Dhaka University Law Journal

The Faculty of Law publishes Dhaka University Law Journal (Former title: The Dhaka University Studies, Part-F) twice a year. The journal started its journey in 1989. Initially it was published annually. Later on it appeared twice a year (June and December Issue). From 2017 to 2020 again it was published annually. This journal is the leading peer-reviewed academic law journal containing original contributions on contemporary and jurisprudentially important issues written by academics, researchers, judges, and practitioners. It also publishes reviews of important recent books from recognized experts.

Published in December 2021 by the Registrar, University of Dhaka

Printed by BCS Printing
Raf'in Plaza (2nd Floor), 3/B Mirpur Road, Dhaka-1205
Phone: 01710880728, Email: bcsprintingl23@gmail.com

Subscription:

The subscription rates for individuals for a single issue are Taka 75 (domestic) and $15 (international). Institutional subscription rates 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
Room No. 113, Kazi Motahar Hossain Bhaban
Faculty of Law, University of Dhaka
Dhaka-1000, Bangladesh
Tel: 880-2-9661900 /4348, 4349
E-mail: deanlaw@du.ac.bd
Web: law.du.ac.bd

ISSN 2790 -1807
E-ISSN 2790-1815

© *Dhaka University Law Journal*, 2021, 32(2), 1-14
doi: https://doi.org/10.3329/dulj.v32i2.57955

United Nations Peacekeeping Operations: Determining Responsibility under International Law

Dr. Borhan Uddin Khan* and Md. Mostafa Hosain**

1. Introduction

One of the primary goals of establishing the United Nations (UN) was to protect future generations from the scourge of war and to ensure international peace and security. Since its establishment till date, UN has been playing diverse role in ensuring peace by ending conflicts and to that end, it has undertaken different mechanisms. The most common way to ensure peace and security is to deploy UN forces in particular conflicting zones. Such forces are deployed in UN mission under the heading of United Nations Peacekeeping Operations with the help of member States by taking force from its members. The importance of any peacekeeping operation can hardly be overemphasized and has been viewed by some as subsidiary organ of the UN.[1] The operations involve complex relationship between contributing States and international organisation respectively. When an internationally unlawful act occurs at the time of an operation, it is difficult to ascertain whether the State or the international organization is to blame.[2] Different jurisdictions encountered questions of attribution of UN force. In the case of Attorney General v. Nissan, the House of Lords was questioned in 1969 whether the UK had to pay compensation for acts committed by British personnel participating in the United Nations Peacekeeping Forces in Cyprus (UNFICYP).[3] Further, the House of Lords after ten years, in the case of Oberlandesgericht Wien, ruled on a similar claim brought against Austria over the conduct of an Austrian Contingent member operating in the UN Disengagement Observer Force.[4] The most crucial case was the recently filed one in the Southern District of New York Court

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

[1] Unpublished letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division, ILC, *Report of the International Law Commission, Fifty-Sixth Session*, UN Doc A/59/10 (2004) 99 ('*2004 Report*') 112. See also, Christopher Leck, 'International Responsibility in UN Peacekeeping Operation: Command and Control Arrangements and Attribution of Conducts', 10 *Melbourne Journal of International Law* (2009) 362-364 <http://classic.austlii.edu.au/au/journals/MelbJIL/2009/16.html#fn23> accessed 1 July 2021.

[2] Caitlin A. Bell, 'Reassessing Multiple Attribution: The International Law Commission and the Behrami and Saramati Decisions' (2009) 42 *International Law and Politics* 502.

[3] House of Lords, 11 February 1969, All ER 1969-I, 646.

[4] *Oberlandesgericht Wien, N.K. v. Austria* [26 February 1979] 77 *International Law Reports* 470.

where allegation against the UN was brought on the issue of cholera epidemic spreading in Haiti in 2010 by the presence of Nepalese peacekeepers in the United Nations Stabilisation Mission in Haiti (MINUSTAH).[5]

In 2011, the International Law Commission (ILC) came out with the Draft Articles on the Responsibility of International Organisations (Draft Articles 2011).[6] According to Article 7 of the Draft Articles 2011, the conduct of UN peacekeeping operation will be attributable to the UN if it exercises 'effective control' over it in particular time and circumstance.[7] In such case, the lending State will not be responsible. On the other hand, the European Court of Human Rights (ECtHR) in *Behrami and Behrami vs. France*,[8] and *Saramati vs. France, Germany and Norway* case,[9] by referring to the same Article of the Draft Articles 2011 said that a conduct of UN peacekeeping operation will always be attributable to UN if UN exercises 'ultimate control' over it. However, ILC rejected the ultimate control test and supported 'effective control' for attributing conduct of UN peacekeeping operation to UN under Article 7 of Draft Articles 2011.[10]

Another way is to look into the possibility of multiple or dual attribution under Article 7 of the Draft Articles 2011. The question arises because the commentary to the Draft Articles 2011 included a discourse on the possibility of dual or multiple attribution, despite the fact that courts have typically applied 'single attribution' and have not addressed 'multiple attribution' of the same action to different actors.[11] Scholars have diverse views on multiple attributions. Some believe that multiple attributions are possible[12] others reiterate that such attributions do not emerge in the present form of article 7 of the Draft Articles 2011.[13]

In the deployment of troops in peacekeeping operations many legal substantial questions arise, including, where will the jurisdiction lie if the deployed forces commit crime or who will be responsible for commission of crime by these forces. Is it the sending States or the UN? In this backdrop, this paper attempts to focus on international law discourse regarding the responsibility of the UN and the troops

---

[5] District Court (Southern District of New York), *Georges et al. v. UN*, October 2013.

[6] *Draft Articles on Responsibility of International Organisations*, United Nations, International Law Commission, Report on the Work of its Sixty-Third Session (26 April–3 June and 4 July–12 August 2011),
General Assembly, Official Records, 63rd Session, Supplement No. 10 (A/66/10).

[7] ibid 56-60.

[8] Decision of Grand Chamber [2 May 2007] Application no. 71412/01; para 59-60, 17

[9] Decision of Grand Chamber [2007] application no 78166/01; para 59-60, 17.

[10] Commentaries on article 7 of the ILC Draft Articles (2011) Adopted by the International Law Commission at its sixty-third session in 2011, paras 8 and 9, 54, 57-58.

[11] ibid, paras 10, 12, 13 and 14, 58-60.

[12] ibid, paras 4, 10, 12-14.

[13] Bell (n 2) 502.

sending States in the event of peace keeping operations. This paper analyses different dimensions involved in the operation in terms of the participation of the UN and the troop sending State. With the introduction in part 1, the subsequent part offers a general overview of UN peacekeeping operation. It discusses about the classification of UN peacekeeping operations and reflects on the control structure in the operation. Part 3 concentrates on the international responsibility arising from the conduct of UN peacekeeping operation. This part analyses the appropriateness of the 'effective control' test and the possibility of multiple attributions to different actors involved in peacekeeping operations in light of article 7 of the Draft Articles 2011 while the final part offers a conclusion.

2. The Development Discourse of UN Peacekeeping Operations: An Overview

It was not until the 1956 Suez Crisis that the phrase 'peacekeeping' was coined. Before that, the first recognised operation was the UN Truce Supervision Organisation (UNTSO) created by the Security Council in June 1948 which was deployed to monitor and maintain the ceasefire during Arab-Israeli War.[14] When Egypt nationalized the Suez Canal, France and the United Kingdom met in secret with Israel and decided to invade Egypt. In such circumstance, restoration of peace and its maintenance was the most significant challenge. The idea of an armed UN peacekeeping force made up of soldiers chosen from Member States through voluntary contributions to secure a buffer zone between the conflicting parties was conceived by Lester Bowles Pearson, Canada's foreign minister.[15]

In 1960s and 1970s, the UN established short-term missions in the Dominican Republic, West New Guinea (West Irian) and Yemen. Later on, UN started longer term deployments in Cyprus, the Middle East and Lebanon. Since 1948, UN Peacekeepers have undertaken around 68 Field missions. Till date, there are approximately 96,877 personnel serving on 15 peace operations in four continents led by the UN Department of Peace Keeping Operation (DPKO). Since 1999, there has been a nine-fold growth. The United Nations has received military and police troops from 120 countries. More than 82,127 troops and military observers are currently serving, with approximately 12,930 police officers.[16]

Peacekeeping operation is different from peace enforcement operation. Enforcement operation is nonconsensual whereas peacekeeping operation is consensual.[17] Peace enforcement operations which are authorised by the UN Security

---

[14] Jean E. Krasno, 'To End the Scourge of War: The Story of UN Peacekeeping' in Jean E. Krasno (ed.), *The United Nations: Confronting the Challenges of a Global Society* (Viva Books Private Limited 2005) 228.

[15] ibid 230.

[16] United Nations Peace Keeping. 'Data' <https://peacekeeping.un.org/en/data> accessed 10 June 2021.

[17] Examples of peacekeeping operations include 'Operation Desert Storm' in Iraq, stabilisation forces in

Council and conducted by coalition of states or regional organisations, the relationship between UN and the conduct of the mission is more tenuous compare to generally attribute conduct of the UN missions. In such operations, the United Nations serves largely as a legitimizing authority by establishing a legal foundation for the operation and determining the overarching objectives through a broad mandate. At both the operational and tactical levels, the mission is entrusted to regional organizations and/or participant states. As a result, attributing action of either the designated regional organization or participating States to the UN only on the basis of the supply of a legal foundation for operation in the form of a mandate does not correspond to the reality of decision-making or command control.[18] Generally, peacekeeping operation is formed by the Security Council with the adoption of a Resolution. The Council makes this decision after receiving a report from the Secretary-General explaining the proposed mission's mandate, functions, composition, and deployment. In exceptional circumstances, the General Assembly also contributes in the formation of the operation.[19]

Although UN Charter makes no reference to peacekeeping operation, the legal basis of these operations are chapters VI and VII of the UN Charter.[20] The peacekeeping bodies have the status, privileges, and immunities guaranteed by Article 105 of the UN Charter and the 1946 United Nations Convention on the Privileges and Immunities of the United Nations. The General Assembly Resolution 76(I) of 7 December 1946, which approved certain privileges and immunities, provides further protection.[21] The UN Legal Counsel affirmed in 1995 that military troops from sending countries enjoy privileges and immunities under customary law. Civilian contractors, on the other hand, are not granted such privileges, even if they are designated as "experts on mission," which refers to people assigned to undertake certain activities or tasks for the UN but excludes commercial functions.[22]

All UN peacekeeping operations rely on the voluntary commitment of troops and equipment by participating member states, who delegate aspects of power and control to the Department of Peacekeeping Operations (DPKO) for the duration of the

---

post-conflict Bosnia (SFOR and IFOR), Kosovo (KFOR), Iraq (MNFI), and the post-invasion phase in Afghanistan (ISAF), all of which were carried out under UN mandate by regional organizations or arrangements, or coalitions of States acting under the overall authority of the Security Council. See, Terry D. Gill, 'Legal Aspects of the Transfer of Authority in UN Peace Operations' 42 *Netherlands Yearbook of International Law* (2011).

[18] ibid.

[19] Dieter Fleck, 'The Legal Status of Personnel Involved in United Nations Peace Operations' (2013) 95 *International Review of the Red Cross* 613, 627.

[20] Chapter VI relates peaceful settlement of dispute and conflict resolution while chapter VII related with the Security Council's power and authority for purpose of maintenance of peace and security.

[21] Fleck (n 19) 618.

[22] ibid 619.

operation.[23] Examples of peacekeeping operations include operations in Congo (MONUSCO), Ivory Coast (UNOCI), Haiti (MINUSTAH) etc. The operation's mandate is normally carried out impartially and in recognition of the United Nations' unique and principal role in maintaining world peace and encouraging conflict resolution. For the period of their engagement in the operation, the States providing forces to a specific mission hand over a portion of their control over the troops and other established formations to the UN.

The common practice is that through a formal agreement or a memorandum of understanding, all or part of the operational level command or control is transferred to UN secretary general (UNSG) acting through the under secretary general of peacekeeping operation who is in charge of DPKO.[24] This usually entails, placing the committed forces of the mission under certain degree of UN command, while leaving the remainder to the state, which includes the right to withdraw from the mission, exclusive criminal jurisdiction over the committed forces, and the management of discipline within the contributed forces.[25] In operations, the normal practice is that the Troops Contributing Country (TCC) appoints a contingent commander to exercise tactical command and control over the contingent for the operation and will act as representative in the field. The UN force commander exercises operational level command/control over the forces as a whole and can assign specific operational task and mission to their respective contingents making up the force for fulfillment of the mission objectives.[26]

Before looking into the responsibility aspect, it is pertinent to refer the dynamics of command and control structure in the peacekeeping operation. The authority vested in particular persons (or bodies) to direct the actions and exercise authority over the armed forces is referred to as command and control. For the purpose of direction, coordination and control of military forces, command is generally conducted by a specific member of the armed forces functioning under the duties and overall direction of the competent national or international governmental or administrative authority. Control refers to a commander's control over a portion of the activities of subordinate organizations or other organizations that are not ordinarily under his command, including the duty for carrying out instructions or directives to achieve certain goals.[27] Full command implies the totalities of the command authority

---

[23] *United Nations Peacekeeping Operations: Principles and Guidelines* (Capstone Doctrine), UNDPKO, (January 2008) 17-28 <https://peacekeeping.un.org/sites/default/files/peacekeeping/en/ capstone_ eng.pdf> accessed 21 June 2021.

[24] Gill (n 17) 67-69.

[25] Para 14 of commentary on Article 7 of Draft Articles 2011.

[26] For definition of operational and tactical command and control, see, Cathcart B, 'Command and control in military operations', in Terry D Gill and Dieter Fleck (eds.) *The Handbook of International Law of Military Operations,* (Oxford University Press 2010) 238.

[27] Gill (n 17) 45.

and covers all aspect of organisation and direction of forces and is only possessed and exercised at national level. Within the context of UN (mandated) operations, certain elements of command authorities are normally delegated for specific purpose for the duration of the operation.[28] The TCC always retains full command. Full commands also include strategic command. Although the UN Security Council decides mandate for the operation but considerable influence in formation of mandate is exercised by the TCCs.[29] Operational command (OPCOM) is vested in an individual or a body to delegate elements of the operational or tactical level command (TACOM) or control to subordinate commanders, to deploy within the area of operations, to detain or delegate elements of the operational or tactical level command (TACOM), or to detain or delegate elements of the operational or tactical level command (TACOM). The commander at the operational level deploys and employs forces to pursue and achieve the overall strategic objective of the operation as a whole, bridging the gap between strategy and tactics.[30]

3. Responsibility Determination under International Law

In order to trigger attribution, tracing the chain of how the peacekeeping operations function in the field is pivotal. The UN peacekeeping force's chain of command is more complicated than it appears. The UN force commander has operational control over the national contingents. However, they are not under UN command.[31] The reason is that orders and instructions of the force commander must be transmitted to the contingent through the national contingent commander and the later one is appointed by the sending State.[32] As a result, the sending State can exert influence over its contingent through the national contingent commander, deciding whether or not to concur with or disobey the UN force commander's commands to its contingent.[33] It is pertinent to clarify that among the UN, host country and troop sending State, the role of host State is minimal. According to state practice, there has never been a criminal case in which a host State claimed criminal jurisdiction over a member of a sending State's visiting forces, unless such authority was allowed under exceptional circumstances by a treaty between those States.[34]

---

[28] ibid 46.
[29] ibid.
[30] ibid 47.
[31] Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines* (2008) 68.
[32] ibid.
[33] Paolo Palchetti, 'International Responsibility for Conduct of UN Peacekeeping Forces: the question of attribution' (2015) 70 *Seqüência (Florianópolis)* 28.
[34] Ian Sinclair, 'The Law of Sovereign Immunity: Recent Developments' in *Collected Courses of the Hague Academy of International Law* (Vol 167, Brill Martinus Nijhoff, Leiden, 1980) 216–17.

It's vital to remember that immunity does not grant impunity to military or civilian members of a sending country's or international organization's troops. It also does not limit the accountability of that State[35] or international organisation.[36] Immunity has only one application in this context; it prevents the host state from taking direct action against members of a visiting force, while the sending state and/or international organization are held liable.[37] The accountability of international organisation is an admitted fact in international law. It states that a breach of an international obligation attributable to the international organisations entails the responsibility of that organisations and its liability for compensation is widely accepted.[38] Thus, the UN secretariat has stated:

> As a subsidiary organ of the United Nations, an act of a peacekeeping force is in principle imputable to the organisation and if committed in violation of international obligations entails the international responsibility of the organisation and its liability in compensation.[39]

3.1. Attribution to UN and Sending State

The Draft Model Status of Forces Agreement 1990 between the United Nations and host countries, in article 15, envisages that the United Nations peacekeeping operation enjoys the status, privileges, and immunities of the United Nations.[40] In relation to this, Article 6 of the Draft Articles 2011 stipulates that the conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, regardless of the position the organ or agent holds in respect of the organization. The peacekeeping operation as a whole is subject to the Secretary General's direction and control, which is overseen by the Security Council or the General Assembly, depending on the case.[41] The nature of the peacekeeping operation can be understood by examining the distribution of power between the UN and troop-contributing states. Normally, the UN has operational command of the forces, while troop-contributing countries retain disciplinary and criminal jurisdiction over the forces, as well as the

---

[35] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, United Nations, International Law Commission, Report on the Work of Its Fifty-Third Session (23 April–1 June and 2 July–10 August 2001), General Assembly, Official Records, 56th Session, Supplement No. 10 (A/56/10).

[36] Draft Articles 2011 (n 6).

[37] Fleck (n 19) 616.

[38] UN document A/51/389, 4 and para 6.

[39] UN Secretariat, *Responsibility of International Organisation: Comments and Observation Received from International Organisations*, 56th session, UN/doc/A/cn.4/545.

[40] Draft Model Status-of-Forces Agreement between the United Nations and host countries, UN doc. A/45/594, para 15.

[41] UN doc. A/CN.4/545, 17.

ability to withdraw troops. Based on the circumstances, it is reasonable to assume that certain actions are the responsibility of the organization rather than the contributing State.[42]

In spite of holding the status as UN organs, national contingents continue to function as organs of their respective states and are not subject to the UN's sole authority. In the Nissan case, Lord Morris of Borth-y-Gest observed in the House of Lords judgment that "though national contingents were under the authority of the United Nations and subject to the instructions of the commander, the troops as members of the force remained in their national service." As a result, the British soldiers remained Her Majesty's soldiers.'[43] According to the Secretary General's report, the UN has operational command over UN peacekeeping forces, but some important command functions (such as the exercise of disciplinary powers and criminal jurisdiction over the forces, and the power to withdraw troops and discontinue their participation in the mission) "remain within the purview of their national authorities".[44] Again, if a state interferes with the UN's operational control, the behavior is to be attributed to the state.[45]

The solution is different in the case of a peacekeeping operation carried out directly by the UN under the DPKO. In such operations, the UN not only provides the mandate for the operation, but also exercises de jure OPCOM and/or control over the operation. In such case, also the factual circumstance will determine whether the conduct attributed in fact done under the effective control of the UN. If the act in question was not done under control of UN, the TCC will be liable for such acts on the basis of articles 4 and 8 of Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles 2001).[46] The effective control test is also helpful to determine the attribution of conduct in case of 'dual' or 'multiple operation' and also will be helpful to decide the joint liability in case of multiple attribution.

---

[42] Palchetti (n 33) 39.

[43] House of Lords, *Attorney General v. Nissan* [11 February 1969] All ER 646.

[44] *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects*, Report of the Secretary-General, UN doc. A/49/681 (21 November 1994) 3.

[45] UN Doc. A/CN.4/637/Add.1 14, 30.

[46] According to Article 4 (1), the conduct of any State organ is considered an act of that State under international law, regardless of whether the organ exercises legislative, executive, judicial, or any other functions, whatever position it holds in the State's organization, and whatever its character as an organ of the central Government or of a territorial unit of the State.
According to article 4 (2), an organ is any person or thing that has that status under the laws of the State.
According to Article 8, the behavior of a person or group of people is deemed an act of a State under international law if the person or group of people is acting on the orders of, or under the direction or control of, that State.

3.2. From Effective Control to Ultimate Control

In 2001, ILC adopted Draft Articles on Responsibility of States for Internationally Wrongful Acts. However, these articles do not cover the responsibility of international organisations or of a State for the conduct of the international organisation. Article 57 of the Draft Articles 2001 says that State responsibility shall be without prejudice to the responsibility of international organisation or of state for the conduct of international organisation. Commentary on this article provides that these subject matters require separate treatment. As a result, and considering the importance of the topics for responsibility of international organisation, ILC adopted Draft Articles 2011. The Draft Articles 2011 almost follows the same principles and approaches of treatment of subject matter as in case of Draft Articles 2001. However, these articles also keep into account the specialty of international organisation.

Article 1 of the Draft Articles 2011 lays down the scope and limit of international responsibility of international organisation. Articles 3, 4 and 5 declare general principles. Article 3 says that every internationally wrongful act of international organisation entails international responsibility of that organisation. According to Article 4, an international wrongful act occurs when the conduct consists of an action or omission that is traceable to the international organization under international law and represents a breach of international responsibility. It has been agreed that UN peacekeeping missions constitute UN subsidiary organs. Article 7 of the Draft Article 2011 states that a peacekeeping force's act can only be attributed to the UN if it has effective control over it at the time of the performance of a given operation. The following is the text of Article 7:

> The conduct of an organ of a State or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct.

The ILC Draft Articles 2011 follow the test of effective control in case of organ placed at the disposal of international organisation. The effective control test is also necessary to attribute a conduct of UN peacekeeping operation to the UN. The same is the view of the UN Secretary General in case of joint operation.[47] According to the Commentary on the Draft Articles 2011, the UN insists on claiming sole command and control over peacekeeping forces for the purpose of military effectiveness. The attribution of behavior should be based on factual criteria as well.[48]

---

[47] ILC Draft Articles 2011, para 9 of the Commentary on Article 7, 58.
[48] ibid.

It is important to note that effective control test has not been universally applied despite widespread support. Most notably, in its decision in the *Behrami*[49] and *Saramati*[50] cases, the European Court of Human Rights (ECtHR) used the "ultimate control approach." While the International Criminal Tribunal for the Former Yugoslavia (ICTY) used an "overall control standard" in its decision in the Tadić case, it was in a somewhat different context.[51] The ECtHR followed the ultimate control test in subsequent cases. In *Kasumaj vs. Greece*[52] and *Gejic vs. Germany*,[53] the ECtHR reiterated its view concerning the attribution to the UN of conduct taken by national contingence allocated to KFOR.

3.3. Shifting to Effective Control

The ultimate control test however, has not been accepted by the ILC. When applying the criteria of effective control, the commentary observes that ‘operational control' appears to be more significant than ‘ultimate control,' as the latter hardly implies a role in the act in question. As a result, it is not surprising that in his June 2008 report on the United Nations Interim Administration Mission in Kosovo, the United Nations Secretary General distanced himself from the ‘ultimate command and control' criteria and stated that the United Nations' international responsibility will be limited to the extent of its ‘effective operational control.[54] However, the House of Lords majority decision in the Al-Jedda case, while following the same line as *Behrami* and *Saramati* but distinguishing the facts of the case, came to the conclusion that it could not realistically be said that US and UK forces were under such command and control of UN when they detained the appellant.[55]

Mr. Al-Jedda filed an application with the ECtHR following the House of Lords' decision. In Al-Jedda vs. UK, the Court cited several texts concerning attribution, including the article (identical to the current article 7) that the Commission had adopted at first reading and some paragraphs of the commentary, the Court considered that the UN Security Council had neither effective control nor ultimate authority over the acts and omissions of foreign troops within the multilateral framework.[56]

---

[49] *Behrami judgment* (n 8) para 59-60, 17.
[50] *Saramati judgment* (n 9) para 59-60, 17.
[51] Gill (n 17) 53.
[52] Decision of 5 July 2007 on admissibility of application no. 6974/05.
[53] Decision of the 28th August 2007 on admissibility of application no 31446/02.
[54] Para 10 of commentary on Article 7 of Draft Articles 2011 (n 6) 58.
[55] ibid, para 12, 59.
[56] Judgment of Grand Chamber (7 July 2011) para 56.

The issue of attribution was also addressed in the District Court of Hague's and Court of Appeal's decisions regarding the attribution of the conduct of the Dutch contingent in the United Nations Protection Force (UNPROFOR) in relation to the Srebrenica massacre.[57] The Court of Appeal applied the criteria of "effective control" to the circumstance of the case. The Court reached to the conclusion that the respondent State was responsible for its involvement in the events at Srebrenica.[58]

Thus, from the House of Lords' decision in the *Al- Jedda* and subsequent decision of ECtHR on same issue makes it clear that 'effective control' test is the viable test to attribute the conduct of UN peacekeeping force to United Nations. Draft Articles 2011 in its commentary also support the effective control test. Beside that UN also supports the effective operational control test. Majority of commentators, the courts' opinions as well as UN view is in favour of 'effective control' test for attribution of conduct of peacekeeping operation. There are compelling reasons to believe that the effective control approach is the most logical and reasonable standard for attribution of conduct in multinational peace operations. It is more in line with the realities of such operations and leaves less room for accountability gaps.[59]

3.4. Determining Multiple Attribution/Joint attribution

Joint attribution is a possibility in situations where both the UN and the contributing State formally exercised their authority over the contingent and the disputed conduct was the result of instructions mutually agreed by the UN and the State.[60] According to some commentators, article 7 of the Draft Articles 2011 admits single attribution through 'effective control' test.[61] It offers single effective command control where the attribution would be either to the UN or to the TCCs by the same conduct. They claim that article 7 of the Draft Articles does not reflect the actual practice of control structure in UN peacekeeping operation.[62] Instead of claiming the command control, UN is approaching operational control basis responsibility. Even on operational command or control, there is no single effective operational command. In practice, the UN force commander decides operational command only after consulting the

---

[57] Case no. 265615/haza06/1671 (10 September 2008) para 4.8.
[58] ibid.
[59] Gill (n 17) 53.
[60] ibid 49.
[61] Bell (n 2) 502.
[62] It has also been reflected in the commentary of the Draft Articles (2011). Panel of UN Peacekeeping Operations, Report of the Panel on UN Peace Operations, 2000, UN/DOC.A/55/305-S/2000/809 (21 August 2000).

contingent commanders who in turn take instruction from TCCs. In such situation, there is possibility of joint control leading to multiple attributions i.e., the UN and TCCs.[63]

The commentary to the Draft Article 2011 did not exclude dual and multiple attribution of conduct. It points out that attribution of a conduct to an international organisation does not wither away attribution of the same to a State. Similarly, the attribution to a state does not exclude possibility of attribution to an international organisation if it were involved. The commentary reflects that any conduct can simultaneously be attributed to two or more international organizations. Such can happen when they establish a joint organ and act through that organ.[64] Although in most of the cases, single attribution theory has been followed, but in no case, the courts have ever expressly doubted about the possibility of multiple attribution. According to the Draft Articles 2011 commentary, although it may not occur frequently in practice, dual or even multiple attribution of conduct cannot be ruled out.[65] Commentators do not deny the possibility of dual attribution as per the criterion of attribution set forth in Article 7.[66]

Profoundly, Special Rapporteur Giorgio Gaja acknowledged that 'dual attribution of certain conducts' cannot be ruled out.[67] The observation of the Dutch Court of Appeal and the Supreme Court of the Netherlands in the *Nuhanović* case is remarkable in the context of simultaneously attributing to the sending State and to the UN. It is widely accepted that more than one party may have 'effective control.' It is not impossible that the application of this criterion will result in the possibility of attribution to more than one party'.[68] Article 17, para 2 of the Articles on Responsibility of International Organisations 2011 provides that an organisation has to bear responsibility under specific conditions for authorising a State to commit an act that would be wrongful for that organisation.

Thus, authorisation by Security Council, for example, to troops of multinational operation to take extrajudicial detention measures while deviating the basic requirements of human rights law or international humanitarian law will trigger the

---

[63] ibid.
[64] Para 4 in Chapter II of the commentary to Draft Articles 2011 (n 6) 54.
[65] Report of the International Law Commission on the work of its sixty-third session, UN doc. A/66/10, 83.
[66] Palchetti (n 33) 22, 45; F. Messineo 'Multiple Attribution of Conduct', *SHARES Research Paper* (2012–11) 41.
[67] Giorgio. Gaja, 'Second Report on the Responsibility of International Organisations', *Yearbook of the International Law Commission* 2.1 (2004) 14.
[68] *Nuhanović v Netherlands*, Court of Appeal of The Hague (5 July 2011) para. 5.9.

responsibility of UN as well.[69] It has been argued that the possibility of joint responsibility under such situations should assist the affected individuals to obtain reparation. But the scanty of effective means of redress against international organisations renders the case extremely unlikely.[70]

In practice, complaints are not forwarded against the UN for several reasons. First, the UN will not accept responsibility or provide compensation for acts not carried out under its direct authority. Second, unlike States, UN is not party to any human rights conventions nor subject to the jurisdiction of any regional or domestic court. Thus, the possibility of providing remedy by the UN is rhetoric for unlawful conduct in context of UN mandated operations where regional organisations or groups of States are involved. The European Court of Human Rights (ECtHR) concluded in the *Behrami/Saramati* instances that conduct allegedly in violation of the European Convention on Human Rights (ECHR) were not attributable to the State party to the ECHR and that the UN was not subject to its jurisdiction.[71] Had the Court applied the effective operational control approach, the States party to ECHR would have been legally accountable as the conduct would have been attributable to them rather than UN, on the basis of cumulative effect of Article 4 and 8 of the Draft Articles 2001.

4. Conclusion

The UN peacekeeping operation has evolved into one of the most important weapons for establishing and maintaining peace. There have been many operations deployed in the conflicting parts which successively helped in bringing peace. The issue of determining responsibility is a key issue at the international level in order to comply with international law. Despite the fact that the UN Force Agreement with States hosting peacekeeping operations stipulates that any dispute or claim of a private law nature to which the UN peacekeeping operation is a party be resolved by a standing claims commission, no such commissions have been established in practice.[72] Another challenge in the peacekeeping operations is regulatory clarity. Uncertainty in the interpretation of various rules can obstruct the successful fulfillment of the

[69] Palchetti (n 33) 26.
[70] ibid.
[71] ibid.
[72] For an examination of the position of the UN on this issue see, T. Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers' (2010) 51(1) *Harvard International Law Review* 141.

mandate, so it's critical to avoid it.[73] Although the UN Safety Convention 1994 and its 2005 Optional Protocol focuses on criminal provisions for the prosecution of individual perpetrators, issues of State responsibility and the responsibility of the UN and other international organisations are not sufficiently addressed. The extent of applicability in strong forms of peace operations is ambiguous, and unfortunately, even when authorized by the Security Council, peace operations conducted by States or regional organizations are not explicitly covered.[74] As a result, the instruments should be rewritten to address the shortcomings while also encouraging ratification by states.

