who control more than half of the votes on the board or at a shareholders' meeting – and indeed, those who command a good deal less than a majority of the votes but manage to exercise de facto control – thus have substantial power. In shareholding companies, shareholders normally vote according to the capital that they have invested in the company. One share equals one vote. Thus, in many jurisdictions, the determination of the majority control depends upon the number of share-holders.

court is usually given the power to grant an injunction to prevent a particular person from engaging in conduct that contravenes the Companies Act. For example, where a director breaches a duty to the company by continuing to take company funds, the court can grant an injunction preventing the director from doing so. Thus, a member can apply for an injunction where the interests of the members have been affected by the conduct contravening the Companies Act. Such injunction can apply to any sort of contravention—whether it leads to criminal penalties or civil remedies.

b) Oppression Remedy: The member may take legal action to obtain any of a wide range of remedies for the oppressive conduct of the majority. The main rational of this remedy is that being equipped with appropriate rights the minority shareholders will be able to defend them in the fight against "oppression".[3] In general, the oppression remedy allows the court to provide a remedy to a member where the court finds that the conduct of the company's conduct is contrary or oppressive to the interests of the members as a whole. This kind of remedy does apply to all kind of companies, public and private, companies limited by shares and companies limited by guarantee. The test of whether a particular act amounts to an oppressive conduct is a question of fact. However, in order to prove oppressive conduct it is not necessary for the member bringing the legal action to prove that the directors acted dishonestly or with the intention of oppressing the members. It is the effect of the actions taken by the directors or majority members which may determine whether such actions are oppressive or not. In this respect, it is generally believed that an oppressive action brought by a member involves the court deciding the issue of oppression with reference to the breach of the reasonable expectations of the members. Some examples of reasonable expectations are exclusion from the management in the company, diversion of business opportunities, unfairly restricting dividends, an oppressive conduct of the board meeting etc.

---

3 In short, minority shareholder protection is a fundamental issue in corporate governance. Minority shareholders are those who not only hold a small amount of shares but are also non-controlling parties in a company. Shareholders' rights and the need for their legal protection result from the separation of ownership from control in the modern corporation. Shareholders, especially minority shareholders supply finance to companies but managers and majority shareholders have control of it, and due to human nature, are prone to misuse their rights. This implies the need for legal protection of minority shareholders. Moreover, strong protection of investors in general, and of outside investors in particular bring significant benefits to a state's economy. Minority shareholder protection thus enhances both shareholder value and corporate competitiveness.

c) Class Right Remedy: Variation of any rights attached to the shares of the member may amount to the violation of members rights. So the member can seek remedy to prevent such variation of the class rights.

d) Winding up Remedy: The members of a company are entitled to seek to wind up the company on the ground that it is just and equitable to do so, or on the ground that the directors are acting in their own interest. It is an established principle of company law that it should allow the members of the company to choose to wind up the company voluntarily because of the fact that the company no longer serves useful purpose. The reasons of such failure from the part of the company may be many such as the deadlock of the companies' affairs, fraud or misconduct, breakdown in mutual trust etc. And all these reasons are usually found to constitute the just and equitable ground of winding up of the company.

e) General Law Remedy: Apart from these statutory remedies, the member may seek some general law remedy. The general law remedies that are available to a member include i) the remedy to enforce a personal right of the member (such as the right to vote), where the directors or the majority members are attempting to take away this right, ii) A remedy against the violation of the limitation on majority voting power, etc.

One important point here is that all these remedies may be available under the company law either as member's personal claim or members' derivative claim. In the case of member's personal claim, these actions are brought about in a personal capacity because the member has a personal right or is affected individually. Thus, if such action is successful, the individual member will be entitled to receive the benefits of the order of the court. On the other hand, a derivative action is brought by a member but it is based on the legal action which the company is entitled to bring. In other words, derivative claim is an action brought by the member on behalf of the company. Thus, if the derivative action is successful, and the director is ordered by the court to pay compensation, the compensation is paid to the company and not to the individual member.

3. Members' Remedies under the Law of Bangladesh andthe UK

3.1. Members' Remedies under the Law of Bangladesh: The Companies Act 1994

In Bangladesh, all types of remedies as described above are granted under the Companies Act of 1994 in one way or other. The availability of these remedies has not been described categorically, however. The Act thus deals with the issue of injunction remedy only incidentally. In section 248, the Companies Act provides for

the remedy of seeking injunction from the court to restrain further proceedings in any suit or proceedings against the company. According to this section, a company, any creditor or contributory (present and past member of the company liable to contribute to the assets of the company) may make an application to the court to restrain further proceedings in any suit or proceedings against the company. It further provides that such application must be made at any time after the petition for winding up of a company under the Act and before making an order for winding up the company, and the court may pass order accordingly on such terms as the court thinks fit.

Apart from this section, the Companies Act does not specifically provide for the injunction remedy to be available for the members. However, the Act allows the government to bring legal action seeking injunction as a remedy against the contravention of the provisions of the Act or against the breach of any duty in the conducts of the company's affairs. In this respect, section 203 provides the government with the power of prosecuting any person found to be guilty of any offence for which he is criminal in relation to company's affairs. Similarly, section 205 provides for the power of the government to bring proceeding for the recovery of damages in the repeat of any fraud, misfeasance or other misconduct in connection with the promotion or formation, or the management of the affairs or for the recovery of any property of such company, or body corporate, which has been misapplied or wrongfully retained.[4] In respect of injunction remedy, it thus appears

4 The procedure of seeking such remedy is this: under section 195, any members (one-tenth of share-holder in case of company having share capital or one-fifth of members of the company having no share capital) may apply to the Government to appoint competent inspector to investigate the affairs of the company. On such application, the Government may appoint one or more competent inspectors to investigate the affairs of the company and to report thereon. On the conclusion of the investigation, the inspector shall make a final report in writing to the government. The Government shall forward a copy of the final report to the company at its registered office, and also to any other body, corporate, managing agent, or associate if dealt with in the report by virtue of section 199. The Government shall also furnish, at the request of the applicants for the investigation, a copy of the report to them (section 202). On receiving of report, if it appears to the Government that any person has, in relation to the company or in relation to any other body corporate, managing agent, or associate of other body corporate, managing agent, or associate of a managing agent whose affairs have been investigated, been guilty of any offence for which he is criminally liable, the Government may prosecute such person for the offence. When the Government has prosecuted any person, it shall be the duty of all officer and employees and agents of the company, body corporate, managing agent or associate, as the case may be, other than the accused in the proceedings, to give the Government all assistance in connection with the prosecution which they are reasonably able to give (section 203). The Government may cause to be presented to the court by the registrar a petition for winding up the company or an application for an order under section 233 (protection of minority

that the members are not personally entitled to bring legal action. Such remedies are available from the government's action on the behalf of the company. The wordings in section 205 "in the name of the company or body corporate" clearly indicates that the injunction remedy for the member does remain as a derivative claim, and the government is entitled to bring such claim on behalf of the company as a whole.

The oppression remedy is available under the Companies Act of 1994 in the name of protection of minority as provided in section 233. The concept of minority shareholders' protection is introduced for the first time by the Companies Act 1994. This provision was absent in its previous Companies Act 1913. The necessary conditions and procedures of seeking an oppression remedy under section 233 are provided in section 195 of the Act. Under section 195 of the Companies Act 1994, the Government may appoint one or more inspectors to observe the affairs of the company and to look up whether the interests of the minority shareholders are well protected. Where the company is limited by share the members having at least one-tenth of the share issued may file an application for inspection. Where the company is not limited by share capital, the applicants must be at least one-fifth shareholders of the company. The grounds for application are set out under section 233 of the Act, which provides that subject to fulfilment of the conditions of the required minimum as specified in section 195 (a) and (b) any member or debenture holder of a company may either individually or jointly bring to the notice of the court by application that

(i) the affairs of the company are being conducted or the powers of the directors are being exercised in a manner prejudicial to one or more of its members or debenture holders or in disregard of his or their interest; or
(ii) the company is acting or is likely to act in a manner which discriminates or is likely to discriminate the interest of any member or debenture holder;
(iii) a resolution of the members, debenture holders or any class of them has been passed or is likely to be passed which discriminates or is likely to discriminate the interest of one or more of the members or likely to debenture holder.

It thus appears that the Companies Act 1994 prescribes the procedure of seeking oppression remedy directly by the members. And procedures to be followed by an aggrieved member of a company in Bangladesh are described in section 233 that can be summed up as follows:

---

interest) or both. [Section 204] The report of the inspector shall be admissible in any legal proceeding as evidence of the opinion of the inspector in relation to any matter contained in the report. [Section 208]

1. Any members (one-tenth of share-holders in case of company having share capital or one-fifth of members of the company having no share capital) of a company may either individually or jointly file an application, specifying the reasons, to court. On receipt of the application, the court shall send a copy thereof to the board and fix a date for hearing the application.
2. After hearing of the parties present on the fixed date, if the court is of opinion that the interest of the applicant is prejudicially affected, it may make such order as prayed for or such other order as it deems fit.
3. Court can also direct to cancel or modify any resolution or transaction, or to regulate the conduct of the affairs of the company in future in such manner as is specified therein.
4. Where the articles or memorandum of the company is amended by order of the court, company cannot amend such article or memorandum without leave of the court and take any action inconsistent with order of the court.
5. When an order is made by the court, it is the duty of the company to inform in writing and send a copy of the order to the registrar within 14 days.
6. A company shall inform the Registrar in writing of the order of the court and send him a copy thereof within fourteen days from the making of an order under section 233. If the company fails to comply with the obligation under this sub-section, it shall be liable to a fine not exceeding one thousand taka.

It is of importance to note that under section 204 the Government may cause to be presented to the court by the registrar a petition for winding up the company or an application for an order under section 233 (protection of minority interest) or both.

The remedies against variation of shareholder's rights (class right) are provided in section 71 of the Companies Act 1994. Where the share capital of a company is divided into different classes of shares, section 71 protects the rights of holders of those classes of shares by requiring that for variation in their rights there should be a provision in the memorandum or articles of association authorizing the variation of the rights attached to any class of shares and these should be sanctioned by a special majority of the shareholders of that class. Any number of dissenting members holding at least ten percent of the issued shares of that class may, within fourteen days of the resolution, apply to the court to have the variation cancelled. Where any such application is made, the variation shall not have effect until it is confirmed by the court. After hearing the concerned parties, if the court is satisfied that the variation would unfairly prejudice the shareholders of the concerned class, it may disallow the variation. But if the court is not satisfied, it shall confirm the variation and the decision of the court on such application shall be final. After the

service of the order on the company, the company shall forward a copy of the order to the register.

Under the Companies Act of 1994, the members of a company are entitled to seek to wind up the company on the ground that it is just and equitable to do so, or on the ground that the directors are acting in their own interest. Under clause (vi) of section 41, the Act provides that a company may be wound up, if the Court is of opinion that it is just and equitable that the company should be wound up. In this respect, section 245 says that an application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company, or by any creditor or creditors, including any contingent or prospective creditor or creditors, contributory or contributors, or by all or any of those parties, together or separately or by the Registrar. It further provided that– (a) a contributory shall not be entitled to present a petition for winding up a company, unless– (i) either the number of members is reduced in the case of a private company, below two, or, in the case of any other company, below seven; or (ii) the shares in respect of which he is a contributory or some of them either were originally allotted to him or have been held by him, and registered in his name for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder.[5]

Apart from these remedies, the Companies Act recognizes the general law remedies to be available to the members. *Right to inspectionsignifies an important example of such general law remedies of the members. Under section 115, the companies are required to keep a register in which particulars of all such contracts or arrangements shall be entered and which shall be open to inspection by any member of the company at the registered office of the company during business hours. According to the section 115(4) (5), the register shall be open to the inspection of any member of the company without charge and of any person on payment of ten taka or such less sum as the company may impose for each inspection. If any inspection required under this section is refused or if default is made in complying with sub-section (1) or (2) of this section, the company and every officer of the company who is knowingly and willfully in default shall be liable to a fine of five hundred taka. In the case of any such refusal, the Court, on application made by the person to whom inspection has been refused and upon notice to the company, may by order, direct an immediate inspection of the register.*

5 According to this section, the Registrar shall not be entitled to present a petitions for winding up a company– (i) except on the ground from the financial condition of the company as disclosed in its balance sheet or from the report of an inspector appointed under section 195 or, in a case falling within section 204, it appears that the company is unable to pay its debts; and (ii) unless the previous sanction of the Government has been obtained to the presentation of the petition:

3.2. Members' Remedies under the Law of the UK: The Companies Act 2006

Under the UK company law, there are two major legal tools available to shareholders: a derivative claim and an unfair prejudice petition. Though the remedies may overlap, nevertheless they serve different goals. Derivative action is focused on breaches of strict legal duties owed by the directors to the company, while unfair prejudice remedy is granted when the unlawful conduct of the controllers or even lawful conduct, but in breach of some informal agreements, unfairly prejudices a shareholder. The main statutory provisions regarding derivative claims and proceedings by members are now contained in Part 11 (sections 260 to 269) of the Companies Act 2006, and the provisions on protection of members against unfair prejudice are contained in Part 30 (section 994 to 999) of the Act.These Rules for the form, procedure for presentation, service and return of the petition to be used in connection with an application to court in England and Wales are contained in the Companies (Unfair Prejudice Applications) Proceedings Rules 2009/2469.[6] Apart from this, the shareholders do have a number of statutory rights particularly in relation to alterations to the company constitution, unilateral variation of class rights attached to shares, prevention of ultraviolent dealings by directors amongst others.

Derivative Claims

It is a well-established principed that the proper claimant in an action for a wrong that is alleged to have been done to the company is the company itself; and if the alleged wrong is a matter which it is confident that the company could settle itself then no individual [shareholder] may bring an action. This is called the rule in Foss and Harbottle ((1843) 1 Hare 461 (Chancery)). But there is an exception to this rule which recognized that the shareholders in a company acting alone or as a group are permitted to pursue a claim that is vested in the company but that if they are successful, the shareholders will obtain a remedy for the benefit of the company and not directly to themselves. The Companies Act of the UK recognizes this kind of remedy in the name of derivative claim. Two conditions must be fulfilled for the derivative claim to be successful: the wrongdoers must have been in control of the company and they must have committed a wrong. The wrongdoers need not own 51% of shares to control the company (*de iure control*).

---

6 These Rules make provision for the form, procedure for presentation, service and return of the petition to be used in connection with an application to court in England and Wales under the Companies Act 2006 section 994 or 995 (application for order on grounds of unfair prejudice). They revoke the Companies (Unfair Prejudice Applications) Proceedings Rules 1986 (S.I. 1986/2000), subject to a transitional provision for petitions commenced before 1st October 2009.

The derivative action has been recently redesigned and put on a statutory basis in the Companies Act of 2006.S. 260–264 CA 2006. The new Act allows the derivative claim to be raised not only when the directors have committed a fraud but also in the case of negligence. The procedure for bringing the derivative claim consists of two steps. Firstly, a member of the company bringing a derivative action must apply to the court for permission to continue with the action. The court will allow continuance of the claim if the member can establish a *prima facie case* – by providing sufficient evidence of fraud (or negligence) or when the court finds it appropriate to continue with the claim. Thus, the court has a large discretion whether to continue with a derivative claim. Section 260(3) provides that a derivative claim may be brought only in respect of a cause of action arising from an actual or a proposed act or omission involving negligence, default, breach of duty, or breach of trust by a director of the company.

Protection against Unfair Prejudice

The Companies Act 2006 gives specific statutory protection to shareholders against unfair prejudice. A shareholder may apply to the court by petition on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its shareholders generally or some of them (including at least the applicant), or that any proposed act or omission of the company would be so prejudicial. Under Section 994(1) of the Companies Act 2006, a company shareholder may petition the court for an order protecting him from unfair prejudice on the ground:

(a) that the company’s affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of shareholders generally or some part of its members (including at least himself), or

(b) that an actual or proposed act or omission of the company, (including an act or omission on its behalf), is or would be so prejudicial.

If the petition is successful the court has wide powers to order redress for a minority shareholder who has suffered unfair prejudice (CA 06 s.996). Among other things the court may make an order:

- regulating the conduct of the company's affairs in the future,
- requiring the company to refrain from doing or continuing an act complained of, or to do an act it has omitted to do,
- authorizing civil proceedings on behalf of the company, as appropriate,
- providing for the purchase of the shares of any shareholder by other shareholders or by the company itself.

In practice, the remedy that is most often sought under a Section 994 Petition is that the other shareholders buy their shares for a fair value. However, this is not the only potential outcome of a Petition because the court has complete discretion as to the remedy it grants. As an alternative, it may make an order that the minority shareholder purchases the majority shareholding. It can order repayment of any monies found to have been wrongfully taken out of the company by those in control of it and, as a last resort, the court has the power to wind up the company on just an equitable grounds. Examples of unfair prejudice include failure to give accurate accounting information, serious mismanagement, diverting business to another company in which the minority have no shareholding, co-option by the board of a director who has been overwhelmingly rejected by the shareholders, or a demonstrably incompetent member of a controlling family remaining in charge of a company despite protestations by the minority shareholders.

Just and Equitable Winding-Up

The most extreme instrument of remedying or resolving shareholders' disputes under the UK law is the winding-up order.[7] By winding up, the company is dissolved and its remaining assets are divided up between the shareholders. Because winding up is a last resort, ending the existence of the company, the courts will not order a company to be wound up if there are other instruments available nor if the petitioners are acting unreasonably. Since S. 994 CA of 2006 provides a wide variety of instruments that are at the court's disposal it seems that winding will be used rarely.

Remedies available by seeking Injunctions

According to section 955, if the High Court or, in Scotland, Court of Session is, on the application of the panel, satisfied that there is a reasonable likelihood of willful contravention, by a person, of rule-based requirement or that a person has contravened a rule based requirement or a disclosure requirement, the court may make such order as it thinks fit to secure compliance with the requirement. The section also mentions that a person has right to seek an injunction only in the above cases.

According to Section 1239, the Secretary of State may, by resolution, impose obligation upon anybody designated by order under section-1252 or upon any person with whom arrangement was made by one or more recognized supervisory bodies, or by anybody designated by order under section 1252, with respect to the keeping

7 This remedy originates in partnership law. If the partners cannot reach an understanding court dissolves the partnership.

of the register. Such obligation is enforceable on the application of the Secretary of State by injunction.

Under section 1254, when it appears to the secretary of State that any action, proposed to be taken by anybody designated by order under Section 1252, would be incompatible with community obligation or any other international obligations of the UK, the Secretary of State may give directions to such body. Such directions shall be enforceable by injunction. The information right may be enforced by an application for injunction.

Remedies against the variation of class right

The rights of a class of shareholders of accompany, having share capital, may be varied in according with the provision of the articles or with the consent of the shareholders of that class. The consent, required for the variation of class right, must be of holders of at least three-quarter in nominal value of the issued share of that class or a special resolution passed at a special general meeting of the holders of that class sanctioning the variation. The amendment, of the provision concerning variation of class right contained in articles, is treated as variation of those rights.[8] *The variation of the class rights includes their abrogation.*[9]

One or more of the non-consenting holders of the fifteen percent of the issued shares of the class may, within 21 days of giving consent or resolution, apply to the court to have the variation cancelled. When such an application is made, the variation has no effect until it is confirmed by the court. After hearing the parties, if the court is satisfied that the variation would unfairly prejudice the shareholder of that class, it may disallow the variation. But if the court is not so satisfied, it will confirm the variation. The decision of the court will be final.[10]

In case of company having no share capital, the rights of a class of members may be varied in according to the provision of the articles, or the written consent or resolution of members of that class. Fifteen percent of the non-consenting members of the concerned class may, within 21 days of giving consent or resolution, apply to the court to have the variation cancelled. If the court is satisfied that the variation would unfairly prejudice the members of that class, it may disallow the variation

8 Variation of right attached to a class of shares means that all changes to the articles that modify the statutory contract needs special protection. It means that the principle of majority rule will be limited.8‘Right attached to a class of share is interpreted as the protection afforded to the minority shareholders.8The UK Companies Act 2006 incorporates the provision for variation of right attached to a class of shares to cover cases where the articles of the company do not contain the provision for variation.

9 [Section-630]

10 [Section-633]

and where the court is not so satisfied, it may confirm the variation. The decision of the court will be final.[11]

Right to inspection

Under the UK Company law, every company must keep separate registers of directors' service addresses and their residential addresses as part of their statutory registers. The public has a right to inspect the former but not the latter. Only the Service Address is shown on the public record; the residential address is only available to certain government bodies, including the police, revenue and custom, and credit reference agencies. However, both register are open to inspection by members of the public and so the public can obtain information about the directors either from companies' house or from the companies registered office..

In addition, the UK law requires a company must, within the period of 14 days from (a) a person becoming or ceasing to be a director, or (b) the occurrence of any change in the particulars contained in its register of directors or its register of directors' residential addresses, give notice to the registrar of the change and of the date on which it occurred. In the same way the UK law requires the register must be open to the inspection— (a) of any member of the company without charge, and (b) of any other person on payment of such fee as may be prescribed. If default is made in complying with subsection (1), (2) or (3) or if default is made for 14 days in complying with subsection (4), or if an inspection required under subsection (5) is refused, an offence is committed by— (a) the company, and (b) every officer of the company who is in default. A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 5 on the standard scale.

Procedure to be followed by an aggrieved member of a company in the UK

1. A member of a company may apply to the court by petition for an order to protect his interest. The application may also be filed by the Secretary of State to the court in certain cases.[12]
2. If the court is satisfied that the petition is well founded, it may make such order as it thinks fit, or order to regulate the conduct the affairs of the company in future, prohibit alteration in article without leave of the court,

11 [Section-631, 634]
12 Sections 994,995 of (UK) Companies Act, 2006.

orauthorize civil proceedings to be brought in the name and on behalf of the company by such person etc.[13]

3. Where the court has made any order relating to the alteration of the company's constitution, the company must deliver a copy of the order to the registrar within 14 days or within such period as extended by the court.[14]
4. Every copy of a company's articles issued by the company after the order is made must be accompanied by a copy of the order, unless the effect of the order has been incorporated into the articles by amendment.[15]

Procedure in respect of derivative claims by the members

1. A derivative claim may be brought by a member of a company in pursuance of an order of the court in proceedings for protection of members against unfair prejudice or in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company. Whether the cause of action arose before or after the claimant became member of the company is not material.[16]
2. The claimant has to apply to the court for permission to continue the derivative claim. The court can give permission, if the claimant can make a prima face case. Otherwise the court must dismiss the application.[17]
3. If the application is not dismissed, the court may give directions as to the evidence to be provided by the company, and may adjourn the proceedings to enable the evidence to be obtained.[18]
4. On hearing the application, the court may give permission to continue the claim on such terms as it thinks fit, or refuse permission and dismiss the claim, or adjourn the proceedings on the application and give such directions as it thinks fit.[19]
5. A member of the company may apply to the court for permission to continue the claim brought by the company as a derivative claim on the ground of abuse of the process of the court, failure to prosecute diligently and when it is appropriate for the member to continue the claim as a derivative claim.[20]
6. In giving permission the court must take into account the good faith of the member, the promotion of the success of the company, whether the act or

13 Section 996 of (UK) Companies Act, 2006.
14 Section 998 of (UK) Companies Act, 2006.
15 Section 999 of (UK) Companies Act, 2006.
16 Section 260 of (UK) Companies Act, 2006.
17 Section 261 of (UK) Companies Act, 2006.
18 Section 261 of (UK) Companies Act, 2006.
19 Section 261 of (UK) Companies Act, 2006.
20 Section 262 of (UK) Companies Act, 2006.

omission was authorized by the company before it occurs or ratified by the company after it occurs, whether the company has decided not to pursue the claim, the circumstance under which the act or omission could be ratified, and whether the act or omission gives rise to a cause of action that the member could pursue in his own right.[21]

7. Another member of the company may apply to the court for permission to continue the claim brought by the company or any other member as derivative claim.[22]

Derivative proceeding in Scotland

1. A member of a company may raise proceedings in respect of any actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company. Whether the act or omission arose before or after the applicant became a member of the company is not material.[23]
2. In order to raise a proceeding, the member must have to obtain leave of the court. The application for leave of the court must specify the cause of action and the summary of the fact on which the derivative proceeding is to be based. And the court may give permission, if the application and produced evidence make a prima facie case. Otherwise the court will refuse the application.[24]
3. The proceeding shall not affect the right of a member of a company to raise a proceeding to protect his own interests and obtain a remedy on his own behalf and the power of the court to make an order under section 996(2)(c).[25]
4. A member of the company may apply to the court to be substituted for the company in the proceedings raised by the company, and for the proceedings to continue in consequence as derivative proceedings, on the ground of abuse of the process of the court, failure to prosecute diligently and when it is appropriate for the member to be substituted for the company in the proceedings. Court can grant permission only if the application and the produced evidence make a prima facie case. Otherwise the court will refuse the application.[26]
5. Another member of the company may apply to the court to be substituted for the claimant in the action on the ground of abuse of the process of the court,

21 Section 263 of (UK) Companies Act, 2006.
22 Section 264 of (UK) Companies Act, 2006.
23 Section 265 of (UK) Companies Act, 2006.
24 Section 266 of (UK) Companies Act, 2006.
25 Section 265 of (UK) Companies Act, 2006.
26 Section 267 of (UK) Companies Act, 2006.

failure to prosecute diligently and when it is appropriate for the member to be substituted for the company in the proceedings. Court can grant permission only if the application and the produced evidence make a prima facie case. Otherwise the court will refuse the application.[27]

6. If the application is not refused, the applicant must serve the application on the company. And the court may make an order requiring evidence to be produced by the company, and may adjourn the proceedings on the application to enable the evidence to be obtained, and the company is entitled to take part in the further proceedings on the application.[28]
7. On hearing the application, the court may grant the application on such terms as it thinks fit or refuse the application, or adjourn the proceedings on the application and make such order as to further procedure as it thinks fit**.**

Divergence and Convergence between the Laws of Bangladesh and the UK

The Companies Act of both the UK and Bangladesh recognize special type of corporate rights aimed at the protection of shareholders. The major points of the divergence and convergences between the law of the UK and Bangladesh can be summed up as follows:

- Both laws recognize that the Court has wide discretionary power to make such order as it thinks fit. Both laws converge on the following points regarding the Court's power: i) the Court has the power to give direction to amend the constitutions of the company; ii) if any amendment is made in the articles of company in pursuance of the order of the court, the company cannot alter them without the leave of the court; iii) the company has to inform and deliver a copy of the order of the court to the registrar within 14 days; iv) the court has power to give direction to regulate the conduct of the affairs of the company in future.
- In respect of variation of class rights, the laws of both the country provide that on hearing of an application against variation, the court shall consider whether the variation would unfairly prejudice the concerned class of shareholders or members. Both laws in Bangladesh and the UK provide that the decision of the court in respect of variation shall be final. It is also provided that where an application is made against the variation, the variation shall not have any effect until confirmed by the court. Regarding inspection of register both laws provide remedy in case of refusal.
- Neither English nor Bangladeshi statutory law contains a definition of the minority or majority shareholder. Under the UK Law, the distinguishing factor between the two is the degree of control over the corporation. The number of

27 Section 267 of (UK) Companies Act, 2006 .
28 Section 267 of (UK) Companies Act, 2006.

shares owned is not decisive, even a shareholder owning a majority of shares may be a minority shareholder, if other shareholders are well organized and, thus, control the company. But under the Companies Act of Bangladesh, the number of shares owned is found as the decisive factor of determining the majority.

- In Bangladesh, section 233 of the companies Act, 1994 mentions only "prejudicial" to one or more of its members or debenture holders. Whereas in the UK, section 994 of the companies Act 2006 mentions "unfairly prejudicial" to the interests of members generally or of some part of its members. The Bangladesh law differs from English law in that the law of the UK requires the applicant to show that the affairs of the company or the act complained of are likely to cause 'unfair prejudice' to the petitioners whereas the Bangladesh law speaks of only 'prejudice' to petitioner. This, in theory, means that the Bangladesh Court should be under less restraint in using the power under this section. Further, Bangladesh law permits an action to be brought when there is discrimination regarding the interest of any member or debenture holder.[29] Moreover, section 233 mentions the term "which discriminates or is likely to discriminate" whereas in the UK Law, section 994 does not mention the term.
- According to sections 233 and 195, one tenth of share-holders or one fifth of the members can apply for the protection. But in the UK law, according to section 994, any member of a company may apply to the court by petition for protection.
- In the UK law, according to section 994, the provisions of this part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company. But in Bangladesh law, section 233 does not mention such provisions.
- In the UK law, according to section 996, "… court may authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct". But in Bangladesh law, the government is entitled under section 205 to bring civil proceeding in the name of the company.
- In the UK, according to section 996, a court may provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the

29 M Zahir, *Company and Securities laws* (The University Press Limited, 2005) 183.

reduction of the company's capital accordingly. But in Bangladesh, section 233 does not mention any such provision.

- In the UK, a representative of the deceased shareholder or member can apply for protection. But this position is not clear under the Companies Act of 1994.
- Under section 331, court may, in course of winding up a company, give relief on application of liquidator, creditor or contributory against misapplication of property, misfeasance or breach of trust. In the UK, under section 260, derivative claim under this chapter may be brought by a member of the company only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.
- The UK law provides specific provisions regarding derivative claims and derivative proceedings. But Bangladesh law does not have any provision regarding derivative claims and derivative proceedings as it is in the UK. In contrast, the Companies Act of 1994 gives the government the power to bring legal action on behalf of the company in the moment of mismanagement in the company's affairs.
- In Bangladesh, any contributory may apply to court to restrain any proceedings only after petition for winding up a company and before the order of the court on such petition. But the UK law does provide a wider scope of such injunction remedy. In the UK, any person may claim injunction in respect of contravention of rule based requirement or disclosure requirement.
- In Bangladesh, the provisions, regarding variation of class right, are provided only in respect of company having share capital. But in the UK, the provisions, relating to variation of class right, are provided in respect of both companies having share capital and companies having no share capital. Moreover, Bangladesh laws provide that the class rights may be varied only according to the provision of articles and memorandum of the company and with the consent of the holders of the concerned class of shares. The UK laws provide that the class rights may be varied in according to provision of the article or with the consent of the holders of the concerned class of shares or members of the concerned class.
- In Bangladesh, the non-consenting holders of ten percent issued shares of the concerned class may, within 14 days of the resolution or consent, apply to the court to have the variation of the class rights to be cancelled. But in the UK, fifteen percent shareholders or members may, within 21 days of resolution or consent, apply to the court to have the variation cancelled.

Recommendations

(i) In Bangladesh, the Companies Act of 1994 does not contain a comprehensive regime of member's remedies in the sense that it deals with the issues of remedying the members only incidentally, and not categorically. It is thus recommended that the Companies Act should provide specific chapter on "member's remedies" which will include derivative claims, oppression remedy etc. in a more comprehensive manner.

(ii) According to the Companies Act 1994, the minority shareholders with at least 10 per cent of shares may take action against the company. In order to extent the ambit of this protection, the Act should allow a single member should have right to go to court for getting protection under section 233.[30]

(iii) In Bangladesh, section 233 of the Companies Act does not apply to any person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law. It is recommended that the Company law should provide provision so that section 233 must apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as this apply to a member of a company.

(iv) The Companies Act 1994 does not incorporate the provision of damages in favor of affected minority shareholders. There must have provision in company law to pay damages where the aggrieved minority shareholders have suffered from financial loss. The complaining petitioners should have a right of recovery of litigation expenses from the company. So, this Act should provide provision for damages in favor of affected minority shareholders.

(v) The Company law should provide jurisdiction to the Court so that Court the may have power to authorize civil proceedings to be brought in the name and

30 Section 233 read with section 195 means that the holders of minimum ten percent share in case of company having share capital and in case of company not having share capital one-fifth of the members are eligible to apply. While in England and Australia, any shareholder can apply. Bangladesh has followed the Indian principle and has restricted the right to apply to minimum ten percent shareholders presumably to avoid unnecessary litigations. In western countries the Court cost awarded to the winner are adequate and the loser will be faced with a heavy burden thus discouraging frivolous applications. In this country where Court costs are not awarded adequately any shareholder can start a series of litigations and caused the company a lot of troubles. However, this detracts from the main rationale behind the section, namely to protect the minority shareholders whatever the share holding may be.30 It was held that unless the applicants are minority shareholders, i.e., less than fifty percent, they have no right to apply for the protection under this section. [Zahir, above n 29, 183-4].

on behalf of the company by such person or persons and on such terms as the court may direct.

(vi) In Bangladesh, there is no legal mechanism of share buyback from the minority shareholders at a fair price where the minority shareholders reasonably believe that there is the chance of variance against their interest in the company. Section 233 of the Companies Act does not point out that the court may order the purchase of the complaining petitioner's share by other members or by the company.[31]The court shall have power to order the purchase of the complaining petitioner's shares by others or the company at a fair price. It is thus recommended that Company law should provide provision so that the Court has the power to provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.

(vii) In Bangladesh, under section 203, no member has any right to prosecute directly any person; rather it is the discretionary power of the government to prosecute any person under that section. In addition, section 203 does not provide opportunity to prosecute by the member of the company even on the ground of abuse of the process of the court, failure of the government to prosecute diligently. It is recommended that Bangladesh law should provide opportunity to prosecute any person by any member of the company.

(viii)In case of seeking injunction, the UK law provides wide scope whereas in Bangladesh, the scope this remedy is narrower. Like the UK, Bangladesh law should provide specific and wide areas where member can seek injunction in related to the company's affairs to prevent contravening any provision of the constitution of the company or acting in such ways which affect the company injuriously.

(ix) In the UK, the variation of class right, are provided in respect of both companies having share capital and companies having no share capital. But In Bangladesh, the provisions, regarding variation of class right, are provided only in respect of company having share capital. It is recommended that Class rights protection should be provided to members of the company having no share capital.

(x) Under Bangladesh law, the non-consenting holders of ten percent issued shares of the concerned class may, within 14 days of the resolution or consent, apply to the court to have the variation of the class rights to be cancelled. But

31 Zahir, above n 29, 194.

in the UK, fifteen percent shareholders or members may, within 21 days of resolution or consent, apply to the court to have the variation cancelled. Like the UK, Bangladesh law should provide fifteen percent of shareholders or members and 21 days or consent requirements.

(xi) In case of variation of class right, in Bangladesh, the class rights may be varied only according to the provision of articles and memorandum of the company and with the consent of the holders of the concerned class of shares, whereas the UK law provides that the class rights may be varied in accordance with the provision of the article or with the consent of the holders of the concerned class of shares or members of the concerned class. Like the UK, Bangladesh law should provide provision so that the class rights may be varied in according to provision of the article or with the consent of the holders of the concerned class of shares or members of the concerned class.

Conclusion

In respect of remedying the violation of member's rights, the Company laws of Bangladesh and the UK share many concerns in common. Compared to the company law of Bangladesh, the law of the UK, however, offers a more comprehensive regime of protecting member's rights. Technically, it divides the remedy into derivative and unfair prejudice claims, thereby making the issue of member's right clearly loom within the language of the Act. Moreover, the recognition of the derivative claim and member's personal action to provide redress to the violation of rights has been a significant feature of the UK Companies Act. It allows any member of the company to bring legal action on the ground of unfair prejudice, and provides the mechanism of share buyback. By contrast, the Companies Act of Bangladesh does not contain any provisions allowing a single member to bring action for seeking oppression remedy. It does not also say about share buyback and member's derivative claim. In respect of injunction remedy, similar gap exists between the Act of the UK and Bangladesh: the Companies Act of the UK has categorically provided for the injunction as a remedy against the contravention of any provisions of the Companies Act, while the law of Bangladesh deals with this issue only incidentally. The Companies Act of both these countries also differs remarkably on the point of variation of class rights. However, the most important divergence between these two Act lies on the fact that the law of the UK requires the applicant to show that the affairs of the company or the act complained of are likely to cause 'unfair prejudice' to the petitioners whereas the Bangladesh law speaks of only 'prejudice' to petitioner. Thus, it appears that the Bangladesh Court should be under less restraint in using the power under this section. Further, Bangladesh law

permits an action to be brought when there is discrimination regarding the interest of any member or debenture holder.[32] Moreover, section 233 mentions the term "which discriminates or is likely to discriminate" whereas in the UK Law, section 994 does not mention the term. Seen in this light of comparison, it is recommended that the Companies Act of Bangladesh should be reformed by following the current regime of the UK company practice with a view to offering a more effective and comprehensive regime of corporate remedies in Bangladesh.