Prior to any operation, the responsibility of the state and international organizations should be clearly defined mentioning the procedures for resolving any allegations for improper acts made by peacekeepers.[75] Transparent procedures and appropriate forms of judicial control are essential in such a settlement forum. International organizations, for their part, should play an active and prompt role in making reparations for wrongdoings that come within their responsibility.[76] It was declared by majority judges in the ECtHR in *Behrami/Saramati* case that 'the UN is in principle responsible, but this regional court is unable to command the UN to comply with its judgment'.[77] Thus, available forum and procedural facility to deal with such situation is imminent.

In terms of responsibility under international law, the authors opine that multiple attributions, as are not prohibited, should be explicitly recognised for prospective situations. The 'effective control' test will be useful in determining whether an act was carried out under joint control or single control on a factual basis, allowing the UN and TCCs to be attributed to the conduct jointly or individually. The 'effective control' approach has the advantage of increasing the likelihood of fixing multiple attributions, lowering the chance of any actor escaping accountability for a wrongful conduct when they are proved to have exercised 'effective control'.

---

[73] Fleck (n 19) 634.
[74] ibid, 635
[75] ibid.
[76] ibid 636.
[77] *Behrami/Saramati* (n 8, 9) 18.

© *Dhaka University Law Journal, 2021, 32(2), 15-48*
doi: https://doi.org/10.3329/dulj.v32i2.57956

Protection of Unregistered Well-Known Trademarks: The Bangladeshi Trademarks Regime Revisited

Dr. Mohammad Towhidul Islam* and Md. Jahid-Al-Mamun**

1. Introduction

A trademark which is a sign or symbol represents an enterprise's name, goodwill, or reputation.[1] The enterprise can register it with the Trademarks Office for its direct admissibility in evidence and often puts a circled ® after the trademark, or can use it as an unregistered trademark by putting sometimes TM or SM after the trademark i.e. the trademark is either in the process of registration or a claim since they are descriptive, get-ups, colours or shapes and hence cannot be registered. For its being a property – an intellectual property, it can be assigned or licensed to others. However, the assignment or licensing is limited only to registered trademarks.[2] Further, an unregistered well-known trademark may cause a competing enterprise to involve in an unfair commercial practice to make benefits by registering or using it. Such unfair trade practices can create confusion among the consumers who are unwary having neither the time nor the desire nor the judgmental literacy to examine a trademark in detail.[3] For example, in Bangladesh, about 26% of the total population i.e. one in four having no literacy and a large number of whom living in rural areas[4] may fall within the consumers who are unknowingly deceived by the piracy of trademarks –

* Professor, Department of Law, University of Dhaka.
** Lecturer, Department of Land Management and Law, Jagannath University, Dhaka.

[1] The trademark may consist of a trade name or name, domain name, or word, or phrase, or logo, or symbol, or colour, or design, or image, or slogan, or combination of such elements. See World Intellectual Property Organization, *Intellectual Property Handbook* (WIPO 2008) 138, para 2.782 (hereinafter WIPO).

[2] Agreement on Trade-Related Aspects of Intellectual Property, 15 April 1994, 33 ILM 1197 [hereafter TRIPS], art 21.

[3] George Miaoulis and Nancy D'Amato, 'Consumer Confusion & Trademark Infringement' (1978) 42 *Journal of Marketing* 48; see also Rebecca Tushnet, 'What's the Harm of Trademark Infringement?' (2015) 49 *Akron Law Review* 627.

[4] '1 in 4 Illiterate in Bangladesh' *The Dhaka Tribune* (Dhaka, 8 September 2019) <https://www.dhakatribune.com/bangladesh/2019/09/08/1-in-4-illiterate-in-bangladesh> accessed 5 September 2020.

registered and unregistered well-known marks.[5] The 2020 Special 301 Report prepared by the United States Trade Representative (USTR) that often bears impacts on foreign investment, trade and commerce for a country, has also identified Bangladesh as an emerging source of counterfeit oncology drugs.[6] So, it appears that the interests of trademarks owners and consumers are in frequent threat of being seriously prejudiced by the infringement of trademarks.[7]

To deal with the unfair trade practice, Bangladesh pledges to offer protection to trademarks – a treaty obligation arising of the Paris Convention for the Protection of Industrial Property 1883[8] (Paris Convention) and the Word Trade Organization (WTO) Agreement on Trade-related aspects of Intellectual Property Rights 1994[9] (TRIPS). Despite its pledges to protect trademarks through the implementing legislation titled the Trademarks Act 2009[10], there appears a dilly-dally in the protection of trademarks due to the TRIPS transition resulting from the country's least developed country (LDC) status. Nevertheless, the country expects to graduate to the developing country status in 2021 and hence, it is supposed to fulfil its TRIPS trademarks related obligations by tailoring and interpreting the local laws and administrative decisions in relation to trademarks – registered or unregistered and

---

[5] See 'Fake Unilever Products Seized' *The Daily Observer* (Dhaka, 11 September 2015) <https://www.observerbd.com/2015/09/11/110053.php> accessed 13 September 2020; 'Cosmetics worth Tk. 50 Lakhs Destroyed' *The Daily Bangladesh* (Dhaka, 18 February 2020) <https://www.daily-bangladesh.com/english/Cosmetics-worth-Tk-50-lakhs-destroyed/37360> accessed 26 September 2020; 'Fake Cosmetics worth 3.5C Seized at Chawkbazar, 5 Jailed' *The Dhaka Tribune* (Dhaka, 5 September 2020) <https://www.dhakatribune.com/bangladesh/court/2020/09/08/fake-cosmetics-worth-3-5c-seized-at-chawkbazar-5-jailed> accessed 26 September 2020; 'RAB Seizes Cosmetics, Electronics worth 90C in Narayanganj' *The Dhaka Tribune* (Dhaka, 4 September 2020) <https://www.dhakatribune.com/bangladesh/nation/2020/09/04/rab-seizes-cosmetics-electronics-worth-90cr-in-narayanganj> accessed 26 September 2020; 'Seized a Huge Quantity of Fake Cosmetics' *The Daily Sun* (Dhaka, 9 September 2020) <https://www.daily-sun.com/printversion/details/504319/Seized-a-huge-quantity-of-fake-cosmetics> accessed 26 September 2020; '6 Jailed for Manufacturing Fake Cosmetics in Dhaka' *The Daily Star* (Dhaka, 13 September 2020) <https://www.thedailystar.net/country/news/6-jailed-manufacturing-fake-cosmetics-dhaka-1826638> accessed 26 September 2020; '18 Cosmetic Traders Fined Tk 13 Lakh' *The Business Standard* (Dhaka, 18 December 2019) <https://tbsnews.net/bangladesh/18-cosmetics-traders-fined-tk13-lakh> accessed 26 September 2020; 'RAB Seals Fake Cosmetics Factories' *Bdnews24.com* (Dhaka, 8 July 2014) <https://bdnews24.com/bangladesh/2014/07/08/rab-seals-fake-cosmetics-factories> accessed 26 September 2020.

[6] '2020 Special 301 Report' (Office of United States Trade Representatives, April 2020) 27 <https://ustr.gov/sites/default/files/2020_Special_301_Report.pdf> accessed 25 September 2020.

[7] WIPO, *Introduction to Trademark Law and Practice* (2nd edn, WIPO 1993) 22, 61.

[8] Paris Convention for the Protection of Industrial Property 1883, 30 March 1883, 828 UNTS 305 (hereinafter Paris Convention), art 6*bis*.

[9] TRIPS, art 16.

[10] Trademarks Act 2009 (Act No XIX of 2009) <https://www.wipo.int/edocs/lexdocs/laws/en/bd/bd013en.pdf> accessed 26 September 2020.

strictly protect them with 'domestic procedures including civil and administrative procedures and remedies, provisional measures, special requirements related to border measures, and criminal procedures for the effective enforcement of the holders' rights.'[11]

To protect unregistered trademarks, Bangladesh has also provided the tripartite statutory protection under other laws i.e. the Penal Code 1860[12], the Customs Act 1969[13], the Consumer's Right Protection Act 2009[14] and the Bangladesh Standard and Testing Institute Act of 2018[15] (BSTI) etc. Under the provisions of these laws, the owner of the original trademark avails the opportunity to file suits for compensation and other remedies including injunctions, the deceived consumers enjoy the opportunity to file suits for damages, and the State as a trustee of the public confidence invokes the power to take actions against the infringer. In protecting registered and unregistered trademarks, different stakeholders including the law enforcing agencies, the administrative authorities, and the judiciary are also actively engaged therein. However, the lack of awareness among the majority of the owners of unregistered trademarks, the consumers, and the stakeholders enforcing them, the absence of comprehensive legislation, and the ambiguity of legislation are the key impediments in the way to the enforcement in line with the statutory protection.

Against the backdrop, this article critically analyses the statutory protection regime of unregistered trademarks, the gap between the statutory remedy for infringement of unregistered trademarks, and the enforcement therefrom. The analysis is made in four parts. The first part discusses the philosophical foundation of protecting these marks, the second part highlights Bangladesh's international obligations and the global best practices, the third part critically analyses the current protection regime in Bangladesh in light of its international obligations and global best practices, and then it puts a way-forward followed by the conclusion.

2. Rationale of Protecting Unregistered Well-known Trademarks

What is the object of protecting a trademark? Is it to protect the 'brand' or the 'goodwill annexed to the 'brand'? To answer these questions, it is better to resolve another issue, e.g. why someone will be prone to penetrate his product in the market

[11] Part III of the TRIPS Agreement deals with enforcement of intellectual property rights. section 2 comprising articles 42 to 49 of this part deals with civil and administrative procedures and remedies, section 3 comprising article 50 deals with provisional measures, section 4 comprising articles 51 to 60 deals with special requirements relating to border measures, and section 5 comprising article 61 deals with criminal procedure.

[12] Trademarks Act 2009, ss 10, 14, 24, 51, 72, 74, 96, and 97.

[13] Customs Act 1969, s 15.

[14] Consumer's Rights Protection Act 2009, ss 2(9), 2(20), 44, 50, 66.

[15] Bangladesh Standard and Testing Institute Act 2018, ss 2(3), 2(20), 15, 20, 21, 22, 27, 34, 35.

using another person's brand name or does the consumer contribute to the piracy along with the competing enterprise. It appears that it is not for using the bare name, but for using the goodwill contained in the brand or embezzlement of others' reputation to make profits. So, the ultimate object of protecting a trademark is more to protect the reputation annexed to the brand than protecting the brand only.

To consumers, a trademark acts as a quality of the product or service, so they consider the functionality, effectiveness, reliability, longevity, taste, smell, user-friendliness, etc. to choose a particular product over another. Very often, the consumers select the product not only from an instant evaluation at the time of purchase[16] but the past consumption and experience of information provided by a third party also play a pivotal role to help them in choosing particular goods over another.[17] A trademark does also have a distinguishing or origin function since it identifies and distinguishes the producer of a particular product as well as his reputation for its origin coupled with the quality which accelerates the repeat purchase. Nobel Laureate economist Kenneth Arrow points out that once the information and knowledge regarding the quality of a product is introduced in the market, it can be easily reproduced for its quality and can attract consumers.[18] Further, the consumers can attach a status value to the product bearing a well-known brand name and the possession of status value creates an urge in the producers to enhance the quality of the product. Consequently, the producer of a well-known trademark has to invest his invaluable time, money, labour, and other interpersonal skills to enhance the reputation. In return, it influences consumers and brings commercial successes. Thus, the trademark emerges as an essential intangible asset that protects the reputation of an enterprise.

Furthermore, a trademark is a private property that creates *jus in rem* meaning the owner of it can enforce his right against anyone in the world. In addition, an owner of a trademark cannot allow an infringer making profits out of his reputation. A trademark, whether registered or unregistered, cannot also accrue any right to outsiders. Further, the 'well-known trademark theory' or 'the prestige theory' supports the protection of unregistered trademarks when it clarifies that the registration or non-registration of a trademark cannot or should not watershed the

---

[16] WIPO Economics and Statistics Series, '2013 World Intellectual Property Report' in *Chapter 2 The Economics of Trademark* (WIPO 2013) 13 <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_944_2013-chapter2.pdf> accessed 26 September 2020.

[17] ibid.

[18] Kenneth Arrow, J, 'Economic Welfare and the Allocation of Resources for Invention' in Richard R. Nelson (ed), *The Rate and Direction of Inventive Activity* (Princeton University Press 1962) 609-625.

protection of well-known unregistered trademarks.[19] Nevertheless, the registration of trademarks may be compared with the birth-registration of a child. Since a birth registration certificate cannot give birth to a child but recognizes its being born, likewise the registration of a trademark is merely a legal formality to secure an exclusive right to use. Its operation is essential to gain the reputation and it cannot change the nature but recognizes the right in it. So, by dint of the very private nature of trademark, an outsider cannot infringe the right of a trademark owner even if his right is unregistered.

Despite the strong rationales behind the protection of unregistered trademarks, outsider competing enterprise infringe trademarks – registered or unregistered for several reasons including the motive of earning higher margins of profits since imitated goods are made of low quality materials and it does not need to advertise, the lack of consumer awareness as they cannot properly read out the brand name and cannot distinguish the duplicated products from original one, or the consumers like to use the brand-named pirated products for a low price, the lack of enforcement of relevant laws, the scarcity of reputed brand items in the market, or banning of some foreign products in the country.[20]

For the reasons mentioned and beyond, the outsider competing enterprise likes to fake consumers by infringing trademarks in different ways. Amongst them, counterfeiting meaning imitation of products but giving genuine impression, or imitation of labels and packaging, or dilution meaning blurring or tarnishment, or piracy meaning registration or use of a generally well-known trademarks of others are considered as the fastest growing and the most profitable modes of the unfair business practices.[21] Further, when consumers cannot distinguish fake goods from the originals, the signalling power of the trademark disappears. Thus, the interests of original producers as well as consumers are seriously curbed by counterfeiting trademarks. It only benefits the producers of counterfeits.

Historically, the Government of Bangladesh opts to protect such natural rights of creators. Article 20(2) of the Constitution of People's Republic of Bangladesh has pledged that:

---

[19] Xiaoqing Feng, 'The Unregistered Well-Known Trademark System and Its Improvement' (2012) 4 *Jurist* 115.

[20] A M Shahabduddin, 'The Impact of Trademark on Brand Duplication in Bangladesh: An Empirical Analysis' (2013) 5(16) *European Journal of Business and Management* 6, 7- 8.

[21] See 'The Counterfeit Trade: Illegal Copies Threaten Most Industries' *The Business Week* (New York, December 1985) 64-72.

> [T]he State shall endeavour to create conditions in which, as a general principle, persons shall not be able to enjoy unearned incomes, and in which human labour in every form, intellectual and physical, shall become a fuller expression of creative endeavour and the human personality.

This provision asks for the twofold protection of property including intellectual property – positive and negative. Since the trademark is an important intellectual property, its owner is entitled to both positive and negative protection. This means the State shall uphold the owner's right as well as create conditions so that it can prevent others from enjoying 'unearned income' by using others' trademarks. So, protecting trademarks is deemed to be a prominent public policy issue since it controls the interests of its owners as well as the consumers.

Therefore, giving exclusive rights to the owners, the trademark encourages them to gain credibility in the market by enhancing the quality of their products with an object to attract more consumers. In effect, it leads to a healthy competition among the producers of the same goods. Further, infringing a well-known unregistered trademark goes against the rule of fairness and credibility. Thus, besides the owner's part, the protection of an unregistered trademark is justified from the consumers' side. In addition, introducing someone's goods in the name of a well-known trademark leads to unfair competition and fraudulent transactions. The infringement of a well-known unregistered trademark also injures the legitimate interests of the public at large. So, the State as their representative is duty-bound to protect and vindicate their rights and can criminalize and prosecute it to gain the public trust since it is a public wrong. Further, since the country's trademark registration process is awfully slow, it takes sometimes more than ten years as is reported in a USTR's report,[22] the protection of unregistered well-known trademarks appears essential in the country.

3. International Obligations and Best Practices of Protecting Unregistered Trademarks

3.1 Paris Convention

The Paris Convention 1883 is not only one of the major but also the oldest multilateral intellectual property treaties asking for the protection of trademarks worldwide. Article 6*bis* of the Paris Convention contains several provisions[23]

---

[22] 'Trademark Working Group Special 301 Submission for 2015' (2015 Global Trademark Report Card) 27 <https://www.hklaw.com/files/Uploads/Images/0209301Global.pdf> accessed 22 September 2020.

[23] Paris Convention 1883, art 6*bis*. It runs:

'(1) The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark

including the provisions for refusing registration or cancellation of registration, and prohibition of the use (by way of reproduction, imitation, or a translation which is liable to create confusion) of trademarks. According to the provision, the mark to be protected must be well known and only its proprietor is entitled to benefits from using it under the convention. From the said provision, it can also be claimed that an unregistered well-known trademark requires to be protected in the member States since this provision is not only applicable to the trademark based on its registration, but also because of its use. The reason for protecting unregistered trademarks lies basically in this particular term 'use'. This provision further asks for allowing at least five years in requesting the cancellation of a junior mark from the date of its registration. The provision also says that if any person registers or uses the trademark of another person in bad faith, a request for cancellation or prohibition of the use can be made at any time since paragraph 3 of article 6*bis* does not prescribe any time limits. However, this convention does not provide any set of rules as a prerequisite of a mark to be considered as a well-known trademark, rather it leaves this power in the hands of legislators of the member States.

3.2 TRIPS Agreement

Paragraphs 2 and 3 of article 16 of the TRIPS have widened the scope of article 6*bis* of the Paris Convention. However, article 6*bis* is applicable only to the mark used for identical or similar goods. On the contrary, paragraph 2 of article 16 of the TRIPS makes article 6*bis* of the Paris Convention applicable not only to goods but also to services as well. So, the scope of article 6*bis* of the Convention is much expanded by paragraph 3 of article 16 of the TRIPS, which does not restrict its application only to identical or similar goods, rather it liberalizes its application to goods or services not similar to those in respect of which the trademark is registered. Further, member States are bound to consider the knowledge of relevant consumers in the marketplace, but not the knowledge of the public at large to determine whether a particular mark is relevant or not.[24]

---

considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well–known mark or an imitation liable to create confusion therewith.

(2) A period of at least five years from the date of registration shall be allowed for requesting the cancellation of such a mark. The countries of the Union may provide for a period within which the prohibition of use must be requested.

(3) No time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith.'

[24] TRIPS, art 16.2.

3.3 Post-TRIPS Development

The World Intellectual Property Organization (WIPO) has developed a non-binding Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks. This Recommendation has provided a higher degree of protection to the well-known trademark than the erstwhile Paris Convention and the TRIPS. Article 2(2)(b) of the Joint Recommendation contains that when a trademark is considered to be well-known towards one relevant sector of the public in a member State, this mark shall be considered as well known to the whole territory of that State. In true sense, it has liberalized the rule of the classical trinity which requires that the products and services must have the goodwill to a substantial portion of consumers. Even if any particular products are famous or well-known to the consumers of the capital city and consumers throughout the rest of the country are unaware of it, this mark shall be considered as well-known throughout the whole country including areas where goodwill or reputation has not been established. Scholars criticize the wholesale territorial protection as suggested by the Joint Recommendation on the ground that it creates a likelihood of consumer confusion since a trademark can be declared as well-known among the public at large, who did not even hear its name.[25] Further, it benefits senior users who have not to invest for attainment of the goodwill in the whole territory of a State.

3.4 Common-Law Principle of Protecting Unregistered Trademarks

In common law countries, the unregistered trademark is protected through the doctrine of passing off also known as 'palming off' which has emerged in the 19th century as a descendant of fraud or deceit.[26] Selling one's goods pretending that they are of other's is known as passing off. It falls within the purview of commercial misconduct and has been a major form of unfair competition.

Further, passing off is a common law economic tort which can be used to enforce unregistered intellectual property rights. It protects the business goodwill from the defendant trying to exploit it for himself, by passing his goods and services off as his competitors. It thus protects the goodwill of the product from being misrepresented. It also prevents one trader from using another's product name, shape, goodwill, and

---

[25] See Maxim Grinberg, 'The WIPO Joint Recommendation Protecting Well-Known Marks and the Forgotten Goodwill' (2005) 5 *Chicago-Kent Journal of Intellectual Property* 1, 9 <https://studentorgs.kentlaw.iit.edu/ckjip/wp-content/uploads/sites/4/2013/06/01_5JIntellProp12005-2006.pdf> accessed 27 September 2020.

[26] Thomas J McCarthy, *McCarthy on Trademarks and Unfair Competition* (4th edn, 200) chapter 29:61 cited in James Faris, 'The Famous Trademark Exception to the Territoriality Principle in American Trademark Law' (2009) 59(2) *Case Western Reserve Law Review* 451.

quality without an authorization. It protects the prior interest of the trader as well. The rationale of introducing passing off is based on the principle of fair trading and consumer protection.[27]

The classical definition of passing off has been developed by the English *Jif Lemon*[28] and *Advocaat*[29] cases. In *Reckitt and Colman Products Limited v Borden Inc*[30], popularly known as *Jif Lemon case*, the plaintiff, Reckitt, sold lemon juice in a plastic container that was shaped like a lemon under the name Jif Lemon. The defendant, Borden, started to produce lemon juice in a similar lemon-shaped container. The plaintiff sued the defendant for passing off their products as Jif Lemon juice. Both the trial court and the Court of Appeal gave the verdict in favour of the plaintiff, Reckitt.

For the first time, Oliver J in the Jif Lemon case requires three elements to be fulfilled to establish the cause of action of passing off which are popularly known as 'classic trinity formulation':

(i) the plaintiff(s) must prove that the product has goodwill;

(ii) a misrepresentation has been made by the defendant(s) to the public which leads or likely to lead them to believe that the goods or services of the defendant(s) are those of the plaintiff(s); and

(iii) the plaintiff(s) must suffer or likely to suffer damages originated from the erroneous belief by the public which caused from the defendant's misrepresentation.[31]

In *Erven Warnink BV v J. Townend & Sons (Hull) Ltd*[32], popularly known as *Advocaat* case, the plaintiff Warnink produced a Dutch liqueur which was made from a blend of hen egg yolks, aromatic spirits, sugar and brandy and sold them under the brand name 'Advocaat'. The defendant, Townend, produced a similar drink and sold it as 'Keelin's Old English Advocaat'. The court held that the defendant was passing off its goods as those of the plaintiff.

---

[27] *Wise Property Care Limited v White Thompson Preservation Limited* [2008] CSIH 44; (see also C W Ng, 'The Irrational Lightness of Trade Marks: A Legal Perspective' in L Bentl, J Davis and J Ginsburg (eds), *Trade Marks and Brands: An Interdisciplinary Critique* (Cambridge University Press 2008) 515.

[28] *Reckitt & Colman Products Ltd v Borden Inc* [1990] 1 WLR 491.

[29] *Erven Warnink v Townend* [1979] AC 731, 742.

[30] *Reckitt* (n 28) 491.

[31] ibid.

[32] *Erven* (n 29) 742.

The classic trinity formulation of *Jif Lemon* has been further illustrated by Lord Diplock in the *Advocaat* case. To be actionable under passing off, Lord Diplock requires[33] that

(i) there must be a misrepresentation;
(ii) the misrepresentation is made by the defendant in the course of the trade;
(iii) the misrepresentation is made to the prospective customers;
(iv) there is a reasonably foreseeable consequence of injury to the goodwill of plaintiff; and
(v) the misrepresentation causes actual damage to the goodwill of the plaintiff.

Lord Fraser has made the elements noticeably clear unlike Oliver J and Lord Diplock. In *Advocaat*[34] he requires that

(i) the plaintiff's goods or services has a trade name;
(ii) the trade name distinguished the goods or services of the plaintiff from these of others in the mind of the prospective consumer;
(iii) reputation of the goods creates goodwill of the trade name;
(iv) the goodwill has substantial value and the plaintiff is the owner of the goodwill; and
(v) the plaintiff has suffered or is likely to suffer damage to his goodwill by the reason that the defendant is selling goods falsely describing the trade name of the plaintiff's goods to which his goodwill is attached.

Now it is a well-settled principle that only the injured defendant, not the consumers can file a suit for passing off.[35] The law against passing off applies only when an actual or threatened injury to the goodwill of the plaintiff occurs. However, where there is no injury, the law against passing off is not applicable. So, the consumer protection or the protection from unfair competition is not the fundamental rationale of law against passing off, these are incidental and occasional outcomes of the action.

3.5 Civil Law Approach of Protecting Unregistered Trademarks

The civil law system accepts the principle against unfair competition in dealing with unregistered trademarks.[36] For example, the German Act against Unfair Competition

[33] ibid 742.
[34] ibid 755-756.
[35] *Ad-Lib Club Limited v Grantille* [1971] 2 All ER 300; *Sutherland v Music Ltd* [2002] EWHC 14; [2002] All ER 156.
[36] L T C Harms, 'A Casebook on the Enforcement of Intellectual Property Rights' (WIPO 2018) 52.

2010[37] has declared unfair commercial practices illegal. The Annexure to section 3(3) enlists some unfair commercial practices which shall always be illegal. Paragraph 13 of the Annex to section 3(3) contains that 'promoting goods or services similar to the goods or services of a specific manufacturer, to deceive the consumer regarding the commercial origin of goods or services promoted.'[38] This paragraph indicates the protection of unregistered trademarks by declaring it as an unfair commercial practice and illegal.

The Japanese Unfair Competition Prevention Act 1993[39] in its definition of 'Unfair Competition' as provided in section 2(1) includes

> [T]he act of creating confusion with another person's goods or business by using an indication (meaning a name, trade name, Trademark, Mark…..) that is identical or similar to another person's Indication of Goods or Business that is well-known among consumers as that of another person's….

This provision is extremely specific for the protection of unregistered well-known trademarks.

4. Statutory Protection of Unregistered Trademarks in Bangladesh

What statutory rights an unregistered trademark owner does have is not clearly mentioned in laws of Bangladesh. For example, section 35(1) of the Trademarks Act 2009 says that 'an unregistered trademark shall not be assignable or transmissible except along with goodwill of the business concerned'. This provision mentions indirectly the unregistered trademark owner's right of assignability or transmissibility if the unregistered trademark does have the goodwill. The Act also requires that registration of the assignment or transmission is necessary as per section 40 of the Act and to assign or transmit a certification mark, a prior consent of the government is essential.[40] However, this Act does not define 'assignment' which usually refers to the transfer, in writing, of trademark owner's rights, title and interest in a trademark.[41] In most jurisdictions, it has been considered as the most common mode of transfer of ownership.[42] In addition, section 2(31) of the Act defines transmission

---

[37] Act against Unfair Competition in the version published on 3 March 2010 (Federal Law Gazette I) 254, as last amended by Article 5 of the Act of 18 April 2019 (Federal Law Gazette I) 466 <https://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html> accessed 26 September 2020.

[38] German Act against Unfair Competition 2010, para 13 of the annex.

[39] Act no. 47 of the 1993 (as amended up to Act No. 54 of 10 July 2015) <https://wipolex.wipo.int/en/text/401411> accessed 26 September 2020.

[40] ibid, s 39.

[41] For example, Trademarks Act 1999, s 2(6). It defines assignment 'an assignment in writing by act of the parties concerned.'

[42] WIPO (n 7) 69.

as 'transmission under this Act, devolution on the personal representative of the deceased person and any other mode of transfer, not being assignment.' However, how the devolution will take place on the personal representative of the deceased remains vague.

Further, section 24(2) of the Trademarks Act 2009 supports an unregistered owner's rights when it says that 'nothing in the Act shall be deemed to affect his rights of action against any person for passing of goods or services as the goods or services, as the case may be, of another person or the remedies in respect thereof.' However, the words in section 24(1) "his rights of action … for passing of goods or services" and the words "right to institute a proceeding … for the infringement" are supposed to differentiate between actions for violations of registered and unregistered trademarks. Further, what constitutes a violation of unregistered trademarks is not mentioned as is mentioned in section 26 for registered trademarks.[43] For protecting unregistered trademarks, trademark owners rely only on common law principles of passing off for what incidences constitute a passing off as discussed above. Furthermore, section 96 entitles an unregistered trademark owner to institute a suit in a similar way that the registered trademark owner can do, and section 97 endows him with the relief similar to the registered owner, including 'an injunction and at the option of the plaintiff, either damages or an account of profits, together with or without any order for the delivery-up of the infringing labels and marks for destruction or erasure.'[44]

4.1 Rights of the Owner for Assignment, Transmission, and Valuation in respect of an Unregistered Trademark

Section 35(1) requires an unregistered trademark to contain goodwill for assignment or transmission of it. However, an unregistered trademark may be assigned or transmitted without goodwill, as section 35(2) requires, if the proprietor or owner of an unregistered trademark, manufactures or sells goods or services under that mark assigns it in relations to goods or services other than those he is already manufacturing or selling. Here, the assignor does not assign the goodwill attached to his brand in relation to the goods or services he is already manufacturing or selling under such brand. As a result, both the assignor and the assignee can use the same trademark but in different goods or services.[45]

---

[43] Trademark Act 2009, s 26.

[44] ibid, s 97. Section 97(1) says: 'The relief which a Court may grant in a suit for infringement or passing off referred to in section 96 of this Act includes an injunction and at the option of the plaintiff, either damages or an account of profits, together with or without any order for the delivery-up of the infringing labels and marks for destruction or erasure.'

[45] Trademarks Act 2009, s 35(2). It says: '… an unregistered trademark may be assigned or transmitted

In addition, if a trademark is assigned or transmitted without goodwill, the assignee must register it in order to protect it. However, since there is no goodwill, he cannot take an action for passing off and it does not confer any enforceable right upon him. Further, if the unregistered trademark is assigned without goodwill, the assignor has to apply to the 'Registrar for directions with respect to the advertisement of the assignment' and must advertise it accordingly.[46]

Besides, the Act is silent in cases of disposition of jointly owned trademarks. In Taiwan, for example, in cases of a jointly owned trademark, the disposition of rights by way of assignment or transmission requires the consent of all right holders unless such right or share is transferred by succession, compulsory execution, a judgment of the court or operation of other law.[47] In India, the right holders may also relinquish their rights in favour of one of them and claim respective value of their shares in the trademarks from the transferee.[48]

Further, as regards creation of joint rights or parallel use of the trademark, the Act follows the line of other countries when it says that the assignment or transmission can, in no way, create exclusive rights in different persons and in different parts of Bangladesh, in relation to same or similar goods or services as it may result in the parallel use of the trademark that will be likely to deceive or cause confusion.[49] As a consequence of this provision, in cases of transmission by succession or devolution, the successors may jointly hold the trademark like their other property or can, in consensus, abandon their respective shares, as per the law or faith they belong to, to one of them on payment of the value of their respective shares in the trademarks. In other parts of the world, for example in the USA, in cases of transmission by devolution on account of the death of the owner who died intestate, trademarks rights like other property vest on the personal representative usually

---

otherwise than along with the goodwill of the business concerned if-
(a) at the time of assignment or transmission of the unregistered trademark, it is used in the same business as a registered trademark;
(b) the registered trademark is assigned or transmitted at the same time and to the same person as the unregistered trademark; and
(c) the unregistered trademark relates to goods or services in respect of which the registered trademark is assigned or transmitted.'