32 Zahir, above n 29, 183.

Mandating Corporate Directorship for Women in Bangladesh: Options and Challenges

Dr. Md. Towhidul Islam*
Ferdous Rahman**

Introduction

Ensuring women participation in economic decision making and making women empowered in all spheres of life has been a great concern throughout the world. In 1975, first women conference was held at Mexico and therefore, the year of 1975 was declared as 'women year'. Subsequently in the year of 1980, the objective of education, health and employment to women was accepted in the second women conference held in Copenhagen. Later on, in the declaration of fourth women conference held in 1994 at Jakarta, the distribution of power and the gap between women and men in decision making process were recognized.[1]Bangladesh has always been a part of these conferences and signatory of international instruments for women rights such as the Convention on Elimination of Discrimination against Women (CEDAW). To follow such commitments, the National Women Development Policy has been passed in 2011 adopting a comprehensive approach towards women empowerment. A national work plan with short term, medium term and long term plan has also been taken for the the implementation of this policy.[2]

One of the major targets set up in the policy is to ensure women involvement in economic decision making.[3]Accordingly, the national work plan has set the target of achieving women representation in all public and private organizations. Therefore, in the absence of any provision in the Companies Act 1994 or in the Bank Companies Act 1991 of Bangladesh ensuring women's mandatory participation in corporations, the encouragement of appointment of women at least at the rate of 20% in the corporate board especially of banks, insurance, and financial institutions

---

* Professor, Department of Law, University of Dhaka
** Advocate, Dhaka Judge Court

1 For details, the third conference was held in 1985 at Nairobi where the strategy for women development on the basis of equality, development and peace was granted.

2 Ministry of Women and Child Affairs, Bangladesh <http://www.mowca.gov.bd> [last accessed on 27 March 2016],

3 National Women Development Policy 2011 (Bangladesh), Clause 23.

is one of the action plans of the government.[4] Such initiative is not only be helpful to achieve the government target but also makes Bangladesh internationally competitive since opening the glass door of boardroom for women is the new demand of the present-day corporate governance law.

Previously, the corporate boards are found to be male dominated and there have been very few female directors in the board.[5] However, since the incorporation of mandatory quota provision for female directors in the Norwegian law in 2009, many European countries are found to adopt the similar provisions in their national legislations. Even the United States and Australia have also accepted the provision of board diversity in terms of gender. Such trend is not only limited to the western countries rather India, Malaysia, and the United Arab Emirates, have adopted the similar provisions subject to respective customizations.

This paper aims at examining the prospect of adopting mandatory quota provisions in Bangladesh for women in the corporate board in view of the experience of the countries which have already adopted such provisions. Furthermore, it also attempts to analyze the possible contradiction of such quota system with the existing legal and socio-economic environment of Bangladesh. Finally, some recommendations on effective provisions for ensuring women representation in the corporate board are formulated in light of the aforementioned issues.

However, given the Companies Act 1994 of Bangladesh does not have any provision of supervisory board, the quota system of various countries for non-executive directors of the supervisory board is not taken into account for this paper. Moreover, the board diversity is considered only from the gender perspective.As a result,the board diversity in terms of age, educational and professional background, ethnicity, and life experience are not taken into account for this paper.

This paper is organized in five major parts, which begins with the introduction of existing corporate governance structure under the relevant laws of Bangladesh, followed by the arguments for quota system for women from both public and private sectors' point of view. Next part focuses on the legislations of the other countries adopting quota provision and their success rate. The later parts examine whether Bangladesh would get benefited by adopting such provision and if yes, whether such provision would go in contradiction with the spirit of existing legal regime and socio-economic conditions of Bangladesh. Subsequent to these, some

---

4 National Work Plan for Implementation of National Women Development Policy 2011 <http://www.mowca.gov.bd> [last accessed on 27 March 2016], p. 56;

5 Diana Bilimoria, 'Board Committee Membership: Effects of Sex-Based Bias' (1994) 37(6) *The Academy of Management Journal*1453.

recommendations have been drawn in light of the present experience of other countries followed by the conclusion.

2. Corporate Governance Structure under the Companies Act 1994

The Companies Act 1994 establishes a three tier corporate governance structure. These are the shareholders, the board of directors (BoD) and the manager. In terms of relationship, shareholders are the mass group of people who actually hold share of the company and in return they are entitled to *inter alia* distribution of profit,[6] attend the annual general meeting,[7] voting rights in meetings.[8] On other hand, the board of directors is comparatively small group of shareholders elected by the other shareholders at the general meeting and is entrusted with the duty of management of the company's business.[9] The last tier of corporate governance is the manager. The term 'Manager' is defined in the law as a person liable for the whole affairs of the company under the superintendence, control, and direction of the board.[10]

In the board, the minimum number of directors required for a private limited company is two whereas a public limited company must have at least three directors.[11] The director is appointed among the member of the company in the general meeting.[12] Apart from being a member, in order to be a director of a company irrespective of the company being private or public limited companies, the proposed director must hold a qualified amount of share in the company.[13] Besides, the amount of this qualification share is to be determined in the articles of association (AoA) of the company.[14] The philosophy behind the incorporation of such requirement is to ensure that the director himself also has some stake in the company which may encourage him for the betterment of the company and moreover company's management is better to be entrusted upon an insider one rather than an outsider.

Such provision for shareholder director signifies that no independent director (or outside director) is allowed to be appointed under the Companies Act 1994 since the director must be a member of the company and hold a minimum qualification share as required by the AoA even though nominated director is allowed to be appointed. The difference between the nominated director and the independent director is that a

6 The Companies Act 1994 (Bangladesh), Clause 97 to the schedule.
7 Ibid. Sec 81.
8 Ibid. Sec 85.
9 Kelli A Alces, 'Beyond the Board of Directors' (2011) 46 *Wake Forest Law Review* 783.
10 Above n 6, Sec 2 (1) (k).
11 Ibid. Sec 90.
12 Ibid. Sec 91 (1) (b).
13 Ibid. Sec 97.
14 Ibid. Sec 97 (1).

nominated director is appointed by the resolution of the holding company to sit as a director at the board of the subsidiary company and exercise all the powers of the holding company which it may use if it were an individual shareholder[15] whereas an independent director is the one who is not a previous employee or a shareholder of the company.[16] He is appointed from the job market based on their qualifications and experience in the respective field like the other corporate official e.g. chief executive officer or senior managers.

However,the independent director is required to be appointed for the banks under the Bank Companies Act 1991[17] and for the public limited companies under the Corporate Governance Guidelines[18] issued by the Securities and Exchange Commission. The minimum number of independent director is be 1/5th of the total number of directors.[19] The term "independent director" is defined as a director who is not a shareholder, has no any connection with the management of the bank and has no direct or indirect interest with the bank or any person involved with the bank in present or in future.[20] He is allowed to give his opinion only for the interest of the bank.[21] The minimum number of independent director is three when the total number of directors is more than 20 whereas at least two independent directors are to be appointed in case of a board having less than 20 directors.[22] Permission from the Bangladesh Securities and Exchange Commission is required before appointing independent directors of a bank.[23]

Similar to the provision of holding qualification shares at the time of appointment or within the specified time after appointment,[24] the appointed director becomes disqualified if his shares fall below the minimum qualification shares or he fails to pay on call in respect of his shares.[25] In addition to this requirement of minimum qualification share, other standard qualifications are also required such as soundness of mind, majority age, solvent and/or having no pending adjudication against his

---

15 Ibid. Sec 86.

16 Investopedia<http://www.investopedia.com/terms/o/outsidedirector.asp> [last accessed on 31 March 2016].

17 The Bank Companies Act 1991 (Bangladesh), Sec 15 (9) (incorporated by amendment to the Bank Companies Act 1991 in 2013).

18 The Corporate Governance Guidelines dated 07 August 2012, Securities and Exchange Commission (Bangladesh), Clause 1.2 <http://www.dsebd.org/pdf/Notification_on_20CG-070812-Amended.pdf>[last accessed on 31 March 2016].

19 Ibid. Clause 1.2 (i).

20 Above n 17, Explanation to sec 15 (9).

21 Ibid.

22 Ibid.

23 Above n 18.

24 Above n 7, Sec 97 (1).

25 Ibid. Sec 94 (1) (d).

solvency.[26] The scope of these qualifications are always open ended since any other additional grounds can be incorporated under the AoA.[27]

Further, upon appointment of the directors, the board acts as a collective unit in order to discharge its duties towards the company. The board manages the company's business as its prime duty.[28]It is responsible to take the business decisions for the company except the excessively major ones which require the votes from the shareholders at their general meeting under the Companies Act 1994.[29] Such business decisions include company's business operation plan, investment proposals, annual financial budget, financial accounting plan, profit distribution plan, loss recovery plan, basic management system etc.[30]

However, since directors work usually part time for the company, it is not possible for the directors to take care of the day to day management of the company.[31] Therefore, managers and senior managements are appointed to undertake this responsibility. The management is also responsible for management of the whole affairs of the company.[32]And the board is entrusted with the responsibility to monitor the management. Its effective oversights ensure effective performance of the management in discharging their duty to maintain day to day business as well as the whole affairs of the company. Apart from monitoring, the board of directors is also responsible to provide directions and guidance to the management in managing company's affairs.[33]

In addition, whether the directors are doing their duties effectively is determined by their reporting to the shareholders. In other words, since the shareholders are not directly involved with the business of the company and it is the directors who conduct the business, directors are required to report to the shareholders about the company's performance on periodic basis and act as an information mechanism to the shareholders for the company's affairs at the general meeting of the shareholders through various reports such as annual report, balance sheet, profit and loss accounts etc. moreover board of directors submits reports regularly to the shareholders at the general meeting.[34]

---

26 Ibid.
27 Ibid. Sec 94 (2).
28 Above n 9.
29 Above n 9, Clause 72.
30 Jiang Yu Wang, *Company Law in China: Regulation of Business Organizations in a Socialist Market Economy* (2014 Edward Elgar, Cheltenham, the United Kingdom) 169.
31 Above n 9.
32 Ibid. see also above n 7, Sec 2 (1) (k).
33 Above n 7, Sec 2 (1) (k).
34 Ibid. Sec 184.

Moreover, it is the duty of the directors to ensure the compliance of the company with the relevant laws and regulations, otherwise penalty has been imposed upon them. Such as failure of the directors of a public limited company to hold statutory general meeting within the stipulated time may cause them fines.[35] Directors are also required to act as a record keeper of the company. The detail minutes of the annual general meeting[36], directors meeting[37], extraordinary general meeting,[38] lists of the members, charge or mortgage created over the assets of the company[39] etc. are required to be maintained in the record book and directors are entrusted with this duty.[40]

In performing these duties, the directors as well as the management are required to maintain two core standards such as duty of care and duty of loyalty. The duty of care is also known as the duty of good management. Under this standard, the directors and the management are bound to act in good faith as a reasonable prudent person with the belief that his action is in the best interest of the company.[41] On the other hand, the duty of loyalty includes avoidance of conflict of interest with the company, abuse of power and position at the corporate board.[42]

3. Women in Corporate Board

In the current legal regime of corporate governance, opening the glass door of the boardroom for female is one of the prominent issues. In the European Union, the law is being under consideration for mandatory quota system for female in the corporate board.[43] When the bill for quota system was being considered by the Dutch Parliament before an enactment is made, questions on capacity of women to be in the top of a management and/or sit in a board, discriminatory action (though this may be termed as a positive discrimination), unnecessary interference on independence of corporation, orthodox view on women contribution for home making and childcare to make its own charters were raised.

---

35 Ibid. Sec 83 (11).
36 Ibid. Sec 81.
37 Ibid. Sec 96.
38 Ibid. Sec 84.
39 Ibid, Sec 159.
40 Above n 6, Clause 75.
41 Above n 30, 209.
42 Ibid. 202; see also Legal Information Institute, Cornell University Law School<https: //www.law.cornell.edu/wex/duty_of_loyalty≥ [last accessed on 31 March 2016].
43 MijntjeLuckerath-Rovers, 'Gender Quota in the Boardroom: the Dutch Approach' (2015) 20(1) *Deakin Law Review*75; see also SandeepGopalan and Katherine Watson, 'An Agency Theoretical Approach to Corporate Board Diversity' (2015) 52(1) *San Diego Law Review*24.

These views were counter argued by the legislators and enacted mandatory quota system in the Netherlands. Similar challenges were faced by most of the countries' pioneers who first came forward with the demand of the provisions of mandatory quota for women in corporate boards. They argued their demand from two perspectives: one from the government (or public) point of view and finally the company's point of view (i.e. the private sectors' view). In other words, these two sets of arguments are from the legislator's perspective and the subjects' perspective.

3.1. Social Justice Arguments

The social justice argument is mostly based on gender equity ensuring women participation in decision making process.A Chinese saying supports this when it says that women hold the half sky. It implies that any progress be it macroeconomics growth or whatever cannot be imagined without women participation in the decision making process. The social justice argument requires representation of both sexes in the corporate governance like the voting rights of the female as a matter of democratic practice.[44] The European Union also relied on the argument of necessity of full economic participation of women in democracy while adopting the mandatory quota system. While vetting the mandatory quota law, a Norwegian minister of the ministry of Children, Equality and Social Inclusions said that "if we neglect the need to empower women, we pay for that neglect by weakening our country's economic growth."[45]

1. Gender Equity: Despite the fact that almost half of the population is women, their representation is significantly to low in corporate governance. Therefore, with the objective of giving equal opportunity to the backward section of the population in order to ensure gender equity, such quota system is justified.
2. Equal opportunities: The logic of equal opportunity denotes to the argument of social justice. At the time of enactment of the first legislation providing mandatory quota system in the corporate board, the Norwegian state secretary said that women's influence for decision making process is important for the growth of national wealth as well as the economy as a whole.[46] Since todays' women are educated, their participation in labor market and competence should be provided with opportunity to contribute to the nation.
3. Equal representation: The moral argument for equal representation is also based on social justice. The presence of women in board provides more just and equitable outcome for the society as a whole. It has been argued that as a

44 Ibid.
45 SandeepGopalan and Katherine Watson, 'An Agency Theoretical Approach to Corporate Board Diversity' (2015) 52(1) *San Diego Law Review*33.
46 Ibid. 25.

corporate citizen, it is also a social responsibility of the company to comply with social norms and values through gender equality which can be ensured through equal representation of genders in its governance.[47]

3.2. Business Case Arguments

It has been argued that state should not interfere with the appointment of directors in any corporate board rather it should be left with the private sector to determine whether they want to have a diverse board or not.[48] This argument is based on the distinctive nature of public and private sector and the independence of private sector to choose their business strategy should not be intervened in the name of social justice. Business case arguments can be the counter logic for this case.

1. Diversity of Board: The business case argument says that having representation of each sex ensures the diversity in board and it is eventually beneficial to the company's business. Such improvement of board's performance would encourage the companies to have more diversified board. It was commented by one of the legislators of Scotland that "if a board better reflects the people it serves, it will be better equipped to make decisions affecting them and so improve its performance."[49] Since 70% of purchasing decisions are taken by women, there is a need that the board should also have the capacity to think like those 70% consumer decisions.[50] Therefore a gender diversified board prevents the group thinking of the "one gender dominated" board and helps to take more effective business decisions.
2. Market Signal: Not only understanding the stakeholders, having women in corporate board also sends a signal to the market that the company values women representation and empowerment.[51] Such approach also distinguishes the company from the others in the market showing that it emphasizes social justice.[52] Based on a study over 290 largest companies of the world, it was

---

47 Caspar Rose, 'Does Female Board Representation Influence Firm Performance? The Danish Evidence' (2007) 15(2) *Corporate Governance: An International Review* 404, 405.

48 Ibid.

49 'Women on Board: Quality through Diversity, Scottish Government Consultation on the Introduction of Gender Quotas on Public Boards', (Scotland Government 2014) (online) available at http://www.gov.scot/publications/2014/04/1438/296931 [last accessed on 30 March 2016].

50 Above n 45, 36.

51 Stephen Bear et al., 'The Impact of Board Diversity and Gender Composition on Corporate Social Responsibility and Firm Reputation' (2010) 97 *Journal of Business Ethics* 207.

52 Above n 45, 20.

found that sales and earnings of the companies having at least one female director are higher than the companies having no women directors.[53]

3. Share Price Performance: One of the key ways to measure the performance of the board is the share price of that company in stock market. In a study by the Credit Suisse in 2012, correlation between the share price and return on equity performance and the inclusion of at least one woman on the board was established.[54] Gender diversity is also inspected by the investors of the capital market. For example, the CalPERS in the US and the Amazon in Europe include gender diversity as an investment criterion.[55]
4. Group Thinking: A corporate board acts as a team in taking decisions for the company. In a board meeting, the directors give their individual oversights and but take the decisions collectively. Therefore, the board acts as a crowd following the highly cohesive individuals (i.e. all male member board) often just to avoid conflicts.[56] However, since the women are typically outsiders[57], they are more prone to question objectively and independently which eventually prevents the group thinking in the boardroom.

5. Improved Governance: Long criticized weakness of stereotype corporate boards are undertaking excessive risks, unreasonable hike of compensation package for senior managers, predominance of board culture focusing value to short-term gains etc.[58] On the other hand, the findings of empirical study showed that firms under women leadership has been proved to be more risk aversion and focused to long-term sustainable projects.[59] The statistic shows that companies with 40% women directors have taken less credit than the companies with a lower representation of women when compared with the whole business community.[60]

---

53 Viviane Reding, 'The Tug of War over the Women Quota' (2012 European Commission, Munich).

54 Credit Suisse, 'Gender Diversity and Corporate Performance' (2012) <http://www.calstrs.com/sites/main/files/file-attachments/csri_gender_diversity_and_corporate_performance.pdf> [last accessed on 30 March 2016].

55 Stephanie N Shelter, 'Women on Corporate Boards: Non-Quota Initiatives to Increase Board Gender Diversity in the US' (2014) 5(1) *Grove City College Journal of Law and Public Policy* 23.

56 Above n 55.

57 Ibid.

58 StijnClaessens and Burcinyurtoglu, 'Corporate Governance and Development: An Update' (International Finance Corporation, 2012).

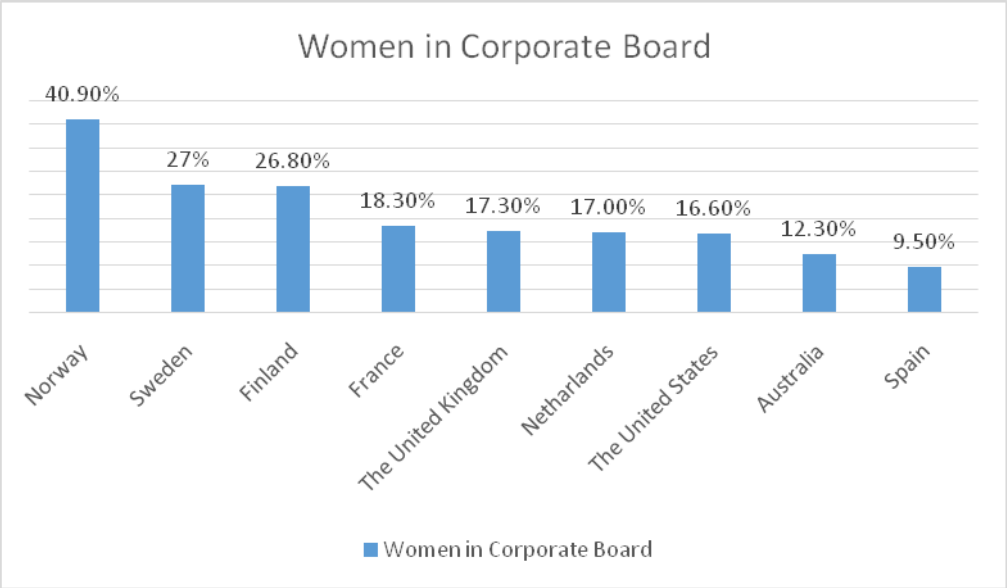
59 Darren Rosenblum and DariaRoithmayr, 'More than a Woman: Insights into Corporate Governance after the French Sex Quota' (2014-2015) 48 *Indiana Law Review*889, 916.

60 Maria Pilar, GraciaGuikarro and Ana ClavoAbril, 'Breaking the Glass Ceiling: Women in Boardroom' (Spain, 2013)

6. Process of Decision Making: It is established that men alter their behavior in presence of women.[61] Therefore, the boardroom environment positively changes when there are women directors rather than when there are all male directors. Moreover, women are found to take decisions considering the interests of multiple stakeholders and tend to be cooperative and collaborative.[62] The empirical research also supports that women are more "detail oriented" and more "methodical" than men with more reasoned argument which positively changes the decision making process of the board even though there is no significant effect on the decision itself.[63]

Initiatives for Women Representation in Corporate Board

The following figure[64] shows the percentage of board seats held by women as of 2014:



Among the countries given in the above figure, Norway, Finland, France, the Netherlands and Spain adopted mandatory quota and the United Kingdom, the

<http://www.paulhastings.com/genderparity/pdf/Gender_Parity_Report.pdf>[last accessed on 30 March 2016].

61 Above n 59, 899.

62 Chris Bart and Gregory McQueen, 'Why Women Make Better Directors' (2013) 8 *International Journal of Business Governance & Ethics* 93, 96-97.

63 Supra Note 59, p. 911-912;

64 Catalyst, 'Women on Board' (2014) <http://www.catalyst.org/knowledge/women-boards> [last accessed 30 March 2016].

United States and Australia adopted directory mode encouraging the companies for their voluntary initiatives to appoint more women in their boards.

4.1. Mandatory Quota System

The European Union suggested to have mandatory quota system for its member states. Currently less than 18% of the board members of 610 largest companies in twenty eight EU member states is held by women even though the trend shows the increase in number.[65] However, the trend shows in the above figure that the countries having the legislation on mandatory quota have largest percentage of growth[66] whereas the United Kingdom is an exception to this trend.[67]

Even though Finland has adopted mandatory quota system, it does not set up any percentage of quotas for the companies to be achieved rather it requires at least one man and one woman in the board of directors, therefore the achievement rate is higher than the other countries which has given the percentage of representation to be ensured by the companies.[68] On the other hand, even though Spain has adopted percentage of quota to be achieved, the achievement of such target is quite lower than the countries adopting directory mode because of weaker enforcement mechanism of Spain.

4.1.1. Norway

The first country in the EU which passed the legislation for mandatory quota system for women in the corporate board was Norway. In 2009, Norway parliament passed the law requiring the public companies to have at least 40% of their board members from Women.

Earlier to the incorporation of mandatory quota for women in corporate board in the Companies Act, similar provision though in modified version, was in place in the Gender Equality Act 1981 of Norway requiring at least 40% quota of each gender on publicly appointed boards, councils and committees.[69] Subsequently in 2003 mandatory quota system was incorporated in the Companies Act requiring the public

---

65 European Commission, 'Gender Balance: Europe Is Cracking the Glass Ceiling' (2014) <http://ec.europa.eu/justice/gender-equality/files/documents/140303_factsheet_wob_en.pdf> [last accessed on 30 March 2016].

66 Ibid.

67 Above n 45.

68 The Corporate Governance Code 10 (2010) (Finland).

69 Alice Lee, 'Gender Quotas Worked in Norway: Why Not Here' (New republic, Sept 5, 2014) <https://newrepublic.com/article/119343/impact-quotas-corporate-gender-equality> [last accessed on 29 March 2016].

limited companies to have board of directors representing both sexes.[70] However such quota is not applicable if representation of either gender in the workforce is less than 20%.[71] Such mandatory quota requirement is backed by dissolution sanction under the legislation even though previously companies had the option of adoption quota voluntarily till 2005. However the compliance rate was not found satisfactory during that time which forced the legislator to enact law with the provision of sanction.[72]

The target for achievement of this quota was set by 2008. In terms of compliance rate, it was found that as of January 2008, only seventy seven companies out of four hundred fifty was in breach.[73] It can be assumed that the sanction for non-compliance boosted up the compliance rate among the companies.

4.1.2. Spain

After Norway, Spain is the second state enacting the mandatory quota provision in corporate board for women. Spain relied on the argument of social justice and elimination of gender discrimination. The purpose of incorporating such quota in the law was stated to ensure equal treatment between man and women and eventually build a more democratic, fair and solidary society.[74] The law required the publicly traded companies having more than 250 employees to maintain 40% of female directors in their boards.[75] The timeframe to achieve this target was eight years i.e. by end of 2015.[76]

In addition to the statutory laws, the Stock Exchange Commission (SEC) also required the listing companies under its Good Governance Code to ensure constitution of their board having due gender composition on a comply or explain basis.[77] The National Securities Market Commission also issued circular providing

---

70 In case of two or three directors in the BoD, both sex shall be represented; in case of four or five directors, each sex shall have at least two directors; for six to eight member board, the minimum representation will be of three; for nine member board, at least four directors must be from each sex and finally in case of more than nine, representation of each sex must be maintained by at least 40%, section 6-11 of Public Limited Liability Companies Act 1997 (Norway);

71 The Public Limited Liability Companies Act 1997 (Norway), Section 6-11.

72 AagothStorvik and Mari Teigen, 'Women om Board: The Norwegian Experience' (2010) (<http://library.fes.de/pdf-files/id/ipa/07309.pdf> [last accessed on 29 March 2016].

73 Ibid.

74 The General Equality Act (Spain), Art 1.

75 Constitutional Act 3/2007 for Effective Equality Between Women and Men (Spain);

76 Ibid.

77 Recommendation no 15 of the Good Governance Code 2006 (the Stock Exchange Commission, Spain); subsequently this recommendations became law in 2013, see also

detail content and structure of this report having the provision of mentioning the number of women directors in the board for past years and measures taken by the company to achieve the gender equality.[78]

However, unlike the legislation of Norway, there was no resolution of sanction rather Spain adopted the incentivized mode. Companies which have complied with the statutory requirements, were given incentives by a "corporate equality mark."[79] On the other hand, pursuant to the requirements of SEC, duty to disclosure was imposed on the companies requiring them to give detailed disclosure in their annual corporate governance report on their compliance and/or explain as to their non-compliance.[80]

In terms of effectiveness of the incentivized method instead of sanction, it was found that the target of 40% mandatory quota for women was achieved by March 2015 whereas the timeframe was fixed by December 2015.[81] It means all the listed companies have at least 40% women directors in their board by March 2015 whereas it was only 12.3% in 2012.

4.1.3. The Netherlands

Like Norway and Spain, in 2013, the Netherlands passed the similar law of 30% quota for women in corporate board or the supervisory board of the public limited companies only. Under the Civil Code, 30% of the total number of directors of the public limited companies was required to be appointed from female.[82] However, only the public limited companies meeting any of the two criterion of having value of assets exceeding a certain limit or net sales for financial year reaching certain ceiling or the average number of employees are required to comply with the quota requirement.[83]

In addition, "comply or explain" provision is adopted in the law to ensure the compliance. In case of failure to comply with the same, the companies are required to provide explanation in its annual report stating the reason for non-compliance,

---

Order ECC/461/2013 Approving the Content and Structure of the Annual Corporate Governance Report (B.O.E 2013, 71) (Spain)

78 The National Securities Commission (Spain), Circular Resolution 4/2013 (12 June 2013).

79 Constitutional Act 3/2007 for Effective Equality between Women and Men (Spain), Art 50.

80 Recommendations of SEC, Good Governance Code (Spain)

81 European Commission, 'National Factsheet: Gender Balance in Boards: United Kingdom' (2013) <http://ec.europa.eu/justice/gender-equality/files/womenonboards/womenonboards-factsheet-uk_en.pdf> [last accessed on 30 March 2016].

82 The Civil Code (Netherlands), Article 2.397.

83 Ibid.

initiatives taken to meet the target and implementation plans to achieve the target in future.[84]

Although mandatory quota provision was adopted, the implementation result was not found satisfactory. A study conducted in August 2014 found only one company (out of 87 companies taken into account for the study) in compliance with the legal requirements of 30% quota whereas two companies were very close with >30%.[85] The study also reported the non-effectiveness of the "comply or explain" provision with62% of the companies gave no explanation as to their non-compliance.[86]

Another distinction of the Dutch legislation from the other states accepting mandatory quota system was that the provision of the Netherlands' Civil Code was passed for a provisional period and repealed on January 2016.[87] However, it is assumed that given the non-effectiveness of 'comply or explain' approach, mandatory sanctions would be taken as the next measure to ensure the compliance.[88]

4.1.4. France

The French law requires the listed companies having at least 500 permanent employees and the balance sheet size of Euro 50 million must achieve 20% of women representation in its board by 2014 and 40% by 2020.[89] Sanctions against the non-compliance include revocation of non-compliant nominations, freezing board members' fees etc.[90]In compliance, 30% of CAC-40 companies reached the target of 20% by 2010 which was even before the enactment of the law.[91] The percentage was increased from 9% to 18.3% since 2009 to 2013.[92] Therefore now, the timeframe for achievement of second phase of 40% of women representation in corporate board has been rescheduled to 2017 whereas previously it was 2020.[93]

4.2. Directory System

Another set of countries are focused on voluntary initiatives of the companies to ensure women representation in their board rather than by compulsory requirement. They prefer to use the term "board diversity" to the term "quota". The argument

---

84 Ibid.

85 The Dutch Female Board Index 2014, <www.tias.edu/docs/default-source/Kennisartikelen/femaleboardindex2014.pdf> [last accessed on 30 March 2016].

86 Ibid.

87 Above n 43.

88 Ibid.

89 Law 2011-103 of January 2011 on the Balanced Representation of Women and Men on Board of Directors and Supervisory Boards and Equality Professional (France).

90 Article 1 of balanced representation of women and men on board of directors (France).

91 Above n 59, 899.

92 Kimberly Gladman and Michelle Lamb, 'Women on Boards Survey, GMI Ratings' (2013) <http://www.boarddiversity.ca/sites/default/files/GMIRatings_WOB_042013.pdf> [last accessed on 30 March 2016].

93 Above n 59.

behind such voluntary initiative is that the appointment of directors should be based on merit rather on gender. During the consultation of the European Union for introducing mandatory quota system for all EU countries, it was commented that "a business environment (is) where the women can take their seat on merit and without the spectra of tokenism."[94]

4.2.1. The United Kingdom

Pursuant to the report of Lord Davies on "Women on Boards", Corporate Governance Code of the United Kingdom was amended in 2010 to incorporate the quota for women in corporate board even though such quota is not mandatory. Therefore, the term 'board diversity' has been used rather than the term 'quota'. With a view to ensuring corporate board diversity, apart from merit based objective criterion, due regards require to be given for the benefits of diversity including gender.[95]

On the contrary to the Norwegian legislation, the UK corporate governance code requires for disclosure only instead of any sanction for non-compliance. It requires the companies to add a new part in their annual report describing the process of appointment of board including the description of the board's policy for gender diversity and implementation plan of the policy with the progress on achieving the objectives.[96] Since 2013, another duty to disclosure was imposed on the *Financial Times Stock Exchange*(FTSE) companies under the Companies Act 2006 requiring them to make a strategic report to their shareholders disclosing the gender based representation of board of directors, positions of senior managers and total number of employees.[97]

In addition to the major difference with the mandatory quota system, it has also been found that the UK code never stated about the optimum number of board members of each sex to ensure the diversity and it also did not give any time limit to reach the targeted diversity rather it kept the both open to be determined by the companies by their respective internal policies.

Even though the voluntary initiatives were encouraged in the UK, the statistic showed the highly satisfactory results. In 2004, only 9.4% of the directors in FTSE 100 was women whereas it increased to 12.5% in 2010. Even such increase occurred

---

94 Consultation on Gender Imbalance in Corporate Boards in the EU, (Eur. Commission,May 28, 2012) < http://ec.europa.eu/justice/newsroom/gender-equality/opinion/ 120528_ en.htm> [last accessed on 29 March 2016].

95 The Corporate Governance Code (The United Kingdom), Section B.2.

96 Ibid. Section B.2.4.

97 The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 (The United Kingdom), Section 414C.

before the amendment in the Corporate Governance Code in 2010. After the amendment, the women representation was increased to 20.7% in 2014[98] and now there is no all-male FTSE 100 boards since 2014.[99]

The reason behind the compliance even before the amendment of law was the media attention on economic importance of diverse boards and negative publicity of the companies for not making efforts to appoint more women in their boards.[100]

4.2.2. Australia

Like the UK, Australia adopted recommendatory approach under its Corporate Governance Code. The diversity recommendations[101] under the code were issued in 2010 and made effective from 2011. At latest, this recommendation was amended in 2014. It was recommended for a listed company to have a diversity policy including the requirement of having gender diversity in its board, senior management and workforce. This policy was suggested to include the numerical target to be achieved, timeframe to achieve the target, measurable objectives for achieving gender diversity, key performance indicators measurable against the gender diversity objectives determined in the policy. This policy is required to be in line with the "Gender Equality Indicator" under the Work Place Gender Equality Act, 2012. Moreover, a separate committee was directed to be formed to prepare this policy.

Given the adoption of recommendatory approach, there is no question of sanction rather duty to disclosure was adopted by Australia. Under this duty to disclosure, first of all the company needs to publish its policy to the public (by way of its websites)[102] and finally, it was to disclose its achievement of the target set by itself in its policy and in case of failure to achieve the target within the timeframe which was also set by itself, the explanation of such failure.[103]

Now, in terms of effectiveness of these recommendations, it was found in 2013 that 98% of the 600 companies which were sampled for data collection, either had

---

98 The Female FTSE Board Report 2014, Cranfield U., SchMgmt (March 26, 2014) <http://www.som.cranfield.ac.uk/som/p21687/Knowledge-Interchange/Management-Themes/Leadership/Leadership-News/The-Female-FTSE-Board-Report-2014> [last accessed on 30 March 2016].

99 Sean Farrell, Glencore, 'Last All-Male FTSE 100 Board, Appoints Patrice Merrin as Director' (June 26, 2014 the Guardian), <http://www.theguardian.com/ business/2014/ jun/26/glencore-male-board-patrice-merrin-woman> [last accessed on 30 March 2016].

100 Consultation on Gender Imbalance in Corporate Boards in the EU, Eur. Commission (May 28, 2012) <http://ec.europa.eu/justice/newsroom/gender-equality/opinion/120528_en.htm> [last accessed on 29 March 2016].

101 ASX Corporate Governance Council, Corporate Governance Principles and Recommendations (3rded, 2014) <http://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf> [last accessed on 30 March 2016].

102 Ibid.

103 ASX Listing Rule 4.10.3 (Australia).

diversity policy or gave explanation for not having the same.[104] 86% of the sampled 186 companies established their measurable objectives against gender diversity. Apart from internal policy level changes, actual appointment of women directors in board of ASX 200 companies was increased from 3% to 15% in 2012 from its previous year and 18% in 2013 and as of February 2016, it has been increased up to 22.7% whereas for ASX 501+ group, it was increased from 8% in 2012 to 9% in 2013[105] but still twenty one ASX 200 companies do not have any women in their board.[106]

However, even though the statistic shows positive changes in terms of having policy or recruitment of women directors, some drawbacks were found in the policy itself. For example, most of the companies set their target up to the minimum level of requirement to reach their gender diversity.[107] It shows that unlike the UK, the mindset of the policy makers did not accept the business case arguments at all. Moreover, most of the measurable objectives and the key performance indicators are not actually measurable in terms of gender diversity.[108]Additionally, even though number of women directors increased, women were not appointed at the senior management level in proportion to the number of appointed women directors.[109]

4.2.3. The United States

In the US, neither the quota is set nor is the term diversity defined rather it is left open ended for the subjective interpretation of each company. The law imposes a duty to disclosure upon the companies that if they have a diversity policy (which is even mandatory to have), it is to disclose how it has plan to implement the same.[110] Even the Security Exchange Commission (SEC) has no mandate to check whether such disclosure is made or not.[111] Pursuant to such lenient provisions, it was reported that 60% of the companies were not in compliance with this requirement of the

---

104 KPMG, ASX Corporate Governance Council Principles and Recommendations on Diversity (2014) <http://www.asx.com.au/documents/asx-compliance/kpmg-report-diversity-2014.pdf>[last accessed on 30 March 2016].

105 Ibid. 29.

106 Appointment to ASX 200 Boards, <http://www.companydirectors.com.au/Director-Resource-Centre/Governance-and-Director-Issues/Board-Diversity/Statistics> [last accessed on March 30, 2016].

107 Blackrock, 'Investment Management (Austl.) Ltd., Glacial Change in Diversity at ASX 200 Companies: Can Corporate Australia Escape the Imposition of Diversity Quotas?' (2012)https://www.wgea.gov.au/sites/default/files/BlackRock_Glacial_Change_in_Diversity_at_ASX200_companies.pdf> [last accessed on 30 March 2016].

108 Ibid. 4.

109 Ibid.

110 Proxy Disclosure Enhancements (2009), The Exchange Act (The Security Exchange Commission, the United States).

111 Above n 45, 45.

SEC.[112] only 16.9% of the companies had women representation in their board in the year of 2014.[113]

Why Bangladesh should adopt the Quota system

As a member of the Convention on Elimination of Discrimination against Women (CEDAW) and signatory of other international instruments such as the Beijing Platform for Action 1995, its duty is to ensure women representation and participation in decision making process not only in government level but also in every sphere of life. Under article 11 of CEDAW, Bangladesh has undertaken to eliminate discrimination against women in employment on a basis of equality between men and women. However, it is argued that since there has been no bar on appointment of women, there is no question of discrimination. In fact, it is the mindset of the male dominated corporate world to appoint a male rather than a female.

Moreover, discrimination against women in workplace has been reported several times. Despite having equal qualifications and performance, a woman employee do not get the preference as a man employee gets both in terms of appointment and promotion.[114] Such actions are attempted to be justified by saying the maintenance cost of a female employee is higher than a male employee since females are required to be given more security; they have family responsibility and even during maternity leave, salary and other compensation packages are to be provided. Therefore, the companies are more interested to appoint and retain a male employee than a female one. On the other hand, many female employees leave their jobs because of the challenges they face at workplace.

It has been established by empirical studies that having women directors at the corporate board has brought positive changes to the work environment in order to eliminate the discrimination against women at workplace and retain the women employees at their jobs.[115] The logic behind such finding is that female corporate leaders are more prone to adopt flexible working hours and family life friendly

---

112 Tamara S Smallman, 'The Glass Boardroom: the SEC's Role in Cracking the Door Open so Women May Enter' (2013) *Columbia Business Law Review*801;

113 The Catalyst, 'Quick Take: Women on Board' (2014) <http://www. catalyst.org/ knowledge/ women-boards> [last accessed on 30 March 2016].

114 The Financial Express, 'Gender Discrimination at Workplace' (12 October 2012) <http://print.thefinancialexpress-bd.com/old/index.php?ref=MjBfMTBfMTJfMTJfMV82XzE0NjU1NQ==> [last accessed on 30 March 2016].

115 Above n 59, 903.

policies for the employees.[116] Moreover, having women in the top management motivates the other women employees to perform with the expectation of their advancement in the corporate ladder.[117]

Apart from the cases of discrimination at workplace in terms of appointment and/or promotion, harassment at workplace has also been a major prime concern for the stakeholders. It has been reported that many female bankers complained to Bangladesh Bank regarding sexual harassment at workplace and on protest, they were terminated on the excuse of poor performance.[118] Even though having women directors in corporate board is not the only effective solutions to prevent harassment at workplace, it is asserted that women representation in the board is helpful to avoid the incidents of harassment since women may better understand the problem of the other women.[119] It can be counter argued that most of the large manufacturing corporates have welfare officers and the human resource department who are predominantly female to listen the complaints from the female workers. However, having a female voice at the board would definitely perform better than a mere welfare officer or a full-fledged human resource department.

Besides, women participation in higher education has been increased gradually. Thirty one per cent of the students of the public universities (without national university) is female.[120] Therefore, creating equal opportunities for these qualified female is also the responsibility of the state. However, in appointing females on the top management and in the board, it is often argued that there is no enough qualified women to be recruited for these posts where the term qualification includes inexperience as well.[121]

However, since women have been away from the participating higher education for long time, it is quite normal that very minimum women would be found in the job market having enough experience for these posts. Therefore, if women are kept

---

116 Lynne L Dallas, 'The New Managerialism and Diversity on Corporate Boards of Directors' (2002) 76 Tulane Law Review 1363, 1384-85.

117 Lisa Fairfax, 'Women and the "new" Corporate Governance, Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to their Advancement' (2006) 65 *Maryland Law Review* 579, 602-05.

118 The Dhaka Tribune, 'Banks asked to Remain Cautious about Harassment of Female Bankers' (02 May 2015) <http://www.dhakatribune.com/banks/2015/may/01/banks-asked-remain-cautious-about-harassment-female-bankers> [last accessed on 16 March 2016].

119 Above n 117.

120 Louise Morley and Barbara Crossouard, 'Women in Higher Education Leadership in South Asia: Rejection, Refusal, Reluctance, Revisioning' (University of Sussex, 2014) <https://www.britishcouncil.org/sites/default/files/morley_crossouard_final_report_22_dec 2014.pdf> [last accessed on 31 March 2016].

121 Above n 55.

separated from participating the decision making process because of their inexperience which can be achieved through learning and development[122] it would be like "as if they (all-male leadership) are leaning down from above the glass ceiling to ask the women below shy they are not making it to the top which unconsciously communicates to these women that women are responsible for the lack of women at the top."[123]

Further, when all the major countries including the USA, the Europeans countries, and Australia have adopted provisions of either mandatory quota system (backed by sanction) or voluntary initiatives of the companies (backed by duty to disclosure), it is high time for Bangladesh as well to incorporate such provisions in its national law. India also adopted mandatory quota for at least one female director of public limited companies having three member board.[124] It is not only for the matter of gender equity, but also staying internationally competitive.[125]

In response to the international best practices, Bangladesh government has already taken its action plan to ensure the 33% quota for women in both public and private sectors at their respective decision making and management levels.[126] It has already adopted the mandatory provision of at least one woman director in the state owned financial institutions.[127]

6. Does the Proposed Quota System contradict with the existing laws and socio-economic environment of Bangladesh

While the quota system was proposed by the European Union, the UK argued against this system and stated that "[a] quota is alien to the British way of thinking and it would be an athema to British Culture."[128] Now the question arises whether quota system also goes in contradiction with the Bangladeshi culture.

In response to this question, it can be said that the constitution itself permits the government to enact necessary laws giving special benefits to women, children and other backward section of the citizen for their respective advancement.[129] According to the Constitution of People's Republic of Bangladesh, it is a fundamental policy of

---

122 Ibid.
123 Avivah Wittenberg-Cox and Alison Maitland, *Why Women Mean Busines*s (John Wiley & Sons Ltd., 2009) 163-164.
124 The Companies Bill 2012 passed on 18 December 2012 (India).
125 Elizabeth Broderick, 'Mandatory Quotas May be needed on Boards" (2010) *Australia Financial Review* 63.
126 Above n 4, 70.
127 Ibid.
128 Above n 45, 37.
129 The Constitution of People's Republic of Bangladesh, Art 28 (3).

the state to take necessary initiative to ensure the equal participation of women in the national life.[130] Therefore, the supreme law of the state allows the government to take action to ensure women participation in public and governmental affairs.

Furthermore, the equal rights of women in both state and public life is also guaranteed in the constitution.[131] Some people argue that when equal rights are protected in the constitution, then taking initiatives for women participation by way of giving special quota system, reserved seat, scholarships etc. go contrary to the spirit of the constitution itself. However, the constitution also empowers the state to make such laws necessary for ensuring women participation and empowerment.[132]

Getting empowered under the constitution, the state passed the National Women Development Policy in 2011. Under this policy it is the objective of the government to ensure reduction of gender discrimination and existing gap between the participations of man and woman in decision making process.[133] This initiative started with the government action of ensuring participation of woman in adoption of any policy and regulations.[134] This policy also aimed at increasing women employment and economic empowerment through institutionalization.[135]

6.1. Participation of Women in education

Stipend program for female students started on 1982[136] and is continuing till now. With the objective to increase the number of girl students and prevent drop out, the government continues this stipend program. Besides, full free studentship is offered for the girl students till the secondary level and the government has the aim to make this full free studentship till the graduation level for girls.[137] Special budget is allocated for women's education and the government has a plan to provide financial supports to promote women's education at all levels.[138] Women are also encouraged to pursue higher and professional studies. Creation of more and more career opportunities, ensuring participation of women in decision making are also included in the National Education Policy 2011.

---

130 Ibid. Art 19.
131 Ibid. Art 28 (2).
132 Ibid. Art 28 (3).
133 Above n 3, Clause 23.1.
134 Ibid. Clause 23.2.
135 Ibid. Clause 23.5-23.10.
136 Janet Raynor and Kate Wesson, 'The Girls Stipend Program in Bangladesh (July 2006) *Journal of Education for International Development* 2.2 <http://www.equip123. net/JEID/ articles/3/ Girls'Stipend PrograminBangladesh.pdf>[last accessed on 27 March 2016].
137 Above n 4.
138 National Education Policy 2011 (Bangladesh) <http://www.moedu.gov.bd/index.php?option=com_docman&task=doc_download&gid=2046&Itemid> [last accessed on 27 March 2016].

6.2 Participation of Women in government jobs

Since the independence of Bangladesh in 1971, reserved seats were ensured for the women in government jobs. The same trend is still maintained. Along with the other quotas, 10% quota is reserved for women in the government job recruitment including both first class cadre and non-cadres.[139] Apart from the first class jobs, 15% and 20% are reserved for the women for second class and third class jobs respectively.[140]Again, the government has the target to increase this quota by 15% for first class jobs, 20% for second class jobs and 35% for third class jobs in future.[141]

6.3. Participation of Women in political activities

There were 45 reserved seats for women in the parliament. With the objective to increase the representation and participation of women, the government increased the number to 50 by the fifteen amendment to the constitution.[142] These reserved seats are distributed among the political parties in proportion to the number of seats held by them in the parliament.[143]This reservation is aimed at increasing by 33% of the total number of seats of the parliament.[144] Women participation is also ensured in the local government level as well. There are three reserved seats for women in Union Parishad under the Local Government (Union Parishad) Act.[145] Apart from reserved seats, direct election is held for these reserved seats of women.[146]Similar reserved seats are also found for the constitution of other local government units with the provision of direct election like City Corporations[147], Pouroshova[148] and Upazila Parishad.[149] Such women representation is aimed not only at legislative or local government level, but also at the political party level. At least 33% women representation in the political parties is targeted[150] and this target is to be achieved by the way of ensuring 33% quota for women in each political party and such reservation is to be made as condition precedent for registration of political party

---

139 Bangladesh Public Service Commission <http://www.bpsc.gov.bd/platform/node/61.bpsc2012.pm l≤ [last accessed on 27 March 2016].

140 Government of Bangladesh, Report of Pay and Service Commission part 1, Cabinet Division, Dhaka, (1997); see also above n 4.

141 Above n 4.

142 Above n 128, Article 65 (3), Supra Note 128; the Constitution (Fifteenth Amendment) Act, 2011 (Act XIV of 2011) (Bangladesh), sec 23 (i).

143 The House of the Nations (Reserved Women Seats) Election Act 2004 (Bangladesh), Section 4.

144 Above 3, Clause 32.7.

145 The Local Government (Union Parishad) Act 2009 (Bangladesh), Section 10 (3).

146 Ibid. Section 19 (3).

147 The of the Local Government (City Corporations) Act 2009 (Bangladesh), Section 5.

148 The Local Government (Pouroshova) Act 2009 (Bangladesh), Section 6 (2) (kh) with cross reference to section 7.

149 The UpozillaParishad Act 1998 (Bangladesh), Section 6 (4).

150 Above n 3, Clause 32.3.

under the Election Commission.[151] Besides the women representation, 30% quota is to be reserved for women at different committees in various levels of politics.[152]

6.4. Encourage of woman entrepreneurship

Under the national action plan for the national women development policy, there has been a plan for extending interest free loan to women to encourage women entrepreneurship. With this objective, the Bangladesh Bank (central bank) has issued its guidelines to the banks and the financial institutions making it mandatory to them to identify woman entrepreneurs and provide loan facilities to them.[153] At least 10% of the total small and medium enterprise (SME) loan is allocated for women and up to taka twenty five lacs loan is permitted for women without any security.[154]

6.5. Participation of Women in public and corporate governance

The government has already taken an initiative to appoint woman director in state owned financial institutions and it has also appointed woman as deputy governor of the Bangladesh Bank.[155]Further, the government has set its aim at reserving 20% quota for woman in offices regarding the economic sectors of the government such as the Bangladesh Bank, the Finance Department, the National Board of Revenue etc. to ensure women participation in economic decision making and eventual development in near future.The government also requires such 20% quota for all the banks and insurance companies at their decision making levels in the future.[156] For NGOs, it is usually required by their memorandum of association to have a certain percentage of women participation in its executive committee as well as the governing body. Besides, the national and local levels, the government has the target to ensure women participation at the international level. It has also set its target to set 30% quota for women at the United Nations and other international organizations and 50% quota at the organizations which directly work for woman affairs.[157]

In addition to the mainstream sectors as mentioned above, women are also encouraged to participate in the cultural development. To this end, woman directors of films and dramas are getting awarded by the government. Separate grants are being allotted to them as well. A special budget is also granted for woman sport players at national and district levels.[158]

---

151 Above n 4, 87.
152 Ibid.;
153 The Daily Star, 'Loan to Woman Entrepreneur Made Mandatory (28 March 2015) <http://www.thedailystar.net/business/banks-must-give-tk-50000-loan-woman-entrepreneur-each-year-74248> [last accessed 24 March 2016].
154 Above n 4.
155 Ibid.
156 Ibid.
157 Ibid.
158 Ibid.

Incorporation of Gender Diversity in existing legal regime

In view of the government initiatives to bring women in the mainstream economic sector, it implies that incorporation of quota provisions for female also falls within the agenda of the government. In order to ensure effective legal mechanism, following recommendations can be made:

Mandatory or Directory provision: as discussed earlier, it has been found that few countries like Norway, Netherlands, France, Spain etc. have adopted the mandatory system. And some countries like Australia, the United Kingdom, and the United States adopted directory system. However, in terms of implementation, the mandatory quota system is found to be more effective one. Therefore, it can be recommended that Bangladesh should also adopt the mandatory quota system rather mere a directory one.

Optimum Threshold: It has been stated that the benefits of having women director cannot be retrieved unless the optimum threshold has been reached. The reason behind such optimum threshold is that "majority can simply ignore a minority's presence"[159]and consequently voice of only one female may not be heard in the boardroom. Failure to reach this critical mass may prevent the potential value of board diversity.[160] Therefore, the initiative of the Bangladesh government approach to appoint at least one female director at the corporate board for the state owned financial institution may not be an efficient one rather the number is required to be increased so that this one female director does not become a mere token director.[161]

Criterion of the companies: In view of the legislations of several countries, it has been found that the mandatory quota system has been introduced for only the public limited companies except few countries like France. Even in some cases, several criterion has been set up to make bound to recruit female directors in their board. These criterion are mostly in terms of number of employees, number of employees based on their gender, asset size, sales record etc. Therefore, Bangladesh should also adopt such filtering provisions based on these criterion since compelling all the companies specially small and medium size companies to have female directors may not be cost effective.

Appropriate sanctions: It is found from the case studies of different countries above that without appropriate and effective sanctions, such quota target cannot be achieved. Some effective sanction modes suggested by the EU are fines, judicially

---

159 Above n 59, 905.

160 Sabina Nielsen and Morten Huse, 'The Contribution of Women on Boards of Directors: Going Beyond the Surface' (2010) 18 *Corporate Governance: An International Review* 136.

161 Katherine Giscombe and Mary C Mattis, 'Leveling the Playing Field for Women of Color in Corporate Management: Is the Business Case Enough?' (2002) 37(1) *Journal of Business Ethics* 104.

ordered nullifications or annulment of appointments in violation of quota rules, ban from participation of public tender, exclusion from government funds etc.[162]

Priority to women: The quota system of the Bangladesh government is under huge criticism. Therefore,the introduction of quota system in private sector would be more challenging and also not preferred. One of the loopholes of the Norwegian legislation was the requirement of appointment of women director even though the required qualifications were not met.[163] However, this was duly addressed in the proposed directives of the European Commission. It requires priority to be given to women when the qualifications are met by both male and female candidates and in order to ensure the transparency, appointment procedures are required to be disclosed if the company fails to meet the targeted percentage of women representation.[164]

Independent Director: Under the guidelines of 2012 of the Bangladesh Securities and Exchange Commission and the Bank Companies Act 1991, independent directors are required to be appointed. However, no provision ensuring the diversity of the board is found. Therefore, in order to incorporate women quota in corporate board, the provision needs to be amended. The recruitment of introduction of independent directors with the verities of gender, age, life experience, knowledge and expertise etc. can also ensure the board diversity.

Introduction of various motivational programs before enactment of laws: Though the debate was on fire since 1996, it was 2013 when the requirement of quota for women participation in the corporate governance was incorporated in the Dutch civil code. Therefore, expecting Bangladesh to introduce such quota system overnight would not be realistic. There has been several voluntary and motivational programs to encourage the companies to appoint women in the top management as well as in other corporate governance structure.[165]

Gradual Integration of Women into Corporate Board: Bangladesh has made its start towards the mandatory quota provision for female by requiring at least one female director at each state owned financial institution. Now such initiatives should be kept continuing to increase women participation at the decision making process of corporate sector. There are some countries which have introduced such provision for the state owned and publicly trades companies only such as Austria, Brazil, Canada,

---

162 The European Parliament Legislative Resolution 2013 (the European Union), Article 6 (2), Recital 30.

163 Above n 59, 902.

164 European Parliament Legislative Resolution of 20 November 2013 on the Proposal for a Directive of the European Parliament and of the Council on Improving the gender Balance Among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures, COM (2012).

165 Above n 43.

Denmark etc.[166]Therefore, next target of the government can be the other state owned companies as well.

Conclusion

Provisions ensuring women participation in economic decision making and making women empowered in all spheres of life have been adopted in western and European countries. Now such practice is no more limited to the westerners; even India, Malaysia, and the UAE have adopted the similar provisions. Women representation in the corporate board is necessary not only from the gender equality perspective rather it is also supported by the empirical data that it improves the board room environment, brings positive changes in decision making processes and eventually enhances the corporate performance.

Bangladesh realizes that to bring the women to the decision making process is a sine qua non for the macroeconomic growth of the country. With a view to empowering women in line with its international obligations, it has committed to ensure women representation in all sphere of both public and private life. As a part of keeping such commitments, the Bangladesh government has taken initiatives to educate girl children since 1982 and at present near to 31% the students of higher studies is female.

To make women economically empowered, its high time to incorporate these women to the economic sectors as well, giving quotas for only public sector is not enough rather women should be brought to the corporate frontiers as well. Given this, the quota provision for women in the corporate board is the demand of time. However, mere enactment of new laws (or amending the existing ones) is not sufficient to achieve the targeted effects on macro economy of the country and micro economy of the company. Unless the critical mass of woman representation is achieved, introduction of quota for women board member would not bring any positive result. In order to achieve the critical mass, sufficient number of women should be appointed so that their voices are heard in decision making process. In addition to this, they should also get priorities in terms of training and capacity building to offset their less number of years of experience with the capacities developed. Moreover, the corporate mindset of male-dominated board is required to be changed which cannot be obtained by enactment of law rather than by gradual practice. When such mindset is changed, benefits of the board diversity can be observed.

166 Above n 45.

Three Waves of Access to Justice in Bangladesh: A Call for A System Approach to Success

Dr. Jamila Ahmed Chowdhury*

Introduction

Though many protective legal provisions are theoretically *'available'* in different laws of the country, because of the high-cost and delay in litigation, poor people may not be able to access the benefits of such laws. As prudently observed by Rhode,[1] *"[p]rocedural hurdles and burden of proof may prevent the have-nots from translating formal rights into legal judgment".*Thus, the divergence between the literal availability of justice in law books and its practical availability in court system may not ensure *'actual'* access to justice for *'all'*. In other words, *'availability' of justice carries only a little meaning to justice seekers if it is not 'accessible'* to them. To make a clear distinction between *'availability'* and *'accessibility'*, Hutchinson[2]rightly linked availability *"to the question of whether a service exists"* and access *"to the question of whether a service is actually secured"*.

Therefore, even when justice is made available in state courts, people may not have required access to it. Hutchinson argues that*"[t]he difference between availability and access is caused by 'barriers',"* which Rhode[3]calls *"procedural hurdles"*[4]. Scholars identified various factors which present as *'barriers'* to access to justice through litigation. When discussing barriers to access to justice, Macdonald[5] identified broadly two different types of barriers: *'subjective barriers'* and *'objective barriers'*. Subjective barriers relate to intellectual and physiological barriers including *'age, physical or intellectual deficiency ... the attitude of state functionaries, such as the police, lawyer and judges', while the 'objective barrier' relates to 'purely physical barriers'.*[6]

---

* Associate Professor, Department of Law, University of Dhaka

1 Deborah L. Rhode, 'Access to justice' (2000-01) 69(5) *Fordham Law Review*, 1787.

2 Allan C. Hutchinson, *Access to Civil Justice* (Carcwell, 1990) 181.

3 See Deborah, above note 1.

4 As prudently observed by Rhode above note 1, p. 1787, *'[p]rocedural hurdles and burden of proof may prevent the have-nots from translating formal rights into legal judgment'*.

5 Richard A. Macdonald, 'Access to Justice and Law Reform' (1990)10 Windsor Year book of Access to Justice, 298-300.

6 Ibid. 300.

For instance, access to justice for the poor and disadvantaged is limited in Bangladesh due to these subjective and objective barriers (e.g. a huge case-backlog, and consequent delays in the disposal of cases, high-cost of litigation, complexities in court process, gender etc)[7]. There are 1048 Supreme Court Justices and 1500 other judges to dispense justice to a population of nearly 170 million people in Bangladesh. In 2015, only in the High Court Division of the Supreme Court of Bangladesh 37,753 cases were disposed of from 4,31,978 cases.[8] In the same year, in the Appellate Division 9,992 cases were disposed of from 23,353 cases.[9] According to Lord Woolf's general principle to access to justice[10], Justice is fair when it is just in its outcome and dealt with reasonable speed.If the current rate of disposal continues, Bangladesh cannot expect to mitigate this backlog and any resulting delays. Given this situation, when people are finally granted a hearing, the end result may not be just, because *'the longer the period from the time of the events which are the subject matter of the action to the time of the trial, the harder it may become to prove the facts of the case'*[11]. Therefore, to minimize unnecessary delay in the formal justice process, high expense of litigation, complexities in court process, the flexible and consensual ADR process should be adopted in a more acceptable way in Bangladesh.

Apart from case backlogs and delays, access to justice for the poor is also restrained by the high-cost of litigation[12]. In Bangladesh, the cost of litigation is further increased by the cost of bribes.According to a nine-month long recent survey conducted by the Transparency International, Bangladesh on 18 pillars of national integrity, our judiciary still remains exploitative[13]. In another study, most of the parties (63 per cent) opined that court officials are major facilitators of corruption and bribe was asked directly in 73 per cent of cases[14]. During interviews conducted

---

7 AshutoahSarkar, 'Case backlog piling up', *The Daily Star* (Online), 28 March 2015 <http://www.thedailystar.net/frontpage/case-backlog-spirals-73002> accessed 15 June 2016; see also, NusratAmeen, 'Dispensing justice to the poor: The village court, arbitration council *vis*-a-vis NGO'(2005) 16(2) *The Dhaka University Studies Part F*103; Begum A Siddiqua,*The family courts of Bangladesh: An appraisal of RajshahiSadar family court and the gender issues*(Bangladesh Freedom Foundation 2005); Jamila A Chowdhury, *Women's access to justice in Bangladesh through ADR in family disputes* (Modern Book Shop, 2005); MustafaKamal, 'Introducing ADR in Bangladesh: Practical model' (paper presented at the seminar on *alternative dispute resolution: In Quest of a New Dimension in Civil Justice System in Bangladesh*, Dhaka, 31 October 2002).

8 Supreme Court of Bangladesh, Annual Report 2015, p.95.

9 Ibid. p.85.

10 Access to Justice, Interim Report to the Lord Chancellor in the civil justice system in England and Wales, 1995); Final Report, (London: HMSO, 1996, p.42).

11Hilary Astor andChristineChinkin, *Dispute Resolution in Australia*(Butterworths, 1sted, 2002)33.

12 See Asian Development Bank, above note 8, 82; See also, Brian Dickson 'Access to justice', (1989) 1 *Windsor Review of Legal and Social Issues* 32; See more, Deborah, above note 1, 369.

13 Transparency International Bangladesh, Annual Report 2014, p. 6.

14 Transparency International, *Corruption in South Asia: Insights and benchmarks form citizen feedback* (2002)

by transparency International, Bangladesh, 88.55 per cent of respondents agreed that it was almost impossible to get quick access to justice from the courts without utilising financial or some other pressure[15]. Further, despite high cost of litigation, availability of legal aid is scarce and is not able to support poor and marginalized people to overcome such barrier to access justice. Among the barriers to access to justice, sometimes complexity of process is also identified[16]. Literature shows that litigation is a much more complex procedure than mediation[17]. In Bangladesh, there is some procedural complexitiesin dealing with civil disputes that severely affect a large number of plaintiffs who do not have sufficient literacy to have minimum understanding of this process.

Therefore, a mere availability of legal provisions carries only a little meaning to the *'accessibility'* of justice to many poor in Bangladesh. Hence, to improve the access to justice condition in the country, different measures have been taken both by the civil society and law makers, following major waves of access to justice experienced worldwide. Thus, this paper firstly discusses three different waves of access justice experienced worldwide and how Bangladesh has adopted with these waves by taking appropriate measures. Secondly, it argues that all different waves are complementary to each other and are contributing to the development of overall access to justice condition of the country. However, still an integrative system approach, to combine all three waves and getting their fullest potentials in the development of justice delivery system of Bangladesh, is largely absent. Hence, this paperthen elaborates how a system approach may integrate the benefits of all three waves simultaneously, to create a more enabling environment for attaining better access to justice in Bangladesh. This part also highlights the significant improvement in lawyers' role that is required as a pre-condition for creating such an enabling environment in the country. Finally, it concludes with some recommendations for future.

Access to Justice and its Developemnt: A Worldwide Phenomenon

Scholars identified three major waves of access to justice that was experienced worldwide since the mid-sixteenth century till today. Cappellletti and Garth (1978)[18] categorized three waves of access to justice staring from 1960s. Incidentally, all

---

<http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN019883.pdf> accessed 20 July 2016.

15 Transparency International Bangladesh above note 13.

16 SeeMacdonald, above n. 6, 298.

17 Ruth V. Glick, 'Was That Mediation or Arbitration? Two New California Cases Beg the Question Again' (2006) (3) Business Law News.

18 Authors like Cappelletti and Garth trace the movement of access to justice in three waves, while Parker views such development in four waves. See more on SumaiyaKhair, *Legal empowerment for the poor and the disadvantaged: Strategies Achievements and Challenges- experiences from Bangladesh* (CIDA, 2008). Frank S. Bloch, 'Access to Justice and the global clinical movement' (2008) 28 *Washington University Journal of Law and Policy*.

three waves started in the United States of America (USA) and then spread all around the developed and developing world.

The first wave began with a series of effort from many developed countries to increase access to legal aid and legal advice to their citizens. For example, in 1963 the US Supreme Court held that criminal defendants have a right to legal counselling in serious criminal charges. Further, the right to legal aid to civil litigants in the USA was established through the Legal Services Cooperation Services (LSCS). Similar initiatives to provide legal aid and legal counselling were replicated by many other developed and developing countries afterwards. For example, providence of legal aid to civil and criminal cases was initiated in Bangladesh through the enactment of *Legal Aid Act 2000* (Act No VI of 2000).

The second wave enhanced access to justice through a class of actions, popularly known as Public Interest Litigation (PIL). This kind of litigation provided an opportunity to file a single suit to represent collective or social interest[19]. The objective of this innovation was to reduce the cost of access to justice by deciding cases on common interest collectively. Like the initiation of legal aid, PIL was first introduced in the USA and later replicated in other developed and developing parts of the world. In Bangladesh, the avenue of PIL was open through the land mark litigation of *Anwar Hussain Chowdhury vs. Bangladesh*[41 DLR (AD) 165] where the plaintiff challenged the 8th amendment of the Constitution of Bangladesh. However, the concept of *'aggrieved person'* in PIL was extended in the case of *Dr. MahiuddinFarooque vs. Bangladesh& others* (Writ petition no 891/1994).

The third wave of access to justice movement started with the introduction of ADR and other informal processes to resolve small claim cases in the USA. As usual, the wave was later extended to other developed and developing countries of the world. In most of the developing countries, the wave of ADR was swelled through judicial reform funded by the donors[20]. In Bangladesh, such a project to popularize ADR was initiated in the year 2000. A detailed discussion on the introduction of ADR has been discussed elaborately in the next section of this paper.

Though all three waves to the development of access to justice got repercussion to the judicial system in Bangladesh, the third wave of ADR seems to be the most effective mechanism to ensure access to justice to its people under the current socio-economic reality of the country. Though the first wave of legal aid may operate as a

---

19 John A. Jolowichz*On Civil Procedure*, (Cambridge University Press, 2000).

20 The World Bank,*Legal/Judicial reform projects approved, identified, or under preparation 2004*(July 2007)<http://www1.worldbank.org/publicsector/legal/legalprojects.htm> accessed 10 July 2011.

complementary force to enhance access to justice through the third wave of ADR, the application of the second wave of access to justice through PIL is still limited in Bangladesh. As mentioned earlier, the following section will delineate the origin of each wave in Bangladesh along with their achievements and bottlenecks.

Access to Legal Aid: A Form of Acess to Justice to the Poor

Government legal aid: The obligation of governments to provide legal aid was asserted in the *International Covenant on Civil and Political Rights* (ICCPR). According to article 14(3) (d) of ICCPR, it is obligatory for each government to provide legal aid to people who want to bring their issue to a court but are not able to do so because of their financial constraints. According to article 2 of the *United Nations Basic Principles on the Role of Lawyers*, it is an obligation of a state to provide legal services to the poor and disadvantaged sections of a society.

Since its initiation in 1972, the Constitution of Bangladesh has recognised equal access to law by all of its citizens[21], yet until 1994, the government had not provided any funding for legal aid to ensure equal rights for the poor and less advantaged groups of society. Provision of legal aid, however, is stipulated in the *Code of Civil Procedure (CPC) 1908*[22] and the *Code of Criminal Procedure (CrPC) 1898*[23] which are still in practice in Bangladesh. The first public fund to provide legal aid was constituted under a resolution by the Ministry of Law and Parliamentary Affairs in 1994 which allocated legal aid to 48 districts. However, the fund had remained almost unutilised since 1997 until the formation of the National Legal Aid Committee (NLAC) for providing legal aid and counsel to financially insolvent or helpless seekers of justice.

Later in 2000, the *Legal Aid Services Act 2000* (Act No. VI of 2000) established a formal legal framework for providing legal aid in Bangladesh.[24]Under this Act, the National Legal Aid Organisation (NLAO) was formed to administer and manage provision of legal aid to different districts in Bangladesh. To support NLAO, 61 District Legal Aid Committees (DLAC) were established for '*providing legal advice, paying lawyers' fees and cost of litigation including any other assistance to the justice seekers who are incapable of seeking justice due to financial insolvency,*

21 According to Section 27 of the Constitution of People's Republic of Bangladesh, '*All citizens are equal before law and are entitled to equal protection of law'.* See more on, *Legal Aid Act 2000*(Act VI of 2000).

22 Order XXXIII; Rule 1.

23 Section 340 (1).

24 Legal and Judicial Capacity Building Project (LJCBP) *Final report: Improving mechanism for delivering legal aid* (Unpublished report, Ministry of Law and Parliamentary Affairs, 2004); NusratAmeen 'The Legal Aid Act, 2000: Implementation of government legal aid versus NGO legal aid' (2004)15(2) *The Dhaka University Studies Part F*59.

destitution, helplessness and for various socio-economic conditions' [s. 2(2); *National Legal Aid and Services Act, 2000*]. One year later in 2001, NLAO adopted the *Legal Aid Rules* to enumerate the eligibility criteria for applying legal aid under the government legal aid scheme. It describes the rules and procedures for the submission of legal aid applications, for the nomination of lawyers and to determination of fees receivable by the lawyers.[25] Therefore, the government's legal aid scheme in Bangladesh started its fully-fledged journey only after 2001.

Despite all these developments, the quality of the government's legal aid program is not satisfactory. It could improve access to justice by boosting the financial capacity of poor clients and by making them capable of running their own cases, yet scarce legal aid funding and inefficient management of available funds has failed to resolve the problem of disproportionate access to formal courts[26]. For instance, government provided legal aid covered only an insignificant number of total family cases filed in *Dhaka*, *Narayanganj* and *Mymensingh* districts. Unpublished secondary data collected from respective court registries in 2006 (Table 1) suggests that among the total family cases filed, only 2.6, 0.8 and 1.3 per cent of cases received government legal aid in those three districts respectively.

Table 1: Total filing of family cases and their receipt of government legal aid (2006)

	Dhaka		*Narayanganj*		*Mymensingh*		Three districts together	
	Total	%	Total	%	Total	%	Total	%
Total family cases filed	2632	100.0	354	100.0	701	100.0	3687	100.0
Family cases that received government legal aid	68	2.6	3	0.8	9	1.3	80	2.2

Source:*Unpublished data from district legal aid committees in Dhaka, Narayanganj and Mymensingh*

25 Ibid. LJCBP.

26 Begum AsmaSiddiqua, *The family courts of Bangladesh: An appraisal of RajshahiSadar family court and the gender issues*(Bangladesh Freedom Foundation, 2005); United Nations Development Program *Human security in Bangladesh: In search of justice and dignity* (UNDP, 2002).See more on, Macrothink Institute, 'A critical analysis of legal aid in Bangladesh' (2014) 2(1) *International Journal of Social Science Research*.; Syed Aminul Islam, Overview of Government legal aid system, The Daily Star (online), 28 April, 2013. <http://www.thedailystar.net/news/overview-of-government-legal-aid-system> accessed 23 August 2016

Another drawback in government legal aid services relates to insufficient payment made to panel lawyers who provide 'free of cost' legal services to clients. Although NLAO does not use a monitoring mechanism or performance index to measure the quality of legal services gained through legal aid, data indicate that, because of insufficient payment, lawyers are not diligent when dealing with cases which receive government legal aid.[27]

> [I]t has been expressed by many respondents that often the lawyer is found to be absent on the date of hearing…Many of the prisoners stated that they never met the lawyers assigned to them even when legal aid had been provided for about a year.[28]

It has been argued that women and other vulnerable people in Bangladesh, who have lower income and higher demand for legal aid, are the most deprived from government legal aid services in Bangladesh.[29]

Table 2: Percentage of government legal aid channelled to family cases (2006)

	Dhaka		Narayanganj		Mymensingh		Total	
	Number	%	Number	%	Number	%	Number	%
Percentage of government legal aid to family cases	139	5.3		0.8		11	4.6	
Percentage of government legal aid to other civil cases	105	0.4		0.8		8.5	0.9	
Percentage of government legal aid to criminal cases	2482	94.3		98.3		80.4	94.5	
Total								

Source:*Unpublished data from district legal aid committees in Dhaka, Narayanganj and Mymensingh*

Insufficient provision of government legal aid affects family court clients even more because, as is evident from Table 2, in all three districts, almost all government-provided legal aid is allocated to criminal cases.