[46] Trademark Act 2009, s 38.

[47] For example, Taiwanese Trademark Act 2016 in its article 46 says "[a]ny license, sub-license, transfer, abandonment of, or creation of pledge on the right in a jointly owned trademark or any transfer of or creation of pledge on the share in a jointly owned trademark shall have the consent of all joint proprietors, unless such right or share is transferred by succession, compulsory execution, a judgment of the court or operation of other law." <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=J0070001> accessed 4 October 2020.

[48] Martand Nemana, 'India: Joint Ownership of Trademarks' (Mondac, 09 July 2017) <https://www.mondaq.com/india/trademark/600602/joint-ownership-of-trademarks> accessed 4 October 2020.

[49] Trademark Act 2009, ss 36-7.

appointed by the court as an administrator to settle the property.[50] So, the owner of an unregistered well-known trademark is entitled to transfer title, ownership and interest in his trademark and his heirs are entitled to inherit it after his death.

For the administrator, the valuation of trademarks is especially important in order to sell it for paying debts of the deceased or for paying other necessary costs and/or distribute the remainder among the heirs. In this regard, there are three approaches, i.e. market approach, cost approach and income approach, used as the best practices worldwide to determine the valuation of trademarks as well as other intellectual property rights.[51] They are as follows:

(i) The income method commonly estimates the valuation of a trademark by 'calculating the present value of future income streams expected to be generated by use of the trademark over its remaining useful life.'[52]

(ii) According to the cost approach, the analyst estimates the value of the investment costs required to develop a new trademark.[53]

(iii) The market method presumes how much the licensee of a trademark would pay to its owner if the owner granted a license.

The hypothetical royalty payment is calculated by 'a market-derived running royalty rate multiplied by the actual owner's projected revenue over the remaining useful life of the trademark.'[54] The personal representative of the deceased may follow one or all of the three methods for the valuation. If one heir of the deceased carries on business by using the trademark, he may require him to pay other heirs proportionately according to the valuation. To this end, the valuation of trademarks plays a key role at the time of merger and acquisition as well. It is equally important as the financial valuation of a company; it could help the buyer and the owner of trademarks to bargain.[55]

4.2 Rights of the Owner and the Consumer in respect of an Unregistered Trademark for Instituting Suits and Claiming Remedies

The infringement of a trademark is both a public wrong as well as a private wrong. It infringes not only the rights of the owner but also the interests of the consumers deceived. Consumers are used to relying on the trademark to identify and buy the

---

[50] *Meinhard v Salmon* [1928] 164 NE 545 (New York).

[51] John E. Elmore, 'The Valuation of Trademark-Related Intangible Property' (2015) *Intangible Property Transfer Price Insights*, winter, 66, 70 <http://www.willamette.com/insights_journal/15/winter_2015_8.pdf> accessed 16 October 2021.

[52] Iibid 66, 70.

[53] Su-Lin Ang, 'Trade Marks in Mergers and Acquisition' (2008) *International In-house Counsel Journal* 732, 735.

[54] John E Elmore (n 51) 66, 69.

[55] Su-Lin Ang (n 53) 732.

products of the legitimate owners; their interests are adversely undermined when they purchase products of infringers known to be the products of legitimate owners.[56] To this end in view, unregistered trademarks have been protected under various statutes of Bangladesh. Statutory protection against unregistered trademark includes the protection of the owner of unregistered protection on the one side and the protection of deceived consumers on the other side.

(i) Protection of the owner of an unregistered trademark in case of its infringement

The owner of an unregistered trademark may claim protection under the Trademarks Act 2009. The Act keeps provision for the prohibition of registration, cancellation of registration, and the civil and criminal remedies for infringement of the right of the owner of an unregistered trademark.

Section 10(4) of the Trademarks Act 2009 prohibits registration of a mark identical or similar to a well-known trademark of other enterprises as the section goes–

> No trademark shall be registered in respect of any goods or services if it is identical with, or confusingly similar to, or constitutes a translation or a mark or a trade restriction which is well-known in Bangladesh for identical or similar goods or services of another enterprise.

In determining whether a particular trademark is well-known or not, section 10(6) of the Act has incorporated the rule as contained in the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks. It asks for taking account of the fact that the mark 'is well-known to the relevant sector of the public, including knowledge which has been obtained in Bangladesh as a result of the promotions of the mark'. Thus, a trademark that is not registered in Bangladesh but is within the knowledge of the relevant sector of the public shall be considered well-known and protected throughout the territories of Bangladesh. Rule 14 of the Trademarks Rules 2015 says that within two months from the date of filling the application to register a trademark, the Registrar shall examine whether the conditions contained in section 10 of the Act are violated or not. If the Registrar finds any anomalies he will decide after giving the applicant an opportunity of being heard.[57] Chapter III of the Trademarks Rules 2015 keeps provision for the advertisement to notify the public at large to entertain objection against registration if any. Chapter IV of the Rules 2015 mentions the procedure to deal with such an objection against registration.

---

[56] Thomas J McCarthy (n 26).
[57] Trademarks Rules 2015, r 15.

Even if an unregistered well-known trademark is wrongly registered, entered into register without sufficient cause or by an error or defect, any person aggrieved may apply to the High Court Division or the Registrar in the prescribed form for expunging or varying such entry as per section 51(2) of the Act. The High Court Division or the Registrar shall decide the matter and order to rectify it if it thinks fit after giving the opposite party the opportunity of being heard.[58]

In addition, Bangladesh has followed the common law to protect unregistered well-known trademarks especially through the filing of suits for remedies when the section 24(2) of the Act entitles the owner of an unregistered trademark to enforce his right of action against any person for passing off goods and services as well as he can ask for remedies in respect thereof. Further, section 96(d) of the Act requires that every suit for passing off must not be instituted in any court, not below the Court of District Judge. Section 96(d) also identifies the cause of passing off as it arises out of the use 'by the defendant of any trademark which is identical with, or, deceptively similar to, the plaintiff's trademark, whether registered or unregistered'. Section 20 of the repealed Trademarks Act 1940 had incorporated similar provisions as well.

Further, whether a particular trademark is creating any confusion or there is any likelihood of creating confusion is determined by the court and such determination varies from case to case. In the USA, in *AMF, Inc v Sleekcraft Boats*[59], the court referred eight relevant factors to determine the likelihood of confusion such as strength of the mark; proximity of the goods; similarity of the marks; evidence of actual confusion; marketing channels used; types of goods and the degree of care likely to be exercised by the purchaser; defendant's intent in selecting the mark; and likelihood of expansion of products line.[60] In another US case named *Polaroid v Polarad*[61], the court considered seven factors to determine likelihood of confusion which are as follows:

> [T]he strength of his mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers.[62]

In both the cases, the court emphasized more on the defendant's intention and the quality of his product than the degree of similarity between two marks in determining whether there is consumer confusion or not.

---

[58] Trademarks Act 2009, ss 51, 65.
[59] [1979] 599 F 2d 341 (C A 9) <https://cyber.harvard.edu/metaschool/fisher/domain/tmcases/amf.htm> accessed 25 September 2020.
[60] ibid.
[61] [1961] 287 F 2d 492.
[62] ibid.

In the UK, for assessing similarities, Jacob J identified some relevant factors in the *Treat* case[63] as follows:

> [T]the respective users of the respective goods or services; the physical nature of the goods or acts of services; the respective trade channels through which the goods or services reach the market; in the case of self serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves; the extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

In all of the cases, the court emphasized on trade channels through which the goods or services reach the market and determined each as an important factor for creating consumer confusion. However, the checklist provided by the US court is more comprehensive than the UK court.

In addition, section 97 of the 2009 Act specifies the remedy for passing off, which includes injunction and either damages or an account of profits at the option of the plaintiff. If the defendant can prove that he uses the alleged trademark in good faith and without knowledge of the existence of the plaintiff's trademark, the court shall exempt him from providing damages or account of profits.[64]

Besides the civil remedy, this Act keeps the penalty for applying a false trademark, which includes both registered and unregistered well-known trademarks. Without a prior assent of the owner of a trademark, when a person makes that trademark or deceptively similar mark, he is said to falsify such trademark as per section 72. Section 74 keeps the penalty also for selling goods to which a false trademark is applied for which a person shall be liable to a punishment up to two years imprisonment or with fine or with both. For repetition of the same act, the person shall be liable with punishment up to three years imprisonment or with fine or with both. The court may also direct forfeiture of such goods to the government as per section 79. A criminal proceeding under this Act shall be tried by the Metropolitan Magistrate or the Magistrate of the first class who acts as the judicial officer in the regular court setting.[65]

(ii) Protection of consumers in case of infringement of an unregistered trademark

---

[63] [1996] RPC 281.
[64] Trademarks Act 2009, s 97 (2) (c).
[65] ibid, s 83(2).

Using someone's trademark or property as that of another is a criminal offense in Bangladesh. The Penal Code 1860 has decriminalized 'using a false trademark' and 'using a false property mark'. Their definition as provided in sections 480 and 481 of the Code has the following ingredients:

(a) someone marking any goods, packaging the goods, or using any such goods with a mark; and

(b) the marking, packaging, or using goods has caused it to believe that these merchandise or property or goods belong to a person to whom they do not belong.

So, misleading consumers using someone's mark is enough to constitute the offenses of 'using false trademark' or 'using a false property mark'. Whether there is any goodwill attached to the mark, whether consumers are misled, or whether any injury caused to the plaintiff is immaterial here. However, these definitions are too wide to include protection of unregistered trademarks. Regarding the remedy for theses offenses, section 483 of the Code says that a person using false trade or property mark shall be punished with imprisonment of one year, or with fine, or with both. Further, 'making or possession of instrument for counterfeiting a trademark or property mark'[66] as well as 'selling goods marked with a counterfeit trademark or property mark'[67] has also been penalized under this Code. Chapter xviii of the Code also penalizes offenses relating to trade, property, or other marks in sections 478 to 489E.

In addition, the infringement of an unregistered trademark appears also to have a certain relationship with cheating. It can be protected under section 415[68] read with

---

[66] Penal Code 1860, s 485. It contains that '[w]hoever makes or has his possession any die, plate or either instrument for the purpose of counterfeiting a trade mark or property mark, or has in his possession a trade mark or property mark for the purpose of denoting that, any goods are the manufacture or merchandise of a person whose manufacture or merchandise they are not, or that they belong to a person to whom they do not belong, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine , or with both'.

[67] ibid, s 486. It says that '[W]hoever sells, or exposes, or has in possession for sale or any purpose of trade or manufacture, any goods or thing with a counterfeit trade mark or property mark affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall unless he proves-

(a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and

(b) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power in respect to the persons from whom he obtained such goods or things, or

(c) that otherwise he has acted innocently,

be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both'.

[68] ibid, s 415. It contains that '[w]hoever, by deceiving any person, fraudulently or dishonestly induces

section 417[69] of the Penal Code. Illustration (b) to section 415 mentions that 'A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z, to buy and pay for the article, A cheats.' The term 'this article was made by certain celebrated manufacturers' proves that the article must have certain goodwill. Very importantly, the term 'deceives Z into a belief that….' proves misrepresentation to the consumer. To be protected under this provision, the unregistered trademark must be well known having prestige, goodwill, or reputation.

Further, section 15 of the Customs Act 1969 has provided that goods containing a counterfeit trademark, or a false trade description shall not be brought into Bangladesh, whether by air or land or sea. The goods so imported in breach of section 15 shall be liable to be detained and confiscated and shall be disposed of in such a manner as may be prescribed.[70] The concerned officer may search any person if he has reason to believe that such person is carrying with himself any goods liable to be confiscated.[71] The officer may also arrest any person if he has reason to believe that such person has committed an offence under the Act.[72] The government may empower the officers with the power of a Magistrate of the first class for the purpose of search, seizure and arrest.[73] The Commissioner[74], Additional Commissioner[75],

---

the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".
Explanation. A dishonest concealment of facts is a deception within the meaning of this section.'

[69] ibid, s 417. It says that '[w]hoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both'.

[70] Customs Act 1969, s 17. It says that '[w]here any goods are imported into or attempted to be exported out of Bangladesh in violation of the provisions of the section 15 or of a notification under section 16, such goods shall, without prejudice to any other penalty to which the offender may be liable under this Act, or any other law, be liable to be detained and confiscated and shall be disposed of in such a manner as may be prescribed.'

[71] ibid, s 158(1). It says that '[t]he appropriate officer, if he has reason to believe that any person is carrying about himself goods liable to confiscation or any documents relating thereto, may search such person, if he has landed from or is on board or is about to board a vessel within the Bangladesh customs-waters, or if he has alighted from or is about to get into or is in any other conveyance arriving in or proceeding from Bangladesh or if he is entering or about to leave Bangladesh or if he is within the limits of any customs-area.'

[72] ibid, s 161(1). It says that '[a]ny officer of customs authorised in this behalf who has reason to believe that any person has committed an offence under this Act may arrest such person.'

[73] ibid, s 158A.

[74] Commissioner of Customs shall have jurisdiction to try cases in which the value of confiscated goods is exceeding 20 lacs Tk.

[75] Additional Commissioner of Customs shall have jurisdiction to try cases in which the value of confiscated goods is not exceeding 20 lacs Tk.

Joint Commissioner[76], Deputy Commissioner[77], and Assistant Commissioner[78] shall have the power under this Act to adjudicate such offence under section 179 of the Act to act as the officer. So, the unregistered trademark or property mark can be protected under these provisions. These provisions not only protect domestic but also foreign unregistered well-known trademarks.

Furthermore, the Consumer's Right Protection Act 2009 has been enacted to protect the right of consumers as well as to prevent anti-consumer right practices.[79] This Act criminalizes the *making or manufacturing of fake goods* for which the offender shall be liable to be punished with imprisonment for a term not exceeding three (3) years, or with fine not exceeding Taka 2 lacs, or with both.[80] The term 'fake' has been defined to be meant that 'making or manufacturing of similar goods without authorization imitating the goods authorized for marketing whether the properties, ingredients, elements or quality of the goods authorized exist or not in such fake goods.'[81] According to this Act, a trademark is the private property of its owner and thus the owner is the person authorized to use it. Further, section 21(1) of the 2009 Act empowers the Director General of the Directorate of National Consumers' Right Protection to 'take all necessary actions as he deems expedient and necessary for the protection of the rights of the consumers, prevention of anti-consumer right practice, and disposal of the complaint against violation of the rights of the consumers'. If he has any reason to believe that any person has committed an offence under this Act, he may issue a warrant of arrest under section 24. This Act empowers any officer to seize such goods after search and arrest the accused related to such goods.[82] The Director General or any officer empowered in this behalf may make order of temporary closure of any shop, commercial enterprise, etc. for any anti-consumer right practice.[83] Upon the request of assistance by the Director General or any officer empowered by him, any law enforcing agency or any other public or statutory

---

[76] Joint Commissioner of Customs shall have jurisdiction to try cases in which the value of confiscated goods is not exceeding 15 lacs Tk.

[77] Deputy Commissioner of Customs shall have jurisdiction to try cases in which the value of confiscated goods is not exceeding 5 lacs Tk.

[78] Assistant Commissioner of Customs shall have jurisdiction to try cases in which the value of confiscated goods is not exceeding 2 lacs Tk.

[79] Consumer's Right Protection Act 2009, preamble.

[80] ibid, s 50.

[81] ibid, s 2(9).

[82] ibid, s 25. It says that '[i]f any officer, while conduction any inquiry or investigation under this Act, has reason to believe that there are goods contrary to this Act in any open place or any vehicle, he may, recording reasons thereof in writing, seize such goods after search and arrest the accused related to such goods.'

[83] ibid, s 27.

authority is bound to render such assistance.[84]According to section 32, the goods which are related to an offence under this Act, shall be liable to confiscation.

Further, the Act of 2009 criminalizes imitating the goods which is authorised for marketing. So, the ultimate object here is marketing which is the ordinary business practice whereby the goods manufactured are marketed under a trade name. Thus, the phrase 'imitating goods' essentially includes 'imitating trademark'. Further, though the definition 'fake' does not directly mean the trademark, it indirectly indicates so. The affected consumers thereby may file a suit for civil remedies in appropriate cases in the regular civil court.[85]

In addition, to deceive consumers by an untrue or false advertisement to sell any goods or services has been included in the definition of 'anti-consumer right practice[86] which is a punishable offense under section 44 of the Act. The person so deceives shall be punished with imprisonment for a term not exceeding 1 year, or with fine not exceeding Taka 2 lacs, or with both. Further, false or untrue 'advertisement campaigns' can be termed as 'misrepresentation'[87] and it is treated as the foundation of all liability in 'passing off'.[88] So, if a person uses the trademark of another person whether registered and unregistered, and thereby falsely advertises it as his own to the consumers, he shall commit a punishable offense under this Act. The affected consumer may file a civil suit in a competent civil court asking for civil remedies for the anti-consumer right practice, hereby deceiving consumers by untrue or false advertisement.[89] The remedies provided by the civil court include injunction, damages etc. The Competition Act 2012 has also empowered the Bangladesh Competition Commission to ensure the protection of consumer rights through the review of the actions taken under any other law. [90]

In light of the analysis, it may be argued that the statutory protection regime has incorporated the common law principle of passing off directly, and the civil law principle against unfair practices to protect unregistered well-known trademarks

---

[84] ibid, s 28.
[85] ibid, s 66.
[86] ibid, s 2(20).
[87] *Cadbury-Schweppes Pty. Ltd. v Pub Squash Co. Pty. Ltd.* [1981] RPC 429 (though it was held there that the use of the advertising campaign did not, in the circumstances, amount to a misrepresentation).
[88] Suman Naresh, 'Passing Off, Goodwill and False Advertising: New Wine in Old Bottles' (1986) 45(1) *Cambridge Law Journal* 99.
[89] Consumer's Right Protection Act 2009, s 66.
[90] Competition Act 2012, s 8(1)(j).

indirectly since the legal provisions mentioned above hold a strong commitment to prevent the promotion of goods or services similar to the goods or services of a specific manufacturer, and prevent the putative infringers from deceiving the consumers regarding the commercial origin of goods or services promoted. So, giving the strongest statutory protection to unregistered well-known trademarks appears to be more than the required in compliance with its treaty obligations.

Further, section 2(3) of the BSTI Act 2018 defines 'trademark' as any registered trademark, or any marks used or proposed to be used with any goods which indicate the right of its proprietor owner in it. This definition includes both registered and unregistered trademarks. Section 15 prohibits using standard marks in a trademark without taking a license. Section 2(20) defines 'standard mark' as a certification mark issued by the BSTI. The Government in consultation with the BSTI can impose restrictions on import and export and can prohibit selling, distributing or advertising of goods which do not contain standard mark, or which violates conditions on which the licence was granted as per sections 20 and 21. In addition, according to section 27(1), if any person violates section 15 by using a trademark with the license, he shall be liable to be punished with imprisonment for a term not exceeding 2 years or with fine not exceeding 1 lakh but not below 25,000 Tk or with both. Further, according to section 27(2), the court trying such offences may seize the property in respect of which the provisions of the Act are violated. To inspect whether any trademark contains any standard mark wrongfully, the BSTI can appoint an Inspector as per section 22(1). The Inspector shall also have the power as given under section 22(2) to inspect any product using standard mark, to collect their sample, to exercise power of Sub-inspector to search, arrest and investigate any matters, and any other power.

In addition, section 34 says that the offences under this Act shall be adjudicated by the Magistrate of the first class or Metropolitan Magistrate. Further, section 35 empowers the mobile court constituted under the Mobile Court Act 2009 to try the offences mentioned under this Act. So, there appears a clear contradiction between sections 34 and 35 in respect of jurisdiction of the court, since in one place it gives jurisdiction to the Magistrate Court and in other places it gives jurisdiction to the Executive Magistrate led mobile courts. The courts - Magistrate Courts or Executive Magistrate led mobile courts do not play any role in protecting intellectual property rights like unregistered trademarks since they may not have any formal knowledge in intellectual property law. Further, the Executive Magistrate does not require any formal educational background in legal studies. They are, in many cases, not familiar with fundamental judicial norms. On several writ petitions filed before the High Court Division (HCD), a Division Bench declared a mobile court conducted by the

Executive Magistrates illegal and unconstitutional.[91] It criticized empowering the Executive Magistrates with judicial powers and held that it is 'a frontal attack on the independence of the judiciary and is violative of the theory of separation of powers'.[92] The case is now pending at the Appellate Division (AD) of the Supreme Court although it has stayed the HCD judgment until the final disposal of the case.

5. Judicial Response towards Protection of Unregistered Well-Known Trademarks in Bangladesh

There are different stakeholders in protecting unregistered well-known trademarks, e.g. Tribunal comprising the Registrar of the Department of Patents, Designs and Trademarks[93], the Commissioner of Customs[94], the District Court, the High Court Division, and the Appellate Division constructed and empowered under various statutes including the Trademarks Act 2009. The role of the District Court and others has been discussed above. This part shall deal with the attitude of the higher judiciary meaning the High Court Division and the Appellate Division of the Bangladesh Supreme Court in protecting unregistered well-known trademarks. The upper judiciary is in true sense expanding the protection regime contained in the various legislation.

For instance, the protection of an unregistered well-known trademark under section 20 of the Trademarks Act 1940 (now repealed) has been reiterated in *Dominous Pizza and others v Domino's Pizza Inc.*[95] where the plaintiff carried out worldwide business of manufacture and merchant of pizza and pizza related products under the trademark 'Domino's Pizza'. Due to an extensive use of high quality of the plaintiff's products and advertisements, this mark acquired excellent reputation and goodwill. The plaintiff filed an application for registration of the mark in Bangladesh. During the pendency of application, the defendant started to produce pizza and pizza related products by using a similar trademark 'Dominous Pizza' and thereby earning

---

[91] Three separate writ petitions; *Kamruzzaman Khan vs Bangladesh represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs, Bangladesh Secretariat, Ramna, Dhaka and others, Md. Shafiullah and others vs Bangladesh represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs, Bangladesh Secretariat, Ramna, Dhaka and others, and Md. Mujibur Rahman and others vs Bangladesh represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs, Bangladesh Secretariat, Ramna, Dhaka and others;* having same issue were heard together. See <http://www.supremecourt.gov.bd/resources/documents/ 382548_ WP8437of2011.pdf > accessed 26 September 2020.

[92] ibid, 61.

[93] Trademarks Act 2009, s 2(6).

[94] Customs Act 1969, s 109. It empowered Commissioners of Customs to require information in respect of imported goods and false trademarks. This provision was omitted by section 33 of the Finance Act 2001.

[95] [2009] 61 DLR 780.

huge profits and causing an irreparable loss to the plaintiff. The loss included a huge economic and reputational loss to the plaintiff by passing off substandard products resulting in deception among the customers, who believed that they were customers of products as prepared by the plaintiff. In this case, the HCD held that 'section 20(1) of the Act (Trademarks Act 1940) relates to the institution of any proceedings by any person to prevent or recover damages for the infringement of an unregistered trademark…'

In this case, the HCD has relied on the decision of the Pakistan Supreme Court in *Messrs Tabaq Restaurant v Messrs Tabaq Restaurant*[96] in which it was held that 'what is described as a passing off action may be passing off action simpliciter or a case of infringement of trademark coupled with passing off trademark being registered or unregistered'. In the case, the Pakistan Supreme Court also construed the phrase 'suit otherwise relating to any right in the trademark' as contained in section 73[97] of the [Pakistan] Trademarks Act 1940 and held that

> [T]he word 'otherwise' is of comprehensive significance and it is cut down in its scope and meaning only when it is followed by an enumeration and when it receives *ejusdem generis* construction. There is no enumeration therefore no restriction can be imported. Similarly, the words 'relating to' bring in comprehensiveness and wider import. In a passing off action, which is based on the infringement of an unregistered trademark, section 73 would be applicable and it is to such passing off cases that the words 'otherwise relating to any right in a trademark' suggest that the section also applies to actions of passing off. [98]

The erstwhile Trademarks Act 1940 also allowed assignment and transmission of an unregistered trademark subject to some conditions. In *Sohan Kumar Agarwala v Assistant Registrar, Department of Patent Design and Trademark and others,*[99] an Indian national, Raj Kumar Agarwala, filed an application to get his trademark 'Dulhan' registered on 28.05.1997. The respondent no 2 was substituted in place of Raj Kumar Agarwala since he acquired the proprietorship of the unregistered trademark 'Dulhan' by virtue of deed of assignment dated 3012.2003 given by Raj Kumar in his favour. The petitioner, Sohan Kumar Agarwala, had applied for registration of the same trademark 'Dulhan' in 2004, i.e. long 7 years after filing the trademark application by Raj Kumar. The matter in issue in this case was whether the unregistered trademark 'Dulhan' was assignable or not. In this case, the Appellate Division of the Supreme Court has considered and reiterated the provision contained

---

[96] [1987] SCMR 1090.

[97] Trademarks Act 1940 (Pakistan), s 73. It states that 'no suit for the infringement of a trademark or otherwise relating to any right in a trademark shall be instituted in any Court inferior to a District Court having jurisdiction to try the suit.'

[98] [1987] SCMR 1090.

[99] [2015] 38 BLD 139 (AD).

in section 30 of the 1940 Act that 'an unregistered trademark shall be assignable or transmissible except in connection with the goodwill of a business only if, at the time of assignment or transmission, such trademark is used in the same business as a registered trademark.' A similar fact of assigning the unregistered trademark 'RANI' without use of the mark meaning assignment without goodwill appeared in the *Danish Foods Limited v Department of Patents, Designs and Trademarks*[100] where the High Court Division gave the decision against the assignment.

In the *British Broadcasting Corporation (BBC) v Department of Patents, Designs and Trademarks*[101], the question arose whether the British Broadcasting Corporation (BBC) a well-known unregistered trademark can be registered and protected where two applications for registering trademarks, namely, Brown, Boveri & Cie AG (BBC) and Bangladesh Brevy Center (BBC) were filed earlier and pending registration. The High Court Division opines that 'the priority use of this mark [British Broadcasting Corporation (BBC)] gets paramount consideration compared to registration'[102] and hence it is protected.

Further, the terms 'deceptively similar' and 'likelihood of confusion' were elaborated in *Nasir Miah, Malik Nasir Soap Factory v Md. Anwar Hossain, Executive Officer, Commander Soap Factory Limited*.[103] In this case, the plaintiff has claimed that the defendant used the word 'MOSCO' in his soap packet which was phonetically and visually similar to 'COSCO' used by the plaintiff in his soap packet which could create doubt and confusion. The trial court ordered for a temporary injunction and the defendant appealed. In the appeal, the HCD found that the defendant had been trying to pass off his Mosco soap as that of the plaintiff's Cosco soap and dismissed the appeal. In this case, the court relied on *Shafaquat Haider v Md. Al-Amin*[104] in which it was held that 'in case of similarities between two names likely to create confusion in the minds of customers temporary injunctions can be granted to restraint the defendant from passing off his goods as that of the plaintiff's.'

An interim remedy in the form of temporary injunction was granted to protect the unregistered trademark in *Kohinoor Chemical Co. (BD) Limited v Unilever Bangladesh Limited*.[105] In this case, the plaintiff started manufacturing of a fairness cream under the brand name 'Fair & Lovely' in 1964 which acquired popularity at home and abroad, but the defendant started business of similar product in 2006

[100] Trademark Appeal No. 09 of 2011.
[101] [2017] 5 CLR 101.
[102] ibid.
[103] [1996] 48 DLR 28.
[104] [1987] BLD 130 (AD).
[105] [2011] 16 BLC 60 (HCD).

imitating the brand name and the package named 'Fair & Care'. Both of them had no trademark registration certificate. The plaintiff filed a suit against the defendant under section 96 read with section 24(2). The District Judge granted a temporary injunction in respect of manufacturing, marketing and selling of fairness cream with the trademark 'Fair and Care'. On appeal from the order of injunction, the HCD observed that

> [T]he matter in issue raised by the parties is absolutely the subject matter of evidence. The Court below failed to ascertain such facts of either party. When a particular dispute is in seisin of the Civil Court neither party should be allowed to take any undue advantage and nature and character of the subject matter of the suit should be protected so long the dispute is pending before the Court.[106]

It directed both parties to maintain status quo in respect of manufacturing, distributing, selling and marketing of their respective product fairness cream with trademark 'Fair & Lovely' and 'Fair & Care' and directed the District Court to dispose of the suit within 3 months. In this case, the HCD emphasized on merit of the case in granting injunction as it observed that 'the matter in issue raised by the parties is absolutely the subject matter of evidence'. But in principle, it is sufficient to prove the prima facie case to get an order of temporary injunction; it is immaterial to prove the merit of the case.[107] Here, the plaintiff proved the prima facie case since it launched the business in 1964 and continued the business with reputation. The plaintiff need not prove the actual merit of the case. The Court's order to stop business of both the parties was not the right solution as it results in a great economic loss for both the parties.

The notion 'consumer confusion' was illustrated in *Nabisco Biscuit and Bread Factory Ltd. v Baby Food Products Ltd*.[108] In this case, the trademark applications by the Opposite Party no. 1 pertain to the registration of the impugned trademark consisting of a deceptively similar trademark "NABI", "NABISO", "NABICO", "NAVICO", "NOBICO" and "NABICO". All the six trademarks are registered under similar circumstances notwithstanding identical pre-existing trademarks of the petitioner named "NABISCO". The petitioner approached the court. The court found

---

[106] ibid, para 9.

[107] In *Nurul Haq v Bangladesh Bank* (39 DLR 310) the court held that 'it is no part of the court's function at that stage to try to resolve conflict of evidence, not to decide complicated questions of fact and of law which called for detailed arguments and mature consideration. These are matters to be dealt with at the time of trial. The court is not required to enter into the merit of the case as is necessary for passing a decree after hearing the evidence'. See also *IDBP v Master Industries* (26 DLR 157); *Dalpat v Prahlad* [1993] AIR 276 SC.

[108] [2010] 30 BLD 241 (HCD).

the merit in petitioner's case and directed the Registrar to expunge the impugned trademarks. The court reiterated the legislative requirements not to deceive or not to cause confusion to the consumers in order to be considered for registration as a trademark. The court based its judgment on sections 8(a) and 10(1) of the Trademarks Act 1940. Of the highlighted provisions, section 8 requires that a trademark to be registered shall not contain any matter which would be disentitled to protection in a Court of Justice by reason of its being likely to deceive or to cause confusion. Further, section 10 as referred to, prohibits the registration of identical or similar trademarks which so nearly resembles such trademarks as to be likely to deceive or cause confusion.