Legal aid from NGOs: A number of NGOs provide legal aid to the poor. '*While the general focus is on providing legal support in civil cases…[the]nature of disputes centred generally around matrimonial issues like, divorce, non-maintenance, non—*

27 See LJCBP above n. 24.
28 Ibid42.
29 Ibid.

payment of dower, child marriage, dowry, and polygamy'[30]. Research data reveal that legal aid granted by various leading NGOs in Bangladesh is not high enough to satisfy the demands. For example, according to the data collected from BLAST, BNWLA and ASK,these leading NGOs granted legal aid to203, 82 and 85 cases respectively or a total of 370 family cases in *Dhaka* district. A comparison of this figure with the total 2,632 new family cases filed in *Dhaka* district in 2006 indicates that leading NGOs provide legal aid to 14.1 per cent cases. A study of LJCPB on legal aid recipients from government and non-government sources concluded that aid recipients from these two sources do not overlap by any considerable degree[31]. Therefore, there is no possibility to increase the number of aid recipients by relocating the fund more equitably to avoid overlapping.

Table 3: Availability of legal aid and different rates of disposal

	Dhaka	*Narayanganj*	*Mymensingh*
In-Court			
Ex parte	35.0	39.0	22.0
Dismissal	32.0	42.0	47.0
Sub-total of *ex parte* and dismissal	67.0	81.0	69.0
Resolved through litigation or in-court mediation	33.0	19.0	31.0
Cases covered under govt. legal aid	2.6.0	0.8	1.3.0
Cases covered under NGO legal aid	14.1	6.2	19.4.0
Cases covered under government and NGO legal aid	16.7	7.0	20.7
Out-of-Court			
Parties never come again (absent)	26.3	43.7	12.5

Source:Court and NGO registries of Dhaka, Narayanganj and Mymenshing districts.

As indicated in Table 3, the availability of legal aid could affect the nature of resolution in family courts. To be specific, the number of cases resolved *ex parte* declined as the availability of legal aid increased. For example, family cases in *Narayanganj* received less legal aid from NGOs and from government sources (Table 4). This could be one reason why the per centage of *ex parte* cases is higher in *Narayanganj* (Table 4) than in *Dhaka* and *Mymensingh* districts. As shown in Table 4, the higher the rate of legal aid from government and NGOs, the lower the number of cases which are settled through *ex parte*. Though the issue cannot be addressed by the data collected under paper, one reason for the negative relationship

30 See Nusrat, above n. 24, 66.
31 See LJCBP, above n.24.

between the availability of legal aid and lower rate of *ex parte* decrees could be that husbands take litigation more seriously when they perceive that, by means of legal aid, their wives have gained the capacity to contest through litigation. This results in a husband making the required payments to his wife. NGO legal aid also increases the abidance to mediated agreements. Sometimes merely the knowledge that a legal aid case is the next step is sufficient to make parties voluntarily comply with a *shalish* agreement[32]. Therefore, provision of legal aid is often described as the *'teeth'* of mediation efforts[33].

Table 4: Family cases receiving legal aid from NGOs (2006)

	Dhaka		*Nrayanganj*		*Mymensingh*		Total for three districts	
	Total	%	Total	%	Total	%	Total	%
Total cases filed in family courts	2632	100.0	354	100.0	701	100.0	3687	100.0
Cases filed by BLAST	203	7.7	20	5.6	114	16.3	337	9.1
Cases filed by BNWLA	82	3.1	2	0.6	22	3.1	106	2.9
Cases filed by ASK	85	3.2	*	0.0	*	0.00	85	2.3
Three NGOs together	336	14.0	22	6.2	136	19.4	528	14.3

Source:Unpublished data from legal cell of BLAST, BNWLA and ASK
** Indicates no operation in that area*

Because of its scarcity, legal aid funding from government and NGOs might not have any significant positive impact on the number of cases proceeding through litigation. In 2006, only 2.6 per cent of family cases received legal aid from government sources, while 14.1 per cent of family cases received legal aid from leading NGOs providing legal aid to their clients. Thus, only 16.7 per cent family dispute cases of *Dhaka* district are covered by the legal aid schemes of the Government and the other three leading NGOs in the country in 2006. This indicates that more than 80 per cent of total family court clients may not have access to either government or NGO provided legal aid and may be '*denied equality in the opportunity to see[k] justice as envisaged in our Constitution*'[34]. Under this circumstance, legal aid fails to relieve the excessive cost of proceedings in the family court. However, recently government has taken initiative to widely circulate the information on availability of legal aid among prospective beneficiaries online[35].

32 The Asia Foundation, *Access to justice: Best practices under the Democracy Partnership* (The Asia Foundation, Dhaka, 2002).

33 Rana P. Sattar, *Existing ADR framework and practices in Bangladesh: A rapid assessment* (Bangladesh Legal Reform Project, Dhaka, 2007).

34 See Nusrat, above n.24.

35 BD News24, (2016) PM Hasina launches national helpline for free legal aid, 28 April; <http://bdnews24.com/bangladesh/2016/04/28/pm-hasina-launches-national-helpline-for-free-legal-aid> accessed 22 Aug 2016>; See more on, State sponsored legal aid for those in

Access to Public Interset Litigation: A Form of Collective Access to Justice

The judiciary of Bangladesh is increasingly assuming an impressive role through liberal interpretations of procedural rules and various laws for a better regime of social justice of what is known as *'judicial activism*.' Public Interest Litigation (PIL) has emerged as a pivotal instrument of such judicial activism in the South Asia. According to the traditional standing rule, judicial redress is only available for persons who have suffered a legal injury by reason of the violation of their legal rights by the action of the state or of a public authority. For the last three decades, the courts of these countries have relaxed the Anglo-American standing so that it has become easier for litigants to initiate class actions. PIL has been developed in Bangladesh through judicial activism in order to establish collective rights of people. PIL attempts to ensure access to justice to the socially and economically disadvantaged, deprived and exploited sections of the people who are unable to seek remedy through court due to various resource constraints. PIL has led the way for expansive interpretation of the procedural rule of *locus standi* and has also opened up the judicial system for those who, otherwise, would have been restricted in terms of access to judicial remedies for violation of their rights. Thus, the initiation of PIL that *'led to the demise of the principle of standing reflected a paradigm shift from the conventional role of judiciary as adjudication of disputes to as a vehicle for the delivery of social justice.'*[36] The shift was from purely legalistic justice to social justice. In Bangladesh, PIL is being conducted in many fields including the promotion of human rights, protecting environment, and preserving historical sites.

Bangladesh, like many other developing countries, is facing multitude of environmental problems, such as air pollution, hazardous waste, land degradation, water pollution etc. Pressure of rising population, rapid industrialization, urbanization and agricultural development has largely contributed to the environmental degradation in Bangladesh. Legislation is by far the most effective instrument to protect environment. Bangladesh has large number of environmental legislations and many laws containing provisions on environmental protection. In Bangladesh, there are about 180 laws, which deal with or have relevance to environment[37]. Apart from statutes, Bangladesh has also well-developed

---

need, (2014) Dhaka Tribune, May 1, <http://archive.dhakatribune.com/ juris/2014/apr/30/ state-sponsored-legal-aid-those-need> accessed 23 Aug 2016.

36 Abdullah Al Faruque, *Judicial Activism and Protection of Environment in Bangladesh: A Critical Appraisal*, p.1, Available at www.culaw.ac.bd.com, Accessed on 18 March, 2016. *See also*; Amirul Islam, A review of Public Interest Experience in South Asia in Sara Hossain et al (eds), *Public Interest Litigation in South Asia*, the University Press, Dhaka, 1997, p.56.

37 Mahbubul Islam, *Defending Human Rights through Public Interest Litigation: Role of Human Rights Activists in Bangladesh*(January 2015)<http://www.hrpb.org.bd/images/PDF_File_%20RPB/Advocate%20Mahbubul%20Islam. pdf>accessed 22 January 2016.

environment policy and many sectoral policies which have relevance to the preservation and conservation of environment.The courts had taken responsibility for upholding the historical sites and national monuments. For instance, regarding the *ShaheedMinar*, the court asked government to take steps so that functions and meetings are not held in the *bedi* or main part[38]. The courts have had to order for the protection of *Lalbagh Fort*, a historic site on which multi-storied buildings have been constructed. Scholars observed the rise in PIL as a healthy trend. *"It is a part of the process of a growing democracy, encouraging rule of law and governance…Every new democracy as it appears has gone through the process; for example, in India, the role of PIL has reached its Zenith"*[39]. Therefore, a good trend of PIL in Bangladesh indicates possibilities to use this avenue for enhancing access to justice to its people.

Access to Alternative Dispute Resolution: the Third wave Enhancing Right to Acess to Justice to the Poor

As mentioned earlier, access to justice is affected by the complexity of a dispute resolution system or the general level of understanding on the system by its beneficiaries. Complexity of the formal court system makes its procedure most difficult to poorly educated, illiterate women who are most ignorant to this system due to their usual presence behind the four walls of their home. It has been shown that women do not understand what is happening and they, therefore, do what their lawyers tell them to do. Once the dispute reaches the lawyers, they take control and parties just follow their instructions. This turns the matter of dispute from a difference between two laymen to lawmen (i.e. a battle between two well-trained professionals who are arguably motivated primarily for enhancing their financial gains)[40].

An earlier study in Bangladesh indicates that, in terms of the complexity of process, women in Bangladesh feel much more comfortable with Alternative Dispute Resolution (ADR) than with litigation.[41] In several focused group discussions conducted with the family court clients of two districts, *Kishorganj* and *Netrokona*, it was unanimously agreed by the participants (women) that they did not understand the court procedure; and had to depend completely on the lawyers from the

38 Ibid.

39 Julfikar Ali Manik and Shehreen Islam; The Courts to the Rescue; *Forum, Vol 3, Issue 11, Nov 2010 <http://archive.thedailystar.net/forum/2010/November/court.htm>*accessed 22 January 2016

40 Formanul Islam, *The Madaripur model of mediation: A new dimension in the field of dispute resolution in rural Bangladesh* (unpublished research paper, 2002).

41 See Chowdhury, above n.7.

beginning to end of the process[42]Therefore, considering the long-standing backlog in civil courts, relatively simple and easily understandable process of ADR, and widely recognized benefits of quicker resolution through ADR, law makers in Bangladesh inscribed a provision for in-court ADR in many laws in Bangladesh including the *Family Courts Ordinance* (FCO)*1985*. According to ss. 10 and 13 of the FCO, family courts have to conduct mediation to resolve family disputes[43]. Though the provision of mediation was present in the FCO, since its initiation in 1985, the family court judges had hardly used this provision in Bangladesh. One of the main reasons behind such reluctance to use mediation was the lack of motivation of the concerned judges towards the practice of mediation in family disputes. Further, judges of family courts were also reluctant to use mediation because they were much acquainted with an adversarial system. It has been observed that mediation was not well practised in family courts prior to the reformed ADRmovement in 2000 – no attempt was made either to train judge-mediators with the art of mediation or to encourage them to use mediation to resolve family disputes[44]. Therefore, attempts were made to incorporate mediation in the family courts in a more systematic, improved way. Such developments were made with the co-operation of the Institute for the Study and Development of Legal Systems (ISDLS)[45] of the USA.

---

42 Ibid.

43 Section 5 of the FCO provides that subject to the provisions of the MFLO, the family court shall have exclusive jurisdiction to entertain, try and dispose of any suit relating to, or arising out of, all or any of the following matters, namely: (a) dissolution of marriage (b) restitution of conjugal rights (c) dower (d) maintenance (e) guardianship and custody of children.

44 KM Hasan, 'A report on mediation in the family courts: Bangladesh experience', (paper presented at 25th Anniversary Conference of the Family Courts of Australia, Sydney, 26-29 July 2001) 8.

45 ISDLS initiatives seek to help the foreign country-partners to address the problems of the formal judicial system and to make procedural reforms with the help of their legal communities and models that have been successful in other parts of the globe. ISDLS bases most of the study components of its civil justice reform collaborations on studies of the California civil court system, where, due to utilization of mediation and case management, only 1% of civil cases goes to full-trial and thus is considered in the forefront of procedural civil justice reform. In all ISDLS projects, foreign legal groups study the techniques and litany of the alternative to litigation utilized in California. As a part of their study program, Bangladesh Legal Study Groups (BLSG) met attorneys, judges, mediation professionals and law professors who were experts in mediation in California. Based on what the BLSG learnt from mediation techniques in California, they returned to their home country to apply the learning by way of designing a model or reform the existing judicial model of the respective country that consisted of their own unique cultural and legal environment. Not only this, ISDLS visit the foreign country-partners to observe what they learned or to assist their reform proposals as needed by the BLSG. The ISDLS successfully reforms civil justice system in many countries in the world.

To popularise mediation, in November 1999 Steve Mayo, Executive Director of ISDLS, Judge Wallace Tashima, and Mr. Jeffery Ranchero came to *Dhaka* to explore the operational procedure and to determine the practical problems on the procedural formalities of formal courts in Bangladesh[46]. In January 2000, a trip by Judge Clifford Wallace to *Dhaka* finalised the selection of a five member Bangladesh Legal Study Group (BLSG) under the leadership of Justice Mustafa Kamal, the former Chief Justice of Bangladesh, to address the problems of backlogs and delays in the court system of Bangladesh. In February 2000, the BLSG visited San Francisco, to attend an intensive ten-day training session[47]. Later, in the first week of April 2000, ISDLS brought a team of US Judges and lawyers as well as Justice Jilani of the Lahore High Court to *Dhaka* to conduct a workshop to demonstrate the methods examined by the BLSG[48]. Finally, after a year-long intensive study by the BLSG in collaboration with American experts from ISDLS, an historic first in Bangladesh, the '*pilot reformed family courton mediation'* was introduced in three family courts in *Dhaka*in June 2000. Additionally, some other techniques were adopted to promote mediation in the family courts. These were briefly as follows:

Mediation by trained judges*:* In Bangladesh, family court judges conduct in-court mediation. Since the success of mediation in the family courts largely depends on the family court judge-mediators, training of judges on mediation was conducted at the initiative of the Ministry of Law, Justice and Parliamentary Affairs, Government of People's Republic of Bangladesh and with the assistance of the American Centre, and the USA Embassy, *Dhaka*, Bangladesh. Initially, a mediator of the US Court of Appeal gave the training in an intensive manner[49]. Since then, training in mediation has been given from time to time[50] by the pioneers and legal experts of mediation in

---

46 Mustafa Kamal,'Alternative dispute resolution' in W.Rahman and Shahabuddin (eds), *Judicial Training in the New Millennium* (Bangladesh Institute for Legal studies and International Affairs, 2005) 124.

47 Ibid.

48 Ibid.

49 KM Hasan'Mediation in the family courts: Bangladesh experience' (Paper presented at the First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1-3 November 2002) 128.

50 Inspired by the success of the pilot project under *Dhaka* judgeship and the training of 36 participants by Mediator Mr. Robert W. Rack, some other 15 Assistant Judges and an equal number of lawyers in addition to the previous 36 participants, were intensively trained for 2 days from 18th October to 19th October, 2000 in *Dhaka*. The training was provided by Mr. Justice Mustafa Kamal. After several training programs in mediation techniques in *Dhaka* district, attention was given to other districts. For example, some two or three days training in mediation were given to the Assistant Judges, lawyers of the Northern Division in *Rajshahi* and *Sylhet* Divisions and of Southern Division of *Khulna* and *Barisal* districts and *Chitagong* district. This training was provided under the able and inspirational guidance of the former Chief Justice Mustafa Kamal, together with Mr. Justice Anwar-ul-Haq and Mr.

Bangladesh, including the former Chief Justice of Bangladesh[51] and the sitting judges of both High Court Divisions and Appellate Division of the Supreme Court[52] – purely on a voluntary basis. Since it is believed that in every dispute there exists a point where the parties can be brought together, and thus they can be assisted to reach agreement, judges are trained in how to find that point of settlement, thereby enabling them to quickly resolve the dispute. The judges are also trained to enhance their role in convincing the parties to come into mediation by focusing on mediation's benefits, as opposed to promoting the full litigation procedure. Reportedly, because of the training of judge-mediators, it appears that the success rate of mediation in family courts have become significantly higher.

Training of lawyers and NGO representatives:Since lawyers and NGO representatives continued to be a part of the success of this process, training programs also included representatives from these groups. The training covered motivational technique, and touched on the earning-potential that exists for lawyers promoting mediation. It is the lawyers in the society upon whom the clients mostly depend for resolution of disputes. The training was aimed at convincing lawyers that the quicker a case leaves their *sheresta* (chambers) by way of final disposal, the more the concerned lawyers will gain trust and good-will amongst the clients – which will automatically provide them new cases[53].

Removing disincentives to use mediation: Taking into account that more time is spent to resolve cases through mediation, the initial challenge was that the judges received no credit for cases resolved by mediation. This was put to the then Chief Justice, and Law Minister who were ultimately persuaded to make an amendment to the performance measures of the judges of the family courts[54]. Consequently, a decision was reached that for every successful mediation case, the judges concerned would get two credits i.e. equivalent to the holding of two litigation cases; and for every two failed mediation cases, they would get one credit. A government circular to that amendment[55] was issued accordingly[56]. Thus, one of the initial problems prior to the year 2000 had been solved successfully to the satisfaction of the judges[57].

AKRoy then Deputy Secretary of Ministry of Law. Moreover, sometimes the training sessions were inaugurated by the Minister of Law to apprise the audiences of the progress of mediation in the family courts of Bangladesh.

51 Justice Mustafa Kamal, the former Chief Justice and the Chairperson of the 5-member BLSG constituted in 2000 for adopting the reformed mediation techniques in Bangladesh.

52 Justice KM Hasan, the then most senior Judge of the High Court Division and one of the members of the 5 of BLSG visited California in 2000.

53 See Hasan, above n. 49, 129.

54 All Assistant Judges are ex-officio presiding judges of the family courts in Bangladesh (s. 4(3) of the FCO 1985).

55 It was also provided in the amendment that such amendment would be enjoyed by all of them, whether they would preside over a pilot court or not.

56 See KM Hasan, above n. 49 130.

57 Ibid.

Another problem was that the judges were only being involved in mediation procedures during court hours. This was also resolved by the Ministry of Law and Parliamentary Affairs, after a discussion with the judges, with one conclusion reached that time management would be the best solution to this problem[58]. The judges of the family courts were allowed to split their time between mediation and the other responsibilities of their ordinary litigation cases so that their time was not wasted, and their credits, which are directly related to their professional career, were not affected adversely[59].

Legal enforceability of the disputes settled through in-court mediation:Prior to the year 2000, mediator-judges used to mediate cases following their own individual methods to a certain extent, and if a settlement was reached by mediation, no further steps were taken to formalise the methodology for settling disputes[60]. So, the judges were directed to follow a uniform method and asked to pass a 'compromise decree' once the settlement was reached. Under this method of mediation with a definite compromise decree, unlike ordinary litigation cases, there is neither a possibility of a settled case being revived, nor any chance of appeal or further proceeding of execution[61]. In other words, once the mediation settlement is reached and the family court passes a compromise decree, the case is finally disposed of and no appeal can be preferred[62]. This is a short and easy procedure for finalising mediation agreements, with the decree having a legal enforceability by the court.

Finally, after necessary adjustments and amendments to the initial model, family court mediation began to achieve good results. By the fall of 2000, the reformed model was deemed successful with 40 per cent of total cases resolved through mediation.[63] Family court mediation attained a remarkable success in reducing the backlog of formal courts all over Bangladesh[64]. The success of pilot family courts was also found to be remarkable in attaining a higher rate of recovery of decree

---

58 Ibid, 130-31.

59 Ibid, 130.

60 See Kamal, above n. 46, 131.

61 See Hasan, above n. 49.

62 See Hasan, above n. 49, 131.

63 Observing the success of mediation in family courts, separate provisions for mediation have been specifically enumerated in many other laws including the *Code of Civil Procedure, (amendment) Act 2003* ; *Code of Civil Procedure, (amendment) Act 2006*; *Code of Civil Procedure, (amendment) Act 2012*; *Arbitration Act, 2001* (Act I of 2001); *Muslim Family Laws Courts Ordinance, 1961* (Ordinance VIII of 1961) ; *Family Courts Ordinance, 1985* (Ordinance XVIII of 1985); *ArthaRinAdalatAin (Money loan Courts Act) , 2003* (Act XIX of 2003); *Money Loan Courts (Amendment) Act, 2010*; *Village Courts Act 2006 (Act XIX of 2006)*; *Dispute Settlement Board Act 2010*; *Labour Act 2006; Income Tax Ordinance 1984* (Finance Act 2011); *Value Added Tax (amendment) Act 2012*, *Bankruptcy Act 1997*; *Child Act 2013*; *Maintenance of Parents Act 2013*; *Legal Aid Rules 2015*.

64 See Hasan, above note 44, 2; See also Kamal, above note 46, 12.

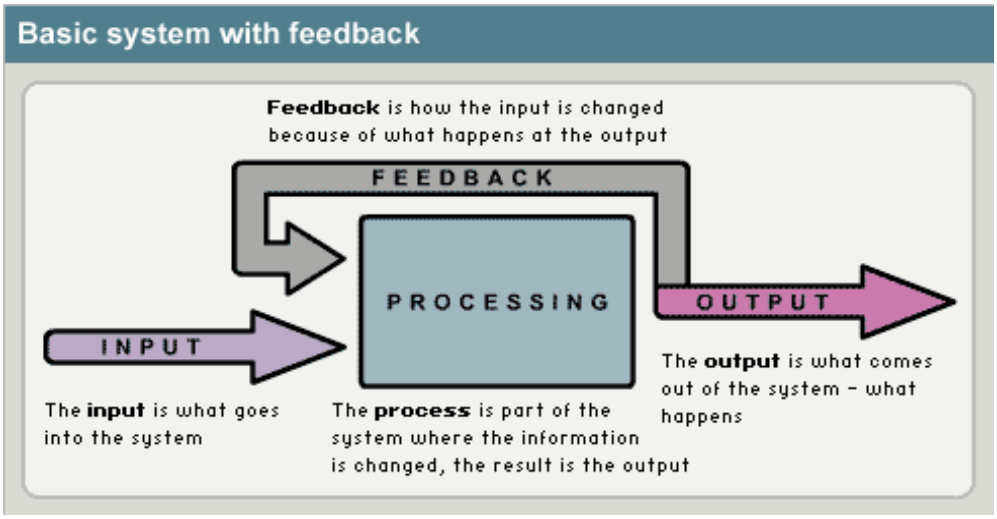
money through mediation[65]. By 2002, the continuing rate of success prompted the World Bank to sponsor[66] the expansion of the reform movement to most of the courts across the country.

However, in many cases performance of ADR is discouraging. The next section thus looks at how a consolidated system approach incorporating all three waves may be applied to improve the situation.

The System Approach To Provide Access To Justice: A Call For Consolidated Action

A system is any set of distinct parts that interact to form a complex whole.[67] For instance, think of the universe; Its parts are as small as subatomic particles and as large as galactic clusters. Each part is distinct but interacts to form the universe. Systems theory treats an institution as a system.[68] A system can be either closed or open, but most approaches treat an institution as an open system that interacts with its environment by way of inputs, throughputs and outputs. Therefore, both inputs from external environment and processing inside the system is important in a system that generates output and feedback for further development of the system.

Figure 1: System approach in an open-end system



65 See Hasan, above n 44, 10.

66 The World Bank provided Bangladesh with a $30.6 million loan to modernise and reform the legal and judiciary system in Bangladesh under the 'Legaland Judicial Capacity Building Project'. The project seeks to support efforts to enhance the quality and cost-effectiveness of the legal, regulatory and institutional framework for private sector development.

67 Michael C. Jackson, *Systems Approaches to Management* (Kluwer Academic Publishers, 2002).

68 Mats Olov Olsson and Gunner Sjostedt 'Systems and Systems Theory in Mats Olov Olsson and Gunner Sjostedt (ed), *Systems Approaches and their Application* (Kluwer Academic Publisher, 2004).

If we consider the in-court mechanism of dispute resolution through ADR as a system, lawyers' non-cooperation or lack of motivation for quick disposal of cases through ADR, as discussed above, is an internal lacuna that slows down the process. On the other hand, a lack of linkage between out-of-court settlements with in-court deprives the system to benefit from quick disposal of cases through out-of-court settlements. These restrict the system to receive an input that may enhance its effectiveness. On the other hand, as widespread gendered power disparity restrainsmany to seek effective remedy at court, better availability of legal aid may have remedied many of these problems. However, government legal aid service is functioning poorly in our country. Though NGO legal aid is operating much effectively in the country a lack of linkage between government legal aid funds with NGO legal aid operation put a restrain on the functioning of NGO operated legal aid schemes. The following sub-sections highlight how the system of providing access to justice can be improved by enhancing the internal efficiency as well creating better linkages with external factors. However, before discussing specific issues for development, the next sub-section discussesabout the indispensable role of lawyer's for the development of the access of justice through ADR.

Pathways to Instigate the System Approach: Process and Input

Promoting Thepro-Activerole of Lawyers: Optimizing the Process

Delay in court proceedings increases cost and involve a complex matter. It has been argued that the conduct of lawyers contributes to it. There are indications in literature that lawyers may not expedite resolution of cases by mediation[69]. The former Chief Justice K. M. Hasan also asserts that '*the lawyers and bar council should change their mindset and come forward to strengthen the mediation system in the judiciary*'[70]. There seems to be a possibility that lawyers may not regard mediation as financially beneficial for them. However, existing literature in Bangladesh does not address this issue with empirical evidence. This paper takes an attempt to confirm this issue. During interviews, the tendency of lawyers to make unnecessary time petitions was highlighted by many family court judges as contributing to such delay. Therefore, most of the judge-mediators prefer direct interaction between parties in settling disputes and to minimise the involvement of lawyers. It is widely identified by family court judges that they are not getting

69 See Kamal, above n.7, 12.

70 KM Hasan,'ADR can ensure speedy justice for poor litigants', *The Daily Star* (Online), 23 April 2008.

sufficient cooperation from lawyers[71]. Sometimes lawyers do not want to cooperate with the quick resolution of dispute that may be attained through ADR, because of a fear that quick disposal will create a loss of their business revenue[72]. Such kind of non-cooperation from the lawyers is one of the hindrances in the success of ADR in Bangladesh. However, most of the policy makers who are in a position to promote ADR in Bangladesh have failed to make lawyers understand that as the existing court system is struggling against a backlog of half a million cases, by promoting the use of ADR and quick disposal of cases, lawyers would be able to get many new cases in their list and ultimately they will be benefited financially. Further, a reduction of disposal time may bring in more cases from those disputants who were not willing to come to court earlier in fear of its lengthy process.

In Bangladesh, it is not surprising that fees for lawyers are overwhelming for the poor. Furthermore, sometimes costs are exacerbated due to delay. As the disposal of cases is delayed, total charges paid to the lawyers increase with consecutive court appearances. An increased number of court appearances also involve higher costs that litigants have to pay for their lawyers in case of settlement their cases through trial. Therefore, lawyers were asked to indicate what they usually charged their clients to resolve their cases through mediation and litigation. Results from a questionnaire survey among lawyers conducted by Chowdhury[73]indicate that in the case of litigation, more than 50 per cent of the clients have to pay lawyer's fees exceeding BDT 10,000, while none of the cases resolved through mediation required lawyer's fees of more than this amount. On the other hand, 95 per cent of in-court mediation can be resolved with lawyer's fees less than BDT 5,000, whereas in the case of litigation, only 23 per cent of cases can be resolved with the lawyer's fees not exceeding BDT 5,000. A more than 50 per cent cost savings in ADRincomparison with trial cases has also been acknowledged by Gold[74].

Further, in a survey[75] conducted for the Transparency International, Bangladesh, regarding the expected time for settlement of pending cases, 78% of the

---

71 Jamila A Chowdhury,'Women's Access to Fair Justice in Bangladesh Is Family Mediation a Virtue or a Vice?' (unpublishedPhDthesis, University of Sydney2011).

72 See Chowdhury, above n 7.

73 See Jamila, above n. 71.

74 Lois Gold 2009. *The healthy divorce: keys to ending your marriage while preserving your emotional well-being*, Sourcebook Inc., Illinois, 224.

75 *"Survey on Corruption in Bangladesh"* conducted for the Transparency International Bangladesh by the Survey and Research System, Dhaka, Bangladesh with the assistance for the Asia Foundation, Bangladesh. The survey was divided in to two phases. Phase I consisted of a 'pilot study' to ascertain the nature, extent, intensity- wherever possible, of corruption, and the places where corruption occur. In the pilot study, a small scale national household survey was undertaken to obtain information on public services performed on six

accused/plaintiff reported that they were uncertain about the period when settlement would be reached and about 75% of them reported that delays in reaching settlement is deliberate and due to lawyer's business interest, 34% opponents ill motive and manipulation and 30% courts high handedness. Most cases that go to the courts remain unresolved for years because of a backlog of cases. Such delay is one of the reasons that discourage the plaintiff not to enter into the formal court process for about two-thirds of the disputes in total.[76]

Further, lawyers consider access to justice in term of 'rights' and not in term of 'interests', the objective of a lawyer in an adversarial trial system is not to find the best solution for clients but to 'win' the case. To attain this objective, lawyers from both sides try to place that evidence that support their claim and suppress that evidence that might strengthen the claim of the other party. In one survey conducted by *Transparency International, Bangladesh*[77], hiring witnesses was reported by 19.8 per cent of the households involved in litigation. 28.6 per cent of urban households are markedly higher than the 18.9 per cent of rural households hiring paid witnesses. This type of fabricated witness can destroy any remnant of faith and honor remaining between the parties for each other. Their primary objective appears to be one of simply getting rid of their opponent rather than of making any amicable or fair settlement. Therefore, the system of ADR that avoid this kind of hostile process has greater potentiality to attain a win-win solution that better satisfies the interest of parties. Furthermore, in contrast to a lawyer dominating adversarial system, where lawyers control the content of a dispute, ADR provides parties an opportunity to effectively control the content of their dispute.

It is already mentioned in that the trials under the formal court usually take years in which one of the most crucial factors that promotes the protracted long trial procedure is the payment mechanism to lawyers. Generally, in our country, fees of lawyers are paid part by part, depending on the number of presence of the lawyers before the judges, for example hearing or argument etc., of the cases throughout the trial till they end. Thus, there was an initial and usual fear regarding the adverse effect on the fees of lawyers, if cases are quickly resolved by mediation. That means, quick mediation process will automatically reduce their number of presence before the judges for hearing of the cases, etc. on which their payment of fees by the client depends. Further, lawyers rarely make settlement out-of-court when a case is ongoing through in-court mediation. In response to a question,[78] all of the in-court mediators interviewed denied the possibility of any out-of-court settlement when a case is ongoing through in-court mediation. It seems that lack of will, particularly from the part of lawyers, and the absence of a coordinated scheme to schedule and

---

different sectors among which judiciary sector deserves a particular mention. Phase II consisted of a large scale survey to provide baseline information on corruption.

76 United Nations Development Program (UNDP), *"Human Security in Bangladesh: In Search of Justice and Dignity"*, Dhaka 2002, p.9.

77 See Transparency International, above note 75.

78 See Jamila, above n. 7.

finish the trial of cases within a time-limit[79] are the main reasons for delay in disposal of cases. In fact, delay in *"our judiciary has reached a point where it has become a factor of injustice, a violation of human rights. Praying for justice, the parties become part of a long, protracted and torturing process, not knowing when it will end"*[80].In Bangladesh, the formal legal process is so complex that the majority of the people, especially the poor and disadvantagedunderstand absolutely nothing about it. They often feel alienated from the entire process from beginning to end with tense, afraid and anxiety about the outcome of the case etc.[81]

In the process of adjudication, parties lose control not only over the dispute but also over the whole process. Once the dispute reaches to the lawyer, s/he takes control over the dispute. The parties have to follow the instructions provided by their lawyers. As Islam rightly cites in his unpublished research, *"the matter in dispute turns from a difference between two layman to a battle between two well-equipped, well-trained and hard fighting professionals, who are motivated not only by the prospect of financial gain but also enhancing their reputation, goodwill and personal image."*[82] Any communication between the parties is cut-off according to the advice of the respective lawyers. At last, when the judge gives his/herjudgment it is seen that only one party has won the case becoming a victor while the other turns into the vanquished losingeverything.Some initiatives were taken earlier to motivate lawyers to act pro-actively and promote quick justice through ADR including:

Direct Involvement of Lawyers in mediation procedure: Initially, there was a usual fear or suspicion on the part of the lawyers regarding the adverse effect on the fees of lawyers, if the case is quickly resolved by ADR. Considering the interest of the lawyers on the one hand, and promotion of the practice of ADR on the other, it was felt that lawyers should be directly involved in ADR techniques through the–

I. involvement of lawyers in the training in mediation; and

II. enhancement of the participation of the lawyers in the whole mediation procedure.

Involvement of Lawyers in the Training in Mediation: It was importantly felt that training is imparted to the lawyers as they are the one on whose advice litigants rely

---

79 Most of the laws in Bangladesh lay down merely for a time- limit to be observed but does not provide for the ancillary roles and systems. There is no organized office to oversee whether these time limits are maintained.

80 Dr. Shah Alam, 'A possible way out of backlog in our judiciary', *The Daily Star* (Online), 16 April 2000<http://archive.thedailystar.net/suppliments/2010/02/ds19/segment3/delay.html> accessed 15 June 2016.

81 NadjaSpegel, Bernadette Rogers, and Ross Buckley 1998, *Negotiation: theory and techniques*(Butterworts, 1998).

82 See Formanul Islam, above n. 40.

most. It was further felt that without their co-operation the success of resolving disputes through mediation, will not come into reality. That is why, they were also selected as the same numbers as judges selected in all training in mediation those were conducted in 2000 during the reformed ADR movement in Bangladesh. The aim of such training has been to dissipate their fear of loss of cases, financial hardship and above all suspicion of a new method of dispute resolution and to give assurance that the new method of mediation in the family courts will not adversely affect them financially but will open up new horizons for them.[83]

Enhancement of the Participation of the Lawyers in the Whole Mediation Process: Another innovation is the direct involvement of the lawyers in the ADR techniques from the beginning to end. Generally, under the ADR system presently practiced in the civil courts, two lawyers of the litigants draft the language of the compromise decree. It helps the judges to spend more time in their other ordinary judicial responsibilities and not spending time in drafting the compromise decree, which the lawyers can do well. At the same time, if the compromise decree is drafted by the lawyers, it helps the party to put all the terms of their agreement according to their consensus, avoiding all kinds of ambiguity in it. Further, by doing this, lawyers' roles cannot be limited only up to the settlement by the parties but also be extended after the settlement by directly involving the lawyers up to the finality of the compromise decree. Accordingly, they will be more interested to involve themselves in the mediation process.

Effective Motivation Techniques in Training Lawyers:The motivation technique is also applied for the lawyers who became the best admirers of ADR. It is the group of lawyers upon whom the clients depend most in case of their resolution of disputes. So, it was emphasized in the training during the reformed ADR movement in Bangladeshthat lawyers practicing in the family courts are the best pillars of strengthening mediation in the family courts. The training tried to convince lawyers that the earlier a case goes out of their *sheresta* (chamber) by way of final disposal, the more the concerned lawyer will gain trust and good-will amongst the clients which will automatically afford him/her new cases. The training of the lawyers in mediation during that time was intended to rebut the traditional approaches that *'lawyers like to pile-up cases in their chambers for years'*; *'they do not admire a quick resolution of a dispute because of the chance of losing income'*; *'the quicker a case goes out of their chambers, the lesser is their income'* . The training focused on the public-spirited motive of the lawyers that will attract more litigants to come under the umbrella of informal justice providing speedy and less expensive justice

83 See Hasan, above n. 44, 6.

for them through mediation, who otherwise would not have dared to come to the court premises.

In-Court and Out-of-Court Linkage Possibilities: Deepening Inputs

Out-of-courtNGOclients do not get any legally binding decree, as NGO *shalish* is voluntary. Eventually, anyagreement made under NGO*shalish*may not be abide by defendant husbands, and aggrieved wivesneed to file their cases in formal courts. Abidance of NGO *shalish* by defendant husbands depends on the stringent and prompt punishmentthat they may expect under formal trial. However, if mediation agreements made through NGOs can be summarily reviewed by formal courts to provide a legallybindingforce, rate of abidance to NGO *shalish* may increase due to an expectation from husbands that NGO mediation agreementscannot be ignored at their discretions. Thus,to strengthen the execution of NGO *shalish*, whilereducing backlog of cases in formal court through accelerated out-of-court resolution, a linkage between out-of-court and in-court mechanisms would be beneficial for both the settings. The ultimate benefit goes to mass women seeking justicethrough NGOs. The following section discusses a variety of such linkage possibilities between informal NGO *shalish* and formal court processes in Bangladesh.

Channeling Disputes in Civil Courts through NGOs: As discussed above, the first linkage possibility between in-courtADR and out-of-courtADR (i.e. NGOs providing mediation services)can be attainedbyreferring NGO mediation agreements to civil courts. Channeling disputes through NGOs will reduce the pressure on formal courts;becauseonly those cases will be filed in the courts thatNGOs are not able to resolve out-of-court. Further, when a poor defendant getswidespread support from NGOs to contest their cases informal courts, it gives a message to their counterpartsthat poordefendants are not vulnerable anymore and can access formal justice against them with all kinds of supports from respective NGO, if required. This type of awareness will ultimately reduce the repression thatpoor and women suffer*in general,*and increase the effectiveness of NGO *shalish*, in *particular*.

Giving LegalEffect to the Documents Prepared by NGOs during *shalish*: Now-a-days,increasing numbers of civil case-clients, especially family case-clients, are experiencing NGO *shalish* before coming to the formal courts. However, as discussed earlier,if the defendant husbands do not abide by *shalish*agreements and women have to go to family courts, courts have to start all the process of a dispute resolution from the very beginning (e.g. issuing summon, hearing the parties, in-court mandatory mediationetc.), although manyof these processes were followed during NGO *shalish* to mediate the same dispute. As a result, the time, energy and money spent by NGOs to mediate disputeswent in vain, only because the agreement

made through NGO *shalish* does not have any legal enforceability. To thrash this problem, one possible solution could be the writing of NGO *shalish* agreement on a non-judicial stamp, so that even if parties have to go to court due to anon-abiding attitude of defendant husbands, this legaldocument could be produced at family courtto ensure further legal step.

Providing CourtDecree on Out-of-court mediation: As experienced in Japan,[84] sometimes couples decide the terms of divorce and register their agreement with proper authority assigned under law. In Bangladesh, many family disputes are also settled by the couples themselves or with the help of their family and relatives but there is no system in the country to legalize these amicable settlements to give them proper legal effect while the parties are unwilling to go to court for avoiding unnecessary harassments. Thus, government may consider opening an office to register these amicable settlements either in family court or outside. Provision may also be made for the family court judges to make a hearing on such petition and issue a decree that the parties have made such agreement voluntarily and with full understanding of the consequences thereof.

To give NGO*shalish* a robustlegal effect, NGOs can also go to formal court and apply for a decree in support of the *shalish* agreement by submitting the entire related documents prepared during NGO *shalish* to the court and by registering a case number in it.After getting such application, court can issue a date on which it will hear from both the parties and ascertain that whether a just *shalish*or fair agreement has been made with the free consent of both the parties. After making such hearing, the court can issue a decree on the agreement made. This will certainly increase the effectiveness of NGO *shalish* by giving its legal enforceability. This practice is nothing but a simple variation of similar practice in other developed countries[85].

C. Government-NGO linkage to provide legal aid: Availability of legal aid could be an important factor to enhance access to justice in Bangladesh. Since the effectiveness of the government legal aid program is poor in comparison with the efficacy of legal aid disbursed by NGOs, NGOs are using their legal aid funds effectively. Further, most of the legal aid funds of government are held unused by different district legal aid committees, and it is apparent that channelling government legal aid funds through NGOs could be beneficial to improve the efficiency of legal aid.

D. ***NGO mediation should be promoted to enhance access to equitable justice:*** As discussed, disputes can be resolved in a much quicker time and lower cost through

84 See Jamila above n. 7.
85 Ibid.

out-of-court mediation, in comparison with in-court mediation. Therefore, while exploring the opportunity of mediation, the government should also promote the use of out-of-court mediation services through NGOs. This would reduce the case burden on formal courts and can provide justice to the poor or women in an even more accessible fashion with a fair outcome. Since NGOs provide legal aid in a much more efficient way than government, the government's legal aid fund could be channelled through NGOs. Further, better access to legal aid would also strengthen the effectiveness of NGO mediation by enhancing the potential for poor and women to get recourse of formal courts.

E. ***More gender equalising law should be incorporated, especially for enhancing women's access to justice:***Sincelaw plays animportant basis for mediation, especially when such mediation is done under the shadow of law (i.e. evaluative mediation), the better the laws for protecting women's rights in the country, the more it can protect women's rights through ADR.As in-court mediations are generally conducted under the shadow of law, in-court mediations can also provide better outcomes to women because of the existence of laws that well protect the rights of women. NGOs may also uphold women's rights by applying legal norms in mediation. For instance, stringent laws against violence may also reduce the possibility of post-separation violence and can act as a bargaining chip for women in mediation. Therefore, laws protecting women's rights and protecting women against violence need to be promotedfor enhancing women's access to justice.

Conclusion

The most important lesson for policy-makers to draw from this paper is that, a mere decision to introduce or incorporate the notion of ADR will not guarantee *per se* access to justice in its 'real' sense. Nevertheless, due to wide potential of a system approach to improve the overall access to justice in the country,improvement on all three waves of access to justicecan be considered by the policy makers for a holistic development of the sector—including motivation and incentivize lawyers' wide participation in resolving cases through ADR; proper linkage between out-of-court ADR and in-court ADR; linkage between government legal aid fund and efficient NGO operation in utilizing those funds; andpromotion ofPIL where individuals can be benefitted through collective action of the society. Once out-of-court resolutions are linked with in-court settlements, justice seekers may access low-cost dispute resolution and yet enjoy betterenforcement of their agreement through court decrees. Such arrangements are available in many developed and developing countries like Japan and Egypt. Allocation of unused or underused government legal aid fund to NGOs will also boost-up access to justice by enhancing NGO's capacity to provide wider support to justice seekers in the community. Lastly, a wide practice of PIL will rescue community from collective issues that are not dealt by individual justice seekers either due to the involvement of unbearably heavy cost or because of ignorance of collective issues out of the misery of commons.

From Charity to Right: An Overview of the Historical Development of the Legal Aid System in Bangladesh

Dr. Farzana Akter*

Introduction

The right to legal aid is a basic prerequisite in ensuring effective access to justice[1]. It has been even said that access to justice refers to the provision of legal aid without which judicial remedies become available only to those who have the financial resources to satisfythe cost of lawyers and other related expenses of the administration of justice.[2] According to the United Nations Special Rapporteur on the Independence of Judges and Lawyers, legal aid is an essential element of a fair and efficient justice system based on the rule of law.[3] It eliminates the obstacles and barriers which restrict access to justice by providing assistance to those who would not otherwise have been able to afford legal representation and access to the court system.[4] However, legal aid is not a recent development[5]and the concept has changed considerably in different contexts over time.[6]

Article 27 of the Constitution of Bangladesh ensures a fundamental right of equality before the law and equal protection of the law.[7] Moreover, the Constitution has guaranteed the right to a fair trial. Still, as Khair notes, the country requires a national legal aid system to meet the needs of the poor and disadvantaged in the

---

* Assistant Professor, Department of Law, University of Dhaka.

1 Skinnider, E., "The Responsibility of States to Provide Legal Aid", Paper prepared for the Legal Aid Conference Beijing, China (March 1999) at 16.http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/beijing.pdf (accessed on 15 August 2016).

2 F. Francioni, The Development of Access to Justice in Customary Law, in: F. Francioni(ed.), Access to Justice as a Human right 1 (Oxford, Oxford University Press, 2007).

3 G. Knaul, Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/23/43 (15 March 2013), para. 20.http://www.wave-network.org/sites/default/files/UN%20Special%20Rapporteur%20on%20the%20Independence%20of%20Judges%20and%20Lawyers.pdf (accessed on 13 March 2016).

4 Ibid, para. 27. It is also noted that legal aid helps to resolve disproportionate access to justice based on economic and social power. D. L. Rhode, Access to Justice, 69 Fordham Law Review1794-1796 (2001).

5 G. J. Bingert, Legal Aid in Modern Society, 36 Women Lawyers Journal 8(1950).

6 M. Cappelletti, The Emergence of a Modern Theme, in: M. Cappelletti, J. Gordley and E. Johnson, Jr., (eds.), Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies 6(Milano, Oceana Publications, 1975).

7 Article 27, the Constitution of Bangladesh.

society.[8] In 2000, the government passed the Legal Aid Services Act[9] to carry out legal aid activities in an organizedmanner. In this context, the article examines the historical background of the legal aid system of Bangladesh. In doing this, the article begins with an overview of the evolution process of legal aid system in other countries.

Historical Development of the Legal Aid System in Other Countries

According to Bingert, the concept of legal aid is not new.[10] It existed in the willingness of a neighbour or a relative to assist person involved in legal proceedings or in a dispute of legal nature. But the stages of development for the courts to recognize the need of the skilled help of lawyers and then to direct them to provide the necessary help on a charitable basis is not that much clear.[11] However,it is found that historical development of legal aid has followed different forms and institutions which were accordant with the social and economic contexts of the given time.[12]

In the medieval times, legal aid was prevalent as a form of charitable exercise. Christians provided such assistance as pious work in similar fashion as they honoured the Peace of God during war, built hospitals for the ill people or provided food during famine.[13] Benevolent exercise of the Church and rulers brought abouttwo other kinds of assistance- one was the *advocatuspauperumdeputatusetstipendiatus*, who was employed and paid by the Church to represent the poor in ecclesiastical courts. This system was applicable in secular courts of various parts in France and Italy. The other system required the magistrates to waive the court fees of poor litigants as well as to assign a private lawyer for the purpose of helping them voluntarily.[14]The French lords and kings very often exercised this power. In addition, Louis IX, Charles V and Charles VI took other steps. Thus, various initiatives were taken to reduce poor men's court fees until the Revolution.[15]

---

8 S. Khair, Legal Empowerment for the Poor and the Disadvantaged: Strategies Achievements and Challenges. Experiences from Bangladesh 212(Dhaka, Department of Justice Canada's CIDA Legal Reform Project in Bangladesh, 2008).

9 Act No. VI of 2000.

10 Supra note 5.

11 Seton Pollock, Legal Aid- The First Twenty Five Years 9 (London, Oyez Publishing, 1975).

12 Supra note 6, p. 6. This section of the article largely depends on this source and very much structured and developed on it.

13 Ibid, p. 11.

14 Ibid, p. 12.

15 Ibid, pp. 12-13.

In England, the poor's writs were carried out without payment during the reign of Henry III.[16]In 1495, Henry VII adopted the statute II that established the foundation of the proceedings described as *in forma pauperis*.[17] It required the judge to assign counsel to the poor and was in use until 1883.[18] Italy and Germany also adopted similar arrangements through different laws.[19] A charitable notion of legal aid, in this way, influenced the Middle Ages. It called on the kings and lords to support the poor and the oppressed as their paternal duty towards them.[20]

After the French Revolution in 1789, the adoption of secular political theory in successive periods brought remarkable change. The notion of legal aid developed into a new form and the State underwent a contractual obligation to protect the rights of the citizens. The American Bill of Rights[21]and the French Declaration of the Rights of Man gave special recognition of the rights of the people to secure justice. [22]Equal access to the courts of law became the spirit and attempts were taken to that end. For instance, American constitutional guarantee of the right to counsel and the French principle of the *gratuite de la justice* were adopted. However, these principles were not able to assist the poor in engaging lawyers according to their need. As a result, significant reforms were made in legal aid provision throughout the West while the laissez-faire ambience was found in post-Civil War America and France together with the revolutionary movements of 1848. England also made reforms following the Reform Bills and both Germany and Italy did the same after national unification.[23]

---

16 F. Pollock and F. W. Maitland, The History of English Law before the Time of Edward I 195 (New Jersey, the Law Book Exchange Ltd., 1996).

17 J. M. Maguire, Poverty and Civil Litigation, 36(4) Harvard Law Review 363 (1923); T. Goriely, Civil Legal Aid in England and Wales 1914 to 1961: the emergence of a paid scheme, PhD Thesis, University College London (2003) at 48-49.

18 J. Mahoney, Green Forms and Legal Aid Offices: A History of Publicly Funded Legal Services in Britain and the United States, 17(2) Saint Louis University Public Law Review 226(1998); Pollock, supra note 11, p. 12.

19 Supra note 6, p. 13.

20 J. Huizinga, The Political and Military Significance of Chivalric Ideas in the Late Middle Ages, in: Men & Ideas, Essays on History, The Middle Ages, The Renaissance 197-198, 206(New York, Harper Torchbooks, 1970); Cappelletti, supra note 6, pp. 13-14.

21 The first ten amendments of the US Constitution collectively are called the Bill of Rights and were adopted in 1789. http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html (accessed on 15 August 2016).

22 Approved by the National Assembly of France, August 26, 1789. The basic principle of the Declaration was that all men are born and remain free and equal in rights upholding the inviolability of the person and resistance to oppression. http://avalon.law.yale.edu/18th_century/rightsof.asp (accessed on15 August 2016).

23 Supra note 6, pp. 16-18.

The Law of January 22, 1851 of France can be identified as the first statute that sought to remove financial obstacles of the poor in litigation. It ensured the right of the poor to have lawyers free of charge. The Act culminated in the establishment of the national *bureaux* by an amending the Act of 1901. This Act determined the eligibility of the legal aid recipients. In 1865, Italy established a national system and declared legal aid an obligatory but voluntary duty of the legal profession. Even the Law of 1923 had the provision of non-paid service with the excuse of court costs.In accordance with the Code of Civil Procedure of 1877, Germany also established legal aid system. The Code allowed judges to assigna counselto the poor and the non-payment of court costs if the litigant could establish his poverty and severity of the case.[24]

During this period, common law countries like England developed the *in forma pauperis* procedure in 1883 by raising the maximum capital requirement from £5 to £25 to get assistance. The service was also extended to both the parties to the suit.[25] The procedure was modernized for appeal cases to the House of Lords in 1893. But in 1914 the system was refined vitally by the abolition of the requirement of a solicitor's letter of attestation that showed the merits of the case in favour of the applicant.[26] This new scheme 'the Poor Persons Procedure' came under Rules of the Court and was applicable only for litigation before the Supreme Court. A person was admitted as a 'poor person' if he could satisfy the Court that he had a reasonable cause of action or defence and his income did not exceed £50; in special circumstances the limit was £100 upon the personal consideration by a Judge.[27] Under this procedure, private lawyers used to render voluntary and gratuitous service.[28] Finally in 1925, the government assigned the Law Society the duty to administer the programme.[29] It was a significant event in the history of legal aid on the realization that legal aid system cannot be satisfactorily administered only by the courts but also requires an organization to run the programme effectively. For the first time, public money was granted for this scheme, though it was only for administration. The outbreak of the Second World War in 1939, however,caused seriousdecline of legal aid services. The solicitors and counsel departed to join the Armed Forces. On the other hand, matrimonial cases were filed in large numbers that required the establishment of a Services Divorce Department in 1942. This is also a remarkable event as it involved the employment of salaried solicitors with

24 Ibid.
25 Maguire, supra note 17, p. 380; Goriely, supra note 17, p. 50.
26 Maguire, supra note 17, p. 380; Pollock, supra note 11, pp. 12-13.
27 R. Egerton, Legal Aid 11 (London, Routledge, 1945);Goriely, supra note 17, pp. 54-55.
28 Pollock, supra note 11, pp. 12-13.
29 Maguire, supra note 17, pp. 391-398; Pollock, supra note 11, pp. 12-13.

sufficient staff. A fixed government budget started to be provided not only for administrative costs but also to meet the salaries for their service.[30]

In 1944, the *Rushcliffe Committee* was appointed to enquire about the existing facilities for legal aid and advice and to accordingly make recommendations.[31] The recommendations indicate that the notion of legal aid as a voluntary service should be replaced as a matter of right and legal aid should be allowed in all courts. Moreover, the beneficiaries of the scheme should include the poor as well as persons of wider income groups in the sense that legal aid should be allowed to persons who were eligible under the Poor Persons Procedure along with those whose income exceeded this limit.[32] Those incapable of affording the cost received legal assistance free but others had to contribute as the scale provided. In addition, the Committee, though it did not bar voluntary service by lawyers, clearly stipulated that the cost of running the programme would be carried out by the government. It reemphasized the indispensable role of the legal profession and made provision for their adequate remuneration. It also mentioned that arrangements should be made to increase the awareness of the public about available services.[33] As far as criminal legal aid was concerned, the Committee recommended liberalizing the criteria for its potential recipients and repealed the limitations as to grave and exceptional charges. As a result, legal aid should be granted in all criminal courts where it seemed appropriate in the interests of justice. The recommendation allowed time for solicitors to prepare their cases. These recommendations eventually culminated in the adoption of the Legal Aid and Advice Act 1949.[34]

In the US, development of legal aid system almost maintained a similar pattern. Legal aid began in 1876 as an organized movement. The first legal aid society started its activities in New York City in order toassist the German immigrants.[35]Benevolent individuals or the volunteer private lawyers took the responsibility until 1964.[36] In accordance with the decision of *Gideon v. Wainwright*,[37] the State became responsible to provide legal aid in criminal cases.

---

30 Pollock, supra note 11, pp. 13-16.

31 C. Wegg-Prosser, Looking at Lawyers, Their Past, Present and Future, 3(1) Poly Law Review 12 (1977);Goriely, supra note 17, pp. 134-163.

32 Pollock, supra note 11, pp. 18-19.

33 Pollock, supra note 11, pp. 19-21, 30-31; G. Bindman, What Made Me a Legal Aid Lawyer?
29 (3) Journal of Law and Society 514-515(2002).

34 Pollock, supra note 11, pp. 16-20, 30-31; Bindman, supra note 33, pp. 514-515.

35 Bryant Garth, Neighborhood Law Firms for the Poor 17(The Netherlands/USA, Sijthoff and Noordhoff, 1980);Philip L. Merkel, At the Crossroads of Reform: The First Fifty Years of American Legal Aid, 1876-1926, 27 Houston Law Review 6, 8 (1990).

36 Merkel, supra note 35, pp. 9-10.

37 372 U.S. 335(1963).

On the other hand, the federal government provided funding in civil programmesfrom 1964 to 1967. This was made possible through a number of social programmes as War on Poverty under the auspices of the Office of Economic Opportunity (OEO).[38] As a result, legal services programmes were linked to antipoverty strategy.[39] OEO funded legal services were applicable in appeal cases including lobbying and organizing strategies. Moreover, legal services were provided for the purpose of reallocatingrights as well as changing relationships between the poor and the rich.[40] Finally after continued negotiations, Congress passed the Legal Services Corporation (LSC) Act in 1974.[41] The Act established a quasi-governmental organization for the collection and distribution of federal funds, then regulate them and also to modify the agenda of the programme. It also modified law reform strategies in fixing the organization's priorities.[42]

The above exposition reveals that the development of legal aid follows a specific pattern. Legal aid started as a charitable practice in the Middle Ages and was replaced as a right by specific legislative and administrative planning with the definition and criteria of persons who would receive it. States have been entrusted with the responsibility and therefore required to affirmatively act to ensure such right for those living in poverty.

Historical development of the Legal Aid System in Bangladesh

According to Murshed, Bangladesh has a history which is several thousand years old.[43] It includes the ancient, medieval and colonial era from antiquity to 1947, when India was partitioned. Therefore, the history of Bangladesh prior to 1947 is a history of India since Bangladesh was a part of it.[44]This means that the history of the Bangladeshi legal aid before 1947 is the history of the Indian legal aid system.

---

38 Edgar S. Cahn and Jean C. Cahn, The War on Poverty: A Civilian Perspective, 73 Yale Law Journal 1317(1964).

39 Ibid.

40 Joan Mahoney, Green Forms and Legal Aid Offices: A History of Publicly Funded Legal Services in Britain and the United States, 17 Saint Louis University Public Law Review 236(1998).

41 Public Law 93-355, 93rd Congress, H.R. 7824, July 25, 1974.

42 Deborah M. Weissman, Law as Largess: Shifting Paradigms of Law for the Poor, 44 William and Mary Law Review 756(2002).

43 M.M. Murshed, Bangladesh.http://www.ic.keio.ac.jp/en/download/jjwbgsp/2010/3_Bangladesh_2010.pdf(accessed on 15 August 2016).

44 C. Farid, New Paths to Justice: A Tale of Social JusticeLawyering in Bangladesh, 31(3) Wisconsin International Law Journal 424 (2013-2014).

It is noted that the history of Indian legal aid is related to the history of its legal system.[45]According to Singh,the spirit of legal aid emerged from the retributive instinct of man and the efforts of Indian society to dispense justice.[46] Therefore, it can be said that the philosophy of legal aid was present even in the ancient Indian society.[47]However,the Indian system embraced the formal concept of legal aid when the system of courts, the appearance of lawyers and the institution of court fees was adopted.[48]

As Galanter and Hayden say, India followed Hindu as its ancient legal tradition.[49] The Hindu political system and institutions were under the rule of *Dharma,* a Sanskrit word.[50]*Dharma* suggests the right or appropriate conduct, and includes the English concepts as law, morality, duty and obligation.[51]A wide body of Sanskrit texts involving rights and other normative topics, known as the *Dharmashastras,*emerged in India during the period between 600 BCE and 500 CE.[52] However, India followed the caste system which is considered one of the most rigid social systems of the world.[53] Each caste had its own specific rules relating to lawful activities and social functions.[54] Moreover, each caste used its panchayat[55] system for the purpose of resolving disputes in society.[56] These institutions maintained the rules of the caste or local custom and the *dharmashastra.*[57] Rules ofthe *dharmashastra* were also followed by the king or his delegate in royal courts situated in capitals and in some larger towns.[58] In fact, the *dharmashastra* motivated the kings to regard the people as God and serve them with love and devotion.[59] The

45 S. Muralidhar, Law, Poverty, and Legal Aid: Access to Criminal Justice 31(New Delhi, LexisNexis Butterworth, 2004).
46 S. Singh, Legal Aid: Human Right to Equality 74 (New Delhi, Deep and Deep Publications, 1996).
47 Ibid.
48 Ibid.
49 M. Galanter and R. M. Hayden, Law: Judicial and Legal Systems of India, in: Encyclopedia of Asian History 411 (New York, Charles Scribner's Sons, 1988).http://marcgalanter.net/Documents/papers/scannedpdf/judicialandlegalsystemsofindia.pdf (accessed on 28 May 2014).
50 V. D. Kulshreshtha, Landmarks in Indian Legal and Constitutional History 3(Lucknow, Eastern Book Company, 1995).
51 Galanter and Hayden, supra note 49, p. 411.
52 Ibid.
53 Kulshreshtha, supra note 50, p. 2.
54 Ibid.
55 It is an indigenous dispute resolution mechanism that includes five or more leading villagers.
56 Kulshreshtha, supra note 50, p. 2.
57 Galanter and Hayden, supra note 49, p. 411.
58 Ibid.
59 Kulshreshtha, supra note 50, p. 3.

kings provided financial assistance or other help to those who had faced attacks or were in need.[60]

In the twelfth century Muslim invaders occupied India and changes were made in the divergent system of the Hindu period.[61] The Muslims were unwilling to follow the caste system.[62]They began to apply *Shariat* (Islamic law) in the social, political and judicial system.[63] During the Muslim period, royal courts wereestablished in cities and administrative centres that had general criminal and sometimes commercial jurisdiction. In addition, civil and family matters were decided in these courts.[64] However, the villagers followed the panchayats to resolve their disputes as there were no courts in villages.[65]

In the Muslim period, the courts followed a systematic judicial procedure. Two Muslim Codes namely the *Fiqh-e-Firoz Shahi* and *Fatwa-in-Alamgiri* explained the powers of the courts.[66] The courts were arranged in an order ofhierarchy based on the political divisions of the kingdom.[67] Formal procedures like plaint, written statement, cross-examination of witnesses and delivering judgments in the open courts were introduced. Moreover, the courts began to follow the principles of estoppel and res-judicata.[68] The right of appeal could be exercised as well.[69]However, the system of courts, compliance with the formal procedures and the rules of evidence made the administration of justice relatively complex. As a result, the use oflegal experts became essential to represent the parties.[70] A group of professional legal experts, popularly known as *Vakils*, started to represent litigants before the courts. But there was no Bar Association during this period.[71] The *Vakils*were required to have a high standard of legal training and behaviour.[72] During the reign of Shahjehan and Aurangjeb, a specific group of State *Vakils* called '*Vakil-e-Sarka*r' or '*Vakil-e-Shara*' was appointed to provide free of charge advice

60 Singh,supra note 46, pp. 75-76.
61 Galanter and Hayden, supra note 49, p. 412.
62 Kulshreshtha, supra note 50, p. 15; Singh, supra note 46, p. 80.
63 Galanter and Hayden, supra note 49, p. 412; Kulshreshtha, supra note 49, p. 15.
64 Galanter and Hayden, supra note 49, p. 412.
65 Ibid.
66 Kulshreshtha,supra note 50, p. 25; Singh, supra note 46, p. 83.
67 Kulshreshtha, supra note 50, p. 25; Singh, supra note 46, p. 81.
68 Kulshreshtha, supra note 50, p. 25; Singh, supra note 46, p. 83.
69 Galanter and Hayden, supra note 49, p. 412.
70 Kulshreshtha, supra note 50, p. 24; Singh,supra note 46, p. 83.
71 Ibid.
72 Kulshreshtha, supra note 50, p. 25.

to poor litigants.[73] Thus, the concept of legal aid emerged in the Muslim period of India.

The British brought the next legal tradition in India in the seventeenth century.[74]The administration of justice became wider and more complicated under the British rule.[75]In accordance with the Charter of 1600, the East India Company took control to regulate its own servants.[76]The Mughal emperor made the treaty of 1618 that approved this power for the company'sfactory at Surat.[77] New British settlements required the establishment of new company courts but these courts were different in different areas. In 1726, the courts got a uniform structure with the provision of appeal to the Privy Council in London.[78] However,the introduction of the Anglo-Saxon system became responsible in making the adjudicatory process more formal.[79]

In 1858, the responsibility of the administration of the East India Company was taken by the British Crown,[80] and it escalated the anglicization of the law.[81]During the next quarter century, a series of codes based on English law were adopted and they were applied throughout the British India.[82] The Criminal Procedure Code was enacted in 1898. Section 340 of the Code provided the accused a right to be defended by a pleader.As regards civil matters, the 1908 Code of Civil procedure embodied the idea of legal aid in the name of 'Suitsby Indigent Persons'. It should be noted that these provisions of the Criminal and Civil Procedure Code are still applicable in Bangladesh. However, the Civil Procedure Codehas the provision in the name of *forma-pauperis* suits.

After the partition in 1947,[83]several Law Reform Committees were formed to improve and make civil law reforms in Pakistan.[84]The government in 1967 set up a

---

73 Kulshreshtha, supra note 50, pp.24-25; Singh, supra note 45, p. 83.
74 Galanter andHayden, supra note 49, p.412.
75 Singh, supra note 45, p. 84; F. H. Zemans, Recent Trends in the Organization of Legal Services 308 (1985).
76 Kulshreshtha, supra note 50, p. 30.
77 Kulshreshtha, supra note 50, p. 31;Galanter and Hayden,supra note 49, p. 412.
78 Galanter and Hayden, supra note 49, p. 412; Singh, supra note 46, p. 85.
79 Singh, supra note 46, pp.84-85.
80 Kulshreshtha, supra note 50, p. 165.
81 Galanter and Hayden, supra note 49, p. 412.
82 Ibid.
83 With the expiration of the British Empire in India in 1947, two separate States namely India and Pakistan emerged. The main reason for this division was religion and it constituted a Muslim majority in Pakistan and a Hindu majority in India. Pakistan was again divided into two parts in the east (East Bengal, which became Bangladesh in 1971) and in the west (western Punjab). The Road to Partition 1939-47. http://www.nationalarchives.gov.uk/education/topics/the-road-to-partition.htm (accessed on 14 March 2016).

committee of ten members headed by Justice HamoodurRahman to ascertain the causes of delay in the disposal of cases and to recommend efficacious measures for it. The Committee was also suggested to recommend ways to provide competent legal aid to poor litigants.[85] The committee submitted a comprehensive report on the delays in civil and criminal litigation in 1970 but due to the Liberation War of 1971, the finding of the committee was stalled.[86]

After independence, the government of Bangladesh set up a Law Reform Commission in 1976. The Commission was headed by Justice KemaluddinHossain and aimed at examining and recommending measures for civil law reforms. It recommended the government to undertake steps that would be useful in providing competent legal aid to poor litigants.[87] The government accepted many suggestions of the Commission and then enacted the Law Reforms Ordinance, 1978.[88]The Ordinance contains provisions for the amendment of the Court-fees Act (1870),the Small Cause Courts Act (1887), the Code of Criminal Procedure (1898), the Code of Civil Procedure (1908) and the Arbitration Act (1940). However,it did not contain legal aid provisions.

Thus, as Muralidhar states, organized State efforts to establish a national legal aid system have a fairly recent origin in Bangladesh.[89] The government granted a legal aid fund in 1994 and it is considered the first initiative towards a national legal aid system.[90] For the fiscal year 1996-1997, the total allocation for this legal aid fund was taka[91] 13,700,000. The District and Sessions Judge of each district was responsible for the distribution of the amount. The amount varied in proportion to the size of the respective district.[92] In 1997, a National Legal Aid Committeewas constituted according to a Resolution of the Ministry of Law, Justice and Parliamentary Affairs.[93] The Minister of the Ministry of Law, Justice and Parliamentary Affairs was the chair of the committee. The Resolution also contained provision for the establishment of District Committees that were to be chaired by the

---

84 I. A. Ahmad and M. E. Karim, Principles of Civil Litigation: Bangladesh Perspective 253(Dhaka, Law Lyceum, 2006); M. Zahir, Delay in Courts and Court Management 2-4, 55-71(Dhaka, Bangladesh Institute of Law and International Affairs, 1988).

85 Ahmad and Karim, supra note 84, pp.185, 254-255; Zahir, supra note 84, pp.2-4, 55-71.

86 Ahmad and Karim, supra note 84, pp.185, 254-255.

87 Zahir, supra note 84, pp.4-5, 71-104; Ahmad and Karim, supra note 84, pp.185, 254-255.

88 Ordinance No.XLIX of 1978.

89 Muralidhar,supra note 45, p. 357; Khair,supra note 8, p.221.

90 N. A. Chowdhury and S. Malik, Awareness on Rights and Legal Aid Facilities: The First Step to Ensuring Human Security, in: Human Security in Bangladesh: In Search of Justice and Dignity 42(United Nations Development Programme /UNDP), Bangladesh, 2002).

91 The currency of Bangladesh is called the taka.

92 Chowdhury and Malik, supra note 90, p. 42.

93 S.R.O .No. 74-Law/1997, dated 19 March 1997.

District and Sessions Judges. However, adequate official data on the coverage of this legal aid mechanism is wanting.[94]According to Chowdhury and Malik, legal aid activities were not effectively functional though exception was found in one or two districts. Even judges referred cases to the non-governmental organizations instead of the official legal aid committee.[95] It was further noted that within three year since the programme began, only seven district committees had taken specific steps to provide legal aid throughout Bangladesh.[96]

Another drawback in legal aid activities under the 1997 Resolution was that the allotted budget remained unused. Chowdhury and Malik have identified several factors for this.[97] The District and Sessions Judge was entrusted with the responsibility of the administration of the fund. Asthe District and Sessions Judge is generally overburdened with various responsibilities, the administration of legal aid fund added his responsibility. Again, the District Legal Aid Committee was not able to invite potential legal aid recipients because the committee comprised of the highest government officials of the district such as the District Commissioner and Superintendent of Police. The recipients of the service are typically from the poor academic and financial backgrounds and they are afraid to approach such committee. Moreover, the district legal aid committees were required to follow various formal procedures which made their task more difficult.[98]

Thus the1997 Resolution was not effective and it became essential to take initiatives to adopt specific legislation on legal aid.The government heldseveral meetings to draft the legislation by 1998.[99]After continued discussions, the government finally adopted the Legal Aid Services Act (hereinafter mentioned as LASA)in 2000.The LASA became effective in the same year. The government has established the National Legal Aid Services Organization to implement the Act. Under the LASA, various Committees have been established at the national and district level. Pursuant to the provisions of the LASA, the government framed the Legal Aid Services Policies in 2001 for the purpose of determining the eligibility of legal aid recipients.The Policies have prescribed an annual income limit for the beneficiaries. Moreover, they have defined a specified group of persons who become automatically entitled to legal aid, such as, poor widows, women deserted by their

94 Chowdhury and Malik, supra note 90, pp. 43-44.
95 Ibid, p. 43.
96 Ibid.
97 Ibid, pp. 43-44.
98 Ibid.
99 N. Ameen, The Legal Aid Act, 2000: Implementation of Government Legal Aid versus NGO Legal Aid, 15(2) The Dhaka University Studies, Part F, 63(2004).

husbands, women and children who are victims of human trafficking and women and children who are acid-burnt by miscreants.

Conclusion

It is apparent that legal aid is essential to ensure access to justice for those living in poverty and it has an ancient origin. The concept has developed from the notion of charity and assumed the status of a right by specific legislative and administrative planning of States. Bangladesh has also experienced an identical transformation process. However, organized state efforts towards a national legal aid system have a recent origin in this country. Moreover, such efforts had drawbacks that made the service ineffective. Finally the government has enacted the LASA with a view to ensuring access to justice for those who are in need of the service.