In this *Nabisco* case[109] Syed Refat Ahmed, J has enunciated a test by holding that it should place itself in the shoes of that ordinary consumer to at the precise moment that the discretion to buy is exercised and to ensure that such exercise of discretion is indeed an informed one and not improperly induced by deception. The court was of the opinion that mere 'ocular comparison may not always or solely prove to be the decisive test. Rather, a probable resemblance between two marks must be considered with reference to the ear as well as eye' which was referred from *K.R. Chinna Krishna Chettiar v Sri Ambel & Co. and another*[110]. The court thus emphasized on the protection of the unwary purchaser from deception. The court noted that

> [I]t must always be careful to make allowances for imperfect recollections of the distinguishing marks of a preferred product and how that recollection is susceptible of corruption by the effect of careless pronunciation and speech on the part not only of the person seeking to buy under a trade description but also of the shop assistant attending the person's wants.[111]

So, it appears that the Honourable Supreme Court of Bangladesh just reiterated the statutory provisions regarding the protection of unregistered well-known trademarks. However, the court seems to be conservative to dealing with the matter relating to the common law doctrine of passing off. They only reiterated the relevant provisions of the trademark law. They did not discuss Bangladesh's international obligations under different treaties and global best practices in respect of protection of unregistered well-known trademarks. They could develop jurisprudence by analysing the global best practices and other relevant domestic laws in addition to the trademark law. They could also find out and fill up the gap between national laws and international obligations as regards the tests for passing off evolved in other jurisdictions. The counsel on behalf of the parties could also play a vital role by assisting the court in this regard.

---

[109] ibid.
[110] [1970] AIR 146 (SC).
[111] [2010] 30 BLD 241 (HCD).

6. Protection of Unregistered Trademarks of Trade Names and Domain Names

Section 11(1) of the Companies Act 1994 provides that 'a company shall not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling the name that there is likelihood of using the name to deceive'. A literal interpretation of this section may reveal that this provision will only be applicable to the similar name of companies already registered, but it has nothing to do with the similar name of, or the trademark used by other business entities including partnerships, sole proprietorships etc. whether incorporated or unincorporated.[112] Nevertheless, in *Shafquat Haider & Others v Mr. Al-Amin and Another*[113], the Appellate Division of the Supreme Court of Bangladesh granted an injunction order to restrain the respondents from using the trade name 'Ciproco Computers', which is a sole proprietorship business, till disposal of the petition for winding up of the 'Ciproco Computers Ltd', which is a company. Thus in light of this decision, it is well settled that the bar against using an identical or similar name as laid down in section 11 is not only limited in its application to a company with reference to another company but can also be applicable to an incorporated and unincorporated business entity including a sole proprietorship, a partnership firm etc., particularly when there is some sort of deception.[114] However, it is not clear whether an unregistered well-known trademark that may also consist of a tradename will be protected under this provision. For example, 'Khan and Khan' which is a well-known unregistered trademark may face challenges regarding the protection of its trademark under this provision if another business is registered as a company with the same tradename 'Khan and Khan'.

In similar line, section 53 of the Partnership Act 1932 empowers every partner of a partnership firm to restrain any other partner or his representative from using the firm's name in a similar business until the firm has been completely wound up. The underlying object of the provision is to fix the value of the goodwill attached to the name and distribute it among partners as evident from the proviso clause which contains that this section will not affect the right to use the firm's name by a partner who has bought the goodwill. Considering a liberal interpretation of this provision, it may be said that this provision is not limited only to partners but to the public at large using the firm's name.

---

[112] Shima Zaman, 'The Scope of Statutory Protection on the Use of Identical or Confusingly Similar Names by Businesses in Bangladesh' (2020) 31 *Dhaka University Law Journal* 49, 53.

[113] [1987] 39 DLR (AD) 103.

[114] Md. Rizwanul Islam, 'Use of Similar Names by Companies' *The Daily Star Online* (Dhaka, 23 December 2014) <http://www.thedailystar.net/use-of-similar-names-by-companies-56593> accessed 2 February 2021.

In addition, the protection of a trademark involving the domain name appears recently in Bangladesh when the Facebook Inc., a US tech giant and largest social media company, files a suit against the Bangladeshi A1 Software Limited in the Dhaka District Court.[115] Here in the case, the defendant, A1 Software Limited company bought a domain name (facebook.com.bd) in 2008 from the Bangladesh Telecommunication Company Limited (BTCL) that owns all dot bd (.bd) domains and it sells the domain name to the public,[116] although the plaintiff, Facebook Inc. has achieved worldwide popularity from the very day of its inception in 2004. In 2020, the Facebook makes an application for a dot bd (.bd) domain from the BTCL but is declined since there is an existing domain in the similar name 'facebook.com.bd'.

The Facebook tries to settle this matter amicably but fails, and thus files a suit seeking a ban on the operation of facebook.com.bd to prevent fraudulent activities through it and asks for USD50000 as compensation.[117] The court grants an ad interim injunction against the defendant along with a show cause notice to respond within 15 days.[118] This case is the first of its nature, which contains an issue relating to the protection of a well-known foreign domain name as a trademark in Bangladesh. Since the plaintiff company has the goodwill, which is being misappropriated and misrepresented by the defendant company and thus causes damages to the former's goodwill, this case is taken by the court to have fulfilled the requirement of passing off. This relief may be a milestone regarding the protection of an unregistered well-known domain name as a trademark in Bangladesh. Further, if the local company also registered the name 'Facebook' as a trademark in Bangladesh, the Facebook Inc., although not registered here as a trademark, could file an application with the Registrar of Trademarks for cancellation of the registration due to its already being a well-known trademark.[119]

7. Examining the Enforcement of Unregistered Trademarks and Suggesting the Way-forward

Despite having a strong commitment towards the protection of unregistered well-known trademarks, there are some lacunae in the protection regime. This part identifies those lacunae and proposes some solutions to overcome them.

---

[115] Trademarks Act 2009, ss 96, 24.

[116] 'Facebook to sue 'facebook.com.bd' domain in Bangladesh' *The Daily Star* (Dhaka, 20 November 2020) <https://www.thedailystar.net/toggle/news/facebook-sue-facebookcombd-domain-bangladesh-1997677> accessed 1 February 2021.

[117] 'Facebook to Sue 'facebook.com.bd' Domain in Bangladesh' *The Daily Star* (Dhaka, 20 November 2020) <https://www.thedailystar.net/toggle/news/facebook-sue-facebookcombd-domain-bangladesh-1997677> accessed 1 February 2021; see also Trademarks Act 2009, ss 96, 97.

[118] 'facebook.com.bd: Court Stops Domain Use as Facebook Files Case' *The Daily Star* (Dhaka, 15 December 2020) <https://www.thedailystar.net/backpage/news/facebookcombd-court-stops-domain-use-facebook-files-case-2011485> accessed 1 February 202; see also Trademarks Act 2009, s 97.

[119] See Trademarks Act 2009, s 51.

The protection regime of an unregistered well-known trademark has been designed to protect the owner of it, the consumers, and most importantly the national interest. The infringement of an unregistered trademark also involves a breach of both public interests and private interests. In this regard, the statutory regime provides for the protection of public interests (right of the consumers and national interests) by the criminal court and protection of private interests (right of the owner) by the civil court.

The statutory protection regime is scattered in different laws and enforced by different authorities sometimes over a single cause of action. For example, as per section 96(d) of the Trademarks Act 2009, the user of an unregistered well-known trademark shall have to institute a suit for passing off arising out of the use by the defendant of any trademark which is identical to or similar with his trademark in the District Court. Here the District Court means the Court of District Judge and includes the Court of Additional District Judge and Joint District Judge.[120] One the other hand, a criminal proceeding against the infringer under this Act shall be tried by the Metropolitan Magistrate or the Magistrate of the first class.[121] Further, the offences under the Consumer Protection Act 2009 is to be tried by the Metropolitan Magistrate or the Magistrate of the first class.[122] For civil remedies in appropriate cases, the affected consumers have to file a suit in Court of the Joint District Judge having local jurisdiction.[123] Furthermore, the offences under section 417 and 478 to 489E of the Penal Code 1860 shall be tried by the Metropolitan Magistrate or the Magistrate of the first class.[124]

So, it appears that using others' unregistered well-known trademarks without authorization has a close connection with making fake, unauthorized, adulterated, substandard products, and selling them to the market. These unfair business practices are quite common here in Bangladesh.[125] The infringers use local and foreign well-known trademarks or brand names for that purpose.[126] The infringers produce their

---

[120] Trademarks Act 2009, s 2(4).

[121] ibid, s 83(2).

[122] Consumer's Rights Protection Act 2009, s 57.

[123] ibid, s 66. Under 66(2), "a competent Civil Court" shall mean the Court of Joint District Judge having local jurisdiction.

[124] Code of Criminal Procedure 1898, Column 8 of the Schedule II.

[125] See, The Daily Observer (n 5); The Daily Bangladesh (n 5); The Dhaka Tribune (n 5); The Daily Sun (n 5); The Daily Star (n 5); The Business Standard (n 5); Bdnews24.com (n 5).

[126] These products include for example cosmetics, face wash, toothpaste, soap, lotion, electronics, body sprays and perfumes, powder, talcum powder, baby powder, body lotion, fairness cream and shampoo etc. The product of famous brands includes for example Unilever, Dove, Fair & Lovely, Sensodyne, Fogg, Axe Signature, Blue Lady, electronics labelled Sony, Panasonic, and LG.

own products and label them with reputed foreign company's logos. As a result, there may be several causes of action arising of one single incident of this kind of infringement e.g. making unauthorized products, making fake products, adulterating products, selling those products to the market, finally and most importantly infringement of a well-known trademark. Very often, the Mobile Court led by the BSTI with the help of law enforcing agencies including the Rapid Action Battalion (RAB) raids the factories, shopping centres, etc. engaged in manufacturing or selling those goods. Usually, they recover those goods and destroy them. The people engaged in making fake, unauthorized, adulterated, substandard, products, and selling them to the market are usually punished with fines as well as sentenced to imprisonments under the BSTI Act 2018. However, in these incidents, the Mobile Court led by the BSTI interferes only when the manufacturer produces goods without following the Bangladesh standard as set by the BSTI, or uses standard certificate in the trademark without taking a license from the BSTI etc. Further, this court has no jurisdiction to try for passing off, or for offences relating to unregistered trademarks as it cannot try an offence having an imprisonment of more than two years.[127]

In addition, the review of the BSTI Act 2018 shows that under this Act, mobile courts can try offences relating to not using standard mark in a trademark or using standard mark in a trademark whether it is registered or not without a license or violating conditions upon which the licence was granted. Hence, the offences relating to an unregistered trademark, or the infringement of an unregistered trademark is outside the jurisdiction of the court.

Further, there appears a lack of coordination among the laws dealing with or the enforcement procedure relating to the unregistered trademark. For example, there are different civil and criminal courts to try the issue arising from the same transaction. In a wrong of the infringement of an unregistered well-known trademark, there are several rights: consumer's right to initiate criminal proceedings as well as claim civil remedies, owner's right to initiate criminal proceedings as well as claim civil remedies, and finally State's right to initiate criminal proceedings to protect national interests. The infringement of an unregistered trademark along with making fake, unauthorized, adulterated, substandard products and selling them to the market arises out of the same transaction. When the same issues are tried by several civil and criminal courts, the same procedures are repeated in every trial. Further, when the

[127] Mobile Court Act 2009, s 8(1). It says that 'in the case of imposing a penalty by a mobile court conducted under this Act, imprisonment not more than two years shall be imposed under this Act, irrespective of the penalty prescribed by the relevant laws for the offense concerned'.

causes of actions arise out of the same transaction, the parties remain the same, the same are with the witnesses. So, it is unnecessary to initiate several proceedings. It imposes an extra-burden upon our judiciary, while it is already overburdened. It creates a considerable delay, great expense, and unnecessary complexity.

To avoid such problems, a joinder of civil and criminal relief is sine qua non. It was regular and constant practice in Anglo-Saxon and Norman times.[128] The civil codes prevailing in the countries of Continental Europe and Latin America allow a person injured by a crime to appear before a court as a party to a criminal proceeding as well as to ask for restitution and damages in the same proceeding.[129] Thus, a joinder of civil and criminal relief will save the time and expense of the parties, witnesses and public machinery of justice. The purpose behind such joinder is the judicial economy and convenience. Such a joinder will make the whole process of trial convenient to the parties, witnesses, and public authorities as well as it will conserve funds.

Further, the language of the texts of different laws is ambiguous and needs a liberal interpretation to ensure protection of unregistered well-known trademarks. The legislation should clearly specify it. The enforcement mechanisms provided under various laws are also overly complex and haphazard.

Having said so, a comprehensive enforcement model is required to protect unregistered well-known trademarks. A coordination among the National Consumers' Right Protection Council, the BSTI, and the DPDT etc are also essential. So, a monitoring cell consisting of members from the DPDT, BSTI, Customs excise and VAT Commissionerate, and law enforcing agencies shall have to be established to ensure a continuous and frequent monitoring of the matter relating to infringement of trademarks. They should act jointly to prevent such infringement. They should have been given power to raid, search, and investigate the matters.

The enterprise using unregistered trademarks may also take initiatives to create public awareness. They can also declare rewards for helping them in detecting any infringements.

Further, one specialized trial court and one appellate court should be constituted to look after the matters. Bangladesh may follow India's example here. Through the Commercial Courts Act 2015, India establishes a separate Commercial Court, Commercial Appellate Court, Commercial Appellate Division at the High Court, and Commercial Appellate Division.[130] These courts are given the jurisdiction to try

---

[128] Felix Forte, 'Joinder of Civil and Criminal Relief in Indiana' (1932) 7 *Notre Dame Law Review* 500.
[129] ibid.
[130] Commercial Court Act 2015 (India), ss 3, 3A, 4 and 5.

commercial disputes which essentially incorporate intellectual property issues. However, there is no law in Bangladesh to define 'commercial disputes' or no specialized court exists to deal with such matters although there is a commercial bench in the High Court Division. Establishing such specialized commercial courts may help in developing the jurisprudence for protecting unregistered well-known trademarks. Further, such a court may be given a comprehensive power to try both criminal and civil matters relating to the infringement of unregistered trademarks. The cause of actions like making fake, unauthorized, adulterated, substandard products, and selling them to the market which arise out of the same transaction along with infringement of an unregistered well-known trademark should be joined in the same case before the same court.

Finally, the Trademarks Act 2009 which provides for the protection of an unregistered trademark in line with the registered trademark, can contain incidences which constitute a violation of an unregistered trademark. For a registered trademark, the incidences mentioned in section 26 of this Act, can cause the infringement committed by any person not being registered owner or registered user of a trademark when he uses a trademark in course of trade, which is identical or deceptively similar with the mark of the former whether it is used in relation to goods or services or whether it is used in relation to goods or services which are not similar to those for which the trademark is registered.[131] For example, DASH & DASH is a well-known registered trademark used in relation to food and beverage. If someone carries on the same food or beverage business under the same trademark, or if someone used a similar trademark in relation to another business, i.e. electronics business, both incidences shall tantamount to infringement of the trademark 'DASH & DASH' under section 26. But in case of an unregistered trademark, if any person uses an existing unregistered trademark without authorization of its owner in relation to goods or services other than those of the original owner shall not be an infringement of the former until it creates a confusion to the consumers – a test developed in the common law remedy of passing off, not revealed in our law.[132] For example, if the term 'Western Bank' becomes well-known as an unregistered trademark and if someone uses later on the term 'Western University', the later does not lead to a breach of the former trademark until there is any consumer confusion.

8. Conclusion

The Bangladeshi trademarks regime follows a double protection mechanism in preventing infringement of an unregistered well-known trademark. The regime protects both the owner of an unregistered trademark as well as the consumers injured

[131] Trademark Act 2009, ss 26(2) and (3).
[132] *American Steel Foundries v Robertson, Commissioner* [1926] 269 US 372, 379.

by such infringement. It has adopted the common law principle of ‘passing off’ in its Trademarks Act 2009. A person, natural or legal - accused of passing off goods or services under a trademark, which is used by another person shall be liable to pay damages, or an account of profits. The court may also grant injunction in this regard. The Penal Code 1860 criminalizes using false trademarks and using others’ trademarks is tantamount to cheating. The similar approach of criminalizing action is done under other laws including the Consumer’s Right Protection Act 2009. The higher judiciary has expressed its firm commitment in protecting unregistered well-known trademarks herein Bangladesh. Thus, the recent Bangladeshi trademarks regime has provided significant protection towards unregistered well-known trademarks. However, there are several lacunae in dealing with the protection regime. For example, the business enterprises are not aware enough to protect their brand names, the legislation dealing with the protection of the unregistered well-known trademarks is not crystal clear, the Supreme Court only deals with passing off protection of unregistered well-known trademarks though they can interpret other laws relating to such protection, and finally the enforcement stakeholders do not take comprehensive initiative to prevent the infringement. Besides a strong statutory protection regime, a comprehensive enforcement mechanism is essential to protect unregistered well-known trademarks.

© *Dhaka University Law Journal, 2021, 32(2), 49-68*
doi: https://doi.org/10.3329/dulj.v32i2.57957

Protection of Copyright and Accessing Education Materials at Low Prices: Finding a Sustainable Solution for Bangladesh

Dr. Mohammad Towhidul Islam* and Moniruz Zaman**

1. Introduction

Copyright which secures the right of litterateurs and artists, becomes a barrier for the users in developing and least developed country (LDC) to access copyrighted works including education materials for its costs. To ease the barrier in accessing education materials in an LDC like Bangladesh where affordability is frequently an issue due to less than two percent government spending on education as a share of the gross domestic product and per capita income of about $1856, copyrighted books either from local or foreign publishers are often photocopied cover to cover and sold at the book shops.[1] There are also books printed from materials found on the net or elsewhere without acknowledging the sources, or books translated from foreign authors whose works are published overseas – acknowledging sometimes the original authors, or sometimes claiming that the copyright vests in the translators themselves.[2] As a result, the photocopied versions of the copyrighted books or books copied and pasted or translated without the authorization of the original authors are sold at low prices. A student or reader finds such bookshops a desirable alternative to purchase exorbitant books produced either by local or foreign rightsholders. Thus, the practice of copying meets some local needs at affordable prices and also serves the profiteering interests of booksellers.

However, in order to offer copyright protection to literary and artistic works including books, journals and the likes, Bangladesh becomes a party to the relevant

* Professor, Department of Law, University of Dhaka.
** Lecturer, Department of Law, Bangladesh University of Professionals.

[1] M S Siddiqui, 'Copyright infringement: Bangladesh & India Perspective' *The Financial Express* (Dhaka, 07 September 2014) 6 <http://www.thefinancialexpress-bd.com/2014/09/07/54732> accessed 12 May 2020; 'Bangladesh: Ensuring Education for All Bangladeshis' (*The World Bank: What We Do*, 13 October 2016) <https://www.worldbank.org/en/results/2016/10/07/ensuring-education-for-all-bangladeshis> accessed 4 February 2021; 'GDP Per Capita (Current US$) – Bangladesh' (*The World Bank: Data*) <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=BD> accessed 4 February 2021.

[2] ibid.

multilateral treaties like the Berne Convention for the Protection of Literary and Artistic Works 1886 (Berne Convention)[3] and the World Trade Organization (WTO) Agreement on the Trade-Related Aspects of Intellectual Property Rights[4] (TRIPS) and enacts the Copyright Act 2000[5] in compliance with the country's treaty obligations. Under the treaties and the local legislation, the copyright, like any other form of intellectual property rights (IPRs), requires striking a balance between the interests of the right holders and users; thereby on one side, it provides rewards and incentives to the copyright holders, and on the other, it facilitates public access to the fruits of creativity and intelligence either at the expiry of the copyright protection when the work is available in the public domain[6] or by allowing the reproduction right through the compulsory license or other exception clauses like fair use whereby the rightsholders' exclusivity is curtailed in favour of the users.[7]

Further, as a Berne and TRIPS complying nation, Bangladesh obliges to give due protection to all the copyrightable books irrespective of national boundaries.[8] Having said that, the questions that arise are – is the use of copyrighted works by photocopy shops in Bangladesh covered by the educational exception clause under the local Copyright Act 2000? Does the use come within 'the purpose of instruction' under section 72(8) of the Copyright Act 2000? Should Bangladesh, in compliance with its international obligations for copyright and fulfilling its constitutional obligations to education, make a balance between offering protection to foreign copyright owners and meeting local users' needs to access education materials at low prices as a sustainable solution?

Given that low-priced books serve the student community of Bangladesh with affordability and convenience, it is frequently argued that Bangladesh as an LDC should enjoy a special and differential treatment regarding the copyright protection mechanism and thereby it should not give any copyright protection to the foreign books.[9] It is also argued that owing to transitional arrangements pursuant to article 66

---

[3] Berne Convention for the Protection of Industrial Property, 9 September 1886, 828 UNTS 221 [hereafter Berne Convention].

[4] 'Agreement on Trade-Related Aspects of Intellectual Property Rights' (1994) 33(1) *International Legal Materials* 81 [hereafter TRIPS].

[5] Copyright Act 2000 (Bangladesh) <http://bdlaws.minlaw.gov.bd/act-details-846.html> accessed 31 January 2021.

[6] Edward Samuels, 'The Public Domain in Copyright Law' (1993) 41 *Journal of the Copyright Society* 137, 140.

[7] Lawrence Liang, 'Exceptions and Limitations in Indian Copyright Law for Education: An Assessment' (2010) 3(2) *The Law and Development Review* 197, 200 –10.

[8] Haq Faruk Ahmed, 'Most of the Translated Books are Pirated' (in Bengali) *The Daily Jugantor* (Dhaka, 27 May 2016) 3,7 <https://epaper.jugantor.com/2016/05/27/index.php> accessed 20 March 2019.

[9] Sourov Rahman and Mir Sabbir, 'Intellectual Property: Law Exists but It Is Not Effective' (in Bengali) *Shaptahik* (Dhaka, 8 August 2009) <http://www.shaptahik.com/v2/print_publication/index.php?DetailsId=607> accessed 18 June 2019.

of the TRIPS[10], an LDC member like Bangladesh should not be required to apply the provisions of the TRIPS, other than articles 3, 4 and 5 that incorporate the right of priority, national treatment and most favoured nation principle[11] until 1 July 2034, or until such a date on which it ceases to be an LDC member, whichever date is earlier.[12] It is further argued that, due to affordability and importance for the right to education as a fundamental principle of state policy as enshrined in article 17 of the Constitution of Bangladesh[13], the country should not enforce any copyright protection to foreign books for purposes of supplying cheaper books to students.[14] It is again argued that since the country has not issued any executive order in the Official Gazette notification offering protection to foreign works under section 69 of the Copyright Act 2000,[15] the copyright protection to foreign books is not applicable.[16]

In fact, the protection of copyright has always been perceived as an obstruction to access to educational materials since the copyright holders have the exclusive rights of reproduction and distribution of their works.[17] As a result, there arises the challenge whether the protection of copyright for a lifetime and certain period after the life generates a proper balance between the interests of the creator and the user, and determine it in an optimum manner.[18] The reason for the challenge is that the dissemination of knowledge cannot be watered down only because the copyright over a work has not yet ceased to exist.

---

[10] TRIPS, art 66.

[11] Paul Goldstein, *International Copyright: Principles, Law, and Practice* (4th edn, Oxford University Press 2001) 102. (According to articles 3, 4 and 5 of the TRIPS, the national treatment requires to treat intellectual property rights equally irrespective of the country of origin, the right to priority requires to be accorded to intellectual property for which registration in different jurisdictions based on the first application and the most favoured nation principle requires not to discriminate between member nations unless some nation is made favoured by a treaty.)

[12] 'WTO members agree to extend TRIPS transition period for LDCs until 1 July 2034' (*World Trade Organization: News and Events*, 29 June 2021) <https://www.wto.org/english/news_e/news21_e/trip_30jun21_e.htm> accessed 3 July 2021; Mohammad Atique Rahman, 'Extension of TRIPS Transition Period for the Least Developed Countries (LDCs): New Opportunities, New Challenges' (2014) 18 (1&2) *Journal of International Affairs* 45.

[13] Constitution of Bangladesh, art 17 (The Article reads as follows: 'The state shall adopt effective measures for (i) establishing a uniform mass-oriented and universal system of education and extending free and compulsory education to all children to such stage as may be determined by law; (b) relating education to the needs of the society and producing properly trained and motivated citizens to serve these needs; (c) removing illiteracy within such time as may be determined by law').

[14] See also Tyler T. Ochoa, 'Copyright Protection for Works of Foreign Origin' in Jan Klabbers and Mortimer Sellers (eds), *The Internationalization of Law and Legal Education* (Springer 2009) 167, 172.

[15] Copyright Act 2000, s 69 (Bangladesh).

[16] See also *Prashanth Ravula and Ors. v Lucintel LLC and Ors*. [2011] (C.M.A. No. 362 of 2011) [28].

[17] L. Ray Patterson, 'Copyright and the exclusive right of authors' (1993) 1(1) *Journal of Intellectual Property Law* 1.

[18] Ruth L. Okediji, 'Sustainable Access to Copyrighted Digital Information Works in Developing Countries' in K. E. Maskus, and J. H. Reichman (eds), *International Public Goods and Transfer of Technology under a Globalized IP Regime* (Cambridge University Press 2005) 149.

This research article explains the intricate relationship between the copyright law and education and finds out that 'the rudimentary hurdle' posed by copyright as depicted in writings of intellectual property scholars like James Boyle[19] is the cost of learning materials compared to the affordability in developing countries and LDCs. It also tries to strike a balance between copyright protection and access to education materials in an LDC like Bangladesh. While outlining the periphery of copyright protection, this article considers the scenario of the Bangladeshi book shops. It largely suggests that a 'fairness' model for the copyright landscape of Bangladesh can promote access to education and learning. Finally, this article concludes by illuminating new strategies for accessing education materials at low prices.

2. Obligations under the Berne Convention 1886

Article 2 of the Berne Convention extends the copyright protection to all kinds of production in the literary, artistic and scientific field irrespective of the form or mode of expression.[20] Under the Convention ideas are not protected, however it is up to the member countries to require that the work be fixed in some particular material form before the protection may apply.[21] Further, article 3 of the Convention requires two criteria regarding the eligibility for copyright protection. The first criteria to protect a work under the convention is nationality (personal criterion). The second one is publication of the work in one of the Berne member countries (geographical criterion).[22] In addition, article 8 makes it clear that only the author owns the translation right throughout the term of protection of the rights in the original work.[23]

Further, the author owns the reproduction right under article 9 of the Berne Convention. However, member countries are permitted to add legal exception without unreasonably prejudicing the legitimate interest of the authors.[24] To elaborate the legal exception, article 9(2) appears with the 'three-step test' where the first test requires the exception only for 'certain special cases' like utilization of work in

---

[19] James Boyle, 'A Politics of Intellectual Property: Environmentalism for the Net' (1997) 47(1) *Duke Law Journal* 87.

[20] World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use* (Vol. 489, WIPO 2004) 263.

[21] Joan Infarinato, 'Copyright Protection for Short-Lived Works of Art' (1982) 51(1) *Fordham Law Review* 90.

[22] Sam Ricketson, 'The Birth of the Berne Union' (1986-87) 11(1) *Columbia-VLA Journal of Law and Arts* 9. (Originally founded by the Volunteer Lawyers for the Arts, the Journal was until Volume 25 known as the Columbia-VLA Journal of Law & the Arts.)

[23] Susan Štrba, *International Copyright Law and Access to Education in Developing Countries: Exploring Multilateral Legal and Quasi-legal Solutions* (Vol. 10, Martinus Nijhoff Publishers 2012) 22.

[24] Berne Convention, art 9(2).

teaching, mostly for non-economic purpose. The second step requires that the exception would not 'conflict with a normal exploitation of the work' which means that a small portion of the work is utilized, not the whole work. Lastly, the third step lays down that the exception would not 'unreasonably prejudice the legitimate interests of the author.' It means that utilization of the work will not have an adverse impact on the potential market for the work.

In addition, article 10 permits to quote from publicly accessible works in so far as this inclusion is compatible with fair practice and justified by its purpose.[25] In that case, the extent of justification is to be determined by the state legislation. Further, article 10(2) recognises the fair use of copyrighted material i.e. a reasonable portion for teaching as legitimate.[26] Here teaching in educational institutions comes under the purview of this provision, mere scientific research does not, however, come within the scope.[27] Further, where copyrighted works are used pursuant to exceptions and limitations under the Berne, proper reference to the original source and names of authors requires to be made.[28] Importantly, the application of this Convention extends to all works which have not yet fallen into public domain.[29] Therefore, when a work falls into the public domain, it is freely accessible by any person.

3. Obligations under the TRIPS Agreement

Article 9 (1) of the TRIPS obliges its members to comply with the Berne Convention, specifically articles 1 through 21 and the appendix.[30] The significance of article 9(1) is that it makes the substantive provisions of the Berne Convention applicable to those WTO members who have not yet signed or ratified or acceded to the Convention.[31] Significantly, article 13 permits member countries to add legal exception to exclusive rights of authors without unreasonably prejudicing their legitimate interest. This provision is the verbatim of provision laid down in article 9(2) of the Berne and both the provisions contain the identical criteria.[32] However, the TRIPS provision contains a double-barrelled filter since the limitations on and exceptions to the exclusive rights of the copyright owners 'cannot conflict with a

---

[25] Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighbouring Right: The Berne Convention and beyond* (Oxford University Press 2006) 786.
[26] Pierre N. Leval, 'Toward a Fair Use Standard' (1990) 103(5) *Harvard Law Review* 1105, 1110.
[27] Claude Masouyé and William Wallace, *Guide to the Berne Convention for the Protection of Literary Works (Paris Act, 1971*) (WIPO 1978) 60.
[28] Berne Convention, art 10(3).
[29] ibid, art 18.
[30] TRIPS, art 9(1).
[31] Peter-Tobias Stoll, Jan Busche, and Katrin Arend, *WTO: Trade-related Aspects of Intellectual Property Rights* (BRILL 2009) 209.
[32] ibid 279.

normal exploitation of the work' and 'must not unreasonably prejudice the legitimate interest of the authors'.[33] For example, reproduction of a small portion of a copyrighted material by a student or a teacher to elucidate a lesson does not prejudice the legitimate interest of the creator. It thus bears the greatest practical importance regarding maintaining a balance between the interests of copyright owners and public interests.

Further, article 41 obliges member countries to ensure that the available enforcement procedure under their law permits effective and expeditious action against acts of infringement.[34] However, the definition of 'effective' or 'expeditious' has been left to be interpreted within the local context.[35] In addition, article 41(2) requires that such enforcement procedures shall be fair and equitable and not unnecessarily complicated or costly.[36] Therefore, an absence of effective and expeditious enforcement procedure may constitute a violation of obligations under the Agreement. However, this requirement does not apply to LDC members because they are still in a transitional period and they need to create a viable technological base.

In addition, whereas article 70(1) provides for the principle of non-retroactivity[37] meaning that the TRIPS does not apply to acts which occurred before the adoption of the Agreement, article 70(2) obliges member countries to apply the TRIPS in the existing subject matter on the date of application of this Agreement. Moreover, the protection will be granted only if the existing work meets the criteria for protection on the date of application of this Agreement or later and the work complies with the provision of article 18 of the Berne Convention which means it has not yet fallen into the public domain at the expiry of the term of protection in the country of origin.

4. Obligations under the Copyright Act 2000

The copyright protection to literary and artistic works including books in Bangladesh is available only in accordance with the provisions of the Copyright Act 2000.[38]

---

[33] Jerome H. Reichman, 'Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement' (1995) 29(2) *The International Lawyer* 345.

[34] Adrian Otten and Hannu Wager, 'Compliance with TRIPS: The Emerging World View' (1996) 29 *Vanderbilt Journal of Transnational Law* 391, 404.

[35] Molly Land, 'Rebalancing TRIPS' (2012) 33(3) *Michigan Journal of International Law* 433, 441; SK Verma, 'Enforcement of Intellectual Property Rights: TRIPS Procedure & India' (2004) 46(2) *Journal of The Indian Law Institute* 183.

[36] Christopher Heath and Thomas F Cotter, 'Comparative Overview and the TRIPS Enforcement Provisions' in Christopher Heath (ed), *Patent Enforcement Worldwide: Writings in Honour of Dieter Stauder* (3rd edn, Hart Publishing House 2015) 12.

[37] Justin Malbon, Charles Lawson, and Mark Davison, *The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights: A Commentary* (Edward Elgar Publishing 2014) 265; TRIPS, art. 70(1). It reads as follows: 'This Agreement does not give rise to obligations in respect of acts which occurred before the date of application of the Agreement for the Member in question.'

[38] Copyright Act 2000, s 13 (Bangladesh).

According to the Act, the copyright protection exists only in 'original works' including literary, dramatic, musical or artistic works.[39] In addition, the Act protects foreign works subject to the provisions of sections 68 and 69 under which the government of Bangladesh will provide copyright protection to the foreign nationals by notification in the Official Gazette.

For the purposes of the Copyright Act, a literary work includes a work written or produced in a book form, which is of creative, research-oriented, informative and similar nature or of translated, converted, adapted, modified or compiled nature, or a programme produced by a computer intended for study and listening to the people in general.[40] Thus, education materials like textbooks, professional books (scientific, medical and technical), course packs and scholarly journals come within the contours of literary work's definition. As a general provision, section 14 provides that copyright in case of a literary, dramatic, or musical work means the right to do or authorize the reproduction of the work in any form, making copies and distributing them, performing it in public, making translation of it, making any cinematograph film from this, broadcasting it, or making any adaptation of the work.

In cases where any work is withheld from the public e.g., due to unreasonable price, non-publication as per demand and necessity, section 50 of the Copyright Act mandates that compulsory licenses can be issued to republish the work and making it available to the public.[41] Under the compulsory licensing, authorization is given to a third-party by the Registrar of Copyrights to reproduce and sell those copyrighted works to the public.[42] In case of unpublished work due to author's absence, any person may make an application under section 51 to the Copyright Board for a license to publish such work or a translation or adaptation thereof in any language.[43] After the expiry of 5 years from the first publication of the work, an application for license can be made under section 52 to the Copyright Board to produce and publish a translation or adaptation of a literary or dramatic work in any language for general use in Bangladesh. A license can also be granted for reproduction or translation of original works of foreign origin after the expiry of three years from the first publication of such work, but only for the purpose of promoting teaching, research, and scientific development etc.[44] Such foreign works and their translation can then be published in Bangladesh. [45]

---

[39] Parameswaran Narayanan, *Intellectual Property Law* (3rd edn, Eastern Law House 2001) 256.
[40] Copyright Act 2000, s 2(46) (Bangladesh).
[41] ibid, s 50.
[42] ibid.
[43] ibid, s 51.
[44] ibid, s 52.
[45] ibid, s 52.

Further, whereas the permission of the copyright owner is not needed under the above-mentioned cases, sections 48-54 of the Copyright Act lay down the procedure of granting license for copyright and the payment of royalties to the owner.[46] In addition, section 71 provides a list of acts which can be regarded as infringement of copyright when any person does or permits anyone else to exploit any of the copyright owner's exclusive rights conferred upon by the Act without a license granted by the copyright owner or the Registrar of Copyrights under this Act. Moreover, section 71(b) provides that without the authorization of the copyright owner, reproducing the work, selling, or distributing it, exhibiting it in public by way of trade, and importing any 'infringing copy' into Bangladesh will fall under the purview of copyright infringement. In fact, by inserting provisions of infringement, the Copyright Act ensures protection of the work.[47]

In addition, the Act sets forth several important exceptions to the copyright owner's rights, and the best-known exception is the fair use or fair dealing.[48] Under the fair use provision, a person can use the copyrighted material in a reasonable manner to do criticism, review etc. Further, under the Act, research or study, criticism or review, judicial proceedings, reporting of news, class instructions by a teacher are considered as a fair use of the copyrighted work.[49] For instance, reproducing a copyrighted material in the course of instructions or while formulating question papers is permitted under the Act. Therefore, it seems that instructions or lectures given by a teacher and for the purpose of answering questions in examination, copyrighted works can be used. This provision has formed the philosophical basis for promoting the public interest in access to copyrighted works and limiting exclusive rights of the copyright holders. Hence on one hand, the Copyright Act provides sufficient protection to promote creative expressions and returns in this field. On the other hand, the Act ensures that the strengthening of the copyright framework should not result in excluding the public from the enjoyment of works.

On the issue of foreign works' copyright, there arises a debate whether foreign works will receive automatic copyright protection in Bangladesh. Regarding this matter, it is argued that Bangladesh as an LDC should enjoy a special and differential treatment regarding the copyright protection mechanism during the TRIPS transition period and thereby it would not be required to give any copyright protection to the foreign books.[50] To the counter, it is argued that as a Berne and TRIPS complying nation, it should give protection to all the copyrightable books irrespective of the

---

[46] Md. Milan Hossain, 'Present Situation of Copyright Protection in Bangladesh' (2012) 7(2) *Bangladesh Research Publications Journal* 99.
[47] Copyright Act 2000, s 71 (Bangladesh).
[48] ibid, s 72.
[49] ibid.
[50] Rahman and Sabbir (n 10).

national boundaries as long as the requirements like fixation, originality etc. are made.[51] In fact, to offer copyright to foreign works, section 69 envisages that by way of notification in the Official Gazette, the Government of Bangladesh will provide copyright protection to foreign works in the following works:

(a) Work is first published in a foreign country

(b) In case of unpublished works, the author is a citizen of a foreign country or domiciled there.

(c) In case of any work, the author, on the date of the first publication, was a subject or citizen of a foreign country.

However, this provision is subject to a proviso requiring that foreign country to provide copyright protection to Bangladeshi nationals in their territory.[52]

5. New Strategies Needed: A Search for Accessing Cheaper Education Materials in Bangladesh

Bangladesh, as an LDC member, is enjoying the TRIPS flexibilities under 'transition period' for not complying with the TRIPS other than its articles 3,4 and 5 until 1 July 2034 or until it ceases to be an LDC member.[53] However, Bangladesh has recently entered the first phase to graduate from the status of LDC.[54] To this end, the United Nations (UN) shall watch the improvements till 2021 in the three criteria which include the economic vulnerability index (EVI), the human assets index (HAI), and per capita gross national income (GNI) based on which the development status is determined.[55] If every criteria goes in line, the UN will make a formal announcement in 2024 for the country's graduation to the status of developing country.[56] However, due to formalities including reviewing, monitoring, notification etc., it will not

---

[51] Jakir Hosen, 'For Copying Books, there will be Imprisonment and Compensation' (in Bengali) (*Ntvbd online: Ain-Kanun*, 17 February 2015) <https://ntvbd.com/law-and-order/1740> accessed 17 June 2019; Ahmed (n 8); Staff Correspondent, 'Pirating Books of Bangabandhu, 4 Sentenced to Jail and Fined' *Daily-Bangladsesh.com* (Dhaka, 07 November 2020) <https://www.daily-bangladesh.com/english/Pirating-books-of-Bangabandhu-4-sentenced-to-jail-and-fined/53062> accessed 25 January 2021.

[52] Copyright Act 2000, s 69 (proviso) (Bangladesh).

[53] TRIPS. 'WTO members agree to extend TRIPS transition period for LDCs until 1 July 2034' (*World Trade Organization: News and Events*, 29 June 2021) <https://www.wto.org/english/news_e/news21_e/trip_30jun21_e.htm> accessed 03 July 2021.

[54] Law Talk, 'IP Means Creation of Mankind' *The Daily Observer* (Dhaka, Law and Justice, 26 April 2018) <https://www.observerbd.com/details.php?id=134638&fb_comment_id=1688748117912202_1689747317812282> accessed 28 March 2019.

[55] LDC Watch, 'Criteria for LDCs' <https://www.ldcwatch.org/index.php/about-ldcs/criteria-for-ldcs> accessed 20 January 2021.

[56] 'Bangladesh, UN Consider Expected LDC Graduation in 2024' (*IISD:SDG Knowledge Hub*, 18 December 2018) <https://sdg.iisd.org/news/bangladesh-un-consider-expected-ldc-graduation-in-2024/> accessed 20 January 2021.

practically be possible before 2027 for the country to reap the developing country benefits of being 'more positively viewed by international investors, leading to increased access to international private finance for both public and private sectors', achieving 'stronger position in international negotiation, especially in the Asian Development Bank, United Nation, World Bank, WTO frameworks'[57] or having special rights called "special and differential treatment" to increase trading opportunities, build the capacity to carry out the WTO work, handle disputes, and implement technical standards or longer transition periods in complying with treaty provisions etc. as inserted in some WTO Agreements.[58] Therefore, considering the status quo of Bangladesh as it stands now and post compliance with the TRIPS, it is essential to search some new strategies and sustainable solutions to provide the student community affordable access to education materials.

5.1 Clarifying the Dilemma Surrounding Foreign Works' Copyright

Copyright laws in Bangladesh and elsewhere begin with the principle that copyright is not about copying – it is about balancing the rights of copyright holders and the public interest.[59] This point has been accentuated in the notion of limited property right as well as by the judicial pronouncements. For example, in the *Donaldson v Becket*[60] case it was held that copyright in published works does not exist for ever but has to go through statutory limits. The challenge that is often faced in Bangladesh whether the copyright in foreign works would receive automatic protection and whether it would be subject to legal boundaries. As a matter of fact, Bangladesh cannot get away from offering copyright protection to foreign works which are generally expensive and unaffordable for people in Bangladesh. And to ensure accessibility for its students an LDC like Bangladesh can set some protection requirements and technical rules in consideration of its transition benefits and people's affordability as is done in other jurisdictions. For example, in India, foreign

---

[57] Mana Southichack, 'LDC Status Graduation: The Ways Forward for LAO PDR' (2017) (Regional Capacity Building Workshop Formulating National Policies and Strategies in Preparation for Graduation from the LDC Category, Thimphu, Bhutan 14-16 November 2017). <https://www.unescap.org/sites/default/files/Lao%20PDR%20LDC%20Graduation%20PPT-revised-MSouthichack.pdf/> accessed 2 February 2021.

[58] Trade and Development Committee, 'Special and Differential Treatment Provisions' (2013) (*World Trade Organization: Trade Topics*) <https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm#legal_provisions> accessed 2 February 2021.

[59] <See generally, Mohammad Towhidul Islam, 'Protection of Public Interests through a Human Rights Framework in the TRIPS Agreement: Realities and Challenges' (2009) 4(8) *Journal of Intellectual Property Law & Practice* 573, 574 (the author succinctly puts that "the monopolization of IP rights and restricting the comparative advantage of imitation and adaptation appear as a blockade to fulfil the developmental needs of IP rights using developing and LDCs in agriculture, health, biodiversity, economic development, and others").

[60] *Donaldson v Becket* [1774] 4 Burr. 2408.

works are accorded protection subject to the fulfilment of formalities like availability of the works, variable formats including e-prints, or the foreign country must grant similar protection to works entitled to the Indian copyrightable works[61] as prescribed by the International Copyright Order 1999.[62]

In similar line, the Copyright Act in Bangladesh also requires that the foreign works will get copyright protection provided the country of that foreign national grants copyright protection to Bangladeshi nationals in their territory.[63] However, the Government is yet to issue an order in the Gazette offering protection to foreign works. So, it appears that foreign works are not automatically protected in Bangladesh under the Copyright Act. This may be considered as a technical rule but other formalities like availability of the works in cheaper rates, variable formats including e-prints can be inserted in laws which can be used as a witting way-out for accessing particularly high priced foreign educational materials as it happens now.

Further, despite the technical ambiguity in offering copyright protection to foreign works, section 93 of the Copyright Act empowers police officers with the authority to launch raids against pirated books – whether of local or foreign origin and seize the same.[64] Even in 2007, a task force was formed under the Ministry of Cultural Affairs[65] in order to tackle piracy which is rampant in the country as also reported by the International Intellectual Property Alliance based in the United States.[66] Till then, members of the task force have launched couple of raids in Dhaka and seized a lot of pirated books written by foreign authors.[67] The National Innovation and Intellectual Property Policy 2018[68] in its Goal no. 5, strategy 8 also mentions that the task force needs to be strengthened to address violation of

---

[61] Narayanan (n 39) 361.

[62] Swetha Logachandru, 'International Copyrights under Copyright Act, 1957: Everything You Need to Know' (*Law CIRCA: Law Articles*, 21 December 2020 <https://lawcirca.com/international-copyrights-under-copyright-act-1957-everything-you-need-to-know/> accessed 30 January 2021.

[63] Copyright Act 2000, s 69 (proviso) (Bangladesh).

[64] ibid, s 93.

[65] Staff Correspondent, 'Task Force to Stop Vulgar Films, Video Piracy' *The Daily Star* (Dhaka, 03 October 2007) <https://www.thedailystar.net/news-detail-6471> accessed 25 January 2021.

[66] International Intellectual Property Alliance (IIPA), *Report on Copyright Protection and Enforcement* (IIPA 2018). (2009) Special 301: Bangladesh 17 February 2009, 369, 373

[67] Staff Correspondent, '5000 Pirated Textbooks Seized at Bangla Bazar' *The Daily Star* (Dhaka, 26 February 2008) <https://www.thedailystar.net/news-detail-25058> accessed 23 March 2019; Staff Correspondent, 'Huge Pirated Books Seized, 9 Held' *The Daily Star* Dhaka, 23 September 2010) <https://www.thedailystar.net/news-detail-155590> accessed 23 March 2019; Jannatul Ferdsuhy, 'Shahriar Conducts Drive in Book Market' *Ourtime.Bd* (Dhaka, 26 June 2019) <https://www.ourtimebd.com/beta/2019/06/26/shahriar-conducts-drive-in-book-market> accessed 27 June 2019.

[68] National Innovation and Intellectual Property Policy 2018 (hereafter National IP Policy) <https://dpdt.portal.gov.bd/site/page/e99a643b-6362-4717-b707-237baa4724af/> accessed 7 September 2020.

intellectual property rights since the existing task force lacks sufficient and qualified manpower in order to launch raids outside Dhaka. Thus, the Government of Bangladesh provides protection to the foreign works in a limited scale.

5.2 Balancing Competing Interests by the Parliament or the Court

The right to education, as envisioned as a Fundamental Principle of State Policy under article 17 of the Constitution of Bangladesh[69], might also be viewed as characteristic augmentation of the scope of the right to life. The Supreme Court of Bangladesh, by interpreting the right to life as a subjective concept as under article 32 of the Constitution, has ensured that any aspect supposably including education through which the life is enjoyed, falls under the wider ambit of article 32 regarding right to life.[70] Therefore, the country is under a constitutional obligation to facilitate free and compulsory education as a fundamental right of the people.[71]

Further, the Parliament can also legislate, or the Court can interpret treaty obligations and laws balancing competing interests regarding copyright and educational needs. Several countries have endorsed the notion of fair dealing/use for copyright in their national legislation taking into consideration the socio-economic conditions of each country. For example, the Supreme Court of the United States in the case of *Cambridge University Press v Becker*[72] highlighted that reproduction averaging around 10% of the whole copyrighted work does not constitute infringement. If the United States with such a strong economy can give such a considerable latitude to its people under the fair use regime, it turns out to be fairly simple for the legislators of Bangladesh to amend section 72 with a specific end goal to unwind the restrictions. For example, a provision can be inserted in the Copyright Act mentioning that reproduction almost about 25% of the copyright protected material for the purpose of education falls under the periphery of fair use. Eventually, the outcome would be a piece of legislation ready to face one of the challenges in the education sector that is the cost of reading materials.

---

[69] Constitution of Bangladesh, art 17.

[70] *Ain O Salish Kendra v Bangladesh* [1999] BLD 488 (The court opined that when rootless people have been taken shelter in slums (basti) and somehow making a livelihood, their wholesale eviction without any scheme of their rehabilitation has been found to offend the right to life); and see also *Advocate Zulhasuddin v Bangladesh* [2010] BLD 1 (the High Court Division held that 'The imposition of VAT on receipts of medical and dental treatment, pathological laboratory and diagnostics centre & fees of specialists doctor is ultra vires of right to life').

[71] Mohammad Badruzzaman and Md. Nannu Mian, ‘Right to Education in Bangladesh: An Appraisal for Constitutional Guarantee’ (2015) 13 *Journal of Studies in Social Sciences* 1.

[72] *Cambridge University Press v Becker* [2012] Civil Action No. 1:08-CV-1425-ODE.

5.3 Reprinting and Translation of Books by LDC at Low Cost

Since the cost of textbooks and learning resources is particularly high in developing countries and LDCs with respect to their per capita income, there should be control on variables like market forces and competition that decide the cost of a book. For instance, let us assume that the cost of a book in Bangladesh typically comprises of direct expenses like paper and ink at 35%, labour expense at 10%, distribution expenses at 40% and royalty at 15%. Such expenses would be much lower if the books were copied or reproduced under the expanded compulsory licensing schemes and disseminated in Bangladesh as opposed to being them imported. That is why, Johnson opined that 'the high production costs of scientific and technical books standing in the way of their dissemination in developing countries could be substantially reduced if the advanced countries would freely allow their books to be reprinted and translated by underdeveloped countries.'[73]

5.4 Establishing Used Book Markets

The sale of used books or second-hand books does not amount to copyright infringement. In a used book market, anyone can resell his or her books without violating the copyright law. The rationale underlying this is the doctrine of first sale, wherein after the first sale of a book, the copyright owners cannot control the resale or redistribution of their books. Consequently, the purchaser of a copyrighted book can sell or otherwise dispose of that book without committing any copyright infringement. Therefore, copying or reproducing a book is illegal, not reselling it.

The doctrine of first sale is enshrined in section 14(1)(1)(b) of the Copyright Act 2000 which grants the copyright owner with the exclusive right 'to issue copies of the work in public, not being copies already in circulation'. Here a copy 'already in circulation' means a copy that is already in circulation within the four corners of Bangladesh since the Copyright Act 2000 extends only within the territory of Bangladesh.[74] For example, if X purchases a book from Z and resells it within Bangladesh, it will fall under the purview of the doctrine of first sale meaning it will make the resale justified. So 'after first sale', the buyer 'is not restricted by the statute from further transfers of that copy'.[75]

Further, second hand or used book markets can help with market segmentation by providing access to expensive education materials at low prices.[76] However, some scholars argue that copyright holders are not adequately rewarded because of this

---

[73] Charles F. Johnson, 'The Origins of the Stockholm Protocol' (1970-71) 18 *Journal of the Copyright Society of the USA* 91.

[74] Copyright Act 2000, s 1(2) (Bangladesh).

[75] Pranesh Prakash, 'Exhaustion: Imports, Exports and the Doctrine of First Sale in Indian Copyright Law' (2011) 1 *Manupatra Intellectual Property Reports* (MIPR) 149; see also *United States v Wise* [1977] 550 F.2d 1180, 1187 (9th Cir. 1977).

[76] Peter K. Yu, 'The Copyright Divide' (2003) 25 *Cardozo Law Review* 331.

resale of their work. They also argue by taking support from the Lockean compensatory justice argument that authors are naturally owners of their fruits (works i.e. books) and no one can snatch away those fruits without their authorization.[77] One might equally well argue that copyright owners realize the full value of their work from the first sale and therefore, should not be permitted to profit repeatedly by controlling a further sale or other transfer of the work.[78] Additionally, second hand books never had much impact on new books' prices.[79] Therefore, the question of 'accessibility' and 'affordability' can be resolved by establishing second hand book stores.

5.5 Production of Low-Priced Editions

To meet the needs of the developing countries and LDCs, low priced edition books can effectively be produced.[80] Under 'publishing agreements' (i.e., a license agreement) with the foreign publishers, textbooks can legally be printed in Bangladesh to fill up the vacuum of affordable books. Even in our neighbouring country 'India', under the copyright arrangements with the Penguin Books, the Indian publishers bring the print and eBook version of the books at low prices. In the case of *Penguin Books Ltd. v India Book Distributors and Others*[81], the court ruled that '[i]mportation of foreign books is possible if there is a licensing arrangement between the national publisher and foreign publisher'. Hereby the Bangladeshi companies can, utilizing tax concessions and cheap labour, publish books in lighter, cheaper and lower quality paperback editions, and sell them at much lower rates wherein the price differentials can be as low as 10 percent of the cost of the same book from abroad. However, 'threat of exports' is unfortunately a major concern in producing low priced edition books as they can be exported back to the country of origin where they were expensive.[82] For example, a British publisher 'R' can grant reprint rights to a

---

[77] Michael J Trebilcock and Robert Howse, *The Regulation of International Trade* (Routledge 2005) 396-400; see also Mohammad Towhidul Islam, 'Implications of the TRIPS Agreement in Bangladesh: Prospects and Concerns' (2009) 6 *Macquarie Journal of Business Law* 1, 4.

[78] Goldstein (n 11) 107.

[79] See Anindya Ghose, Michael D. Smith, Rahul Telang, 'Internet Exchanges for Used Books: An Empirical Analysis of Product Cannibalization and Welfare Impact' (2006) 17(1) *Information Systems Research* 1, 3–19 (arguing that only 16% of Amazon's used book sales displaced new book sales. These estimates are almost certainly out-of-date given continuing improvements in on-line markets and the rise of eBooks whose quality is literally indistinguishable from new texts.); see also Michael D. Smith & Rahul Telang, 'Internet Exchanges for Used Digital Goods: Empirical Analysis and Managerial Implications' (2008) Working paper, Carnegie Mellon University 1(remarking that eBooks have much larger cross- elasticities than physical used books).

[80] John O'Neil, 'Getting Textbooks Cheaper from India' *The New York Times* (New York, 19 March 2006) <https://www.nytimes.com/2006/03/29/education/29textbooks.html> accessed 02 May 2020.

[81] *Penguin Books Ltd. v India Book Distributors and Others* [1984] AIR 1985 Delhi 29, 26 (1984) DLT 316.

[82] Shamnad Basheer and others, 'Exhausting Copyrights and Promoting Access to Education: An Empirical Take' (2012) 17 *Journal of Intellectual Property Rights* 335, 342.

Bangladeshi publisher 'B' under the low-priced editions arrangement. Consequently, it is possible that B or someone else will export those low-priced books under the parallel importation scheme of exhaustion to Britain where those books are priced at exorbitant rates. Therefore, a licensing agreement between the Bangladeshi publishers and foreign publishers is necessary to restrict the sale of those books within Bangladesh only. So, in terms of 'accessibility' and 'pricing', low priced edition books can become a sustainable solution for Bangladesh.

5.6 Introduction of a New International legal Instrument to Meet the Needs of Developing and Least- Developed Countries

Given that the copyright standards outlined by the Berne Convention has placed the low per capita income countries at a significant disadvantage, its appendix[83] to the 1971 Paris Act of the Berne Convention offers some special flexibilities open to all developing countries concerning translation and reproduction of works of foreign origin. The appendix allows developing countries to issue compulsory licenses for translating works of foreign origin into languages of general use in their territories[84], and reproducing published copyrighted works with systematic instructional activities.[85] In the meantime, Bangladesh has availed of the flexibilities provided by articles II and III of the said appendix which became effective from 5 December 2014, until 10 October 2024.[86] However, the appendix seems to have failed to meet the needs of developing countries.

In Bangladesh, for example, the draft Copyright Act 2020[87] tries to respond to the education needs by providing that any person can obtain compulsory license from the Copyright Board for using copyrighted works[88]. However, those provisions seem to have been narrowed down by the so called three-step test of special cases, not conflicting with normal exploitation and prejudicing author's legitimate interests[89] as provided by the Berne. For instance, if there is a provision that there will be limitations on quantity and quality of the copies of the work, it suggests that a full book cannot be copied altogether. Thus, the purpose of the appendix to disseminate knowledge in developing countries has been diluted.

---

[83] Berne Contention for the Protection of literary and Artistic Works: Basic Rules and special Rules for Developing Countries 1971 (WIPO/GIC/CNR/GE/86/4) [hereinafter the Paris Act 1971].

[84] Appendix to the Paris Act 1971 (n 51), art II.

[85] ibid, art III.

[86] Berne Notification No. 269, 'Declaration by the People's Republic of Bangladesh' (World Intellectual Property Organization, 05 September 2014) <http://www.wipo.int/treaties/en/notifications/berne/treaty_berne_269.html> accessed 12 May 2018.

[87] Draft Copyright Act 2020 [On file with the author].

[88] ibid, ss 50-56.

[89] Berne Convention, art 13 [explaining that copyright exceptions must be (1) limited to special cases, (2) do not conflict with normal exploitation of the work, and (3) do not unreasonably prejudice the legitimate interests of the author].

Further, like the provision of article 31bis of the TRIPS that allows WTO members to grant special compulsory licences exclusively for the production and export of affordable generic medicines to other members that cannot domestically produce the needed medicines in sufficient quantities for their patients, article 13 of the Berne can be amended by inserting article 13bis to allow developing countries and LDCs under compulsory license to reproduce and supply the copyrighted works subject to the condition that right holders receive fair compensation consistent with royalty standards in respecting countries. This means that this new legal instrument will drastically reduce the cost of education materials in developing countries and LDCs and will be an effective solution in ensuring access to affordable education materials.

5.7 A 'Fairness' Model for Copyright and Access to Education: A Way out for Bangladesh

The doctrine of 'fair use' or 'fair dealing' permits certain limited uses of copyright-protected works without the permission of the copyright owner. For instance, reproduction of copyright protected works for the purpose of teaching, scholarship or research comes within the purview of fair use as it does not prejudice author's interests. As socio-economic conditions vary across different countries, any 'fair dealing' provision in the national copyright law should be tailored to the needs of that country. Given the reality of economic asymmetry of the developing countries and LDCs, they should be given the choice to formulate their own 'fairness' model for copyright which will serve the best interests for their people. Unfortunately, in most of the cases, being the users and not the publishers of the books, most of the people from LDCs like Bangladesh cannot afford to buy the high-priced books like their developed world counterparts.[90] To allow access to its people, Bangladesh has to find a sustainable way-out to access education materials at a cheaper price without discouraging intellectualism and creativity.

In accessing cheaper education materials, a number of countries have endorsed the notion of fair dealing/use in their respective national legislation. Some utilize the fair use doctrine, while some follow the fair dealing. The concept of 'fair use' is derived from the United States copyright law in contrast to the concept of 'fair dealing' which is a British 'copyright' concept. It is said that the former is much more flexible than the later[91] since the fair dealing protection is limited to specific

---

[90] Štrba (n 23) 38.

[91] Justice Laddie, 'Copyright: Over-strength, Over-regulated, Over-rated' (1996) 18(5) *European Intellectual Property Review* 253.

acts which are laid out in the copyright laws of common law jurisdictions such as the United Kingdom, Australia and India, whereas the fair use is not limited to specific activities rather it requires case-by-case determination.[92] Unfortunately, no such statutory criteria of 'fairness' exists under the copyright framework of Bangladesh; it still follows the conventional list of section 72 and any use falling outside the list is considered as infringement. The Judiciary of Bangladesh is still not concerned about the various facets of fair dealing since it has not found the opportunity to deal with the principles of fair dealing in any litigation.

Surprisingly, the Indian copyright jurisprudence, unlike Bangladesh, is burgeoning day by day although once there was a dearth of judicial precedents on copyright issues in India.[93] The Indian Judiciary, recognizing the socio-economic conditions of India, makes it easy for the Indian citizens to access to educational materials at low prices.[94] In the recent *DU Photocopy case*[95], the court found that a small photocopy shop named Rameshwari was licensed by Delhi University to make course packs for the students of the university. The publishers of the textbooks, from which course packs were made, brought a legal action against the photocopy shop and the University. The court then ruled that even if the four factors test for the purpose of being education, being non-benefit oriented, the quantity of the work used and effect on value of the work[96], go against the fair dealing, it would not be considered as infringement as long as it is 'in the course of instruction' within the meaning of section 52(1)(i) of the Indian Copyright Act 1957. The court thus declined to apply the US four factor test since the purpose of fair dealing was education. Owing to this case in India, the educational photocopying has been brought under the safe lock of fair dealing. And a fairness model for copyright has been formed there, which is still lacking in many developing countries and LDCs.

Therefore, considering the socio-economic conditions of Bangladesh, it is desirable to develop a 'fairness' model for copyright to accommodate the educational

---

[92] *United States v Elcom Ltd.* [2002] 203 F Supp 2d 1111, 1121 (N D Cal 2002) (citing *Harper & Row Publishers, Inc. v Nation Enters* [1985] 471 US 539 (549) (1985).

[93] *Taylor Bradford v Sahara Media Entertainment Ltd* [2004] (28) PTC 474 (Cal) [56].

[94] Dharam Veer Singh and Pankaj Kumar, 'Photocopying of Copyrighted Works for Educational Purposes: Does It Constitute Fair Use' (2005) 10 *Journal of Intellectual Property Rights* 21, 31.

[95] *The Chancellor Masters and Scholars of the University of Oxford v Rameshwari Photocopy Services* [2016] (also known as DU Photocopy Case) 233 (2016) DLT 279.