Normative Compliance of Bangladesh Regarding Torture: Towards an Anti-Torture Regime

Dr. Raushan Ara*

1. Introduction

Bangladesh is committed to ensure all human rights be it civil, political, economic, social and cultural rights including the right to development and fundamental freedoms to all its citizens without any discrimination, It is also committed to building a society free from exploitation in which the fundamental human rights and freedom, equality and justice, political economic and social rights are secured. While favoring a holistic approach in this respect, Bangladesh believes in individuality, universality, non-selectivity, and interdependence of human rights. It is because of its commitment to the promotion and protection of human rights and fundamental freedoms of all its citizens that Bangladesh actively and constructively participated in the negotiations leading up to the creation of the Human Rights commission. She served the Commission on Human Rights, with distinction, during 1983-2000 and was elected to the Commission for the term 2006-2008.[1] However, among the other instruments Bangladesh ratified the Convention against Torture (CAT) on 5 October 1998 by an instrument of accession. But unfortunately Bangladesh has not ratified the Optional Protocol of the CAT.[2] Whereas Article 2 (1) and Article 4 of the Convention against Torture requires the state party acceding to it to enact a domestic law to recognize an act of torture, cruel, inhuman and degrading punishment and treatment, as a crime in the country.[3] And it is now well known that the international ban on the use of torture has reached the status of a peremptory norm of general international law (*jus cogens*). This means that it "enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. At the national level it de-legitimates any law,

---

* Assistant Professor, Department of Law, University of Dhaka
This article is a modified version of Chapter -4 of the author's Ph.D. thesis titled "Normative and Institutional Responses to Torture in Bangladesh.

1 The Department of General Assembly and Conference Management of the United Nations, 'Human rights pledges by the government of Bangladesh to the UN'(2006) 5(4) *Article 2 of the International Covenant on Civil and Political Rights*, 86, 87.

2 Asian Human Rights Commission, *Torture in Bangladesh* (2013) < http://www.humanrights.asia/countries/bangladesh/torture-in-bangladesh> accessed 19 April 2013.

3 Rule of law in armed conflicts project (RULAC), *Bangladesh: National Legislation* (2009) < http://bangladesh.ahrchk.net/docs/TortureandCustodialDeathBill2009.pdf> accessed 18 May 2013.

administrative or judicial act authorizing torture. As a result of the absolute prohibition of torture, no state is permitted to excuse itself from the application of the peremptory norm. Since the ban is absolute, it applies regardless of the status of the victim and the circumstances, whether they are in a state of war, siege, emergency, or whatever. The revulsion with which the torturer is held is demonstrated by a very strong judicial rebuke, condemning the torturer as someone who has become "like the pirate and slave trader before him '*hostis humani generis'*, an enemy of all mankind", and torture itself as an act of barbarity which "no civilized society condones," "one of the most evil practices known to man" and "an unqualified evil". Following from the status of the prohibition of torture as peremptory norm, any state has the authority to punish perpetrators of the crime of torture as "they are all enemies of mankind and all nations have an equal interest in their apprehension and prosecution". The United Nations Convention against Torture (UNCAT) therefore has the important function of ensuring that under international law, the torturer will find no safe haven. Applying the principle of universal jurisdiction, UNCAT also places the obligation on states to either prosecute or extradite any person suspected of committing a single act of torture and doing nothing is not an option here.[4]

However, Bangladesh which has ratified the CAT is therefore bound by Article 4 of the CAT to ensure two different things, namely criminalization of and appropriate penalties for torture. The first obligation of Bangladesh under Article 4 of the CAT is to ensure that all acts of torture, attempt to torture and complicity or participation in torture are offences under its criminal law. The Committee against Torture has repeatedly called on states to list torture as a specific offence in domestic criminal codes and to ensure that the offence of torture is consistent with article 1 of the Convention against Torture. However, it is not the explicit opinion of the Committee that the definition of torture as offered by the CAT should be reproduced exactly in national criminal legislation. Rather States parties must include a definition of torture which covers the CAT definition. The concluding observations of the Committee in respect of the latest report of Sweden were that 'while the specific arrangements for giving effect to the convention in the domestic legal system are left to the discretion of each state party, the means used must be appropriate, that is they should produce results which indicate that the state party has fully discharge its

---

[4] African Policing Civilian Oversight Forum, *Investigating Torture: The New Legislative Framework and Mandate of the Independent Complaints Directorate* (2010)< http://www.ipid.gov.za/documents/report_released/research_reports/Torture%20Workshop%20Report.pdf> accessed 17 May 2013.

obligations'.[5] But unfortunately, although Bangladesh has twice gone through independence struggles, culminating in full political independence in 1971, its laws have not yet emerged from the 19th century. Meanwhile, policing has for the most part degenerated back into the feudal ages. At no stage, has there been a serious attempt to modernize it or to take advantage of significant developments happening elsewhere in the world. Legal and investigative reforms are moving so slowly as to place Bangladesh completely out of touch with the rapid developments in communications, transportation and sense of time among people in other countries.[6]

And for this it is necessary to make legislative provisions to give effect to Bangladesh's obligations under the aforesaid Convention[7] along with an audit on implementation of the CAT or any of its provision in the domestic arena of a country is utmost importance.[8] And this article focuses all the normative compliance of Bangladesh's international obligation regarding torture including both the positive assertion and the grim reality regarding this in order to find out the prevailing situations of Bangladesh towards the anti torture regime.

2. Analyzing Bangladesh's Compliance in Laws

Bangladesh has established itself as a democratic and pluralistic polity through its unwavering commitment to the principles and practices of good governance, democracy, rule of law, and promotion and protection of all human rights and fundamental freedom of all her citizens with particular attention to the rights of women, children, minorities, disabled and other vulnerable sections of her population and has been endeavoring to meet its constitutional obligations as well as its international commitments towards promoting and protecting human rights of its citizens through among others, enacting legislations and adopting administrative measures to implement them, as well as through implementation of several socio-economic development programs.[9] There are numerous sources of law in Bangladesh, ranging from the highest law of the land, the Constitution all the way down to case law. Aside from public law, there is also the possibility to bring civil proceedings for damages in private law. While international law is clear on the

---

5 Md. Mahbubur Rahman and Sk. Samidul Islam, 'Obligation of Bangladesh under Article 4 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984: A Performance Audit' (2006) 10(1 & 2) *Bangladesh Journal of Law* 119, 121.

6 Asian Human Rights Commission, *Bangladesh: the Human Rights Situation in 2006* (2006) < http://www.humanrights.asia/resources/hrreport/2006/Bangladesh2006.pdf> accessed 02 May 2013.

7 See RULAC, above n 3.

8 See Rahman, above n 5.

9 See General Assembly, above n 1.

subject, it is necessary to examine the state of domestic. Law on torture and reparation for its victims and the practical realities of the legal system to fully understand the current legal situation domestically regarding torture and reparation in Bangladesh. Thus an attempt will be made to discuss all these things in this article starting from the compliance in laws and finishes with revealing the grim reality. Therefore it is all about the rights discourse, promotion, protection regime and the prohibition, prevention and de jure eradication of torture domestically.[10]

2.1 Rights Discourse

This part focuses on the obligation to implement the prohibition of torture as a norm of *jus cogens*, compliance in enacting and implementing legislation, review of policies, procedures and practices in Bangladesh's perspective. Starting the compliance in laws the thesis has firstly the supreme law of the Republic i.e. the Constitution and the other existing laws along with certain policies and bills of Bangladesh providing the prohibition of torture in absolute term or other.

2.1.1 Constitution and the Prohibition of Torture

The Constitution of the People's Republic of Bangladesh has the prohibition of torture in absolute terms in various articles with an anti-torture spirit in the whole. So torture or cruel, inhuman or degrading treatment in police custody or jail custody are not permissible in any way or other under the Constitution and any such act is unconstitutional and unlawful.[11] Every day it is seen the casual way in which the matter of arrest and remand is dealt with in court. Regularly accused persons are remanded for the purpose of interrogation and extortion of information by application of force contrary to the spirit of the whole Constitution.[12] the Protection of the fundamental rights of individuals is the central edifice on which the concept of democracy is based. All instruments and mechanics of a democratic system of government are meant to protect these rights. These rights cannot be curtailed, abridged or compromised except in accordance with law. However, the very foundation of a democracy is shattered and frustrated if the basic rights of its people cannot be protected or enforced through legal means. On the recognition of the above, the framers of the Constitution took utmost care and gave maximum emphasis on the constitutional provisions guaranteeing protection and enforcement of fundamental human rights of its people.[13] And it should be mentioned that the

---

10 Bangladesh Rehabilitation Centre for Trauma Victims (BRCT),) *Broken Promises: The State of Reparation for torture Victims in Bangladesh* (2006).

11 *Bangladesh Legal Aid and Services Trust (BLAST) v Bangladesh* (2003) 55 DLR (HCD) 363, 373.

12 Mahmudul Islam, *Constitutional Law of Bangladesh*, (Mullick Brothers, 3rd ed, 2012) 279.

13 Bangladesh Legal Aid and Services Trust (BLAST), *Seeking Effective Remedies: Prevention of Arbitrary Arrests and Freedom from Torture and Custodial Violence* (2010).

Proclamation of Independence of 10th April, 1971 which furnished the basis of the Constitution of Bangladesh indicated the willingness of the nation to submit to the obligations under international law.[14] Since the Constitution of Bangladesh which embodies the principles and provisions of the Universal Declaration of Human Rights where freedom from torture is described as a basic human rights, [15] this nation's Declaration of Independence where, human rights issues have received considerable public and governmental attention, the Constitution of Bangladesh, adopted on 4 November 1972, declared that the Republic shall be a democracy in which fundamental rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed.[16] The provisions of the Constitution that pertain to international law[17] deal with two main issues. One is that international relations and the other international treaty. It is clear that constitutional provision on international law is normative in character and is the embodiment of principles of *jus cogens*. It reflects to a large extent, the desire of Bangladesh to become an active member of the international community. This notion is reinforced by the fact that article 8(2) of the Constitution declares that fundamental principles of state policies shall be fundamental to the governance, shall be applied in the making laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh.[18] The Constitution sought to establish a welfare State and the preamble declared the fundamental aim of the state to be the realization through democratic process of a socialist society, free from exploitation: a society in which the rule of law, fundamental human rights and freedom, equality and justice would be ensured. The concept of a welfare state was further strengthened by the fundamental principles of state policy which set out the economic, social and political goals of the Constitution.[19] It is therefore required to take note of the scheme and objectives of the Constitution as evidenced by those principles of state policy and cannot construe any provision contrary to such principles of state policy unless the language of a

---

[14] It declared that the elected representatives of the people of Bangladesh would undertake to observe and give effect to all duties and obligations that developed upon themselves as a member of the family of nations and to abide by the Charter of the United Nations. See Sheikh Hafizur Rahman Karzon and Abdullah-Al Faruque, 'Status of International Law under the Constitution of Bangladesh: An Appraisal' (1999) 3(1) *Bangladesh Journal of Law* (2006)23, 26.

[15] See General Assembly, above n 1.

[16] Richard Greenfield, 'The Human Rights Literature of South Asia' (1981) 3(3) *Human Rights Quarterly* 129, 130.

[17] *Constitution of the People's Republic of Bangladesh 1972,* Art 25.

[18] See Karzon, above n 14, 27.

[19] See Islam, above n 12, 19.

provision is so clear as to convince the court that in that particular instance the framers wanted to make a departure.[20]

And also starting with that, the Constitution categorically and emphatically enshrined in its Part III the fundamental rights of the people[21] where no law could be made which was inconsistent with these rights and no action could be taken by the government in derogation of such rights. To that extent, the power of the Parliament and the Executive was limited since these are basic rights which cannot be denied. In 1650, Grotius, the Dutch political thinker, propounded a theory that when a sovereign of a state infringes the basic human rights of his subjects, it becomes an international question and the sovereign forfeits his right to rule under the law of nations and other nations may be justified in intervening. Though the theory had no immediate impact, it drew the attention of the contemporary political thinkers and by the next century it was being considered that every man has certain natural and inalienable rights necessary for the development of his personality which should be inviolable.[22] The rights guaranteed by Part III of the Constitution can be classified into two groups. One the one side fall the rights which are general in nature covering the whole range of human activities and on the other fall the rights in respect of specific activities. Irrespective of the subject matter of legislation, every law must satisfy the requirements of art. 27 and 31. Article 27 is a guarantee against discrimination both in conferment of privileges and imposition of liabilities. Article 31 prohibits detrimental action affecting individuals otherwise than in accordance with law. This is an analogue of the due process concept of the American jurisdiction[23] and article 32 provides a protection in respect of deprivation of life and personal liberty.[24] However, these host of rights provide for a number of rights as fundamental which the state is prohibited from transgressing but the very purpose stated in the preamble necessitates limitations on the exercise of fundamental rights and the framers of the Constitution provided the limitations, striking a fine balance between the individuals' freedoms and the governmental needs for the welfare of the community.[25] And, considering human proneness to abuse freedom and ingenuity to misuse legal protection, the Constitution has provided for checks and balances where applicable. At the same time considering necessity of some discretionary power needed by the government to protect public interests and maintain law and order, it has provided for few circumstances when certain fundamental rights can be

---

20 Ibid, 42.
21 See BLAST, above n 13.
22 See Islam, above n 12, 125.
23 *Mujibur Rahman v Bangladesh* (1992) 44 DLR (AD) 111.
24 See Islam, above n 12, 133.
25 Ibid, 129.

temporarily taken away by the government only in accordance with law.[26] And in support of that article 26 provides that all existing laws inconsistent with the fundamental rights as provided in Part III shall to the extent of the inconsistency become void on the commencement of the Constitution and the state shall not make any law inconsistent with those rights.[27] 'State' as is defined in art. 152 to include Parliament and the expressions 'all existing law' and 'state shall not make law' clearly show that the prohibition of art. 26 is principally addressed to Parliament. It must be understood that the provisions of articles 27 to 29 and 31 to 44 are primarily limitations on the plenary power of legislation of Parliament and these provisions are to be interpreted accordingly otherwise the purported entrenchment of those arts. "would be little more than a mockery". And the term 'law' is defined in art. 152 to include rules, regulations and all those instruments, customs and usages which have the force of law. Any notification issued under any statutory provision has the force of law[28] and an administrative instruction which has the precision of rules and are general in nature may have the force of law if issued by authority competent to alter or amend the rules.[29] The prohibition of art. 26 is not only applicable to the Acts of Parliament, but to all those which come within the definition of law. As a law cannot be inconsistent with the provisions of Part III of the Constitution, executive and administrative actions, which must have the backing of law to encroach upon the rights of individuals, cannot also infringe the fundamental rights guaranteed by Part III. When rights are guaranteed by the Constitution in achieving the aims and objectives stated in the preamble, those rights are to be liberally interpreted and the exceptions provided in the Constitution are not to be interpreted in a manner which renders those rights inconsequential or illusory.[30] The court will employ intensive level of scrutiny in here in assessing the lawfulness of the exercise of public powers when fundamental rights are at stake.[31]

However, according to the article 27 of the Constitution, all citizens are entitled to be treated in accordance with the law of the land administered by the ordinary law courts and it is a fundamental principle of law that every person is innocent before the law until proven guilty. Hence, until it is proved in court with all the safeguards provided by our criminal justice system, that a person is guilty, he or she should not be branded a "criminal" and in no event should he be subject to the process of extra-

---

26 See BLAST, above n 21.

27 See Islam, above n 25.

28 *Bangladesh v Shamsul Huq* (2009) 59 DLR (AD) 54.

29 *Bangladesh v Shafiuddin* (1998) 50 DLR (AD) 27; *West Pakistan v Din Mohammad* (1964) 16 DLR (SC) 58; *Naseem Ahmed v Azra Feroze Bakth* (1968) 20 DLR (SC) 78.

30 *Jibendra Kishore v East Pakistan* (1957) 9 DLR (SC) 21, 44; *Pakistan v Syed Akhlaque Hussain* PLD (1965) (SC) 527. 580.

31 *Bugdaycay v Secy. of State of Home Deptt.* (1987) (AC) 514; *R v Secy. of State for Home Deptt.* (1993) 4 All E.R. 539.

judicial execution practiced by law enforcers.[32] In modern times both state constitutions and international human rights instruments, have explicitly provided that arrest can only be made in accordance with law. However, the article 31of the Constitution guarantees the protection of law. It has two parts; one provides that the citizens and the residents of Bangladesh have the inalienable right to be treated in accordance with law and the other states that no action detrimental to the life, liberty, body, reputation or property of any citizen or resident of Bangladesh shall be taken except in accordance with law. The second part is illustrative of the first. Article 31is wider in its scope and operation than the due process clause of the American Jurisdiction in as much as it covers the entire range of human activities and is attracted when a person is adversely affected by any state action irrespective of the question whether it affects life, liberty or property.[33] This article must be read as guaranteeing a fundamental right and as a limitation on the power of Parliament in the enactment of laws. And finding its place in Part III it not only speaking about procedure but also cannot but be taken to be an incorporation of both substantive and procedural 'due process' as is known in the American jurisdiction[34] and the expression 'law' must mean reasonable and non-arbitrary law in both substantive and procedural aspects. Procedural due process implies procedures that the government must follow before it takes action detrimental to life, liberty, body, reputation and property[35], while substantive due process requires the government to have adequate reasons for taking away or detrimentally affect life, liberty, body, reputation and property[36]. Because of the provision of art. 31of the Constitution arbitrariness in all fields is prohibited, all laws must be tested for reasonableness. The Constitution boldly proclaims the establishment of rule of law as one of the prime objectives and incorporates article 31 as a fundamental right. As a result the concept of reasonableness pervades the entire Constitution and the provision of the Constitution cannot be interpreted in a manner which will in any way shelter arbitrariness in any degree or form.[37] Constitutional enactment should be interpreted liberally and not in any narrow or pedantic sense.[38] In interpreting a constitution, the widest construction possible in its context should be given according to the ordinary meaning of the words and each general word should be held to extend to all ancillary and subsidiary matters.[39] And as a general rule a constitutional provision is held to

---

32 Arafat Hossain Khan, *Stop Extra Judicial Killings: Respect and establish an effective judiciary* (2010) <http://www.blast.org.bd/news/news-reports/101-stopextrajudicialkillings> accessed 19 May 2013.

33 See Islam, above n 12, 230.

34 See above n 23, 122.

35 *Honda Motor Co. v Oberg* (1994) 512 US 415.

36 *State Farm Mutual Automobile Insurance v Campbell* (2003) 548 US 408.

37 See Islam, above n 12, 136.

38 *C.P. & Berar Motor Spirit Sales Tax Act*, AIR 1939 FC 1*; Anwar Hossain Chowdhury v Bangladesh*, 1989 9 BLD (Spl) 1; See above n 23; *James v Commonwealth of Australia* (1936) AC 578, 614.

39 *Nur Hossain v East Pakistan* (1959) 11 DLR (SC) 423; *Golam Ali Shah v State* (1970) 22 DLR (SC) 247; See above n 23.

be mandatory unless it appears from the express terms thereof or by necessary implication from the language used that is intended to be directory.[40]

However, freedom from arbitrary arrests is usually grounded in constitutional provisions. Article 32 of the Constitution encapsulates this freedom. In this article 32 the conventional right to liberty was understood to have restricted the power of the state to arrest a citizen only to the situations or instances where there were reasons to believe that a citizen has committed a serious crime and continued denial of the right to personal liberty which was possible only upon conviction, through a fair and open trial on a charge of having committed a crime which was punishable by imprisonment.[41] In other words, though the law authorizes preventive detention and arrests on suspicion, yet such derogation of liberty must also meet other standards carved out by judicial pronouncements. The ambit of these requirements and the fulfillment of the conditions constitute the real parameters of the right to personal liberty. In general terms detention is authorized for 'prejudicial acts' while arrests can be made on valid suspicion of criminal wrong-doing. It follows from these propositions that it is the duty of the court to ensure that the conditions or requirements laid down by law is strictly adhered to. The deprivation of personal liberty must satisfy the requirement of 'in accordance with law' or 'under the due process of law' not only when the deprivation is authorized by law but also when the requirements and conditions embedded in the authorization have been meticulously followed.[42]

And the deprivation of life or personal liberty can well be covered and protected by art. 31, but in view of the fact that deprivation of life or personal liberty is far more serious a matter than detrimental action in respect of life or personal liberty, the framers of the Constitution thought it necessary to make a separate provision in respect of deprivation of life or personal liberty. Thus detrimental action short of deprivation in respect of life or personal liberty will be covered by article 31, while deprivation of life or personal liberty must fulfill the requirement of art. 32. The expression 'liberty' has a personal content in it. So when the framers of the Constitution used the expression 'personal liberty' in art. 32 after using the term 'liberty' in art. 31, the expression 'personal liberty' must have a narrow connotation meaning freedom from bodily restraint.[43] And a casual reading of Articles 31 and 32 where the requirement of 'in accordance with law' mentions twice may indicate identity and hence, repetitions, as both the Articles require that actions in derogation

---

40 *Osman Gani v Moinuddin* (1975) 27 DLR (AD) 61.

41 Shahdeen Malik, 'Arrest and Remand: Judicial Interpretation and Police Practice' (2007) (Special Issue) *Bangladesh Journal of Law* 259, 262.

42 Ibid, 265.

43 In *Maneka Gandhi v India* (1978) AIR (SC) 597.

of liberty may only be taken in accordance with law. A seeming repetition of a provision, requirement or norm in a constitution cannot be taken as superfluous or redundant and must be taken to import two different meanings or requirements. Hence by providing that deprivation of life and liberty must be affected only in accordance with law, the Constitution sets a higher standard for laws which purport to deprive life and liberty. While laws affecting body, reputation and property have to be reasonable and non-arbitrary, those touching upon life and liberty must in addition to being reasonable and non-arbitrary also indicate other compelling state or social interest. Furthermore, while many constitutional rights are subject to reasonable restrictions, yet the right to personal liberty though not absolute must be judged by yard-sticks of such reasonableness which are more exacting and clearly and immediately connected to greater interest of the society and the state. The expression 'in accordance with law' does not include any law, but only laws which are not violative of fundamental rights, and incorporates both procedural and substantive safeguards. If personal liberty could be curtailed by any law, i.e. whimsical and arbitrary, the protection against deprivation of liberty would become meaningless. Hence the real import of protecting personal liberty in two Articles of the Constitution lies in the fact that laws depriving personal liberty must be a reasonable legislation reasonably applied.[44] No right is so basic and fundamental as the right to life and personal liberty and the exercise of all other rights is dependent on the existence of this unalienable right. Also the core essence of Articles 31 and 32 is the right to access to justice and fair trial, which is denied outright in the face of extra-judicial recourse.[45] While there a is difference of opinion as to the actual meaning of 'rule of law', the framers of the Constitution after mentioning 'rule of law' in the preamble, took care to mention the other concepts touching the qualitative aspects of law, thereby showing their adherence to the concept of rule of law as pronounced by the latter viewers. If the relevant paragraph of the preamble is read as a whole in its proper context, there remains no doubt that the framers of the Constitution intended to achieve 'rule of law'. To attain this fundamental aim of the state, the constitution has made substantive provisions for the establishment of a polity where every functionary of the state must justify his action with reference to law. Here 'law' does not mean anything that Parliament may pass. Arts. 27, 31 and 32 have taken care of the qualitative aspects of law and forbid discrimination in law or in state actions, while arts. 31 and 32 import the concept of due process, both

---

44 See Malik, above n 41, 266-267.

45 Md. Tajul Islam, *Extra-Judicial Killings in Bangladesh: 'Cross-fires' or Violations of Human Rights?* (2010)<http://www.nipsa.in/extra-judicial-killings-in-bangladesh-cross-fires-or-violations-of-human-rights/>, accessed 07 May 2013.

substantive and procedural, and thus prohibit arbitrary or unreasonable law or state action.[46]

However, the arrest and detention of individuals are actions detrimental to liberty covered by art. 31. Yet separate provisions have been made in art. 33 to safeguard the individuals against arbitrary and unreasonable arrest and detention. Thus any law providing for arrests or detention to be valid must not only be reasonable and non-arbitrary to satisfy the requirement of art. 31, it must also be consistent with the provisions of article 33[47] where the rights of an arrested person confers three constitutional rights or safeguards upon a person arrested and they are review by an advisory board, right to communication of grounds of detention, right of fight against the detention. There is nothing in this section which provides that the accused be furnished with the grounds for his arrest. It is the basic human right that whenever a person is arrested he must know the reasons for his arrest. The clause (1) of the Article 33 provides that the person who is arrested shall be informed of the grounds for such arrest. It is true that no time limit has been mentioned in this Article but the expression 'as soon as may be' is used. This expression 'as soon as may be' does not mean that furnishing of grounds may be delayed for an indefinite period. According to one explanation, 'as soon as may be' implies that the grounds shall be furnished after the person is brought to the police station after his arrest and entries are made in the diary about his arrest. It is the duty of everyone in the country to adhere to the provisions of the Constitution since it's the Supreme law of the country and shall prevail over any other law. The Constitution not only provides that the person arrested shall be informed of the grounds for his arrest, but also that the person arrested shall not be denied the right to consult and to defend himself by a legal practitioner of his choice. From this provision it has been clear that immediately after furnishing the grounds for arrest to the person, the police shall be bound to provide the facility to the person to consult his lawyer if he desires. If these two rights are denied, this will amount to confining him in custody beyond the authority of the Constitution.[48]

However article 35 of the Constitution where 'torture' is directly prohibited as a fundamental right[49] which states that no person shall be subjected to torture or cruel, inhuman or degrading punishment or treatment. Even a person accused for criminal

---

46 *West Pakistan v Begum Shorish Kashmiri* (1969) 21 DLR (AD) 1, 12.

47 See Islam, above n 12, 134.

48 See above n 11, 371.

49 Asian Human Rights Commission, *Lesson 2: The Practice of Torture and Relevant Legal Provisions in 10 Asian Countries: Bangladesh: Legal Framework Regarding Torture* (2012) < http://www.humanrights. asia/resources/journals- magazines/hrschool/lesson-61/lesson-2-the-practice-of-torture-and-relevant-legal-provisions-in-10-asian-countries> accessed 30 April 2013.

offence has the right to an independent, impartial trial which has been articulated in article 35(3) that every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law.[50] As regards the custodial death and torture Clause (4) of the Article 35 clearly provides that no person accused of an offence shall be compelled to be witness against himself. So, any information which may be obtained or extorted by taking an accused on remand and by applying physical torture or torture through any other means, the same information cannot be considered as evidence and cannot be used against him. Clause (4) of Article 35 is so clear that the information obtained from the accused carries no evidentiary value against the accused person and cannot be used against him at the time of trial. Through judicial pronouncements, it is also establishment that any statement made by any accused before a police officer in course of his interrogation cannot be used against any other accused. So, it is not understand how a police officer or a Magistrate allowing remand can act in violation of the Constitution and provisions of other laws and can legalize the practice of remand. The use of force to extort information can never be justified since the use of force is totally prohibited by the Constitution. In this connection, clause (5) of Article 35 of the Constitution may be referred which provides that no person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. This clause is preceded by clause (4) where it is provided that no person accused of any offence shall be compelled to be a witness against himself. Due to the use of the word "compelled" in clause (4), it may be presumed that the framers of the Constitution were apprehensive of use of force upon an accused. So, it is found that even if the accused is taken in police custody for the purpose of interrogation for extortion of information from him, neither any law of the country nor the Constitution gives any authority to the police to torture that person or to subject him to cruel, inhuman and degrading treatment. Thus, it is clear that the very system of taking an accused on remand for the purpose of interrogation and extortion of information by application of force on such person is totally against the spirit and explicit provisions of the Constitution. So, the practice is also inconsistent with the provisions of the Constitution.[51]

2.1.2 Torture and Other laws

In this part other laws include the most controversial laws which are used for the purpose of torture generally but they are actually not enacted for that purpose. Among others the thesis has procedural laws, criminal laws, law of evidence anti-torture laws of the law enforcing agencies, torture, major crimes and the Rome Statute and lastly a draft Bill criminalizing torture, all of which focuse the anti-torture regime existing in Bangladesh.

---

[50] Assignment Point, *Assignment on Human Dignity and Torture in Bangladesh* (2013)< http://www.assignmentpoint.com/arts/law/assignment-on-human-dignity-and-torture-in-bangladesh.html> accessed 11 June 2013.

[51] See above n 11, 370-371.

2.1.2.1 Procedural Laws

Within the procedural laws it's the Code of Criminal Procedure, with the special sections nessary 167, 54, 61, 163, 132, 197 fous that even if all these are the most controversial sections but following those in totality gives no scope of abusing it for the purpose of torture. Section 167 provides that, when investigation cannot be completed in twenty four hours of the arrest, a magistrate can authorize the detention of an accused in police custody for up to 15 days for further investigation.[52] Under the following two circumstances a person can be arrested without warrant and to be produced before the Magistrate if the investigation cannot be completed within 24 hours; and if there are grounds for believing that the accusation or information received against the person is well founded.[53] This section provides that if the FIR is complete in that case the accused arrested in this case must be forwarded to the nearest judicial magistrate within 24 hours, but if the materials which are very vital are not found in that case the police may for the ends of justice and for the investigation forwarded to the nearest Magistrate beyond 24 hours.[54] The police are required under this section to transmit to the nearest Magistrate copies of the entries in the diary relating to the case.[55] If the police do not transmit copies of the entries in the police diary, the Magistrate will have no jurisdiction to direct detention of the accused. Though there is no procedure in the Code of Criminal Procedure authorizing a Magistrate to order arrest of a person who he thinks is guilty of the commission of an offence unless he has taken cognizance of the case. This section applies only when the police are investigating the case; that Magistrate who makes an investigation under this section keep the accused persons in custody. The mere leveling of an accusation against a person in the FIR does not make him accused person within the meaning of this section, until and unless some evidence implicating such person in the commission of offence is available. It is the duty of the Magistrate to inform the accused that he is a Magistrate and a remand has been applied for, and whether the accused has any objection to the grant of that remand. If the Magistrate in his discretion refuses to remand accused to police custody a superior Magistrate cannot direct him to do so. If the Magistrate is permitted to make orders in police station where the accused have no means to have recourse to a

---

52 See Malik, above n 41, 273-274.

53 See above n 11, 363, 369.

54 M.A. Wahab Ex Justice, *The Code of Criminal Procedure*. Dhaka: (Kamrul Book House, 2007) 333.

55 This case diary is B.P. Form No. 38. In Police Regulation No. 264, details are given as to how this diary shall be maintained. Regulation No. 263 provides that in the diary, the police officer is to show that time at which the relevant information reached him, the time at which he began and closed his investigation the place or visited by him, and statement of the circumstances ascertained through his investigation.

lawyer or their relatives, the whole significant of section 167 of the Code of Criminal Procedure would disappear and it will amount to a farcical performance.[56] And it was not at all the intention of the law giver that the police officer should at his own sweet arrest anybody he likes, although he may be a peace loving citizen of the country.[57] The Code enjoins on the police and the Magistrate strict compliance with the provisions of section 167 of the Code.[58] And the Code says that the judicial officer while granting remand should weight the evidence to decide whether the accused should be detained in custody or not, the remand to police or judicial custody being an infringement of liberty[59] should not be granted in a mechanical manner or as a matter of course. The Application of mind is a must and remand should be granted in case of real necessity. And in the absence of a reasonable cause no further remand should be granted.[60] If the police officer justifies the arrest only by saying that the person is suspected to be involved in a cognizable offence, such general statement cannot justify the arrest.[61] A vague information that a crime was likely to be committed would not justify an arrest under this section. 'Credible information' or 'a reasonable suspicion' under this section upon which an arrest can be made by a police officer must be based upon definite facts and materials placed before him, which the officer must consider for himself before he can take any action.[62] And if detention in police custody is ordered, the Magistrate must record his reasons.[63] It is to be remember that in many ways, the power conferred to police by section 167 to ask the magistrate for remand for further investigation is an exceptional power to be applied only in exceptional instances. In ordinary course of things, police must have enough credible and justifiable information implicating the arrested person in the commission of a crime.[64]

Another controversial section is section 54 which specifies the cases where the police officer may arrest without a warrant and it is specified in Schedule II, column 3 of the Code. The section enumerates nine categories under which the police may arrest without warrant.[65] Section 54 of the Cr. P. C. lays down certain procedures to be observed once an arrest has been made. This includes that the accused must be produced before a magistrate within 24 hours, and that a magistrate must give prior

---

56 See Wahab, above n 54.
57 Ibid, 48.
58 *Aftabur Rahman v State* (1993) 45 DLR 593.
59 Zahirul Huq, *Law and Practice of Criminal Procedure* (Ayesha Mahal, 1996) 288.
60 See Wahab, above n 54, 340.
61 See above n 11, 115.
62 See Wahab, above n 54, 46-48.
63 See Huq, above n 59.
64 See Malik, above n 41, 277.
65 See Wahab, above n 54, 45.

permission if police want to hold a prisoner for longer.[66] The object of section 54 is to give widest powers to the police in cognizable cases and the only limitation is the necessary requirement of reasonability and credibility to prevent the misuse of the powers. 'Reasonable suspicion' here means a *bonafide* belief on the part of the police officer that an offence has been committed or is about to be committed. And the powers under this section must be cautiously used.[67] Now-a-days in most of the cases different persons are arrested under section 54 of the Code on political grounds in order to detain him under the provisions of section 3 of the Special Powers Act, 1974. A person is detained under the preventive detention law not for his involvement in any offence but for the purpose of preventing him from doing any prejudicial act. So, there is no doubt that a police officer cannot arrest a person under section 54 of the Code with a view to detain him under section 3 of the Special Powers Act, 1974. Such arrest is neither lawful nor permissible under section 54 since a police officer may arrest a person under this section, under certain conditions and the main condition is that the person arrested is to be concerned in a cognizable offence and the purpose of detention is totally different. If the authority has any reason to detain a person under section 3 the Special Powers Act, the detention can be made by making an order under the provisions of that section and when such order is made and handed over to the police for detaining the person, the order shall be treated as warrant of arrest and on the basis of that order, the police may arrest a person for the purpose of detention.[68] However, when a person is arrested under section 54 without a warrant, the provisions of section 61 of the Code applies in his case. Section 61 provides that no police officer shall detain in custody a person arrested without warrant for a period exceeding 24 hours unless there is a special order of a Magistrate under section 167 of the Code. So, it is found that there is reference of section 167 in section 61 of the Code. Section 61 implies that if there is a special order of a Magistrate under section 167, the police may keep a person in its custody for more than 24 hours.[69] The object of sec. 61 is two-fold; one that the law does not favor detention in police custody except in special cases and that also for reasons to be stated by the Magistrate in writing and secondly, to enable such a person to make a representation before a Magistrate.[70] However, it needs to be remembered that grant of remand in every case should not be a mechanical exercise and it must be ascertained by a Magistrate concerned that the accusation is well

---

66 UNHCR, *Country of Origin Information Report – Bangladesh* (2009) < http://www.unhcr.org/refworld/docid/4a8d005b2.html> accessed 16 January 2013.

67 See above n 11, 64-65.

68 See above n 11, 372.

69 Ibid, 368.

70 *Gauri Shankar v State of Bihar* (1972) AIR (SC) 711, 715.

founded and remand would render substantial assistance in investigation of the matter.[71]

Among the others, section 163 prohibits a police officer or a person in authority from offering or making any inducement, threat or promise[72] to any accused while recording his statement under section 161 of the Code.[73] And section 132 provides for protection against prosecution for acts done in good faith except with the sanction of the government. However, this section should therefore be construed broadly. It is the policy of the Legislature to afford adequate protection to public servants, to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause. And no sanction is necessary when the police officer is not an officer-in-charge of a police station as his action is illegal; nor when police officers are charged under sections 302, 304, 326, 148 of the Penal Code.[74] However, section 197 provides that at any time before taking cognizance of an offence the proper authority can grant sanction and the prosecution is entitled to produce the order of sanction. The bar may be removed when sanction is given by the Government. This section gives protection from false, vexatious or *malafide* prosecution to important public servant performing onerous and responsible duties fearlessly. It does not mean that the section has laid down a wall around the public servants from prosecution for criminal offences committed by them, but the protection extended only to a public servant but not all the servants. This section does not bar to make complaint or to submit a police report but only bars a Magistrate from taking cognizance of the offence on such complaint. The court must take sanctions from the prosecution to proof that the prosecution has really takes sanction from the appropriate court.[75] And it is not every offence committed by a public servant that requires sanction for prosecution under section 197 of the Code nor even every act done by him while he is actually engaged in the performance of his official duties but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary.[76] However, criminal act such as outraging the modesty of a women and killing a man while the culprit was being chased, has no connection with acts done or purported to be done in the discharge of public duty[77] and if a public servant commits an offence of cheating or abets another to cheat, the offence is not within the span of his official duty and so

---

71 See Wahab, above n 56, 55.
72 Ibid, 299.
73 See above n 11, 370.
74 See Wahab, above n 54, 166.
75 Ibid, 446.
76 *Sudhir Das Gupta v Bhupal Chandra Chowdhury* (1986) 38 DLR 343.
77 *Rakanuddin Bhuiya v The State* (1966) 18 DLR 412.

no sanction is necessary. The police can investigate into the conduct of public servant for alleged offences against the law even before the sanction of the government. The question of sanction under section 197 will arise only when a charge is preferred before a court and the court's function begins.[78]

2.1.2.2 Criminal Laws

The Penal Code, 1860 is the principal penal legislation of Bangladesh. It defines and prescribes punishments for various offences. Besides, there are other penal laws in Bangladesh but the criminal laws prevailing in Bangladesh do not have the definition of torture in particular. However, there are a number of offences that penalize conduct that may amount to torture[79] in line with the article 1 of the CAT.[80] The Penal Code, 1860 criminalizes hurt and grievous hurt.[81] And all these offences are widely categorized for the purpose of punishment where these offences may in certain circumstances cover the offence of torture[82] as defined by the CAT.[83] Among

---

78 See Wahab, above n 54, 451-452.

79 Conduct amounting to torture may be prosecuted under the following offences: - Voluntarily causing hurt to extort confession or to compel restoration of property (punishable by up to seven years imprisonment and liable to a fine, and, if the hurt caused is grievous, the maximum punishment is ten years imprisonment and liability to pay a fine); - Wrongful confinement to extort confession or compel restoration of property (maximum punishment of three years imprisonment and fine1); - A public servant disobeying the law, with intent to cause injury to any person (up to one year imprisonment and/or a fine); - A public servant concealing the design to commit an offence that it is his or her duty to prevent (punishment depends on the imprisonment or fine that is provided for the related offence.

80 See Wahab, above n 54, 138.

81 Different categories of hurt and grievous hurt consists of , amongst others voluntarily causing hurt not in consequences of grave and sudden provocation, voluntarily causing hurt with dangerous weapons or means, voluntarily causing hurt in consequences of grave and sudden provocation, voluntarily causing hurt with the intention to extort property or to constrain to an illegal act, voluntarily causing hurt with the intention to extort confession or to compel restoration of property, voluntarily causing grievous hurt not in consequences of grave and sudden provocation, voluntarily causing hurt with the intention to extort property or to constrain to an illegal act, voluntarily causing hurt with the intention to extort confession or to compel restoration of property.

82 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess. Article 1(1) CAT defines torture as follows: For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

83 See Wahab, above n 54, 141.

those, section 330 that provides for voluntarily causing hurt to extort confession or to compel restoration of any property,[84] the principle object is to prevent torture by the police but the section covers every kind of torture for whatever purpose it may be intended. This section requires that the assault should be proved to be solely for the purpose of extorting confession or restoration of property and has to be read along with sections 30, 39 and 327[85] and for voluntarily causing grievous hurt to extort confession or to compel restoration of any property[86] seeks to punish if suspect is tortured causing him grievous hurt. Sections 330 and 331 as mentioned earlier are similar, the only difference being that this is an aggravated form and the hurt caused is grievous.[87] There is another offence defined as wrongful confinement of a person to extort from him or from any other person interested in him any confession or any information which may lead to the detection of an offence or misconduct is a punishable offence under the Penal Code, 1860.[88] To some extend certain acts of torture can be punished under this penal provision.[89] Also section 348 that corresponds to section 330 substantially and may be read along with sections 30, 40 and 330 of the Penal Code, the only difference being the nature of the act made punishable. A police officer detaining a person not concerned with investigation for more than 24 hours is punishable under this section.[90] In case of

---

84 Whoever voluntarily causes hurt, for the purpose of extorting from the sufferer or any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand; or to give information which may lead to the restoration of any property or valuable security shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

85 Zahirul Huq, *The Penal Code* (Anupam Gyan Bhandar, 2001) 663.

86 Section 331:Whoever voluntarily causes grievous hurt, for the purpose of extorting from the sufferer or any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand; or to give information which may lead to the restoration of any property or valuable security shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

87 See Huq, above n 85, 664.

88 Section 348:Whoever wrongfully confines any person for the purpose of extorting from the person confined or any person interested in the person confined, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confine or any person interested in the person confined to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand; or to give information which may lead to the restoration of any property or valuable security shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

89 See Rahman, above n 5, 142.

90 See Huq, above n 85, 684.

personal violence or threats by a police officer, who shall offer any unwarrantable personal violence to any person in his custody, may amount to torture. In that sense, these offences are punishable[91] under the laws regulating the police forces.[92] Also the Penal Code criminalizes criminal intimidation[93] where torture, primarily arising out of severe mental pain or suffering may fall under the offence of criminal intimidation.[94] And under certain aggravating circumstances, culpable homicide[95] may amount to murder. In fact an act of torture cannot be punished as a culpable homicide. The definitions and jurisprudentially basis of these offences are altogether different from each other. Nevertheless the statutory provisions relating to culpable homicide can be relevant and accordingly employed when death is caused as a consequence of torture. However, an attempt to commit torture is punishable under the laws of Bangladesh only to the extent torture is addressed as a criminal offence under the laws of Bangladesh. However, according to the Penal Code, 1860, complicity or participation to in offence depending on the circumstances of a case can be punished as a joint liability or abetment of the offence. The principle of joint liability states that when a criminal act is done by several persons in furtherance of the common intention of all, each of such person is liable for that act in the same manner as if it were done by him alone. On the other hand the abetment of an offence means instigating any person to do the offence or engaging with one or more other person or persons in a conspiracy to commit the offence or intentionally aiding a person to commit the offence. When an offence is committed its abetment is punishable with punishment provided for the offence. Therefore complicity or participation in torture is punishable under the laws of Bangladesh only to the extent torture is addressed as a criminal offence under the laws of Bangladesh.[96] The Penal Code, 1860 also criminalizes criminal force[97] and assault[98]. As per this penal law the

---

91 *Police Act 1861,* s 29 and *Dhaka Metropolitan Police Ordinance 1976*, s 53, *Chittagong Metropolitan Police Ordinance 1978,* s 55, *Khulna Metropolitan Police Ordinance 1985,* s 55, *Rajshahi Metropolitan Police Act1992*, s 55.

92 See Rahman, above n 5, 146.

93 It means threatening a person with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with an intention to cause harm to that person or to cause that person to do any act which he is not legally bound to do or to omit ot do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat.

94 See Rahman, above n 5, 145.

95 Culpable homicide means causing death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that the doer of the act is likely by such act to cause death.

96 See Rahman, above n 5, 146-147.

97 Criminal force is defined as an intentional use of force to any person without that persons consent, in order to the committing of an offence or without the intention or knowledge of causing injury, fear or annoyance to that person.

term criminal force includes what in English law is called 'battery'. On an analytical look at the penal provisions of Bangladesh concerning criminal force and assault, it is evident that these provisions being very limited in application are not wide enough to deal with the offence of torture although on some occasions some particular aspects of torture can be punished under these provisions.[99]

2.1.2.3 The Evidence Act

It has been observed that the inadmissibility of statements made under torture, as based on international law, does not depend on any further consideration, be they related to the identity of the torturer state or to the persons concerned. This conclusion is in line with the general attitude international law takes towards the practice of torture and therefore underlines that the exclusionary rule 'is a function of the absolute nature of the prohibition of torture'. It may therefore be said that international law provides a comprehensive set of rules to combat torture and that the inadmissibility of evidence found to have been obtained by coercion is an important tool designed to eradicate torture once and for all.[100] The question of the admissibility of such evidence is broken down into several different cases. All those cases come within the exclusionary rule of Article 15 of the the UN Convention against Torture. The article further argues that the inadmissibility is also comprehensive under the right to a fair trial, having regard to the right against self-incrimination and to the unreliability of statements obtained by torture. It is also argued that this exclusionary rule is the part of customary international law and that the very concept of *jus cogens* obliges all states including Bangladesh to distance them from any violation of its substantive content and therefore refuse to accept any evidence obtained by torture.[101] However, the Evidence Act does not permit under various provisions the use of any inducement, influence, and force in making a person to confess.[102] First of all it is the section 24 that provides a confession[103] or

---

98 The offence of assault is defined as an act of making any gesture or any preparation with the intention or knowledge of causing any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person. It is to be noted here that mere words do not amount to an assault unless the words used by a person gives to his gestures or preparations such a meaning as may make those gesture or preparations amount to an assault.

99 See Rahman, above n 5.

100 Tobias Thienel, 'The Admissibility of Evidence obtained by Torture under International Law' (2006) 17(2) *The European Journal of International Law* 349, 367.

101 Ibid, 349.

102 Farzana Akhi, *Confession in police remand* (2008) <http://farzanaakhi.blogspot.com/2008/02/remand-and-confession-are-most.html> accessed 12 June 2013.

103 As the term confession is not defined in the Evidence Act, the courts in this sub-continent adopted Stephen's definition of confession given in his Digest of the Law of Evidence. Stephen defined confession as an admission made at any time by a person charged with

admission is evidence against its maker, unless its admissibility is excluded by provisions embodied in the Evidence Act. The provisions of section 24 are general and are intended to exclude confessions which have been improperly obtained. A confession which falls within the mischief of this section is not admissible in evidence. Under section 24 a confession made by an accused is irrelevant in a criminal proceeding if the confession has been made by an accused person to a person in authority[104]; it must appear to the court that the confession has been caused or obtained by reason of any inducement, threat or promise proceeding from a person in authority; the inducement, threat or promise must have reference to the charge against the accused person, and the inducement, threat or promise, in the opinion of the court , be such that it would appear to the court that the accused in making the confession believed or supposed that he would, by making it gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him. All these conditions must cumulatively exist and in deciding whether particular confession attracts section 24, the confession has to be considered from the point of view of the confessing accused as to how the inducement, threat or promise proceeding from a person in authority would operate in his mind. If the confession is caused by inducement, threat or promise, as contemplated by section 24, the whole of the confession is excluded by this section, which excludes proof of all the admissions of incriminating facts contained in a confessional statement. The prohibition also provides in section 25 that covers a confession which was made when the maker was free and not in police custody, as also a confession made before any investigation was begun. A statement or confession made in the course of an investigation may be recorded by a Magistrate under section 164 of the Cr. P.C. subject to the safeguards imposed by that section. Even a confessional first information report to a police officer cannot be used against the accused in view of section 25 of the Evidence Act. And except as provided in section 27, a confession by an accused to a police officer is absolutely protected under section 25 and if it is made in the course of an investigation, it is also protected by section 162 of the Cr. P.C. and a confession to any other person made by him while in custody of a police officer, is protected by section 26 unless it is made in the immediate presence of a Magistrate. These provisions seem to proceed upon the view that confession made by the accused to a police officer or made by them while in custody of police officer are not to be trusted and should not be used in evidence against him. This principle is based upon grounds of public policy and fullest effect should be given to them.

---

crime stating or suggesting the inference that he committed a crime. See M. Ansaruddin Sikder, *Law of Evidence* (M. Tanveer Foysal, 1991) 406.

[104] A person in authority in section 24 is one who is engaged in the apprehension, detention or prosecution of the accused or one who is empowered to examine him. See Obaidul Huq Chowdhury, *Evidence* Act (Esrarul Huq Chowdhury, 1999) 66.

And the ban, which is partial under section 24 and complete under section 25, applies equally whether or not a person against whom evidence is sought to be led in a criminal trial was, at the time of making the confession in custody. For the ban to be effective the person need not have been accused of an offence when he made the confession. The expression 'accused person' in section 24 and the expression 'a person accused of any offence', have the same connotation and describe the person against whom evidence is sought to be led in a criminal proceeding.[105] However, in case of section 26, custody does not mean custody after formal arrest, but includes any sort of surveillance or restriction or restraint by the police. When a person is called to the police station and is interrogated as an accused in connection with the investigation of a crime, he must be deemed to be in the custody of the police while he is so interrogated and no formal arrest is necessary.[106] Similarly sections 25 and 26 provide bar for not only proof of admissions of an offence by an accused to a police officer or made by him while in the custody of a police officer, but also admissions contained in the confessional statement of all incriminating facts relating to the offence.[107] The objection contained in section 25 and 26 is to prevent the practice of torture etc. by the police for the purpose of extracting confessions from the accused persons.[108] And section 24 and 25 were enacted not because the law presumed the statements to be untrue, but having regard to the tainted nature of the source of the evidence, the law prohibited them from being received in evidence.[109]

There is much of controversy regarding section 27 of the Evidence Act but the real fact is that this section is one of a group of sections relating to the relevancy of certain forms of admissions made by persons accused of offence. It is founded on the principle that even though the evidence, relating to confessional or other statements made by a person, whilst he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted, and is therefore, declared provable in so far as it distinctly relates to the fact thereby discovered. Even though section 27 is the form of a proviso to section 26, the two sections do not necessarily deal with the evidence of the same character. The ban imposed by section 26 is against the proof of confessional statements. Section 27 is concerned with the proof of information, whether it amounts to a confession or not, which leads to the discovery of facts. By section 27 even if a fact is deposed to as discovered in consequence of information received, only that much of the information is

---

105 See Sikder, above n 103, 406-407.
106 Ibid, 483.
107 See Sikder, above n 103, 407.
108 Ibid, 469.
109 See Sikder, above n 103, 409.

admissible as distinctly relates to the fact discovered.[110] However, regarding the corroboration of confession, the High Court Division has confirmed in its jurisprudence that convictions based solely on the confession of an accused to a police officer are unsafe, and other corroborative evidence is required.[111] Though the conviction of the maker can be founded on his confession alone, as a rule of prudence the courts require corroboration. There is no legal bar to a conviction being on a voluntary confession if believed to be true, but the rule of prudence does not require each and every circumstances mentioned in the confession with regard to the participation of the accused in the crime must be separately and independently corroborated, nor is it correct that confession can only be corroborated by facts and circumstances discovered after the confession was made. A judicial confession which has been corroborated by other evidence is sufficient for conviction of the accused. But where the version of events given in the judicial confession of the accused was highly improbable and the confession was yet not corroborated by any other evidence and circumstance, the accused was given the benefit of the doubt and acquitted. If there is ocular evidence in a case to which no exception can be taken, then that portion of the confessional statement which is not corroborated by ocular evidence can be discarded by the courts.[112]

2.1.2.4 Anti-torture Laws of the Law Enforcing Agencies

There are certain laws of the law enforcing agencies that portray the anti-torture regime in them. According to the Police Act of 1861 maintaining law and order is the principal function of the police.[113] In addition, the Police Act of 1861 lists the following offences for which a police officer can be disciplined or prosecuted and they are, a willful breach or neglect of any rule or regulation or lawful order, withdrawal from duties of the office or being absent without permission or reasonable cause, engaging without authority in any employment other than their police duty, cowardice and causing any unwarrantable violence to any person in their custody. The penalty for these offences ranges between “a fine of up to three months pay” to “imprisonment of up to three months” or “a combination of both”. As mentioned earlier, any aggrieved person can file a criminal case with the police station or with a judicial magistrate against a police officer accused of any offence, such as brutality, harassment, and any abuse of power. The Human Rights Commission is another means of holding the police accountable in cases of misconduct, abuse of power, or police excess. The law authorizes the Commission to

---

110 Ibid, 407-408.

111 REDRESS, *Torture in Bangladesh 1971-2004 Making International Commitments a Reality and Providing Justice and Reparations to Victims*. (2004).

112 See Sikder, above n 103, 439.

113 See Point, above n 50.

inquire into complaint of violation of human rights by a person, state or government agency or institution or organization. The Commission can do it *suo-moto* or on a petition presented to it by a person affected or any person on his behalf.[114] However, section 153 of the Police Regulations of Bengal (PRB), 1943 says about the principles governing the use of firearms in the terms that firearms should not be used other than in emergencies. Under the aforementioned section, the use of firearms is applicable only in the following three situations; to exercise the right of private defence of person or property, for dispersal of unlawful assemblies and to effect arrest in certain circumstances.[115] A police officer belonging to the forces of the Metropolitan Dhaka area faces a punishment of up to one year and/or a fine of up to two thousand taka (approximately $33) for personal violence or threats against any person in his or her custody.[116] Furthermore, the Police Act, 1861, Police Regulations of Bengal 1943 and the Dhaka Metropolitan Police Ordinance empower police authorities to impose disciplinary sanctions.[117] In the case of delimiting political interference in the activities of the Police, the Draft Police Ordinance, 2007 in Chapter IV says that the NPC would be a nonpartisan body that would oversee the functioning of the Police Service so as to limit and ideally eliminate political interference.

Another controversial agency in the matter of torture is the RAB but regarding the formation of it, the formation illustrates a common trend in antiterrorism approaches to blur police or military distinctions. The Armed Police Battalions (Amendment) Act, 2003 placed the RAB under the command of the Inspector General of Police and, by extension, the Minister of Home Affairs. The Act requires the RAB to be commanded by an officer not below the rank of Deputy Inspector General of Police or a person of equivalent rank from the army, navy, air force, or other disciplined force. Human Rights Watch notes that the main tasks of the RAB, according to the law, are to provide internal security; conduct intelligence into criminal activity; recover illegal arms; arrest criminals and members of armed gangs; assist other law enforcement agencies; and investigate any offense as ordered by the government. As long as they are within these activities, they are doing it reasonably; there is no possibility of abusing power by them resulting no torture by them.[118]

---

[114] Dr. Zahidul Islam Biswas, *Police accountability and the 'rule of politics* (2012)< http://www.blast.org.bd/content/news/police-accountability-and-the-rule-of-politics.pdf> accessed on 20 May 2013.

[115] See Tajul, above n 45.

[116] *Dhaka Metropolitan Police Ordinance 1976*, s 53.

[117] See REDRESS, above n 111.

[118] Human Rights Initiative, *Bangladesh Country Report: Anti-terrorism Laws and Policing* (2003)<

2.1.2.5 Torture, Major Crimes and the Rome Statute

Bangladesh is the 111th state to ratify the Rome Statute international criminal court of international criminal court and the seventh in Asia to do so, joining Afghanistan, Cambodia, Mongolia, the Republic of Korea, Timor-Leste and Japan. By ratifying the Rome Statute, Bangladesh has demonstrated an important commitment to international justice and working to end impunity for genocide, crimes against humanity and war crimes. With this ratification Bangladesh has become the first country to join the International Criminal Court in South Asia and 111th State party to the Statute. Joining of this international justice system by Bangladesh would grant the region a stronger voice and a more meaningful role in supporting this truly effective mechanism for the protection of human rights and the rule of law.[119] It seems fair to argue that torture could fit very easily into any of the three major crimes, ratifying the Rome Statute and would send a clear signal against impunity in Bangladesh.[120]

2.1.2.6 Torture and Custodial Death Prevention Act, 2013

Bangladesh signed the UN Convention against Torture and Cruel, Inhumane or Degrading Treatment or Punishment on October 5, 1998, during the tenure of an Awami League-led government, promising to create effective legislation and take administrative, judicial or other measures to prevent acts of torture.[121] In pursuance of this obligation a tough new law named the Torture and Custodial Death (Prevention) Act, 2013 that provides for life imprisonment for members of police and other law enforcement agencies if they found guilty of custodial deaths, has been passed by Bangladesh's Parliament. The Bill was introduced a few months after the Parliament first sat in 2009 and was passed nearly five years after ruling Awami League lawmaker Saber Hussian Chowdhury brought it as a Private Member's Bill.[122] It was drafted aimed at curbing tortures by the law enforcement agencies on

---

http://www.humanrightsinitiative.org/publications/chogm/chogm_2007/docs/country_reports/071004_chogm07_bangladesh_anti_terrorism_policing_country_report2007.pdf> accessed 30 April 2013.

119 Coalition for the International Criminal Court, *Bangladesh Ratification: CICC Ratification Campaign Backgrounder; Related Members Media Releases; EU Statement* (2010)< http://www.iccnow.org/?mod=newsdetail&news=3868> accessed 30 April 2013.

120 See BRCT, above n 10.

121 The Daily *Star*, 'Life sentence for custodial death, torture convicts', *The Daily Star* (online), 2013 <http://www.thedailystar.net/beta2/news/life-sentence-for-custodial-death-torture convicts/>accessed 28 October 2013.

122 Anisur Rahman, *New Bangladesh Law to Prevent Custodial Deaths* (2013) < http://news.outlookindia.com/items.aspx?artid=814925> accessed 28 October 2013.

common people under custody[123] and to conform to the UN Convention against Torture and Cruel, Inhumane or Degrading Treatment or Punishment, adopted in 1984.[124] However, police torture on Awami League MP Saber Hossain Chowdhury during the previous tenure of the BNP, prompted the leader to frame a law to prevent torture and death in custody of the police and other law enforcement agencies. He said the law would be a big "no" to such human rights violations in Bangladesh.[125] However, the AHRC termed the enactment unique as the Bill was placed in the Parliament as a Private Member Bill by a lawmaker from the Treasury Bench. The enactment is the quintessence of the struggles and demands of the people, survivors of torture, families of extrajudicial executions, and human rights defenders to end the culture of custodial violence in the country. With the passing of this special statute, which criminalizes all forms of custodial violence, Bangladesh shares a covetable position amongst its counterparts in Asia. This law, which will enable everyone in Bangladesh to fight against all forms of custodial violence, is thereby one that draws from both the experience of a human rights group and the personal experiences of a torture survivor. Today, exceptional challenges exist for those that dare to make complaints of custodial violence in Bangladesh. While this has been addressed to a certain extent by the new law, now a complainant can approach the Court to file a complaint against torture and other forms of custodial violence.[126]

As per the law, torture means acts which cause physical or mental pain and are intended to intimidate, coerce or punish someone to obtain information or a confession. It also says that any person who attempts to commit, aid and abet in committing, and conspires to commit an offence shall also be guilty of an offence.[127] Under the law, personnel of Police, Rapid Action Battalion (RAB), Border Guard Bangladesh (BGB), Customs, Immigration, Criminal Investigation Department (CID), Intelligence Agencies, Ansar and Village Defence Party, Coast Guard and other public servants cannot extract confessional statement through torture. Any person attempting to commit, aiding and abetting to commit, or conspiring to commit an offence must be considered as an offender according to this law. The Court will immediately record the statement of any person who declares he was

---

[123] Kamran Reza Chowdhury, *JS passes bill to stop custodial deaths* (2013)< http://www.dhakatribune.com/law-amp-rights/2013/oct/25/js-passes-bill-stop-custodial-deaths> accessed 28 October 2013.

[124] See above n 122.

[125] See above n 123.

[126] The Financial Express, *AHRC urges BD to implement new law against torture, custodial violence* (2013) < http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMTBfMjdfMTNfMV8yXzE4ODExOQ==> accessed 28 October 2013.

[127] See Star, above n 121.

tortured in custody and then order physical examination of the victim by doctors.[128] The new legislation provides for adverse presumption against the State agent, if it is proven that a person under the State's custody has been tortured or has died whilst in custody, the statement said.[129] Besides, any suspect or criminal cannot be physically or mentally coerced or intimidated. The law enforcement agencies could not justify their offences even during war-like situation, threat of war, internal political instability and emergency.[130] And for the first time in Bangladesh, the law addresses delays in investigation and adjudication of the cases of custodial violence.[131] The new law mandates suspension of the accused from service during investigation into the charges, regardless of whether the suspect is a member of a regular law-enforcement agency, the armed forces, or any other government office.[132] The law mandates that investigations into cases of torture will have to be completed within 90 days of registration of a complaint, and the trial will have to be completed within 180 days.[133] The law further says, any aggrieved person can turn to the Court if they thought that the police could not carry out any investigation. In that case, the Court could instruct for a judicial inquiry into the allegation. And for any death in custody, the custodian would be awarded with rigorous life imprisonment or a fine of Tk100, 000. In addition, they must compensate the family members of the affected with Tk 200, 000 also.[134]

2.2 Promotion and Protection Regime

The promotion and protection regime is for ensuring redress for the victims of torture. In general terms, redress in the form of reparation is granted to an injured party to make up for the damage caused by a wrongful act. For torture survivors, the act of procuring reparation, if handled with the proper support and care by assisting parties, may be an important part of the healing process. The pursuit of reparation can be empowering, allowing torture survivors to transform feelings of pain, isolation or stigmatization through a public process that may result in a public acknowledgement that a wrong was committed and that those responsible will be punished. Very often, the term “reparation” is wrongly thought to be synonymous with “financial compensation”. Although compensation is a very common form of reparation, it is not the only form. As elucidated in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly in 2005,

---

128 See Rahman, above n 122.
129 See Express, above n 126.
130 See Chowdhury, above n 123.
131 See Express, above n 126.
132 See Rahman, above n 122.
133 See Express, above n 126.
134 See Chowdhury, above n 123.

reparation can include restitution, such as restoration of liberty, legal rights, social status, family life and citizenship; physical and psychological rehabilitation, and legal and social services; satisfaction, which comprises verification of the facts and revelation of the truth, acknowledgment of the suffering, public apology, judicial and administrative sanctions against the perpetrator, commemoration and tributes to the victims; guarantees of non-repetition, to prevent recurrence of similar crimes such as measures to control the military, strengthen the independence of the judiciary, and reform human rights laws; and compensation, which includes any monetary award calculated on the basis of the estimated damage resulting from the crime, including physical and mental pain and loss of opportunities, such as education. However, cultural differences and diversity of backgrounds and experiences can impact on perceptions of reparation.[135] And that is why national authorities commitment to implementing the right to reparation may take many and varied forms. It is unlikely that all victims will find the same form of reparation beneficial or desirable. National authorities should therefore facilitate access to a variety of reparations, including judicial, compensatory, rehabilitative, restitutive, declaratory and commemorative forms. And as all states are obliged to provide reparation to victims of torture, a precondition for successful reparation is that those responsible for making and interpreting laws and policies within the national administration are empathetic to the rights and needs of victims.[136] States are therefore not only obliged to refrain from acts of torture and to take measures to prevent its occurrence, but also have a duty to punish the perpetrators. The right to reparation also entails the obligation of States to afford effective remedies for victims to obtain reparation, including access to justice.[137] In Bangladesh victims may submit a written application to the High Court Division of the Supreme Court that has the power to provide relief for violations of fundamental rights. The court has asserted its competency in this regard that the Constitution of Bangladesh does not provide for the defence of sovereign immunity so there is no bar to awarding compensation to an aggrieved person under writ jurisdiction for a violation of his or her fundamental rights". Thus the possibility exists for constitutional relief in Bangladesh including the others also.[138]

2.2.1 Constitutional Remedies

As a matter of Constitutional law, torture victims may seek relief through a writ application[139] to the High Court Division of the Supreme Court.[140] The High Court

---

135 Torture Abolition and Survivor Support Coalition TASSC International, *Reparation* (2011) < http://tassc.org/blog/about-torture/reparation/> accessed 09 May 2013.

136 Paul Dalton, *Some perspectives on torture victims, reparation and mental recovery* (2003) < http://www.article2.org/mainfile.php/0106/63/> accessed 09 May 2013.

137 REDRESS, *Reparation for Torture* (2003).

138 See BRCT, above n 10.

139 Writ petition under the Constitution is maintainable in case of a violation of any fundamental right of the citizens, affecting particularly the weak and downtrodden or deprived section of the community, or if there is a public cause involving public wrong or public injury, any

Division has the power to provide appropriate relief for the violations of fundamental rights, including a violation of the prohibition of torture under Article 35 (5) of the Constitution.[141] Article 102(1) of the Constitution confers power on the High Court Division to enforce fundamental rights, while article 102(2) confers power of judicial review in non-fundamental right matters.[142] Article 44(1) provides that the right to move the Supreme Court for enforcement of any of the fundamental rights is itself a fundamental right. Article 44(2) enables the Parliament to confer the jurisdiction to enforce fundamental rights on any other court, but such conferment cannot be in derogation of the power of the Supreme Court under article 102(1) which means that such other court may be given concurrent, but not exclusive, power of enforcement of fundamental rights. The Supreme Court must always have the power for enforcement of fundamental rights.[143] The Constitution does not stipulate the nature of the relief which may be granted. It has been left to the High Court Division to fashion the relief according to the circumstances of each particular case.[144] It need not be confined to the injunctive relief of preventing the infringement of a fundamental right and in an appropriate case it may be a remedial one providing relief against a breach already committed.[145] And where any person illegally detained then in favor of him any person can file a writ of *habeas corpus* under article 102(b) (1) of our Constitution.[146] The UNDP report of 2002 noted that detentions under the SPA may be challenged on the basis of *habeas corpus* petitions moved before the High Court under Article 102 of the Constitution and under Section 491 of the Cr. P. C. which provides power to issue directions of the nature of a *habeas corpus*.[147] If the detention is not in conformity with the provisions of law under which he is purported to be detained he may secure release by moving the courts of law. It is to be mentioned that there is no hard and fast rule for this application.[148] And it is not discretionary with the High Court Division to grant relief

---

member of the public or an organization whether being a sufferer himself/itself or not may become a person aggrieved if it is for the realization of the objectives and purposes of the Constitution. See Justice Muhammad Habibur Rahman, 'Our Experience with Constitutionalism' (1998) 2 (2) *Bangladesh Journal of Law* 115, 123.

140 *Constitution of People's Republic of Bangladesh 1972,* arts 44 (1) and 102 (1).

141 See REDRESS, above n 111.

142 See Islam, above n 12, 593.

143 Ibid, 385.

144 *Bangladesh v Ahmed Nazir* (1975) 27 DLR (AD) 41.

145 *Mehta v India* (1987) AIR (SC) 1086, 1091.

146 Md. Ashraful Arafat Sufian, 'Preventive Detention in Bangladesh: A General Discussion' (2008) 1(2), *Bangladesh Research Publications Journal*, 166, 173.

147 See UNHCR, above n 66.

148 Md. Jahid Hossain Bhuiyan, 'Preventive Detention and Violation of Human Rights: Bangladesh, India and Pakistan Perspective' (2004) 8(1& 2) *Bangladesh Journal of Law*, 103, 126.

under article 102(1) but a constitutional obligation to grant the necessary relief.[149] It provides that on the application of any person the court may direct the person having custody of another to bring the latter before it so that it can satisfy itself that the detenu is not being held in custody without lawful authority or in an unlawful manner. The expression 'custody' is not confined to executive custody[150] and includes custody of private person also. [151]

However, the avowed purpose of the exercise of writ jurisdiction is to further justice.[152] The High Court Division will exercise its discretion in accordance with judicial consideration and well established principles[153] and will interfere where any improper exercise of power or non-exercise of jurisdiction has caused manifest injustice.[154] It is reported in two cases of Indian jurisdiction specially the case reported in AIR 1977 SC that while fundamental rights to life and liberty is curtailed or infringed, this Court in exercise of its power given under Article 102 of the Constitution may also give compensation to the victim if it is found that the confinement or detention of the victim is not lawful and that the victim was subjected to torture, cruel, inhuman and degrading treatment. He has further submitted that the victim should not be asked to seek relief in any other civil court for damages and compensation.[155] For certain grounds[156] when High Court is satisfied that the detenu has been detained arbitrarily then court can declare the detention illegal and order to release him immediately. In the time of emergency when writ of *habeas corpus* is withheld then a case filed under section 491 of Cr. P. C. to get directions or rule of the nature of a *habeas corpus*. Though it is stated that under the Special Power Act there is no chance of filing a *habeas corpus* writ but it can be filed under constitutional law which is stronger than the general law i.e. the

---

149 *Kochuni v Madras* (1959) AIR (SC) 725; *Romesh Thapar v Madras* (1950) AIR (SC) 124.

150 *Bangladesh v Ahmed Nazir* (1975) 27 DLR (AD) 41.

151 *Ayesha v Shabbir* (1993) BLD 186; *Abdul Jalil v Sharon Laily* (1998) 50 DLR (AD) 55; *Farhana Azad v Samudra Ejazul Haque* (2008) 60 DLR 12; *Bangladesh Jatiyo Mahila Ainjibi Samity v Ministry of Home Affairs* (2009) 61 DLR 371; *Zahida Ahmed v Syed Nooruddin Ahmed* (2009) 14 BLC 488.

152 *Brihan Mumbai Electric Supply & Transport v Loqshya Media (P) Ltd* (2010) 1 SCC 620.

153 *Janardhan Reddy v Hydrabad* (1951) AIR (SC) 217.

154 *Kallolimath v Mysore* (1977) AIR (SC) 1980.

155 See above n 11.

156 Most of the cases the court found the weak grounds, vague & not any specific grounds. as a result the high court can relax the detenu for following grounds like detaining by governments unlawful authority, failure to state the grounds within time, failure to give chance to be defend himself, lack of nexus with the reason of detention, not to produce the detenu before advisory board within specific time, mixing good grounds with bad grounds, retrospective issuance of orders and failure to submit essential documents before court or not in proper time.

Special Power Act.[157] The High court Division has power to issue the order of release of a person in custody under section 491 of the Code of Criminal Procedure and this power can be exercised *suo motu*.[158] But this power is hedged with limitation[159] and can be taken away or curtailed by ordinary legislation. In codifying the writ of *habeas corpus*, the framers of the Constitution have freed the jurisdiction from any limitation and have conferred wide power of judicial review[160] which can in no way be curtailed by any legislative device.[161]

However, in the case of exceeding powers, committing injustice and violating the legal provisions by the law enforcing agencies through the practice of torture, judicial review is available.[162] Courts exercise the power of judicial review on the basis that powers can validly be exercised only within their true limits and a public functionary is not to be allowed to transgress the limits of his authority conferred by the Constitution or the laws.[163] In the same way the court can exercise the power of judicial review if the decision is *mala fide* or in violation of the principles of natural justice.[164] The duty of the review court is to confine itself to the question whether the authority has exceeded its powers, committed an error of law, failed to consider all relevant factors, failed to observe the statutory procedural requirement and the common law principles of natural justice or procedural fairness, reached a decision which no reasonable authority would have reached, or abused its powers.[165] The court quoted the observation of Lord Brightman that in judicial review the court is concerned not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power.[166] The power of

---

157 See Sufian, above n 146.

158 *State v D C Satkhira* (1993) 45 DLR 643 (HCD took action on the basis of news published in a newspaper).

159 Sub-section (3) of sec. 491 shall not apply to a person detained under any law providing for preventive detention. The High Court Division held that this sub-section will not bar the remedy under sec.491 when a detention order is patently illegal or passed in colorable exercise of the detention law. *Panajit Barua v State* (1998) 50 DLR 399; *Pearu Md. Ferdous Alam v State* (1992) 44 DLR 603; *Sultanara Begum v Secy. Ministry of Home* (1986) 38 DLR 93.

160 *Aruna Sen v Bangladesh* (1975) 27 DLR 122, 142; *Abdul Latif Mirza v Bangladesh* (1979) 31 DLR (AD) 1; *West Pakistan v Begum Shorish Kashmiri* (1969) 21 DLR (SC) 1.

161 *West Pakistan v Begum Shorish Kashmiri* (1969) 21 DLR (SC) 1.