[96] Copyright Act, s 107 (US) [where the courts will weigh four factors- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for, or value of the copyrighted work.]

needs of Bangladesh. However, Bangladesh is awkwardly bereft of case laws or precedents in copyright actions. Therefore, one inevitably relies on statutory provisions to assess the legal position. So, it is essential to bring in some life to the fair dealing provisions i.e. fair healing[97] and for that Bangladesh can, like India, conceive educational exceptions through focused interpretation of the Copyright Act. It can be suggested that 'fair dealing' is defined in the Copyright Act to provide greater legislative clarity taking jurisprudential precedents from countries like India.

5.8 Formation of a Copyright Society

The Copyright Act 2000 provides provisions for the formation, registration and administration of the copyright society or copyright management organization (CMO).[98] To operate as a copyright society, it needs to be registered by following the provisions of the Copyright Act and Copyright Rules 2006.[99] In addition, the society must obtain exclusive authorization of copyright owners' rights by constructing agreements regarding the administration and duration of the rights, the quantum of fees and the frequency of paying them.[100] Therefore, the society can perform the task of granting license to others to use a protected work on behalf of a plurality of rights holders.

It seems that a detailed provision on establishment and management of the copyright society or CMO has been there a long ago but till date no effective CMO exists in Bangladesh. The music industry has recently formed the first ever CMO[101] but it is not functioning properly due to its incapacity to collect and distribute proper royalties from the persons or organizations for using the copyright protected works.[102] As a result, the absence of an effective copyright society like CMO affects the education sector of Bangladesh to find a sustainable solution to access education materials at low prices.

---

[97] For a detail analysis of 'fair healing and fair dealing', see Gluseppina D'Agostino, 'Healing Fair Dealing: A Comparative Copyright Analysis of Canada's Fair Dealing to UK Fair Dealing and US Fair Use' (2008) 53(2) *McGill Law Review* 309.

[98] Copyright Act 2000, ss 41-47 (Bangladesh).

[99] ibid, s 41; Copyright Rules 2006, r 14 (Bangladesh).

[100] ibid, ss 42,43,44; Copyright Rules 2006, rr 15-17 (Bangladesh).

[101] Afrose Jahan Chaity, 'New Organisation for Ensuring Royalty for Musicians' *Dhaka Tribune* (Dhaka, 25 August 2014) <https://www.dhakatribune.com/uncategorized/2014/08/25/new-organisation-for-ensuring-royalty-of-musicians> accessed 20 April 2020.

[102] Sadi Mohammad Shahnewaz, 'Musicians Hopeful for a Structured Future with BLCPS' *The Daily Star* (Dhaka, 03 October 2020) <https://www.thedailystar.net/arts-entertainment/news/musicians-hopeful-structured-future-blcps-1971529> accessed 30 January 2021.

Undoubtedly, the formation of an effective CMO can become a sustainable way-out for Bangladesh to provide access to people who cannot afford expensive books at much lower rates. The CMO can usually represent the authors and other rights holders such as publishers, producers and performers and provides licenses to the users of the copyrighted work on their behalf.[103] Through the CMO, the copyright owners can monitor and control the use of their works and collect fees for such use. By setting fair dealing, it can also establish a high threshold level of copying for academic purposes and if that copying crosses the threshold level, then the CMO can intervene and amass 'remuneration' from such unapproved copying and distribute it to the right holders in the form of 'royalty'. Moreover, the CMO can grant licenses (blanket or transactional) to the users of the copyrighted materials on behalf of the copyright owners. In this respect, an agreement must be made between the CMO and the rights holders authorizing the CMO to provide licenses to others.

6. Conclusion

The philosophical basis of copyright is to promote the advancement of learning. However, the economic/instrumentalist view of the copyright has restrained the free flow of information by granting the copyright holders the exclusive right to reproduce and disseminate their works. Naturally, the developing countries and LDCs now are facing difficulties in meeting the educational needs since most of the copyrighted works are costly and unaffordable. In many countries, the right to education is considered a fundamental right and therefore, the citizens, especially students, need access to the photocopied books. An average person of a developing country or LDC cannot afford to buy a sky-high priced copyrighted book because of the high administrative costs involved in attaining permission from the author and publisher who are the multinationals of the developed countries. The developing countries and LDCs thus must find a sustainable way-out to access education materials at a cheaper price without discouraging the creativity and proper reward.

The article suggests that the developing countries and LDCs can reproduce the copyrighted works at low cost by using their cheap labour and tax break. Moreover, production of low-priced edition books by the local book publishers in collaboration with foreign publishers just like 'Penguin Book Publishing House' can be an effective solution for affordable access to education materials.

---

[103] Jasim U Khan, 'Protecting Copyrights' *The Daily Star* (Dhaka, 21 July 2010) <https://www.thedailystar.net/news-detail-147578> accessed 20 December 2020.

Regarding the 'fairness', this article suggests that the traditional fair use provision of Bangladesh needs incorporating some fair healing. Suggestions may include a recent model as developed in India where copying 'in the course of instruction' under section 52(1)(i) of the Indian Copyright Act 1957 was considered fair and not infringing. Given the numerous fairness models for copyright, Bangladesh should formulate its own guidelines or models for fairness after taking into consideration of its socio-economic status, and copying for educational purposes should be given priority in that model. Additionally, in the quest of satisfying the educational needs of Bangladesh, a new international legal instrument along the lines of article 31bis of TRIPS can be introduced in ensuring affordable access to education materials.

Further on copying issues where poor-quality cover-to-cover photocopies of copyrighted books are made, this article shows that a copyright society like CMO can be the proper organization to play a crucial role by acting as a bridge between those shop-owners and authors of the original book. With the help of CMO, intellectualism and creativity may flourish in our society and at the same time affordable access to education materials can raise the standards of education.

© *Dhaka University Law Journal, 2021, 32(2), 69-86*
doi: https://doi.org/10.3329/dulj.v32i2.57958

Weighing the Gender Hypothesis on Mediators: Insiders' View from District Legal Aid Offices in Bangladesh

Dr. Jamila A. Chowdhury[*] and Nusrat Jahan[**]

1. Introduction

Alternative Dispute Resolution (ADR), especially mediation, is often considered an effective tool to enhance access to justice for women.[1] Legal aid and public interest litigation were the two other tools used to promote access to justice and were initiated much earlier than ADR. It is, therefore, claimed that ADR denotes the advent of the third wave of access to justice.[2] Although the practice of an indigenous form of out-of-court ADR has existed in this sub-continent from time immemorial, the practice of court-connected ADR through mediation is a new addition to the 21st Century[3]. The third wave of access to justice relating to court-connected mediation started in Bangladesh with its *mandatory* application in both family and civil courts.[4] Gradually, a *mandatory* practice of ADR was introduced in various other laws of Bangladesh, for instance, the *Labour Act, 2006*, the *Money Loan Courts (Amendment) Act, 2010*, *Income Tax Ordinance, 1984 (through the Finance Act, 2011)*, *Value Added Tax Act, 1991*, *Arbitration Act, 2001*, and the *Overseas Employment and Migrants Act, 2013* etc. All these laws have provisions for resolving through ADR, especially mediation, after the filing of a case but before the initiation of the trial process[5].

---

[*] Professor, Department of Law, University of Dhaka.
[**] Assistant Judge, Bangladesh Judicial Service, District and Sessions Judge Court, *Narsingdi*.

[1] Jamila A. Chowdhury, *Gender Power and Mediation: Evaluative Mediation to Challenge the Power of Social Discourses* (Cambridge Scholars Publishing 2012); See also *Mediation to Enhance Gender Justice in Bangladesh: Navigating Wisdom in Asia and the Pacific* (London College of Legal Studies 2018).

[2] Mauro Cappelletti,; Bryant and Garth (eds), *Access to Justice, Vol I: A World Survey (Book I & II)* (1st edn, Giuffrè Editore/ Sijthoff/ Noordhoff 1978) 21-54*;* see also Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' (1993) 56(1) *Modern Law Review* 282; See also Jamila A. Chowdhury, 'Three Waves of Access to Justice in Bangladesh: Call for a System Approach to Success' (2012) 26(1) *The Dhaka University Studies Part F* 73-96.

[3] Sheikh G. Mahbub, *Alternative Dispute Resolution through Civil Courts in Bangladesh*, (1st edn, Bangladesh International Arbitration Center 2019) 208.

[4] Jamila A. Chowdhury, *ADR Theories and Practices: A Glimpse of Access to Justice and ADR in Bangladesh* (3rd edn, London College of Legal Studies 2020).

[5] ibid.

Against the backdrop of a huge backlog of cases in the formal courts, mediation was introduced to promote our constitutionally guaranteed rights to a *speedy and fair trial*[6] and a right to be treated equally according to law.[7] However, the inception of ADR, especially mediation, after the filing of cases may systematically exclude those women from accessing low-cost, accelerated justice who are financially incapable of filing cases in the formal courts.[8] Thus, the *Legal Aid Services Act, 2000* was introduced in Bangladesh to ensure a pre-filing mediation option for the poor, vulnerable, and other critically disadvantaged people.[9] According to rule 3(4.a) of the *Legal Aid* (*Legal Counselling and Alternative Dispute Resolution) Rule 2015*, a District Legal Aid Officer (DLAO) evaluates the suitability of a dispute for resolution through mediation.

A DLAO may advise parties to apply for legal aid for cases not suitable for mediation. According to Section 2 of the *Legal Aid Services Act, 2000*, legal aid includes fees for lawyers, fees for mediators, and court fees and other associated costs of filing cases in the formal courts.[10] If found suitable, the DLAO sends notice to parties, invites them to come to his/her office on a specific date and time and makes an initial attempt to resolve the dispute through mediation. At this initial stage, s/he will act as a mediator (hereinafter referred to as DLAO-mediator). However, once parties attempt a mediation session, the dichotomy between the modes of mediation (i.e. facilitative mediation v evaluative mediation) was a matter of controversy in the literature.[11]

Facilitative mediators are supposed to perform a neutral and impartial role only by facilitating the mediation process and not suggesting or evaluating the content or outcome of a mediation.[12] Evaluative mediators, on the other hand, bring their evaluation into the mediation process.[13] The facilitative versus evaluative mediation controversy was later mitigated by Chowdhury (2011) under the cultural context[14].

---

[6] The Constitution of the People's Republic of Bangladesh, art. 35(3).

[7] ibid, art. 27 and 31.

[8] Jamila A Chowdhury, 'Legal Aid and Women's Access to Justice in Bangladesh: A Drizzling in the Desert' (2012) 1(3) *International Research Journal of Social Sciences* 8-14.

[9] Bisheswar Singha, 'Legal Aid Empowers the Critically Disadvantage People in Bangladesh' (*NLASO,* 2018) <http://nlaso.gov.bd/site/publications/387c5119-24bf-4d3e-a972-5d174e7cd65a/Legal-Aid-mpowers-the-Critically-Disadvantaged-People-of-bd> accessed 10 September 2021.

[10] ibid.

[11] Kenneth M. Roberts, 'Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement' (2007) 39(1) *Loyola University Chicago Law Journal* 187-213.

[12] Ellen A. Waldman, 'The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence' (1998) 82(1) *Marquette Law Review* 155-170.

[13] ibid.

[14] Jamila A Chowdhury, 'Women's Access to Fair Justice in Bangladesh: Is Family Mediation a Virtue or a Vice?' (Rare Collection, Unpublished PhD Thesis, University of Sydney 2011).

As observed by her, while facilitative mediation is more suitable in the western cultural context due to their cultural orientation, people from Asia, Africa, or Latin America may prefer to attend evaluative mediation.[15] Hence, according to the cultural theory of mediation, parties attending mediation from high power distance[16] countries, including Bangladesh, prefers evaluative mediation.[17] Such preference gets even more robust when any person holding formal authority[18] (e.g. judge-mediators, DLAO-mediators) conducts mediation. Therefore, evaluative mediation is generally considered an ideal mode of mediation in Bangladesh, where a mediator puts his/her efforts to control power play at the mediation table and empower weaker parties by promoting principled negotiation techniques between parties.[19] Although no detailed mediation process was suggested in the *Legal Aid (Legal Counselling and Alternative Dispute Resolution) Rules 2015*, a closer look at rules 9(2) and 9(3) indicate that DLAOs may bring their evaluation during a legal aid mediation. However, parties are free to accept or reject the suggestions made by a DLAO-mediator during the mediation session/s.[20]

Despite a practice of evaluative mediation, it is sometimes argued that even mediators are not free from the *'cultural stereotypes'* based on *'gender'* embedded in dominant social discourses. For instance, a recent study on several prospective judges and lawyers in Bangladesh revealed that even highly educated lawyers and judges struggle against their *'gender roles'* while performing dual responsibilities at home and office.[21] Thus, this paper examines whether the stereotyped gender roles that affect the female judges to balance work and professional life also create a similar gender role expectation during in-court mediation. If so, it opens up a probability that

---

[15] Jamila A Chowdhury, 'Paradox of 'Neutrality' in Mediation: An Analysis of High Power-Distance versus Low Power Distance Cultural Dichotomy' (2015) 15(1-2) *Bangladesh Journal of Law* 1-20; See also, ibid.

[16] Disputants in high-power-distance cultures place more reliance on high-authoritative third party intervention in resolving their disputes, than on their own negotiation capabilities. See John Adamopoulos and Yoshihisa Kashima, *Social Psychology and Cultural Context* (Sage 1999).

[17] Chowdhury (n 1).

[18] Evaluative mediation is most often used in court-mandated mediation, and evaluative mediators are often attorneys who have legal expertise in the area of the dispute. See Katie Shonk, 'Types of Mediation: Choose the Type Best Suited to Your Conflict' (*Daily Blog: Harvard Law School*, 9 August 2021) <https://www.pon.harvard.edu/daily/mediation/types-mediation-choose-type-best-suited-conflict/> accessed 12 September 2021.

[19] Chowdhury (n 4) 86.

[20] As stated in rule 9(2), a DLAO may not insist parties to take his suggestions; i.e. unlike facilitative mediators a DLAO may not limit his role to mere facilitation. Rule 9(3) also extended the modus operandi beyond neutrality and extended to ethics, and fair evaluation.

[21] Jamila A Chowdhury and Ifat M. Eusuf, 'Women's Empowerment in the Justice Delivery System of Bangladesh: Social Milieus and Women's Sluggish Progression in Bar and Bench' (2018) 51(3) *Kanagawa Law Review* 57-94.

the gender of judge-mediators may impact the outcome of court-connected mediation attained through evaluative meditation. A similar inference may even be extended to the court-connected (in-court) mediations conducted by DLAO-mediators and trial judges.

However, due to limited accessibility under the COVID-19 pandemic, this paper concentrates only on DLAO-mediators who serve the more vulnerable quarters of the society. Unlike many other dominantly cited contemporary literature discussing the impact of gender on mediation, the focus of this paper is not the gender of parties attending mediation – rather the gender of mediators conducting meditation. In this paper, insiders' view indicates the perceptions of DLAO-mediators currently acting as DLAOs or were assigned as DLAOs in their early careers. Nonetheless, all of them have regular interaction with DLAOs in referring cases to legal aid.

Thus, this paper examines whether female DLAO-mediators are equally competent, compared to their male counterparts, to control this gendered power disparity despite the gendered role expectation attached to their identity. Furthermore, due to close similarity, lessons from this study would be equally applicable to other female mediators conducting pre-trial mediation after filing cases in different trial courts (e.g. family courts, civil courts). Hence, the following section starts with a discussion on the meaning of mediation in the context of dispute resolution. It further discusses the meaning of mediated outcome in the high-context[22] Eastern culture where parties usually prefer evaluative mediation, the theory of gender and how it may affect the evaluative mediation depending on the gender of a mediator (i.e. male mediator versus female mediator). Finally, the article contains an empirical analysis of different tiers' judge-mediators' perceptions, including DLAO-mediators of whether gender differences between male and female mediators may significantly affect the outcome of court-connected mediation at district legal aid offices in Bangladesh.

2. Meaning of Mediation *vis-à-vis* Mediated Outcome: The Theoretical Underpinning

The term mediation belongs to the Latin root *"Mediare"*, which means to "halve". In Chinese, it refers to the process of stepping between two parties.[23] However, in

[22] In high-context (Eastern) cultures such as Japan, Korea, China or African America, people may not express all their feelings and emotions through words, and inference, gesture, or even silence may have a specific cultural meaning which warrants a culturally specific response. See, Lary A. Samovar, Richard E Porter and Edwin R McDaniel, *Intercultural Communication: A Reader* (13th ed, Wadsworth 2012).

[23] Jamila A. Chowdhury, *Mediation to Enhance Gender Justice in Bangladesh* (n 1).

contemporary meaning, mediation has been alleviated from an adversarial sense to a process where the output is halved between the parties. Instead, it is defined as a principled approach that endeavours to reach an agreement by identifying the disputed issues, developing multiple options, and considering parties interests under different alternatives.[24]

As mentioned earlier, depending on the role of the mediator, mediation can be broadly defined as facilitative mediation and evaluative mediation. The *'facilitative'* mediators *merely* facilitate the mediation process by only controlling the process. Whereas under *'evaluative'* mediation, the mediator provides his/her evaluation on the content of the dispute and lets parties decide on their mediated outcome.[25] Though *'therapeutic'* mediation is another particular type of mediation applied to bring behavioural changes, especially in the case of frequent and prolonged violent relationship disputes between intimate partners, the process of such mediation requires therapy. Therefore, it is markedly different from the dialectic approach used under the *'facilitative'* and *'evaluative'* forms of mediation.[26] Due to the substantially different techniques used in *'therapeutic'* mediation compared to the other two types, it is kept outside the purview of the discussion made in this paper.

Despite the assumption that mediators primarily follow evaluative mediation in Bangladesh, a significant issue remains for further consideration relating to the quality and fairness of the *'mediated outcomes'*. The outcomes of mediation may be fair when it is in the form of a consensual agreement in which both parties participate equally without fear or control from the other party. Moreover, no party takes a rigid approach to their rights, emphasizing and sustaining the *'shared interests'* of all the parties concerned.[27] Without assuring the interests of all the parties concerned, a mediated resolution may not provide a fair outcome.[28]

As analyzed by Fisher:

> Principled negotiation has four elements; firstly, mutual trust has to be established between the parties. Secondly, the negotiator has to create or maintain a positive relationship with the parties. Thirdly, negotiators have to discover shared interests (goals or objectives) that will work as common ground between the parties. [Lastly] the negotiator must identify the zone of the possible agreement between the parties. [29]

The above are the factors that parties may consider to perceive whether the mediated outcome was fair to them. Some scholars have termed mediated outcome as *"a contract as the exchange of mutual opinion for a common consideration"* in a

---

[24] Sriram Panchu, *Mediation Practice and Law: The Path to Successful Dispute Resolution* (1st edn, Lexis Nexis 2011) 5-6.
[25] Mahbub (n 3) 174.
[26] Chowdhury (n 4) 85.
[27] David L. Spencer, *Essential Dispute Resolution* (2nd edn, Cavendish Publishing 2005) 45-83.
[28] Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating an Agreement without Giving In* (2nd edn, Random House 1991) 4-8.
[29] ibid.

mediation agreement.[30] Nonetheless, the outcome of mediation can be influenced by various factors, including gender stereotypes, power disparity, violence, silence, fear and control that may limit parties' capacity to negotiate effectively during mediation.[31]

As less empowered parties, especially women, may remain silent out of fear or may sometimes be controlled due to their usual gender role identity in the society, it is assumed that an evaluative mediator may neutralize these adverse effects of *'gender'* during mediation.[32] A voluminous literature employs this gender theory to analyze this primary view of mediation, i.e. how gender role and cultural expectations may affect the effective negotiation practice between parties during mediation. However, less explored is the notion of whether this gender theory is cross-cutting with the roles of mediators in mediation. In other words, the gender theory that applies to 1st party and 2nd party is equally applicable to the 3rd party mediators, while compared side by side in shaping a mediated outcome. After a brief theoretical discussion on the gender theory of negotiation and its implication for mediation, the paper elaborates the result obtained through empirical data collected from expert interviews in this regard.

3. Mediators' Gender and Mediation: Gender Stereotyping and Cultural Expectations at Cross-roads

Theoretically, the context of a dispute, the gender of the parties, and the existence of power disparity might affect the quality and outcome of the mediation. Thus, to better understand the present concept, the notions of *'sex'* and *'gender'* need to be elaborated. The term *'sex'* refers to a person's biological status. On the other hand, *'gender'* is a term that society attributes to the *'sex'* depending on the cultural expectation of a particular society.[33]

> Behaviour that is compatible with cultural expectations is referred to as gender-normative; behaviours that are viewed as incompatible with these expectations constitute gender non-conformity.[34]

In our society, males are presumed to be more powerful than their female counterparts. This trait prevalent in the society is known as patriarchy, which

---

[30] David Spencer and Michael Brogan, *Mediation Law and Practice* (1st edn, Cambridge University Press 2006) 348.
[31] Chowdhury, *Mediation to Enhance Gender Justice in Bangladesh* (n 1).
[32] ibid.
[33] Penelope Eckert and Shally McConnell-Ginet, *Language and Gender* (2nd edn, Cambridge University Press 2003) 2.
[34] ibid.

recognizes male dominance over females[35] regarding family matters and other important societal issues.[36] Alternatively, in matriarchal societies, females are presumed to be dominant over males. This type of gender role of women in patriarchal and matriarchal societies is attributable to '*gender stereotypes'*. Generally, *'stereotypes'* are the beliefs regarding people on the sole basis of their membership in any particular social category.[37] Consequently, it constrains the ability to view and perceive matters from a broader viewpoint.

Society dominantly creates the stereotypical division between genders. Children are taught to maintain specific socially approved dominant rules depending on their sex, i.e., male or female. Through these dominant rules and socialization processes, males and females gradually adopt such *'gender stereotypes'* practices into their behaviours.[38] For example, males are taught to be confident, aggressive, assertive, dominant and controlling, while females are taught to be emotional, submissive, patient, and passive. All these behavioural patterns create disparities among males and females. In every corner of society, the roots of this evil dogma are being implanted. As a result, the same gender role may influence their behaviour when defending their rights in mediation.

Due to cultural stereotypes, women, in many cases, feel shame to share their personal matters and keep silent instead. Therefore, power remains in social discourses. As explained by Bagshaw:

> Stories and "truths" are inevitably framed by dominant cultural discourses that specify what is normal and what can or cannot be talked about, by whom and in what contexts. This notion of power suggests that power remains in a social network and so cannot be possessed by an individual[39].

The power disparity between parties may exist even when violence or oppression is not present in the relationship. It may happen due to widely prevalent gender role stereotypes in society and consequent lower reward expectations by female parties attending mediation. Social discourses may portray women as soft, submissive, and more compromising. Further,

---

[35] Dale Bagshaw, ‘The Three M’s- Mediation, Postmodernism, and the New Millennium’ (2007) 18(3) *Conflict Resolution Quarterly* 205.

[36] Abeda Sultana, 'Patriarchy and Women’s Subordination: A Theoretical Analysis' (2011) 4(1) *The Arts Faculty Journal* 3.

[37] Dina L. Anselmi and Anne L. Law, *Questions of Gender: Perspectives and Paradoxes* (1st edn, McGraw-Hill 1997) 195; see also Margaret L. Andersen & Howard F. Taylor, *Sociology: Understanding a Diverse Society* (4th edn, Thomson and Wadsworth 2008) 275.

[38] Pat Boland, *Gender Stereotypes: The Links to Violence* (1st edn, WEEA Publishing Center 1995) 2.

[39] Foucault cited in Jamila A. Chowdhury, Gender Power and Mediation, (n 1) 75.

> [A]t a decided disadvantage in this patriarchal society… [where women have] little access to material resources, women lack autonomy and decision-making power and are therefore disempowered within the family, community, and society at large.[40]

Despite this general scenario, it is pertinent to mention that power is contextual. Therefore, it is not expected that the same person can exert the same level of power with every other person in all different contexts.[41] Earlier studies to examine the gender role in negotiation also end up with contrasting gender theories.

The *gender role socialization theory* assumes a compromising role of women with low reward expectations, as they are socialized by their family and society[42]. According to g*ender plus power theory*, different power factors such as income, education, employment etc., work on top to define his/her role in mediation. Therefore, it is expected that between same-gender persons, one having a better income, education, and employment may overpower the other party during mediation.[43] The *expectation states theory*, however, impose more weight on gender stereotypes. According to this theory, in most cases, gender may overpower the impact of other moderating variables such as income, education or social status of a counterpart in negotiation. On the other hand, the *situational power theory* defines gender power as contextual to the situation under which a person is making his/her negotiation during mediation. In line with Watson's gender theories, in her writings, Bagshaw viewed the issue of power disparities as primary consideration within the culture, context, and structures in which mediation takes place. In such a situation, the mediator must try to balance power disparity by providing information, encouragement, and reminding the parties about their legal entitlements through evaluative mediation.[44]

However, when a female mediator plays the role of an evaluative mediator, arguably, gender theory suggests that they have to take a *'gender non-confirmatory'* position to bring more evaluation to the negotiation table. Unfortunately, the

---

[40] The Asia Foundation. *Access to Justice: Best Practices under the Democracy Partnership*, (The Asia Foundation 2000).

[41] Hilary Astor, 'Some Contemporary Theories of Power in Mediation: A Primer for the Puzzled Practitioner' (2005) 16(1) *Australian Dispute Resolution Journal* 32.

[42] Penelope Bryan, 'Killing us softly: Divorce Mediation and the Politics of Power' (1992) 40(2) *Buffalo Law Review* 441.

[43] Carol Watson, 'Gender Versus Power as a Predictor of Negotiation Behaviour and Outcomes' (1994) 10 (2) *Negotiation Journal* 117.

[44] Alison Taylor, 'Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process' (1997) 14(3) *Mediation Quarterly* 215.

available literature on this issue is still scarce.[45] Almas explained how women mediators face gender bias and stereotypes while conducting mediation.[46] In another study, Petkeviciute and Streimikiene revealed that in more than 70 per cent of cases, clients show less respect for female mediators than their male counterparts.[47] Unlike Petkeviciute and Streimikiene, Stuhlmacher and Morissett identified no significant difference between male and female mediators capacity to attain initial settlement through mediation. However, female mediators showed a better capacity to successfully mediate emotionally thorny issues, such as divorce or sexual harassment.[48]

Wall and Deuhurst also asserted the insensitivity of mediators' gender on their ability to conduct successful mediation. The authors found a strong correlation between the number of formulations used by mediators and the rate of successful mediation.[49] Although no significant difference was ascertained in the number of male and female mediators in the case of the rate of a successful mediation, there was a qualitative difference in formulations used by male and female mediators. While formulations from female mediators were more precise, formulations used by male mediators were more authoritative in nature. Hence, as long as the rate of a successful mediation is concerned, there may be a balance between these two factors and, therefore, no difference depending on the gender of a mediator.

However, contemporary literature from Bangladesh or any other neighbouring country does not shed light on which of these two contrary views may prevail in the cultural context of Bangladesh. Thus, this paper explores the issue further based on the mediator's opinions at various district legal aid offices in Bangladesh.

4. Quantitative Approach to the Gender Ratio of Beneficiaries under Legal Aid Mediation: A Popular View on Gender Parity

To further highlight the impact of mediators' gender on the mediated outcome, if any, both published and empirical data were incorporated in this paper. In addition,

---

[45] Alice F. Stuhlmacher and Melissa G. Morrissett, 'Men and Women as Mediators: Disputant Perceptions' (2008) 19(3) *International Journal of Conflict Management* 249; See also Katalien Bollen, Martin Euwema, and Lourdes Munduate, 'Promoting Effective Workplace Mediation' in Katalien Bollen, Martin Euwema, and Lourdes Munduate, (eds), *Advancing Workplace Mediation through Integration of Theory and Practice* (Springer International 2016); See also Katalien Bollen, & Martin Euwema, 'Workplace Mediation: An Underdeveloped Research Area' (2013) 29(3*) Negotiation Journal* 329.

[46] Roselynn Almas, *Promoting Conflict Management Competencies within Informal Structures and Informal Networks Doctoral Dissertation* (Pepperdine University 2018).

[47] Nijole Petkeviciute and Dalia Streimikiene, 'Gender and Sustainable Negotiation. Economics & Sociology' (2017) 10(2) *Journal of Scientific Papers Economy and Sociology* 279.

[48] Taylor (n 44).

[49] Victor D. Wall and Marcia L. Dewhurst, 'Mediator Gender: Communication Differences in Resolved and Unresolved Mediations' (1991) 9(1) *Mediation Quarterly* 63.

quantitative data on legal aid applications over the years, as indicated in Table 1, demonstrates that mediation through district legal aid offices has gained momentum, which will be apparent from the statistics shown in the Table below:

Table 1: Mediation under Legal Advice and Alternative Dispute Resolution Regulation, 2015: A Six years' Evaluation (2015 to 2020)[50]

Year	Pre-Cases	Post Cases	Total Disposal through mediation (Pre-Cases)	Total Disposal through mediation (Post-Cases)	Total Number of Beneficiaries	
					Pre-Cases	Post-Cases
2015 (July-Dec)	454	251	336	190	290	168
2016	2276	333	1832	270	1420	294
2017	3841	321	3572	292	2342	268
2018	5992	516	4877	467	7474	823
2019	11999	1265	10403	932	18434	1565
2020 (December)	12306	1870	10893	1740	21098	3354
Total	36868	4556	31913	3891	51058	6472

Source: National Legal Aid Services Organization, Yearly Report December 2020, p.4.

In 2015, only 454 pre-case legal aid applications were filed for 290 beneficiaries, whereas in 2020, 12306 pre-case applications were filed for 21098 beneficiaries. Likewise, in 2015, 251 post-case legal aid applications were filed with 168 beneficiaries, whereas in 2020, 1870 post-case applications were filed for 3354 beneficiaries. That means, there has been a significant increase in the number of pre-case applications filed and beneficiaries involved over the years. However, this aggregate data on legal aid applications over the years is not enough to reach a conclusion on the gender issue of mediators. Because, while vulnerable women apply for legal aid, they do not have any option of choosing male or female mediators; instead, they apply to their respective legal aid offices.

[50] National Legal Aid Services Organization, Yearly Report December 2020, 4.

This section further analyzes gender-sensitive quantitative data on applications for legal aid made by eligible male and female litigants and gender breakdown of ultimate beneficiaries who have resolved their cases through mediation held at district legal aid offices. As legal aid is generally targeted more for the vulnerable, especially women in our context, it is expected that the ultimate beneficiary from the process would also reflect this normative preference. *Hence, it appears that there is no apparent impact of the mediators' gender on the mediated outcome, and it actually works for the benefit of all the parties involved in the dispute*.