162 Judicial review is available where a decision making authority exceeds its powers, commit an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers.

163 See Islam, above n 12, 590.

164 *Shamsul Huda v BTMC* (1980) 32 DLR 114.

165 See *Tata Cellular v India* AIR 1996 SC 11.

166 *Chief Constable of the North Wales Police v Evans* (1982) 3 All E.R. 141, 154.

the judicial review of the superior courts has been a matter of Constitutional conferment and is a basic feature of the Constitution[167] in our country and it cannot be taken away or abridged by ordinary legislation.[168] And this Court (HCD) in exercise of its power of judicial review when finds that fundamental rights of an individual has been infringed by colorable exercise of power by the police, is competent to award compensation for the wrong done to the person concerned. Indian Supreme Court held the view that compensatory relief under the public law jurisdiction may be given for the wrong done due to breach of public duty by the state of not protecting the fundamental right to the life of citizen. So it is accepted that compensation may be given by this Court when it is found that confinement is not legal and death resulted due to failure of the state to protect the life but where it is found that the arrest was unlawful and that the person was subjected to torture while he was in police custody or in jail, in that case, there is scope of awarding compensation to the victim and in case of death of a person to his nearest relation.[169]

2.2.2 Common Law Remedies in Civil Courts

Torture survivors may invoke common law remedies in civil courts, such as public misfeasance or trespass to the person, or assault and battery. The State is vicariously liable for damages caused by its officials, so that both may be held jointly liable. Victims are entitled to damages, which are to be awarded to the extent that the victims can be put in the position they would have been in had the tort not been committed. Damages encompass both actual pecuniary loss, i.e. any expenses reasonably incurred by the plaintiff and future loss of income, as well as non-pecuniary damages for pain and suffering and loss of enjoyment of life. The amount of compensation depends on the facts and circumstances of each case. Exemplary damages may be awarded where the damage has been caused by the oppressive, arbitrary, unconstitutional action of Government officials. Torture survivors may file a civil claim for damages at the court of first instance in the place where the tort occurred or where the defendant resides. The Court has discretion in awarding costs and they usually follow the event. However, judgments are enforced by way of decrees issued by courts and executed by competent officers.[170]

2.2.3 Remedies under Criminal Law

A victim of a crime cannot claim reparation as part of criminal proceedings. However, a court hearing a criminal case has the discretion to order compensation

---

[167] See Islam, above n 12, 592.

[168] *Farzand Ali v West Pakistan* (1970) 22 DLR (SC) 203; *Fazal Din v Custodian of Evacuee Property* (1971) PLD (SC) 779.

[169] See above n 11.

[170] See Islam, above n 12.

when imposing a fine as the sentence. Section 545 (1) (b) of the Criminal Procedure Code might be utilized by courts in torture cases to order a convicted perpetrator to compensate the victim.[171] If there is a subsequent civil suit, the Court will take into account any sum already paid or recovered by the way of compensation under section. The Special Tribunals constituted to deal with offences under the Suppression of Violence against Women and Children Act, 2000, have been expressly vested with the power to award compensation to victims[172] in cases of custodial rape by ordering the offender to pay the imposed fine as compensation.[173] Custodial violence much as torture, rape or death involving not only physical suffering but also mental agony constitutes violation of human dignity and infringes the right guaranteed under art. 32 and strikes a blow at rule of law. A victim of custodial violence and in case of death while in custody, his family members are entitled to compensation under public law in addition to the remedy available under the private law for damages[174] for tortuous act of the police personnel.[175] In the case of investigations into allegations of torture a victim of torture may lodge a complaint with the police[176] or a magistrate.[177] In the absence of an independent body responsible for investigating human rights violations, investigations are carried out by the police and the magistrate. Complaints to the police[178] may be made by any person in writing or they can be made orally and recorded.[179]

2.2.4 Legal Aid

The Constitution of Bangladesh has in clear terms recognized the basic fundamental human rights. One of the basic fundamental rights is that all citizens are equal before

---

171 Section 545 (1) Cr. PC reads: "Whenever under any law in force for the time being a Criminal Court imposes a fine or confirms in appeal, revision or otherwise a sentence of fine, or a sentence of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied- (a) in defraying expenses properly incurred in the prosecution; (b) in the payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court."

172 Section 15 of Act No. VIII of 2000: "From section 4 to 14 [listing offences of rape and sexual abuse], the offences for which fine is imposed by the tribunal, such fines may be treated as compensation for the victims and if it is not possible to realize the fine from the existing wealth of the convicts, the fine shall be receivable from the future wealth to which the convict will be owner and in such cases realization of fine will have priority than that of other claims."

173 See Islam, above n 12.

174 *DK Basu v W.B.* (1997) AIR (SC) 610.

175 See Islam, above n 12, 269.

176 *Code of Criminal Procedure* 1898, s 154.

177 *Code of Criminal Procedure* 1898, s 200.

178 See above n 176.

179 See above n 142.

law and are entitled to equal protection of law. In Bangladesh majority people are improvised. They cannot access themselves to justice to protect and vindicate their legal rights and lawful causes. To address this problem legal aid services have been activated under the Aingoto Sohayota Prodan Ain (Act No. VI of 2000) i.e. the Legal Aid Act, 2000.[180] However, The Government legal aid in Bangladesh has nationally existed since the late 1990s. The current version was enacted in 2001 as the Legal Aid Services Act 2000 (LASA). It is a *judicare* program, delivered at the District level through a committee chaired by the District and Sessions judge under the central authority of a semi-autonomous body corporate named the National Legal Aid Organization (NLASO). [181] It comprehensively provides for the decentralization of activities in national and district level. At national level there is a National Legal Aid Board, at district level there are District Legal Aid Committees, in the Upazilla or Thana level there are Upazil1a Legal Aid Committees and in Union level there are provisions of Union Legal Aid Committees.[182] These Legal Aid Committees are headed by the respective District Judges, have been constituted with Government officer, Lawyer, Voluntary and Woman Organizations in each district. A statutory body called National Legal Aid Organization has been established and there is a National Board of Director consisting of 19 members. The members represent Ministers of Ministry of Law, Justice and Parliamentary Affairs as chairman, Members of the Parliament, Attorney-General of Bangladesh, Government officials as well as representatives from civil societies. [183] This Act is an honest attempt of the Government to lend its assistance to the poor people to institute or defend cases in courts. This Act along with guidelines and rules framed under it presents a comprehensive, nation-wide and state-funded legal aid scheme. It is mentioned in the preamble that the aim of enacting the Act is to provide legal aid[184] to the people who are unable to get the justice due to financial crisis or due to different socio-economic reasons.[185] Legal aid is theoretically available for all sorts of criminal,[186] family and civil matters[187] and is defined to include legal advice, legal

---

[180] Ministry of Law, Justice and Parliamentary Affairs, Bangladesh, *Legal Aid Service* (2013) < http://www.minlaw.gov.bd/legalaidservice.htm> accessed 21 July 2013.

[181] Ian Morrison, *Legal Aid in Bangladesh* (2013)< http://www. ilagnet.org/ jscripts/tiny_ mce/ plugins/filemanager/files/papers/Legal_Aid_in_Bangladesh_-_Ian_Morrison.pdf> accessed 21 July 2013.

[182] Shaila Islam, *Legal Aid in Bangladesh: A theoretical study on Govt. & Nongovt. Organization* (2010)< http://shailallb.blogspot.com/2010/02/legal-aid-in-bangladesh-theoretical.html> accessed 21 July 2013.

[183] See Ministry, above n 180.

[184] According to section 2(a) of the Act, "Legal Aid" means to provide legal aid to people who are unable to get the justice due to financial position or due to different socio econoimc condition such as the payment of lawyer's fees, etc. Thus, section 2 (a) of the Act broadly defines 'Legal Aid' so as to include counseling, payment of lawyers fees and other incidental cost for expenses of litigation. See above n. 182.

[185] See Islam, above n 182.

[186] The need for legal aid is felt more in criminal matters as the life, property and personal liberty of a person are inseparably connected there. As regards criminal matters, section 340 Cr. P.C. states that an accused should be defended by a lawyer and he must pay the fees and

representation and (since 2006 amendments) limited ADR services in civil matters. By 2008, the pilot Districts had well-known and accessible offices, easy to locate for poor justice seekers. Applications had more than doubled, and the number and percentage of women receiving legal aid increased greatly.[188] Processing time for cases was greatly reduced, quality standards for legal services were set and monitored, and panel lawyers received training, including gender training, more lawyers participated in legal aid including a higher percentage of women lawyers. In the pilot Districts, the government legal aid is collaborated with NGO services with mutual referrals and supports. The possibility of delivering legal aid services to an acceptable standard through the government legal aid mechanism was clearly demonstrated.[189]

However, the government is contemplating the constitution of a separate legal aid cell for the workers of mills and factories to help them getting legal assistance. The legal aid cell for worker of limited income group would help them taking step to protect their service and seek justice. The cell will work side by side existing Legal Aid Service,[190] and the National Legal Aid Committee is looking into the jail appeal matter as a result there are many poor convicts who are getting benefits of the law.

---

nothing more. Commenting on section 340 (1) of the Code of Criminal Procedure, 1898, the Supreme Court of India observed that the right conferred by section 340 (1) does not extend to a right in an accused person to be provided with a lawyer by the State, or by the police or by the Magistrate. That is a privilege given to him and it is his duty to ask for a lawyer if he wants to engage one and to engage one himself or get his relations to engage one for him. The only duty cast on the Magistrate is to afford him the necessary opportunity. In the case of Clarence *Earl Gideon v Wainwrght*, 1963, the USA Supreme Court has recognized that it is the right of undefended accused to have a lawyer at the cost of the state. In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defence. The leading case on Sixth Amendment to USA Constitution provides that as to the right of counsel, the Courts have "no power and authority to deprive an accused of his life or liberty unless he has or waived the assistance of counsel".

187 As regards civil matters, Order XXXIII of CPC deals with the 'pauper' suit. The Conscious Law Dictionary says that a pauper, is a poor person especially one so indigent as to depend on charity for maintenance or one supported by some public provisions; one so poor that he must be supported at public expense. The words 'pauper' and 'poor' have nearly the same meaning and they both embrace several classes. But Explanation to rule 1 of Order XXXIII of CPC provides that a person is a "Pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or where no such fee is prescribed, when he is not entitled to property worth five thousand taka other than his necessary wearing-apparel and the subject-matter if the suit. See above n. 181.

188 The Prime Minister Sheikh Hasina said over the last four years, some 48,444 people including women, men and children have received legal aid services. Some 19,010 cases have been disposed of under the government legal aid services. See Bangladesh Sangbad Sangstha (BSS), *Govt plans separate legal aid cell for workers: PM* (2013) < http://www1.bssnews.net/newsDetails.php?cat=0&id=327950$date=2013-04-28&dateCurrent=2013-04-30> accessed 21 July 2013.

189 See Morrison, above n 181.

190 See above n 188.

Under the Legal Aid Program, private lawyers are also being engaged to press and conduct the jail appeals in courts.[191]

2.2.5 National Human Rights Commission

For many years the people of Bangladesh lacked an effective mechanism for addressing their grievances when basic human dignities were involved. With the reconstitution of the National Human Rights Commission people's confidence is beginning to be revived. The Government took initial steps to establish a National Human Rights Commission more than a decade ago, in 1998. Although a draft law was prepared and debated, it was not finalized. The NHRC was later formally established by the National Human Rights Commission Ordinance 2007 and commenced activities on 1 September 2008 with the appointment of a Chairman and two other Members. The 2007 Ordinance was superseded by the Jatio Manobadhikar Commission Ain, 2009 i.e. the National Human Rights Commission Act, 2009 which was approved by the Parliament on 14 July 2009 with retrospective effect from 1 September 2008. Under the 2009 Act, the NHRC was reconstituted on 22 June 2010 with the renewed aim of establishing and securing human rights in every sphere of Bangladeshi society. The present Commission is dedicated to securing and upholding human dignity through the protection of fundamental rights and by advancing human security. The reconstituted National Human Rights Commission began its journey on 23 June 2010, envisioned as a pre-eminent organization of the State, having been created to support and embody the philosophy of Bangladesh. According to article 11 of the Bangladesh Constitution, the guarantee of 'fundamental human rights and freedoms and respect for the dignity and worth of human person' has been promulgated as the main mission of the State. Likewise, the National Human Rights Commission Act, 2009 preamble read with section 2(f) establishes the institution in order to protect, promote and foster human rights as envisaged in the Bangladesh Constitution and international instruments.[192] However, the NHRC's Draft Strategic Plan lays out the vision and mission of the Commission, with the vision being to establish "a human rights culture throughout Bangladesh" and the mission being to ensure "the rule of law, social justice, freedom and human dignity through promoting and protecting human rights". The Commission has also established four Long-term Goals[193] for itself and the country, which the NHRC will

---

191 See Ministry, above n 180.

192 National Human Rights Commission, *National Human Rights Commission Annual Report 2010* (2010).

193 Goal One: A human rights culture throughout Bangladesh where the dignity of every person is respected. Goal Two: A just society where violence by state is an episode of the past and officials know, and are held accountable for, their responsibilities. Goal Three: A nation that is respected internationally for: its human rights compliance, ratification of all human rights

vigorously pursue during the current terms of the Commissioners and the beyond.[194] The Commission also identified sixteen thematic areas as pressing human rights issues on which it will pay particular attention, while being responsive to other human rights-related concerns or matters that may arise. One of these pressing human rights issues is 'violence by state mechanisms, particularly enforced disappearance, torture and extra-judicial killings (the highest priority[195] area in 2011), NHRC is endowed with a comprehensive mandate as outlined in the 2009 Act. A glimpse at the functions of the Commission reflects several major areas of responsibility like investigation and enquiry, recommendations, legal aid and human rights advocacy, research and training on human rights laws, norms and practices.[196] The functions of the commission will include investigating any allegation of human rights violation received from any individual or quarter, or the commission itself can initiate investigation into any incident of rights violation.[197] If a human rights violation has been proved, the NHRC can either settle the matter or pass it on to the court[198] or relevant authorities.[199] One of the key mandates of NHRC is to intervene in human rights violations depending on merits of the case. National Human Rights Commission of Bangladesh bearing powers of civil court, can initiate contempt case in grave violations. NHRC Bangladesh, can intervene *suo moto* or with the permission of High Court and can appoint special rapporteur on specific issue to monitor HRVs.[200] NHRC can monitor[201] whether international standards are followed or not[202] and may provide guidelines also.[203]

---

instruments, up-to-date reporting to treaty bodies, Open cooperation with UN special mechanisms. Goal Four: An NHRC that is credible, apolitical, objective and effective and respected for leading human rights protection throughout the country. See National Human Rights Commission, *Strategic Plan of the National Human Rights Commission 2010-2015* (2011).

194 See NHRC, above n 192.

195 See above n 193.

196 See NHRC, above n 192.

197 *National Human Rights Commission Act 2009*, s 12.

198 Ibid, s 14.

199 Human Rights Initiative, *Bangladesh Country Report: Anti-terrorism Laws and Policing* (2007) < http://www.humanrightsinitiative.org/publications/chogm/chogm_2007/docs/country_reports/071004_chogm07_bangladesh_anti_terrorism_policing_country_report2007.pdf> accessed 16 January 2013.

200 See above n 197, ss 17, 18, 19.

201 In 2009, Anti Torture Bill adopted by Lokshabha, the lower house of Parliament of India, was possible only for NHRCs consecutive intervention. See Ain o Salish Kendra (ASK), *Preventing Torture within the Fight against Terrorism* (2010)< http://www.askbd.org/web/wp-content/uploads/2011/01/Eng_report_journ_workshop_final.pdf> accessed 19 April 2013.

202 See ASK, above n 201.

3. Prohibition, Prevention and *De Jure* Eradication of Torture: Revealing Grim Reality

According to Article 2 and 6 of the ICCPR, the Bangladeshi authorities have the obligation to ensure the right to life of the country's people and must provide prompt and effective remedies in cases where any violations take place. Bangladesh also has the obligation to introduce legislation that is in conformity with the ICCPR, but continues to fail in this regard even though Bangladesh has ratified all the core human rights treaties (ICCPR, ICESCR, CERD, CEDAW, CAT, CRC) and is subject to the Universal Declaration of Human Rights (UDHR). Extra-Judicial Killings in the name of "crossfire", "gunfights" or "encounters", unwarranted arrests, torture in police remand practiced by the law enforcing agencies in Bangladesh constitute flagrant violations of basic human rights enshrined in the UDHR and in the Constitution that ensured right to life for all. Since 2004, extra judicial killings by law enforcing agencies, custodial deaths and torture, and lack of any public reports of investigation and prosecution of those responsible demonstrate the vulnerability of the right to life of Bangladeshi citizens. In the vast majority of instances, the state failed to publish any information regarding actions taken to investigate, prosecute or punish those responsible for such. In reality however, the authorities can and do get away with murder and function as if they are above the law and even the supreme law, the Constitution.[204] There are certain provisions of the Constitution[205] which are not followed by the police officers and are very much over jealous in exercising the powers given under section 54 but they are reluctant to act in accordance with the provisions of the Constitution itself.[206] Even if Bangladesh has anti-torture laws but unfortunately the grim reality is different. Sometimes it's the law itself or the implementation of it makes the whole anti-torture regime a gloomy one. This part 'prohibition, prevention and *de jure* eradication of torture' first provides certain loopholes in the existing laws and then focuses on the shortcomings in the enforcement and monitoring measures basing upon the previous part i.e. the 'compliance in laws' in order to understand the anti-torture regime perfectly.

3.1. *De Jure* Eradication and the Reality

Amnesty International reports that a number of laws in Bangladesh create the conditions which facilitate torture.[207] In all the cases of detention the detainees

---

[203] Indian initiative was cited where NHRC gave direction on how to deal encounter killings & specifically mentioned that any officer goes into encounter must report to the NHRC on how much ammunition has been used. See ASK, above n 201.

[204] See Khan, above n 32.

[205] *Constitution of People's Republic of Bangladesh 1972*, art 33.

[206] See above n 11, 371.

[207] The most commonly used of these is Section 54 of the Code of Criminal Procedure. It is also found that under eight conditions a person may be arrested by a police-officer without warrant but from the first condition we find that this condition actually includes four

claimed that they had been tortured and that torture began from the moment of their arrest'.[208] However, section 54 of the Cr. P. C. grants police qualified power of arrest of any person on reasonable suspicion without warrant on nine grounds. Practically section 54(1) is the most abused section of the Code. The Police, in fact do not comply with the provision in its totality. They bluntly ignore the qualifying terms mentioned in the section e.g., 'cognizable offence', 'reasonable complaints', 'credible information', and 'reasonable suspicion'. It is being indiscriminately used by the police and as application of this section fraught more with ulterior motives than prevention of crimes and or arrest of persons suspected of having committed or about to commit cognizable crimes. Most of the arrests under section 54 are caused on fanciful suspicion and in most cases to fill in the quota allotted to an individual police officer to make an arrest each day. This incredible practice has been going on with impunity for many years. An arrest under section 54 is often a prelude to issuance of detention order under the Special Powers Act, 1974 (SPA) that allows the authorities to detain any person on eight grounds, vague enough to detain any person according to the whim and caprice of the executives and the party in power. Such detention can extend to six months, and may extend beyond this period, if so sanctioned by the Advisory Board. The use and abuse of the SPA in the name of securing law and order have resulted in steady pattern of human rights violations.[209] The Act provides no guidance on the burden of proof necessary for the Government to conclude that an individual is likely to commit a prejudicial act. As a result, detentions under the SPA 1974 can occur on allegations with very little evidence. The Commonwealth Parliamentary Association reports that the wide ranging powers of detention without express reasons under the SPA 1974 have been widely used[210] against political opponents and that, in reality, detainees are held for much longer periods than those specified in the Act. Amnesty has also identified the way in

---

conditions under which a police officer may arrest without warrant and these four conditions are couched in such wards that there is scope of abusive and colorable exercise of power. See above n. 206; but see p. 366. However, it is reported that despite the safeguards, Section 54 effectively allows the police to arrest anyone at any time for almost any reason, and is one of the most easily abused provisions in the Bangladesh legal system. See UNHCR, *Country of Origin Information Report – Bangladesh* (2009) <http://www.unhcr.org/refworld/docid/4a8d005b2.html> accessed 16 January 2013.

208 See HRI, above n 118.

209 A. H. Monjurul Kabir, *Police remand and the need for judicial activism* (2011)< http://saqebmahbub.wordpress.com/2011/06/06/a-case-for-defining-and-criminalising-torture-in-bangladesh/> accessed 05 June 2013.

210 A 2002 study by the Bangladesh Law Commission found that in 99% of cases challenging preventive detention under the SPA 1974 (between 1998–2001), the detention orders were found to be illegal and without lawful authority. Its report stated," this fact indicates how carelessly and without regard to the provisions of the law of detention as they stand today in Bangladesh, the detaining authorities applied this law'. See HRI, above n 118.

which Section 54 is reinforced by Section 167 to exacerbate the likelihood of torture.[211] There are certain legal requirements to be fulfilled on the part of the Magistrate to apply his judicial mind in case of granting remand. But unfortunately though these are not fulfilled, the Magistrate as a routine matter passes his order on the forwarding letter of the police officer either for detaining the person for further period in jail or in police custody.[212] Though there are a good number of formal requirements for recording confession by a magistrate to ensure that confessions are 'voluntary', yet tortures in police custody during remand have often led to 'confession' by arrestees who had spent a few days in police custody. Voluntariness of confessions has been an issue in much criminal litigation but, again, these had hardly been scrutinized in terms of Article 35(4) and 35(5) of the Constitution.[213]

Though the Constitution contains provisions as to ensure the rule of law, no right can compared with the right to life without which all other rights are meaningless and the rule of law can play its most significant role in this aspect. But the tolerant and rather approving attitude of the successive governments in respect of extra-judicial killings by the law enforcing agency has seriously dented the operation of rule of law so much that it will not be a misstatement to say that rule of law for the common men in the country exists only in the pages of the Constitution.[214] However, 1972 Constitution includes various fundamental rights which should provide safeguards including to the victims of security laws of the country. Despite temporary suspension of these safeguards during various periods, these provisions survive till now. These safeguards are not applicable during emergency and may become non-applicable during other time. If they fall within the restrictions defined in the very chapter of the Constitution that describes the fundamental rights.[215]

In the case of offences in the nature of torture as described in the Penal Code in 'compliance in laws part' have two significant limitations. Firstly, the acts prohibited are limited and fail to encompass a wide range of established practices of torture by state officials, which would however fall under the Convention definition. Secondly, from a principled point of view, the offences and the punishments fail miserably to reflect the particular wrongness of such acts being committed by the

---

211 See HRI, above n 118.
212 See above n 11, 369.
213 See Malik, above n 41, 273-274.
214 See Islam, above n 19, 85.
215 Dr. Asif Nazrul, *The Security and Emergency Related Laws in Bangladesh: Tools for Human Rights Violations* (2009)< http://www.southasianrights.org/wp-content/uploads/2009/10/securitylaw_BD.pdf> accessed 12 June 2013.

state as opposed to private individuals.[216] However, these provisions have no manner of application when the act of torture is committed in a legally authorized custody. Similarly an act of torture committed with a purpose other than the purpose mentioned in the penal provisions cannot be addressed under this law and also the punishments for those offences are not adequate enough to take into account the gravity of the offence of torture[217] which are so negligible that it will betray the international obligation of Bangladesh if torture is tried under these penal provisions. However, sometimes offences under these sections become difficult to detect[218] and the reasons behind paucity of evidence in cases of torture and even death of a person while in police custody are obvious. In a criminal case, the burden of proving the guilt of the accused is invariably on the prosecution according to the scheme and various provisions of the Evidence Act, 1872. In cases of torture on a person while in police custody one can rarely expect to get eye-witnesses to such incidents, excepting police personnel some of whom themselves happen to be the perpetrators of torture. It is an extremely peculiar situation in which a police personnel alone, and none else, can give evidence regarding the circumstances in which a person in police custody receives injuries. This results in paucity of evidence and probable escape of the culprits.[219]

3.2 Enforcement and Monitoring Measures in Reality

The Torture Convention was ratified by the government of Bangladesh in October, 1998 reserving the article 14 paragraph 1 of it, which states that each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation. While ratifying the CAT Bangladesh declared that it will apply article 14 Para 1 in consonance with the existing laws and legislation in the country. Again Bangladesh has not accepted the competence of either the Committee against Torture or the Human Rights Committee to received individual complaints about torture. In absence of any

---

216 Saqeb Mahbub, *A case for defining and criminalizing torture in Bangladesh* (2011) < http://saqebmahbub.wordpress.com/2011/06/06/a-case-for-defining-and-criminalising-torture-in-bangladesh/> accessed 13 June 2013.

217 See Rahman, above n 5, 142.

218 See Haq, above n 85.

219 Lawcommissionbangladesh.org, *Law commission final report on the Evidence Act, 1872 relating to burden of proof in cases of torture on persons in police custody* (1998) < http://www.lawcommissionbangladesh.org/reports/17a.pdf> accessed 20 June 2013.

international mechanism, victims of torture can only recourse to the domestic remedies which are very poor in Bangladesh.[220]

3.2.1 Availability of Civil Redress for Victims

There were no comprehensive official statistics on the number of torture related complaints filed with magistrates or the police and subsequent action taken. A large number of cases remained unreported. Some complaints were withdrawn due to police pressure, including offers of money to victims to drop their claims. Only a few prosecutions of perpetrators had been successful; inadequate investigations and difficulty in finding witnesses and obtaining medical evidence were cited as problems. There had, apparently, been several instances of out-of-court settlements in torture cases. Citizens who wish to file a complaint with the police face many hurdles. First is the fear of reprisal, sometimes based on direct threats not to file a complaint. When the families of victims are brave enough to come forward, the police frequently refuse to accept the case. Another reason why criminal complaints are not filed is widespread police corruption. The police are over-worked and do not have sufficient time off. Police officers secend time doing errands for higher officials or on protocol functions or VIP protection or collecting incentives or bribes, or could not perform their duties properly. According to the US State Department Country Report on Human Rights Practices 2008 (USSD 2008 report), released 25 February 2009 which stated that corruption, judicial inefficiency, lack of resources, and a large case backlog remained serious problems. It also stated that corruption and a substantial backlog of cases hindered the court system, and trials were typically marked by extended continuances, effectively preventing many from obtaining a fair trial due to witness tampering, victim intimidation, and missing evidence.[221] In the majority of cases, investigations into allegations of torture have been inconclusive. In several instances, investigations have not been opened either because the alleged perpetrator enjoys immunity under special law, or because the prosecution of the alleged perpetrators has not been authorized by the Government as required by law. Other cases were closed without any charges being brought against the alleged perpetrators. The police, often the same institution allegedly responsible for the violations, are not independent and there appears to be little interest on their part to investigate torture allegations promptly and effectively. There are several reports of police officers shielding their colleagues and discouraging victims from pursuing their cases, or otherwise obstructing investigations. It often appears that the only actions taken against the alleged perpetrators are administrative measures such as temporary suspension and transfer

---

[220] See Point, above n 50.
[221] See UNHCR, above n 66.

to other police stations. Prompt and thorough investigations into death in custody cases remain exceptional. It was only after public outcry that a 'Probe Committee' was established to investigate the circumstances of death and possible criminal responsibility. However, official inquiries are said to lack transparency and most inquiries have apparently not resulted in any subsequent criminal prosecutions of those responsible. One of the main reasons for the lack of charges being brought is the difficulty that victims face in obtaining evidence, especially medical evidence, and the paucity of other evidence in the absence of any witnesses other than the victim in those cases where he or she survived the torture. Where police officers remain silent or present a differing account of events, the prosecution will find it immensely difficult, if not impossible, to secure a conviction unless other compelling evidence is available. This constellation, resulting in widespread impunity, has been identified by the Law Commission and the High Court Division,[222] both of which recommended that the burden should be on the police officer responsible for taking a person into custody to explain the reasons for injury or death and to prove the relevant facts to substantiate the explanation.[223] At present to get the most rudimentary investigation opened often requires a huge effort through the media, demonstrations and lobbying. After that, the entire legal process is so slow that it is almost unendurable for the average litigant. There is no witness protection scheme to shield victims from the inevitable pressure and harassment by the accused. Nor has the state acknowledged its responsibility to rehabilitate victims. And the slowness and inefficiency of all levels of bureaucracy makes the pursuit of complaints very difficult.[224]

In case of legal aid although the legislative framework has existed since 2001, the government legal aid scheme is still very much in its infancy; the government never established the central authority envisaged by the legislation nor did it choose to appoint any full time staff. The allocated legal aid fund was disbursed to Districts,

---

[222] See above n.11. Recommendation F: "If death takes place in police custody or in jail it is difficult to prove by the relations of the victim as to who caused the death. In many cases, this court has decided that when a wife dies while in custody of the husband, the husband shall explain how the wife met her death. Similar principle may be applied when a person dies in police custody or in jail. To give a legal backing to the above principle, we like to recommend that a section in the Evidence Act (after section 106) or a clause may be added in section 114 of that Act incorporating the above principle. The new section in the Evidence Act shall provide that when a person dies in police custody or in jail, the police officer who arrested the person or the police officer who has taken him in his custody for the purpose of interrogation or the jail authority in which jail the death took place, shall explain the reasons for death and shall prove the relevant facts to substantiate the explanation."

[223] See REDRESS, above n 111.

[224] Basil Farnando, 'Foreword: Short stories about home truths in Bangladesh' (2006) 5(4) *Article 2 of the International Covenant on Civil and Political Rights* 2, 5.

but without any unaccountably or any particular rhyme or reason, to an outsider. For poor justice seekers who learned of the program, the application process was intimidating and often completely beyond reach. Most legal aid cases came as referrals by jailers for unrepresented inmates, but this too was a haphazard process. Where legal aid was granted, services were often provided or additional fees were demanded by lawyers. Although there were honorable exceptions amongst some motivated judicial officers and lawyers who made efforts from time to time to use the legal aid fund, there were neither incentives nor mechanisms to move these beyond the level of individual initiative. As late as 2008-2009, only about 25% of the national legal aid fund was actually spent.[225]

3.2.2 Appropriateness of Penalties

The second obligation of Bangladesh under Article 4 of the CAT is to ensure that all acts of torture, attempt to torture and complicity or participation in torture are punishable by appropriate penalties, which take into account their grave nature. Though the CAT demands 'appropriate penalties for torture, it doesn't outlines the exact gravity of the penalties. Similarly the Committee against Torture has not prescribed a rule for the required punishment by specifying a minimum or maximum length of imprisonment. It has however, indicated the limits of appropriate sentences, finding on the one hand that short sentences of three to five years imprisonment are inadequate, and on the other that too serious penalties might deter the initiation of prosecutions. The punishment of torture provided for under the domestic law of a state party must not be trivial or disproportionate, but must take into account the grave nature of the offence. This means that torture must be punishable by severe penalties. So far as the expected length of sentence for the offence of torture is concerned; one commentator argues that it must be calculated in the same way as other serious offences under international law. Lenient penalties may fail to deter torture, while rigid and draconian penalties may result in courts being unwilling to apply the law as it fails to flexibly take into account individual circumstances. The practice of the committee indicates that a significant custodial sentence is generally appropriate. Although the committee as a whole has not commented on the appropriate level of the sentence for torture, it is according to one commentator, possible on the basis of the individual opinions of members to establish a range within which such sentences should fall. [226] Human Rights Watch (HRW) stated in their report 'Ignoring Executions and Torture' published on 18 May 2009 that there has been a lack of political will under successive governments to hold accountable those responsible for human rights violations. Of the thousands of killings of individuals in the custody of the security forces since independence in 1971, Human Rights Watch knows of very few cases that have resulted in a criminal conviction. The situation is not significantly different when it comes to other forms

---

[225] See Morrison, above n 181.
[226] See Rahman, above n 5, 137-138.

of human rights abuses, including torture, which is endemic in Bangladesh. The internal justice and disciplinary systems of the military, RAB, and police have utterly failed to deliver justice. Although these institutions have claimed that in some cases their personnel have been punished, details are not made publicly available. There is every indication, however, that the sanctions handed out to the perpetrators are wholly inadequate and stand in no relation to the gravity of the crimes committed. While the cases described in this report have not resulted in criminal convictions, it appears that in several cases those responsible have been subjected to disciplinary actions.[227] In Bangladesh today, the prospects of punishing the perpetrators of "crossfire" killings, torture and other grave abuses is remote, to say the least. Sometimes internal inquiries may lead to transfers or dismissals, and very occasionally, limited action in the courts.[228]

3.2.3 Monitoring Measures

Among the monitoring measures Bangladesh has the National Human Rights Commission along with the prison authorities while the accused persons are in custody. Despite certain encouraging modifications, the National Human Rights Commission Act still contains some sections in the Act which seems to be gray and needs clarification. In respect of violation by the law enforcement agencies the Commission has limited jurisdiction and can only demand report from the Government. There is no clear provision about Commission's further action in case of non compliance of the reporting of the Government.[229] The Home Ministry has asked the National Human Rights Commission not to go beyond its jurisdiction regarding the activities of the disciplined forces, especially police and RAB personnel.[230] Odhikar believes that the NHRC has become a powerless institution as it has no specific jurisdiction to take action against the accused persons or law enforcement agencies. The Commission ought to file cases against human rights violations; however, according to the Human Rights Commission Act, the Commission can only give recommendations to the government to take action against perpetrators. It appears that the NHRC does not have any effective power. Odhikar questions the actual necessity of the Commission, if the Government is going to ignore it.[231] However, in the case of prison, the prison authorities still followed statutes framed by the British colonial authorities in the nineteenth century, the main objective of which is the confinement and safe custody of prisoners

---

227 See UNHCR, above n 66.

228 See Farnando, above n 224.

229 See NHRC, above n 192.

230 Sources said the Ministry made the comments following the NHRC's reactions regarding extrajudicial killings by law enforcement agencies and the recent incident of maiming college student Limon during a RAB shooting.

231 Odhikar, *Human Rights Monitoring Report: 2011* (2011).

through suppressive and punitive measures. There is an absence of programs for the reform and rehabilitation of offenders and vocational training programs did not cater for all classes of prisoners. The recruitment and training procedures of prison officers was inadequate to facilitate the reform of prisoners. The number of medical doctors is disproportionate to the size of the prison population, and women prisoners were attended to by male doctors. There are no paid nurses in prison hospitals; literate convicts work as hospital attendants, without training. There are no trained social welfare officers or psychologists. However, it was stated in the USSD 2008 report that in general the government did not permit prison visits by independent human rights monitors, including the International Committee of the Red Cross. Government-appointed committees of prominent private citizens in each prison locality monitored prisons monthly but did not release their findings. District judges occasionally visited prisons, but rarely disclosed their findings.[232]

4. Conclusion

The normative compliance of Bangladesh reveals that Bangladesh is 'towards' an anti-torture regime even though complete eradication of torture be a long way away. However, one of the fundamental rights guaranteed by the Constitution of the People's Republic of Bangladesh is that "no person shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. So torture is expressly prohibited by the Constitution of Bangladesh. There are certain other encouraging developments and successful initiatives that might provide an opportunity to quell the practice of torture, impunity and lack of justice and reparation for the victims. In particular, a number of initiatives providing legal reforms bound to result over time a change in the human rights culture in Bangladesh. Nevertheless, Bangladesh's obligation under Article 4 of CAT to which the country has committed itself in normative aspect falls even to date, far below to the international standards. Added to this, there are various shortcomings in the process of implementation with the excessive use as well as abuse of powers by the concerned authorities that inhibit accountability and effective recourse for torture survivors and relatives of torture victims to courts or other bodies.

---

[232] See UNHCR, above n 66.