Table 2: Disposal Rate of District Legal Aid Office[51], Cumilla[52]: An Overview from Last Two Years (2019-2020)

Year	**Number of Applicants/ Litigants**			**Disposal Rate**			**Number of Beneficiaries**		
	Total	Male	Female	Total	Successful	Kept with record	Total	Male	Female
2019%	453 (100)	100 (22.1)	353 (77.9)	435 (100)	123 (28.3)	312 (71.7)	380 (100)	174 (45.8)	206 (54.2)
2020%	403 (100)	86 (21.3)	317 (78.7)	369 (100)	100 (27.1)	269 (72.9)	485 (100)	228 (47.0)	201 (41.4)

Source: District Legal Aid Office, Cumilla Yearly Statistics (2019-2020).

As demonstrated in Table 2, according to recent statistics from the district legal aid office of Cumilla, more than three-fourth of applications for legal aid were made by females. The rate of applications made by female disputants has even increased from 77.9 per cent in 2019 to 78.7 per cent in 2020. From this brief account, it is unclear whether this higher rate of the application indicates increased vulnerability or more confidence of women that may encourage them to apply for legal aid. However, a thorough analysis of the second and third columns of Table 2 indicates that the success of mediation conducted at the district legal aid office of Cumilla remains less than 30 per cent, with a declining trend from 2019 to 2020. The COVID-19 pandemic situation might have attributed to this slight decline during this period.

[51] District Legal Aid Office, Cumilla Yearly Statistics (2019-2020).

[52] Government of People's Republic of Bangladesh, 'Extra-Ordinary Gazette ' (*Bangladesh Government Press*, 10 September 2018) <https://www.dpp.gov.bd/bgpress/index.php/document/get_extraordinary/27772> accessed 20 July 2021.

For the purpose of this paper, it is pertinent to mention that the legal aid officer of the relevant district (i.e. Cumilla) was a female. That indicates that mediation applications made by female parties may have a low rate of success even when the mediator remains a female.

Table 3: Disposal Rate of District Legal Aid Office (*Narsingdi*) (January 01 to December 31, 2020: Pre-cases)[53]: A Glimpse from the Last Year (2020)

Nature of Suits	Pending Disputes (Pre-Cases)	Applications Received (Pre-cases)				Disposed			Unresolved pending pre-cases
		Female	Male	Child	Total	Successful	Kept with record	Total	
Civil	4	4	6		14	2	2	4	10
Criminal	5	23	5		33	11	9	20	13
Family	11	105	14	1	131	17	41	58	73
Total	20	132	25	1	178	30	52	82	96

Source: District Legal Aid Office, Narsingdi (Yearly Statistics January 2020-December 2020).

According to Table-3, the total number of pre-cases pending before the district legal aid office, *Narsingdi*, was 178, amongst which 132 applications were received from female applicants, and 25 were from male applicants. Thus, 82 cases were resolved where 30 were successful, and 52 were kept on record for a further transfer to litigation. This quantitative analysis in another district re-confirms that mediators' gender may not have any impact on the successful resolution of disputes filed by women. Thus, from the light of these analyses, though not conclusive, a hypothesis can be formed that mediators' gender may not have any practical impact on the mediated outcome at the district legal aid offices.

5. Impact of Mediators' Gender on Mediation through the Lens of Insiders: A Qualitative Analysis

The authors have interviewed thirty judicial officers, of which sixteen were female, and fourteen were male. These groups include legal aid officers, assistant and senior assistant judges and joint district and sessions judges. While interviewing, the authors have tried to maintain uniformity between the number of male and female mediator-judges or mediators from legal aid offices to be able to draw a conclusion on this issue, which has not surfaced in contemporary literature on mediation.

[53] District Legal Aid Office, *Narsingdi* (Yearly Statistics January 2020-December 2020).

Among the various questions asked, this paper mainly focused on clients' attitudes towards mediators' gender (male mediators versus female mediators) and mediators' mindset towards clients of different genders. Respondents were further asked about mediators' role in mitigating the extraneous effects that might impact the process of mediation, the reliance and preference of the clients on the mediator of the same gender, whether the presence of a female mediator kept the mediation process friendlier with female clients. Participants were also asked about the mechanism that the mediators are applying to make the process gender-neutral.

As mentioned earlier, amongst the thirty judicial officers interviewed, there were both male[54] and female officers[55]. The first group of interviewees involved judicial officers who are currently serving as DLAO-mediators. The findings are highlighted in Table 4.

Table 4: Impact of a Mediators' Gender on Mediated Outcome from Clients and Mediators' perspectives (DLAO-mediators)[56]

Question	Yes	No	May be	It would depend on the type of disputes
Preference of same gender mediators by the parties	60 %	0 %	0 %	40 %
Reliance on same gender mediators by the parties	20%	40%	20%	20%
Gender bias of the mediators and impact on the outcome	0 %	100 %	0%	0 %
Whether the presence of female mediators make the mediation process friendly	20 %	80 %	0 %	0%

From the above analysis, it is evident that 60 per cent of currently serving DLAO-mediators[57] opined that clients might prefer the same gender as mediators, whereas 40 per cent viewed that it varies on a case-by-case basis. As also mentioned by the DLAO-mediators, clients might prefer the same gendered mediator in cases involving sexual harassment, marital life issues or family matters. However, they affirmed that it does not make any difference in all other cases. That means the presence of female mediators would not make the process friendlier in all other cases except a few.

[54] Interviews with male legal aid officers were conducted at district legal aid offices.
[55] Interviews with female legal aid officers were conducted at district legal aid offices.
[56] Table prepared based on interviews taken from the male and female legal aid officers.
[57] In the district legal aid offices, DLAO-mediators only act as mediators and take a mandatory attempt for mediation between the parties prior to refer the case to trial.

The crucial point here is whether the presence of same-gender mediators has anything to do with the outcome of mediation or not. The interviewees mostly shared that the DLAO-mediators are, *per se*, judicial officers whose primary duty is to uphold justice. The thin line here is that DLAO-mediators do not provide any judgment; instead, they play the role of an impartial third-party mediator. Apart from that, the traditional and paramount characteristics of a judge, i.e. honesty, integrity, neutrality and impartiality, are highly maintained in mediation too. Hence, there is no question of bias from the mediators' gender perspective. Moreover, all of them unanimously denied the issue of bias, which implies that the mediators' gender has no impact on the mediated outcome.

The second group of interviewees involved Assistant Judges and Senior Assistant Judges. It is essential to mention here that this group of judicial officers mostly conduct mediation in family matters and some civil matters. Further, they performed the role of mediator as former district legal aid officers during their tenure. Thus, based on their experiences, they have shared their views. In this segment, the authors interviewed both male and female Assistant and Senior Assistant Judges[58]. The findings are summarized in Table 5:

Table 5: Impact of Mediators' Gender on Mediated Outcome from Clients and Mediators' Perspectives (Assistant Judges and Senior Assistant Judges)[59]

Question	Yes	No	May be	Would depend on the type of disputes
Preference of same-gender mediators by the parties	70%	20%	0%	10%
Reliance on same gender mediators by the parties	30%	45%	15%	10%
Gender bias of the mediators' gender and impact on the outcome	5%	90 %	0%	5%
Whether the presence of female mediators make the mediation process friendly	35%	50%	5%	10%

From the breakdown as indicated above, it is clear that most of the respondents from Assistant Judges to Senior Assistant Judges have observed a preference by the parties for a mediator of the same gender. However, from the response obtained on

[58] Interviews were conducted with both male and female Assistant Judges and Senior Assistant Judges of Dhaka Court.

[59] Table prepared based on the combined responses of Assistant Judges and Senior Assistant Judges of Dhaka Court.

the question of reliance, it is clear that party preference on mediators' gender does not impact their reliance on the mediators' impartiality while formulating the mediated outcome. Instead, the mediators explained that depending on the types of disputes, although it may create a comfort zone for the clients – it does not lessen their reliance on the outcome of mediation or reduce its impact. Furthermore, it becomes more evident by the ratio of the negative response received on the issue of bias.[60] Hence, this group (Assistant and Senior Assistant Judges formerly acting as legal aid officers) also agreed with the previous group (i.e. those currently serving as legal aid officers) that the mediators' gender does not impact the outcome of the mediation.

In order to triangulate the views from the earlier two groups, the authors have interviewed an even more experienced tier of judges (i.e. Joint and District and Sessions Judges) to substantiate more robust perceptions in this regard. This tier also comprised both male[61] and female judicial officers[62] with extensive experience in district legal aid offices and case management. The findings of this group were arranged in Table 6:

Table 6: Impact of Mediators' Gender on Mediated Outcome from Qualitative Approach (Joint and District and Sessions Judges) [63]

Question	Yes	No	May be	Would depend on the type of disputes
Preference of same gender mediators by the parties	20%	80%	0%	0%
Reliance on same gender mediators by the parties	20%	80%	0%	0%
Gender bias of the mediators and impact on the outcome	0%	100 %	0%	0%
Whether the presence of female mediators make the mediation process friendly	40%	20%	0%	40%

[60] However, 5 per cent of judges opined that they are sometimes more sympathetic to an issue involving a person of a particular gender, especially women, in family disputes.
[61] Interviews were conducted with male Joint and District and Sessions Judges.
[62] Interviews conducted with female Joint and District and Sessions Judges.
[63] Table prepared based on the combined responses of Joint District and Session Judges.

From the analysis of the Table above, only 20 per cent of litigants rely on and prefer mediators of the same gender. During the interview, the judges opined that a few illiterate women feel comfortable with female mediators. However, a well-conducted mediation session also mitigates the discomforts that may exist regardless of the mediators' gender. Furthermore, they all unanimously denied any inclination towards prejudice while dealing with clients of the same gender in mediation. This proposition re-confirmed that the parties' preference for same-gender mediators may lie in the gender role ideology of women attending mediation in a few thorny instances (e.g. personal and domestic violence). But that is not an issue of mediators' impartial and evaluative role as bestowed by the cultural theory of mediation. Hence, gender has no predictable impact on the mediated outcome.

6. Strategies Suggested by DLAO-mediators to Liberate Mediated Outcome from Typical Gender Role Ideology

Though not conclusive, the quantitative and qualitative analysis above indicates that mediators' gender does not impact the mediated outcome. However, women mediators usually show higher ethical standards[64] and use more clarification to formulate issues. Mediators at different tiers of the judiciary were interviewed about the strategies and mechanisms they usually adopt to make the mediation process impartial and reach an amicable settlement in mediation. The DLAO-mediators spoke about their different techniques, beginning from listening and raising awareness about the parties' legal rights. Some of these observations were as follows:

(a) The interviewees, i.e. DLAO-mediators, give the utmost importance to listening. By listening to the problems of both sides, it becomes easier to earn their confidence and increase reliance on the process of mediation. In this way, they also become comfortable with the mediator, and the mediator's gender then plays an insignificant role on the mediated outcome. Therefore, listening by giving them equal attention, respect and opportunity are crucial to attaining parties' confidence.

(b) A successful dispute resolution requires the time and patience of the mediator. The mediator must listen to the parties with patience and give them time to open up without any fear or control from the other party. Consequently, the parties' reliance on the mediation process increases.

---

[64] Jessica A. Kennedy, Laura J. Kray and Gillan Ku, 'A Social-Cognitive Approach to Understanding Gender Differences in Negotiator Ethics: The Role of Moral Identity' (2017) 138(1*)* Organizational Behavior and Human Decision Processes 28.

(c) Motivating the parties has been demonstrated as one of the unique and vital techniques in mediation. Motivation includes helping the parties think beyond the fixed boundaries of the law. For example, sometimes sharing multiple viable options ranging from social norms to religious norms helps them thinking positively about resolving their disputes. That ultimately leads the parties to reach a settlement that otherwise would be difficult.

(d) Sharing with the parties about the powers and functions of the DLAO-mediators, conveying success stories by DLAO-mediators through mediation also increase the parties' reliance on the process. Therefore, it is imperative to reassure the parties that they are of equal status before the mediator to attain their confidence.

(e) More pertinently, the art of mediation requires specific attributes and qualities from the mediator himself/herself to make the mediation successful, which is not related to the gender of the mediator. The majority of the interviewees stated that the mediation's success rate depends on the mediators' skills and techniques – not on the mediators' gender role.

7. Conclusion

Resolving disputes through alternative ways, especially through mediation, has created momentum in the history of easing the way to access justice in Bangladesh. From the analysis demonstrated above, it is apparent that justice seekers' confidence in this alternative mode is increasing. Theoretically, gender power disparity might have an impact on the performance of parties attending mediation. Due to gender stereotypes among participants in mediation, clients' satisfaction with mediated outcomes may vary depending on the gender of a mediator.[65] However, as far as successful resolution through mediation and its outcome is concerned, existing literature, though scarce, have indicated no significant difference between male and female mediators. Thus, the current study re-examined this gender hypothesis of mediators at different district legal aid offices of Bangladesh to confirm the indifference.

As revealed from the study, while the authors interviewed the judicial officers, they observed that sometimes it is not unusual to sympathize with one party's sensitive story. Still, the very norm and vital requirement of a mediation process are

[65] Bollen and Euwema (n 45).

to keep away from any sort of bias. The meditators' utmost priority is to assist the parties in reaching an amicable and fair agreement. The quantitative analysis further supports the qualitative analysis made by the authors. It shows that even where the male applicants are less in number, the number of male beneficiaries outweighs the number of female beneficiaries. This substantiates that the mediators' gender, in essence, does not have any impact on the mediated outcome. However, what affects the outcome of mediation is the lack of a mediator's skills and techniques. Undeniably, the skills and techniques of a mediator are the essential factors of a successful mediation. With the rising practice of mediation in the courts of Bangladesh, justice seekers, regardless of mediators' gender, would reap the benefits of this alternative way to access justice when a mediator gains the parties' trust with their efficiency and skills.

© *Dhaka University Law Journal, 2021, 32(2), 87-102*
doi: https://doi.org/10.3329/dulj.v32i2.57959

An Empirical Study on Unethical Legal Practices in Bangladesh and Suggested Remedial Measures

Dr. Abdullah Al Faruque*

1. Introduction[1]

Legal ethics play an important role in regulating legal practice and the legal profession in every country. Legal ethics deal with the ethical behavior of lawyers, roles and responsibilities of lawyers in society.[2] Lawyers are an integral part of the justice delivery system, entrusted with upholding the law and justice and promoting the rule of law. Legal ethics are a matter of public as well as a professional concern. Lawyers play a central role in the structure of legal, economic, and political institutions of any country. However, lawyers often face conflicts between their professional obligations and personal interests, which is described as ethical dilemma. A central challenge of legal practice is how to live a life of integrity in the tension between these competing demands.[3] Legal ethics refer to the core values that should guide the lawyer in fulfilling his professional responsibilities. It is often said that lawyers are independent, self-regulated and self-employed. This independence of the legal profession places unique social responsibility for lawyers. Ethical lawyering requires a comprehensive understanding of the role of lawyers and of law in society. The principles of legal ethics cover duty to society generally, to clients, to other members of the legal profession and the duty to the courts. The professional virtues of lawyers include competence, independence, loyalty, and maintaining

---

* Professor, Department of Law, University of Chittagong, LL.B.(Hons.), LL.M., University of Dhaka, PhD, University of Dundee, UK. This article is excerpted from the report submitted to the Research and Publication Cell of the University of Chittagong. The author acknowledges the financial grant given by the Research and Publication Cell of the University of Chittagong to conduct this study.

[1] (The author is grateful to the following persons for their valuable feedback and opinion for writing this article - Justice Nizamul Haque Nasim, Barrister Sara Hossain, Dr. Naim Ahmed, Advocate Tanim Hussain Shawon (Bar at Law), Advocate Reduanul Karim, (Bar at Law), Hussain Md. Fazlul Bari, Additional District Judge, Advocate Ziaul Haque, Nargis Islam, Joint District Judge, Uzma Shukrana Chowdhury, Senior Assistant Judge, Hossain Mohammad Reza, Senior Assistant Judge, Dhaka, Advocate Badrul Huda Mamun, Shushmita Ahmed, Judicial Magistrate, Alamgir Farukey, Additional Chief Judicial Magistrate. Their opinion had been taken through questionnaire survey during the period of January to June 2019.)

[2] Richard O' Dair, *Legal Ethics: Text and Materials*, (Butterworths, 2001) 5.

[3] Deborah L. Rhode (ed), *Ethics in Practice* (Oxford University Press 2000) 3.

confidentiality. The MacCrate Report identified the fundamental professional values as are: providing competent representation- the responsibility to clients; - striving to justice, fairness and morality- the public responsibility to the justice system; maintaining and striving to improve the profession- responsibility to the legal profession; and professional self-development- the responsibility to oneself.[4] Actually the contour of legal ethics is too wide to delimit and delineate its definite boundary. But in all events, it refers to minimum standards that a lawyer should at all events comply with.

The legal profession in Bangladesh has been undergoing a crisis of trust and public confidence. Widespread distrust of people on the justice delivery system in Bangladesh is a reflection of such a crisis. Lawyers serve not only in a private capacity to represent their clients, but also they occupy important positions in government offices and in the private sector. But many unethical practices of lawyers are observed today which can be attributed to such distrust and lack of public confidence towards lawyers. In Bangladesh, the general shift to practice in large law firms, increasing specialization in legal practice, more legal practice activities in-house rather than in court room pose new challenges for observing legal ethics. In many cases, unethical practices of lawyers go unnoticed and are not sanctioned effectively. A critical assessment of the code of conduct and existing mechanisms for the accountability of lawyers is essential for an in-depth understanding of the current regulation of the legal profession in Bangladesh. An accessible, transparent judicial complaint process and remedial and punitive sanctions for violation of code of conduct is required for ensuring lawyers' accountability.

Ethical lawyering encompasses a common understanding of expected and permissible behavior in the performance of the lawyer's office. Lawyers are also officers of the court. Lawyers' responsibilities are designed to protect not only the client, but also the profession, the public and the judicial system. In a common law system, the contesting advocates "use their skill to test the evidence, and to control the way the evidence emerges"[5] and by doing so assist the court to seek out the truth as best as it can. But the scope of legal ethics is much wider than only regulating an advocate's role in the court.

Professional ethics are frequently formulated in codes of conduct which illustrates the high standards on which reputations for professionalism rest. There are two objectives of such a code of conduct- professional service is provided by only properly qualified or technically expert persons but also by persons whose professional standards merit the high degrees of public trustworthiness which are

---

[4] 'Legal Education and Professional Development-An Educational Continuum', (*Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (A.B.A. Sec. of Legal Educ. & Admission 1992).

[5] Iain Morley, *The Devil's Advocate* (Thomson Sweet & Maxwell 2006) 12.

typically required of professionals. Professional rules serve as a standard of conduct in disciplinary proceedings, as a guide for action in a specific case and as a demonstration of the profession's commitment to integrity and public service. As to the first of these, professional rules express the profession's collective judgement as to the standards expected of its members. The Bangladesh Bar Council Canons of Professional Conduct and Etiquette, 1969 framed in exercise of the power conferred on the Bangladesh Bar Council by Section 48(q) of the Legal Practitioners and Bar Council Act, 1965, contains legal ethics provisions that apply to lawyers' professional conduct in Bangladesh. The Bangladesh Canons of Conduct addresses a wide range of issues, including lawyers' duties to the court, conduct with regard to fellow practitioners and clients, and also the overarching duty to uphold rule of law and to strive for establishing and maintaining independence and integrity of the judiciary. However, there are many unethical practices that emerged in the last few decades which have not been addressed in the Bar Council Canons of Professional Conduct and Etiquette. Thus, the Bar Council Canons are not adequate and comprehensive enough to encompass all aspects of unethical practice which are observed today in Bangladesh. However, observance of legal ethics by lawyers should not be viewed from a narrow legalistic perspective. Lawyers' ethical behavior is inevitably affected by a host of factors including informal norms and shared values of the legal community.

Despite the importance of legal ethics in regulating the conduct of lawyers, no comprehensive research is yet to be undertaken in Bangladesh. In fact, legal ethics is an unexplored area of research in Bangladesh. This article is expected to fill in the gaps of knowledge on legal ethics in Bangladesh.

The article addresses the following research questions:

What are the common unethical practices in the legal profession in Bangladesh? To what extent is the Bangladesh Bar Council Canons of Professional Conduct and Etiquette 1969 adequate to deal with unethical legal practices? How far are the Bangladesh Bar Council Canons of Professional Conduct and Etiquette 1969 complied with? What reforms are needed in the Bangladesh Bar Council Canons of Professional Conduct and Etiquette 1969? To what extent have legal ethics been integrated in the curriculum of law schools of Bangladesh? How far is the mechanism for accountability of lawyers effective?

Accordingly, this article has the following aims and objectives: to identify the unethical practices in legal profession in Bangladesh; to examine the adequacy and relevance of the Bangladesh Bar Council Canons of Professional Conduct and Etiquette 1969 to address the unethical practices of lawyers; to examine the extent of compliance with the Bangladesh Bar Council Canons of Professional Conduct and

Etiquette 1969 by lawyers; to focus on effectiveness of existing mechanisms of accountability of lawyers in Bangladesh; and to suggest reforms for the Bar Council Canons of Professional Conduct and Etiquette in order to meet the changing needs of the legal profession.

2. Core Areas of Legal Ethics

2.1 Duty to be Competent

The duty to be competent is an important element of legal ethics. According to one commentator, "No matter how skillful, a lawyer is not a true professional without a commitment to fundamental values as well: the two aspects of lawyering are inseparable."[6] But what is competence? The word competency lacks any generally accepted meaning. It requires lawyers to use their best endeavours to complete any professional work competently and as soon as reasonably possible, and it becomes apparent that this cannot be done within a reasonable time, to inform the client immediately.[7] According to the American Bar Association (ABA), 'competence' has been phrased in the following way:

"Legal competence is measured by the extent to which an attorney (1) is specifically *knowledgeable* about the fields of law in which he or she practises, (2) performs the techniques of such practice with *skill*, (3) manages such practices *efficiently*, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention, (5) *properly* prepares and carries through the matter undertaken and (6) is intellectually, emotionally and physically *capable*. Legal incompetence is measured by the extent to which an attorney fails to maintain these qualities."[8]

In certain circumstances, competence also requires specialized knowledge. Legal practice in modern times involves more and more specialisation. Should there be a different standard for a specialist? Specialized lawyers should meet higher standards in their area of expertise than other members of the profession as implied by the test being 'the standard of the ordinary skilled man exercising and professing to have that special skill.'[9]

---

[6] Richard A Matasar, 'Skills and Values Education: Debate about the Continuum Continues' (2002-2003) 46(3-4) *New York Law School Law Review* 425.

[7] Gino E. Dal Pont, *Lawyers' Professional Responsibility*, (4th edn, Thomson Reuters 2010) 75.

[8] ABA-ALJ Committee on Continuing Professional Education Model peer review System, 11, Discussion Draft, 1980.

[9] Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (5th edn, LexisNexis Butterworths 2010) 310.

2.2 Duty to Uphold the Law

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights. The lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. Similarly, a lawyer has a duty not to use false evidence. But a lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. The lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. The lawyer in such cases has professional discretion to reveal information in order to prevent such consequences.[10] A lawyer has a duty to obey existing laws and to assist in their enforcement. This duty to uphold the law manifests itself in three ways, namely: not to undermine the law; not to break the law; and to assist a client or an agent to break the law. While a lawyer is entitled to criticise the law, he or she should take particular care to ensure such criticism does not undermine the law itself or public confidence in it.[11]

2.3 Duty of Confidentiality

The duty of confidentiality is an article of faith in the legal profession. Some courts have recognised the duty of confidentiality, and the corresponding obligation of the lawyer not to disclose client communications even to a court, as a fundamental human right.[12] In all legal systems, a lawyer has a right and a duty to maintain in confidence matters that have been learned from a concern a client. The duty governs not only communications directly from the client but also information obtained from others, such as the client's banker or accountant or friends or family members.[13] In common law systems, the lawyer's duty of confidentiality is supported by a corollary known as the lawyer-client privilege.[14] Lawyers perform most of their functions by conveying information about their clients to others, for example, in litigation through pleadings, motions, and evidence. Information about a client is transmitted to other parties in the negotiation. The addressee of information about a client may be a government official in response to an official inquiry.[15]

---

[10] Richard O' Dair, *Legal Ethics: Text and Materials* (Butterworths 2001) 284-85.
[11] Geoff Monahan and David Hipsley, *Essential Professional Conduct: Legal Ethics* (2nd edn, Routledge 2006) 11.
[12] ibid 204.
[13] ibid 205.
[14] ibid 206.
[15] ibid 210.

The primary arguments for confidentiality are three- for the adversary system to operate, citizens must use lawyers to resolve disputes and lawyers must be able to represent the client effectively. Second, lawyers can be effective only if they have all the relevant facts at their disposal. Third, clients will not provide them with information, unless all aspects of the lawyer-client relationship remain secret.[16]

Lawyers should maintain high standards of professionalism in all communications. They should not use insulting, provocative or annoying language or acrimonious or offensive correspondence as this is unbecoming, discourteous and may merit professional sanction. They should avoid discriminatory, harassing or vilifying communications with third parties.[17] It is unethical to threaten the institution of criminal proceedings against a person in default of satisfying a civil liability to the lawyer's client.[18]

3. Areas of the Unethical Legal Practices in Bangladesh

According to the lawyers, judges and legal experts, the following unethical legal practices are found amongst legal practitioners in Bangladesh: taking up cases concealing conflict of interest; bribing judges and other officials in the judiciary; deliberate distortion of facts; taking up cases without appreciating that they do not have necessary expertise on the matter; despite taking fees, lawyers do not work for the clients; taking gratification from the opposing side; assisting or advising clients who are themselves involved in payment of bribe and other unlawful gratifications; using affiliation with the ruling party in order to gain leverage in judicial proceedings; informing clients about having personal relation and access to particular judge(s), and on that basis, guaranteeing a win in a case and obtaining excessive fees; providing incomplete, incorrect and negligent advice; charging higher fees and demanding fees as and when an advocate wishes on various vague grounds; advising and encouraging clients to initiate legal proceedings for the purpose of harassing someone or delaying proceedings; representing clients without proper preparation before courts; knowingly or recklessly misleading courts with wrongful information that may cause miscarriage of justice; pursuing private audiences with judges in the absence of opposite counsel; suggesting bribe to judge or court staff; intimidating and treating witness which discourages witnesses from coming to courts for providing their testimony which may cause miscarriage of justice; disrespect and using disgraceful words or gesture towards opponent counsel; making comments through printing, electronic and social media on sub-judice matters which is likely to impact

[16] O' Dair (n 10) 250.
[17] Dal Pont (n 7) 492.
[18] ibid 493.

proper administration of justice; taking inducements from opposite side for compromising own clients' interest; not communicating with and updating clients about the progress of litigations; while representing Government or prosecution, public prosecutors trying to pursue courts to ensure conviction instead of assisting courts to ensure proper administration of justice; public prosecutors taking inducements from accused and playing a silent role before courts to ensure illegal discharge of the accused who would otherwise be convicted; taking pictures with clients and uploading them on social media, which compromises confidentiality about representation of a particular client; behaving on social, printing and electronic media in a way which is likely to diminish the trust and confidence which the general public places on advocates or the profession; purchasing clients' properties directly or indirectly; using political identity to obtain unreasonable, unlawful and illegal orders and judgments from courts; not paying junior advocates properly; not providing junior advocates with adequate tuition, and supervision; using monetary means to have hearing moved up in the daily cause lists of courts causing other hearings to be replaced; giving assurance of bail in the criminal cases; illogical and irrational demand of fee; disclosure of client's confidential information to other; claiming share of client's property as a fees for legal practice; demanding high fee after obtaining remedy; soliciting professional employment by *Dalal;* advising client for the violation of law; disrespectful attitude towards court; misleading the court, suppressing the fact before the court; discussing any confidential matters of clients of another lawyer in the absence of that lawyer; accepting a case in which the opposite party was his client in the same matter and he knows the confidential matters of the case; misappropriation of money which is due to client; tampering of evidence, showing cost of case more than actual; keeping necessary documents of client relating to case with him without any necessity and extracting money by keeping these documents; intentionally causing delay of proceedings of a case in order to economic gain; not discussing possible remedy or outcome of a case with client; sexual harassment of clients; threat of boycott or boycotting court; engaging junior advocates or trainees by senior lawyers to collect clients from premises of the courts and prisons; submitting petitions without informing the concerned advocates of the opposite parties and implore the judges to hear the petitions in the absence of the opposing counsels; misquoting the contents of documents; rude behavior of lawyers with the witnesses during cross-examinations; reacting badly before the Judges if the decision of the court goes against him; misbehaving with the client; creating fake documents and orders of court; refusing briefs by lawyers on the ground of religious belief, social or financial status, and political consideration of clients; carrying out other profession or business on full time basis and so on.

4. Adequacy and Effectiveness of the Bangladesh Bar Council Canons of Professional Conduct and Etiquette 1969 to Deal with Unethical Practices

The Bangladesh Bar Council Cannons of Professional Conduct and Etiquette was formulated in 1969 to incorporate an ethical code of conduct for the lawyers. But the Bangladesh Bar Council Cannons of Professional Conduct and Etiquette 1969 is not adequate enough as it is not exhaustive to deal with the present situation. It needs to be updated and elaborated in view of the changing circumstances and needs of society. According to experts, although the Bangladesh Bar Council Cannons of Professional Conduct and Etiquette 1969 contains basic principles of legal ethics, it requires the elaboration of those principles. It is not adequate as it does not define clearly and specifically the process of determination of honorarium of lawyers. Lawyers' duty to render free legal assistance to the client and duty to imparting legal knowledge to the trainees also have not been covered by the Bangladesh Bar Council Canons of Professional Conduct and Etiquette 1969.

Lawyers have to observe the ethical conduct prescribed by the Bangladesh Bar Council and the government of Bangladesh under the Bangladesh Bar Council Canons of Professional Conduct and Etiquette 1969. In reality, the provisions are seldom observed and are hardly complied with by many lawyers in their day-to-day professional conduct. In Bangladesh, after enrollment as an advocate, in fact, there is nobody to monitor the lawyers' activities except the Bar Council. The District Bar Associations are not well equipped to monitor the unethical practices of the lawyers.

One reason for non-compliance with the Canons is that most of the lawyers are unaware of the contents of the Canons. However, it is difficult to quantify the level of observance and compliance with the Bar Council Canons in the absence of monitoring of such compliance. Lack of adequate sanctions for breach of the Canons has been cited as another reason for its non-observance.

Observance of the canon of conduct and etiquette also depends on the moral standard of individual lawyers. The centralisation of the Bangladesh Bar Council office in Dhaka has been cited as another reason for the poor observance of the Bar Council Cannons. Since a huge number of lawyers are practicing in the district level, it is very difficult to control the conduct and etiquette by the Bar Council office based in Dhaka. As a result Bar Council cannot monitor compliance with the conduct and etiquette by the lawyers effectively.

5. Reforming of the Bangladesh Bar Council Canons of Professional Conduct and Etiquette, 1969

Although the existing Code of Conduct contains some important principles of legal ethics and addresses core areas of unethical practices, it should be revised in order to

bring simplicity and cohesion, to remove vagueness and obsolete words, and to reconcile overlapping principles in order to address the changing needs of the legal profession. Many provisions of the Bar Council Code of Conduct are outdated and not clear and specific in terms of misconduct. Usages and language in those cannons are more in the nature of literature than legalistic. The existing provisions of the Code of Conduct are wide in scope and have been drafted in a broad manner. Therefore, in theory, there may not be any unethical legal practice that has not been covered by the Bangladesh Bar Council Canons of Professional Conduct and Etiquette 1969, but the provisions are not sufficiently specific to the unethical practices that are prevalent now. Some specific areas of the Code of Conduct which require reforms include:

(a) The title 'the Bangladesh Bar Council Canons of Professional Conduct and Etiquette 1969' is too long and itself should be changed and simplified. It can be changed to 'the Bangladesh Bar Council Code of Professional Conduct' since the expression 'canons' also include etiquette.
(b) Provisions relating to the conflict of interest should be elaborated.
(c) The lawyers' obligations to clients and judges should be spelled out with more clarity.
(d) The mechanism under which lawyers can be made accountable should be updated.
(e) Provisions relating to fixing and charging fees are vague and do not provide specific guidelines and criteria for charging fees by advocates. In order to avoid any uncertainty, these provisions should be reformed to include a prescribed fee schedule for each scope and stage of work for a particular class of advocates and criteria for charging fees by advocates.
(f) There should be a mandatory provision requiring all advocates toprovide an engagement letter setting out the scope of engagement and the fees for each scope and stage of work, to provide money-receipt to the clients in respect of receiving any payment.
(g) There are overlapping provisions regarding the division of fees with any person for legal service is proper and avoiding conflict of interest. For example, Clauses 2, 3 and 4 of Chapter II forbid advocates from accepting instructions conflicting with the interest of existing and former clients. These three provisions may be reconciled and simplified.
(h) The Code of Conduct contains obsolete and back-dated words. For instance, Clause 12 of Chapter II provides in the third paragraph "warm zeal" and "chicanery" which are exceedingly old and are not in use in modern times. Clause 3 of Chapter III provides "or jury" which is not applicable in Bangladesh since Bangladesh's criminal justice system does not have a jury trial. These expressions and words need to be removed.

(i) Clause 6 of Chapter III contains principles regarding publications by an advocate as to pending or anticipated litigation in "newspapers" only. This clause should be reformed to include provisions regarding publications, posting, making comments on other media, for instance: electronic media, social media including Facebook, Twitter etc.

(j) Clause 4 of Chapter IV provides the liberty to an advocate to decline an instruction. This liberty is discretionary. Whilst providing liberty to advocates is logical, this principle would impose an unjustified restriction on the client's choice of an advocate. There is also a risk that in some cases clients would be left without legal representations. In order to mitigate such risk, the liberty provision should be reformed to make it more balanced while mitigating the risk to clients indicated above. In order to mitigate such risk, Clause 4 of Chapter IV should be reformed requiring all advocates to accept any instruction if the advocate possesses appropriate experience and knowledge to provide competent professional service. In other words, an advocate must accept an instruction, if the same falls within his/her usual area of practice and expertise.

(k) The Bar Council Canons also prohibit an advocate to carry on any other profession or business, or to be an active partner in or a salaried official or servant in connection with any such profession or business. This provision appears to be impractical in modern times. Therefore, this clause should be omitted.

(l) The Bar Council Canons should make a mandatory provision requiring all law schools to include professional ethics as a module in their curriculum.

(m) The Bar Council Canons should require all advocates providing to the junior advocates adequate tuition, supervision and sharing their experience with the junior advocates.

(n) Proper provisions and guidelines should be incorporated to the Bar Council Canons for advocates with regard to using social media, making comments on social, electronic and print media on any sub-judice matter. This would reduce the chance of comments being made by influential advocates on social, electronic and print media, which may impact the proper administration of justice.

(o) An advocate may be allowed to do part-time employment apart from his legal practice.

(p) Professional training must be made compulsory and shall be arranged by the local bar association for the newly enrolled lawyers. Clinical legal education programme (CLEP) may be introduced for the newly enrolled lawyers. On the other hand, Bar Vocation Course (BVC) should be introduced as

compulsory programme and a prerequisite for enrollment as advocate. The main purposes of these programmes are developing professional competence, enhance ethical standards and to improve the public image of lawyers. Previously the Bar Council of Bangladesh introduced CLEP for the newly enrolled lawyers and BVC as requirement of entry into the legal profession in order to equip them necessary legal knowledge, skill and ethical value for lawyering. These programmes do not exist now. Both CLEP and BVC should be introduced by the Bar Council for imparting professional training and legal ethics in order to bridge between academic knowledge of law and practical skills required in the profession.

Apart from reforming the Bar Council Canons, the following provisions of the Bangladesh Legal Practitioners and Bar Council Order, 1972 should also be reformed:

(a) Section 32(1) of the 1972 Order should be amended to empower the Bar Council Tribunal to make an order of compensation in favour of a victim of professional and other misconduct of an advocate and to order to the Bar Council to publish its order in Bar Council's website and in at least two national newspapers having wide circulation.
(b) Framing of charges and formats of complaints are not clear and specific. These need to be more specific.
(c) In the Bar Council Order 1972, there is no time frame for the disposal of allegations by the Bar Council. Amendment may be made for compulsory disposal of allegations within the time fixed by the Bar Council.
(d) Usually, clients are not aware of the complaint procedure to the Bar Council. In most of cases, they make a complaint to the concerned District Bar Association and the Bar association solves it mutually. Amendment may be made for sending an annual report by the Bar Association to the Bar Council of the lawyer against whom any allegations have been made. The Bar Council may take steps in case of a repeated allegation against any lawyer. In case of enrolment of such lawyers to the High Court Division and Appellate Division, the reputation of such lawyers may be taken into consideration.
(e) Criteria of determination of punishments for breach of the Bar Council Cannons should be included in the Bar Council Order. Such punishment may vary depending on the gravity of the offences.

6. Integrating Legal Ethics in the Curriculum of Law Schools of Bangladesh

Fundamental goals of legal education include acquiring knowledge, skill and professional value. Law students must learn about problem-solving, legal analysis and reasoning, legal research, factual investigation, oral and written communication, counseling, negotiation, understanding of the procedures of ADR, organizing and managing legal work and recognizing and resolving ethical dilemmas. Law students must be exposed to four central professional values based on:

(a) the responsibility to clients, e.g., providing competent representation;
(b) the public responsibility to the justice system, e.g. striving to promote justice, fairness and morality;
(c) the responsibility to the profession, e.g. maintaining and striving to improve it; and
(d) The personal responsibility, e.g., one's own professional self-development.[19]

But scant attention has been given to the integration of legal ethics in the legal education curriculum of Bangladesh and overemphasis has been put on corporate and private practice. The traditional arguments against the integration legal ethics in the curriculum that ethics cannot be taught; the law is a value-neutral discipline and teaching ethics should be left to the profession- have been discarded now. On the other hand, it is now widely acknowledged that law schools can improve the ethical conduct of the lawyers through teaching legal ethics. The function of legal education is not only to impart legal skills but to impart values. Since the vast majority of law students are likely to be lawyers, therefore, legal ethics should be imparted in law schools.

Teaching legal ethics is concerned with imparting to students a critical understanding of the legal profession, its structures, its roles and responsibilities, the roles and responsibilities of lawyers in their provision of professional services and the individual student's own values and attitudes. It includes an examination of what the legal profession does and ought to do.' It also involves teaching students about the disciplinary rules regulating the legal profession.

But what is the appropriate teaching for imparting legal ethics is often debated. Clinical legal education instead of the traditional teaching method has been promoted as a valuable tool for instilling professional values and ethics of lawyers. Because the traditional method for teaching ethics tends to be abstract and theoretical. On the other hand, clinical legal education is an experimental method and emphasises on learning skills rather than pedagogy. The shared goal of teaching ethics can be achieved when the law schools, the bar and the bench working together to build an educational continuum that would assure all new lawyers the opportunity for comprehensive instruction in lawyering skills and professional values as the key to effective participation in the legal profession. The case method is important modality of teaching ethics as it functions as an instrument for the development of moral imagination. The case method also cultivates perceptual habits and may be used to cultivate a public-spirited approach to law and legal institutions. Case method as a teaching method covers ethical concerns naturally and pervasively throughout the

[19] Robert MacCrate, 'Preparing Lawyers to Participate Effectively in the Legal Profession' (1994) 44(1) *Journal of Legal Education* 89, 90-91.

curricula even when the schools offer little or no specific instruction in legal ethics.[20] Case method can play a crucial role in building capacities for reflective judgment on issues involving professional conduct and regulation.[21]

But law schools of Bangladesh do not put sufficient emphasis on learning lawyers' professional ethical conduct. It is generally assumed that the law graduates would familiarize themselves with the professional standard when they appear for enrollment exams or enter into the legal profession. In fact, most of the law schools do not include legal ethics adequately as a module in their curriculum. Even where some law schools include professional ethics in their curriculum, most of them do not address the issues of legal ethics from a practical perspective as they only contain the Bangladesh Bar Council Canons of Professional Conduct and Etiquette, 1969. Because only studying the Code of Conduct is not sufficient unless the unethical legal practices that take place in everyday professional conduct of advocates are portrayed to the students.

It is vitally important for law students to learn about legal ethics. Otherwise they will lose their respect for the legal profession. It is widely believed that if ethics are integrated in legal education, law students will refrain from unethical practices. In all law schools, case studies of unethical practices (bases on real cases or simulated) should be included in the Syllabus.

Therefore, the law schools of Bangladesh should address the issue of legal ethics in their curriculum and it should be included as a compulsory course so that the students of law learn about the professional conduct and etiquettes from the beginning.

7. Effectiveness of Accountability Mechanisms for Lawyers in Bangladesh

There are mainly two types of sanctions for professional misconduct. Firstly, institutional sanctions: the institutions within which lawyers work may themselves impose sanctions upon misconduct. Misconduct may result in suspension from legal practice. Secondly, liability rules- in case of breach of contractual duty of care to the client, a lawyer may be sued both in contract and tort. In fact, breach of a legal obligation confers on a person affected a right to a remedy against the lawyer.

---

[20] Oliver W. Holmes, 'The Use of Law Schools' in Sheldon M. Novick (ed) *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes* (The Holmes Devise Memorial Edition, University of Chicago Press 1995) 55; See also, Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press 1993) 113.

[21] Deborah L. Rhode, 'Legal Ethics in Legal Education' (2009) 16 *Clinical Law Review* 43.

According to section 5 of the Legal Practitioners (Fees) Act, 1926 of Bangladesh, no legal practitioner who has acted or agreed to act shall, by reason only of being a legal practitioner, be exempt from liability to be sued in respect of any loss or injury due to any negligence in the conduct of his professional duties.[22]

Under the Bangladesh Legal Practitioners and Bar Council 1972 Order and the Bangladesh Legal Practitioners and Bar Council Rules, 1972 there are provisions for making a complaint against an advocate for professional or other misconduct to the Bar Council by any court or advocate or any other person. Under the existing mechanism, a lawyer is accountable in two ways. (a) He is liable under civil and criminal law for his civil wrongs and crimes relating to his profession; (b) his professional body can disbar him and refer him to the police. The complaint is to be made by submitting the Complaint Form along with a fee of taka one thousand to the Bar Council. The Bar Council Tribunal as an organ of the Bangladesh Bar Council investigates and conducts a trial of any allegation of unethical practice against a lawyer. The existing mechanism of accountability may be triggered only when a complaint is made against an advocate who has committed professional misconduct.

The complaint procedure needs to be amended for speedy trial of cases as the procedure is complex and excessively lengthy. There is no sufficient supply of information and procedure on how to file a complaint against a lawyer for misconduct. Even if a complaint is filed, it has be to be first scrutinized by the Executive Committee of Bar Council in its meeting whether the complaint should be dismissed or should be sent to the Tribunal for trial. In many occasions, it appears to be a time-consuming process. The Bar Council should frame guidelines or time frames for dealing with complaints. There is no time limit within which time a complaint is to be dealt with by EC. The Rules should spell out in a more detailed way about the proceedings before the Tribunal.

Usually, a lawyer does not make a complaint against another lawyer. In very exceptional cases, courts are seen making complaints to the Bar Council to take appropriate disciplinary action against an advocate, who according to the concerned court, seems to have committed misconduct. Lack of awareness about the complaint procedure among the litigants is another reason for the under-utilization of these rules. Clients or the general public who become victims of advocates' misconduct cannot complain due to the lack of information about the complaint procedure. Even when the clients know about the complaint procedure, they abstain from making a

[22] Act No. XXI of 1926

complaint to the Bar Council due to the fear of damage to the litigation. Therefore, in order to make the existing mechanism of accountability of advocates in Bangladesh effective, the Code of Conduct should be amended.

8. Adequacy and Effectiveness of Sanctions for Breach of the Bangladesh Bar Council Canons

According to Section 34(4) and Section 32(1) of the 1972 Bangladesh Bar Council Order, on completion of the inquiry, the Tribunal may either dismiss the complaint or, direct that the proceedings be filed; or it may make an order of reprimand, suspension or removal of the concerned lawyer from the legal practice. The rate of disposal of complaints by the Tribunal is very low and lengthy. There is no provision under the1972 Bangladesh Bar Council Order for making an order of compensation against a convicted advocate requiring him to compensate a client who suffered any damage due to the lawyer's professional or other misconduct. Apart from this, the centralization of the Bar Council Tribunal in Dhaka is another reason for the under-utilization of the complaint procedure as many people do not want to lodge complaints due to this geographical barrier.

According to most of the experts, sanctions for breach of the Bangladesh Bar Council Canons of Professional Conduct and Etiquette 1969 by the lawyers in Bangladesh are not adequate and effective. Although, Advocates are sometimes punished for their fraudulent activities, for example, the fabrication of documents, they rarely receive any sanctions for their unacceptable behavior with the judges and the public.

9. Suggestions on Reforming Accountability Mechanism under Bar Council Canons

Given the inadequacy of accountability for the lawyers for non-compliance with the Bar Council Canons, the accountability mechanism (including Chapter IV of the Rules) needs the following reforms:

(a) Each Bar Association will have public display boards stating the contact number for the submission of the complaint before the Bar Council or the local Bar Association.

(b) The Bar Council should respond to complaints within a short time.

(c) All decisions by Tribunals should be publicized in each Bar Association.

(d) Apart from disbarment, lawyers should be financially penalized for unethical practices.

(e) Advocates who use financial means to have hearing moved up in the daily cause lists of courts through the backdoor should be deterred from such practices.

(f) District Bar Associations should be strengthened to take necessary steps regarding the misconduct of the lawyers and they should be empowered with the same procedure of the Bar Council in case of the allegation against a lawyer.

(g) The District Bar Associations should be more active and they should be given more power for ensuring the ethical behaviour of the lawyers.

10. Conclusion

Professional rules of ethics serve as a standard of conduct in disciplinary proceedings, as a guide for action in a specific case and as a demonstration of the profession's commitment to integrity and public service. Maintaining ethics enhances public confidence in the legal profession, enhances the legitimacy of the judicial system and increases the reputation, self-respect and dignity of a lawyer. It is also essential for the accountability of lawyers and the well-functioning of the administration of justice. The above findings of the empirical research clearly suggest that the value of ethics should be deeply ingrained in legal institutions and lawyers in order to deliver justice. Although the Bar Council Canons contains basic principles relating to legal ethics, it requires updating and elaboration of many key issues. The existing enforcement mechanism for ensuring compliance with the Bar Council Canons is not at all satisfactory. The Bar Council Canons need to be amended to address and include new forms of unethical legal practices, to prescribe punishment for unethical practices depending on the gravity of the offences, and to make accountability mechanisms for lawyers' conduct more effective. Sanctions for breach of the Bangladesh Bar Council Canons of Professional Conduct and Etiquette 1969 by the lawyers in Bangladesh should be made more effective.

© *Dhaka University Law Journal, 2021, 32(2), 103-118*
doi: https://doi.org/10.3329/dulj.v32i2.57960

Laws against Sexual Harassment: Analyzing the legal framework of Bangladesh

Taslima Yasmin*

1. Introduction

"Sexual harassment is unwelcome sexual conduct"[1] that can extend from comments on what one is wearing to physical assaults such as rape. It is a category of gender-based violence (GBV) predominantly perpetrated against women throughout the world, especially girls, which prejudices their capacities and contribution in public life, especially in education and in work. Sexual harassment expresses and reinforces inequalities of power.[2] "Inequalities based on race, ethnicity, immigration status, age, disability and sexual orientation, among other factors, also contribute to structuring the hierarchy of power and therefore to the perpetration of sexual harassment and its redress."[3]

As defined in the United Nations Secretary-General's bulletin (2008):

> "Sexual harassment is any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern of behaviour, it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either the victims or the offenders."[4]

In Bangladesh, sexual harassment has become one of the major challenges that women face. With more women working outside the domestic household and

---

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

1 UN Women, *Towards an end to sexual harassment: The urgency and nature of change in the era of #metoo* (November 2018) < https://www.itstopsnow.org/sites/default/files/Towards-an-end-to-sexual-harassment-en.pdf> accessed 7 January, 2022.

2 United Nations, *UN Position Paper on Sexual Harassment Legislation in Bangladesh* (2019).

3 UN Women (n 1).

4 United Nations Secretariat, Secretary-General's Bulletin (11 February 2008) <https://unctad.org/en/Docs/ST_sgb2008d5_en.pdf> accessed 23 December, 2021.

availing educational and work opportunities, sexual harassment has become a subject of greater focus in recent decades. While not a new phenomenon, it is only in recent years that the term is being discussed publicly.[5]

There are few empirical qualitative data and little research on the extent of sexual harassment in Bangladesh.[6] A 2015 survey on Violence against Women conducted by the Bangladesh Bureau of Statistics (BBS) found that more than one-quarter (27.3%) of women had been subjected to sexual abuse by their partners. A UN Women study had shown that "more than three-quarters of female students of tertiary education institutes faced sexual harassment at least once".[7] According to the Human Rights Monitoring report of Ain o Salish Kendra (ASK), from January to December 2021, 128 women experienced sexual harassment.[8] And according to a study by BRAC, 94 per cent of women commuting in public transport in Bangladesh have experienced sexual harassment in verbal, physical and other forms.[9]

2. Legislative Background

In the subcontinent, the term "eve-teasing"[10] had been used more popularly to refer to acts in the nature of sexual harassment. "The phrase 'eve-teasing' seems to have surfaced in the late 1950s when it first appeared in the Times of India, in a report about a 'non-official bill' before parliament that proposed rigorous punishment for those molesting women".[11] The phrase became more popular since then and was

---

[5] Shahnaz Huda, 'Sexual Harassment and Professional Women in Bangladesh' 2(4) Asia-Pacific Journal on Human Rights and the Law, [52], [69].

[6] Dina M Siddiqi, *The Sexual Harassment of Industrial Workers: Strategies for Intervention in the Workplace and Beyond*, (CPD and UNFPA, June 2003) [10] < http://cpd.org.bd/pub_attach/unfpa26.pdf> accessed 23 December, 2021.

[7] Human Development Research Centre, *Situational Analysis of Sexual Harassment at Tertiary Level Educational Institutes in and around Dhaka* ,(2013) <https://www.hdrc-bd.com/situational-analysis-of-sexual-harassment-at-tertiary-level-education-institutes-in-and-around-dhaka-conducted-for-un-women-bangladesh-year-2013/ > accessed 23 December 2021.

[8] Ain O Salish Kendra (ASK), 'Violence Against Women – Sexual Harassment : January-December 2021' <https://www.askbd.org/ask/2022/01/13/violence-against-women-sexual-harassment-jan-dec-2021/ > accessed 20 January 2021.

[9] BRAC, '94% women victims of sexual harassment in public transport', *BRAC* (25 March 2018) <https://www.brac.net/latest-news/item/1142-94-women-victims-of-sexual-harassment-in-public-transport> accessed 23 December, 2021.

[10] The term colloquially refers to a range of practices that feminists in India have sought to rephrase as the sexual harassment of women in public. See Deepti Misri, "Eve-Teasing: South Asia", 40(2) (2017) Journal of South Asian Studies [305].

[11] Taslima Yasmin, International Labour Organisation (ILO), *Overview of laws, policies and practices on gender-based violence and harassment in the world of work in Bangladesh*, (2020) <

frequently seen to be used by government and non-government actors and authorities to address offences in the nature of sexual harassment i.e. those less severe than rape or other forms of severe physical tortures. However, "by 1990s the term eve-teasing came under serious criticism from the rights groups in India as a mechanism of normalizing violence against women"[12]. The legal and policy framework in India was also facing serious criticisms for scanty protection against sexual harassment. "The brutal gang rape of a social worker Bhanwari Devi for protesting a child marriage in her community in a remote village in Jaipur then brought greater focus on sexual harassment of working women not only in India but also in the subcontinent."[13]

Concurrently, sexual harassment of women at workplaces was being emphasized globally, and in 1992, the General Recommendation No.19 was issued by the UN "Committee on the Elimination of Discrimination against Women (CEDAW Committee)"[14]. Through this General Recommendation, the Committee declared sexual harassment as a form of GBV and thereby was considered a form of discrimination for the purpose of Article 1 of CEDAW[15]. Keeping in line with this global focus on sexual harassment as a form of sex discrimination[16] and in the context of the rape of Bhanwawari Devi, a number of women's groups and NGOs filed a petition in the Indian Supreme Court under the collective platform of Vishakha[17] to enforce fundamental rights of working women and to "prevent sexual harassment of working women in all workplaces through judicial process"[18]. Through this historic

---

https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/publication/wcms_757149.pdf> accessed 08 January 2022.

[12] Pratiksha Baxi, "Sexual Harassment" <http://www.india-seminar.com/2001/505/505%20pratiksha%20baxi.htm > accessed 23 December, 2021, quoted in Taslima Yasmin, International Labour Organisation (ILO), *Overview of laws, policies and practices on gender-based violence and harassment in the world of work in Bangladesh*, (2020) <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo dhaka/documents/publication/wcms_757149.pdf> accessed 08 January 2022.

[13] Yasmin (n 11).

[14] Committee on the Elimination of Discrimination against Women <https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx> accessed 08 January 2022.

[15] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, (UNTS vol. 1249, p. 13, 18 December 1979) <https://www.refworld.org/docid/3ae6b3970.html> accessed 16 January 2022.

[16] As opposed to viewing sexual harassment as an 'individual, intentional act of interpersonal violence'; For a detail discussion on conceptualizing sexual harassment as sex discrimination, see Nuara Choudhury, "The Immodest Truth: An Evaluation of the Measures Taken to Combat Sexual Harassment in Bangladesh", (2012) 12 Bangladesh Journal of Law [137]-[170].

[17] *Vishakha and others vs. State of Rajasthan and others* (1997) AIR 1997 SC 3011 <http://www.iimb.ac.in/sites/default/files/u198/VISHAKHA%20GUIDELINES1.pdf> accessed 23 December 2021.

[18] ibid.

judgment, the Supreme Court of India, had recognized sexual harassment at workplaces, to be a violation of human rights.[19] A number of binding Directives were given in the judgment based on the Constitutional guarantees of equality and dignity and on the rights given in CEDAW.[20] The directives made it obligatory for all employers to provide a grievance mechanism to redress sexual harassment at workplaces.

The increased focus in the global context on workplace sexual harassment against women, especially the development in India post the *Vishakha* Guidelines, had also shaped the civil society movements in Bangladesh in favor of similar legal protection for women. The term eve-teasing began to be subjected to growing criticism and the word sexual harassment came to be in use in a wider scale in the rights discourse in Bangladesh.[21] The movement of the rights groups for protection against sexual harassment was gradually building up[22] , and in 2008 BNWLA - a women lawyers' association in Bangladesh,[23] filed a writ petition in the Supreme Court pointing out the lack of adequate laws and policies to prevent sexual harassment both at work and

---

[19] Nishith Desai & Associates "India's Law on the Prevention of Sexual Harassment at Workplace" in *Prevention of Sexual Harassment at the Workplace (POSH) : Legal & HR Considerations* (December, 2020) <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Prevention_of_Sexual_Harassment_at_Workplace.pdf> accessed 23 December 2021.

[20] Government of India Ministry of Women and Child Development, *Handbook on Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013* (November 2015) [4] <https://www.iitk.ac.in/wc/data/Handbook%20on%20Sexual%20Harassment%20of%20Women%20at%20Workplace.pdf> accessed 23 December 2021.

[21] Although it is not documented since when the term sexual harassment gained significance and began to replace 'eve-teasing' (albeit slowly and the term is still in use to refer to street harassment), several references to sexual harassment in the late 1990s and early 2000s can be found with regard to rights and safety issues of the female workers in the industrial sector particularly in the RMG sector. For example, writing for IPS news in 1998, Tabibul Islam noted that' '*sexual harassment* was a common issue in garment factories and women were threatened with dismissal if they speak out'. A reference to workplace sexual harassment was also noted in a seminar titled "Dialogue on Sexual Harassment and Professional Women: Perspectives, Experiences and Responses", which was organized by FOWSIA ("Forum on Women in Security and International Affairs") on August 2003, in Dhaka; see: <http://archive.thedailystar.net/magazine/2003/08/03/human.htm> accessed 06 January 2022.

[22] 'On 7 July, 2008, a platform of 47 right based organizations including the BNWLA, Bangladesh Manila Parishad, Ain O Shalish Kendra, Bangladesh Manila Samity arranged a press conference on the issue and put in sharp focus the acuteness of the problem and highlighted how the sexual harassment was taking place in different organizations and institutions. The Committee at the press conference presented a statistics showing 333 incidents of repressions on women from January to June 2008. The Committee also adopted seven resolutions including framing of guidelines to stop sexual harassment and implementation thereof at all educational institutions and universities' see *Bangladesh National Women Lawyers Association (BNWLA) Vs. Government Of Bangladesh And Others*, 29 BLD (HCD) (2009) [415].

[23] Bangladesh National Women Lawyers Association.

in educational places. The landmark judgment came out in 2009[24] wherein the Supreme Court gave a detailed guideline on sexual harassment, the language of which was very much aligned to what the Indian Supreme Court had laid down in the Vishakha judgment. Later in 2010, another writ petition was filed by BNWLA addressing harassment at public places.[25] In the latter judgment, the Court emphatically condemned using the phrase 'eve-teasing' to refer to acts of sexual harassment.

3. Sexual Harassment as Recognized in the International Normative Framework

In its General Recommendation No.19, the CEDAW Committee declared that GBV is a form of discrimination. The Committee affirmed that "equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace"[26]. The Committee delineated a number of acts or behaviors that could be labeled as sexual harassment and included both "*quid pro quo*" and "hostile working environment" harassment.[27]

The "UN Declaration on Violence Against Women, 1993"[28] also described "sexual harassment and intimidation at work, in educational institutions and elsewhere" as a category of violence against women. The "Beijing Platform for Action"[29] requires governments "to develop programmes and procedures to eliminate sexual harassment and other forms of violence against women in all educational institutions, workplaces and elsewhere".[30]

---

[24] ibid.

[25] *BNWLA vs. Government of Bangladesh And Others* 31 31 BLD (HCD) 2011[3240].

[26] CEDAW, General Recommendation No.19 <https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> accessed 6 January 2022.

[27] 'Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment'.

[28] UN General Assembly, *Declaration on the Elimination of Violence against Women* (Resolution adopted by the General Assembly 48/104 A/RES/48/104) <http://un-documents.net/a48r104.htm> accessed 6 January 2022.

[29] United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women* (27 October, 1995) <https://www.refworld.org/docid/3dde04324.html> accessed 16 January 2022.

[30] ibid.

The 2013 agreed conclusions of the "Commission on the Status of Women on the elimination and prevention of all forms of violence against women and girls"[31] refers to the "need to respond to, prevent and eliminate all forms of discrimination and violence, including sexual harassment at the workplace".[32] The Commission, in its agreed conclusions on "Women's economic empowerment in the changing world of work" adopted in 2017[33], urged governments at all levels "to enact or strengthen and enforce laws and policies to eliminate all forms of violence and harassment against women of all ages in the world of work, in public and private spheres, and provide means of effective redress in cases of non-compliance".[34] The agreed conclusions of the Commission of 2018 again urged the governments to –

> "Pursue, by effective means, programmes and strategies for preventing and eliminating sexual harassment against all women and girls, including harassment in the workplace and in schools, and cyber-bullying and cyber-stalking, including in rural areas, with an emphasis on effective legal, preventive and protective measures for victims of sexual harassment or those who are at risk of sexual harassment"[35]

The ILO under the "Discrimination (Employment and Occupation) Convention of 1958"[36] addresses "discrimination in employment on a number of grounds, including sex, and requires that ILO member States declare and pursue a national policy designed to promote equality of opportunity and treatment with a view to eliminating discrimination".[37] However, the international instrument itself does not refer specifically to sexual harassment.

---

[31] Commission on the Status of Women, *Agreed conclusions on the elimination and prevention of all forms of violence against women and girls* (Report on the fifty-seventh session, March 2013) <http://www.un.org/womenwatch/daw/csw/csw57/CSW57_Agreed_Conclusions_(CSW_report_excerpt).pdf > accessed 07 January 2022.

[32] ibid.

[33] Commission on the Status of Women, *Agreed conclusions on Women's economic empowerment in the changing world of work* (Report on the sixty-first session, March 2017) < https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/CSW/61/CSW-Conclusions-61-WEB.pdf> accessed 07 January, 2022.

[34] ibid.

[35] Commission on the Status of Women, *Agreed conclusions on Challenges and opportunities in achieving gender equality and the empowerment of rural women and girls* (Report on the sixty-second session, March 2018) < https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/CSW/62/CSW-Conclusions-62-EN.PDF> accessed 07 January, 2022.

[36] International Labour Organization, *Discrimination (Employment and Occupation) Convention, 1958* (Convention no. 111) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111 > accessed 07 January, 2022.

[37] ibid.

Furthermore, in 2019 ILO adopted the "Violence and Harassment Convention, 2019 (Convention No. 190)"[38]. The Convention calls on all ILO members to adopt "an inclusive, integrated and gender-responsive approach for the prevention and elimination of violence and harassment", taking a wide definition of "the world of work" applied to all sectors. The Convention speaks of the legal prohibition on violence and harassment and emphasizes that the "ratifying members should establish and strengthen enforcement and monitoring mechanisms, ensure access to remedies and support for victims, and provide for sanctions".[39]

4. Sexual Harassment as Recognized in Bangladesh's National Legal Framework

Having ratified the CEDAW and the other key human rights treaties[40], Bangladesh is committed under international law to provide effective protection against sexual harassment to women. However, the existing legal framework in Bangladesh is relatively weak in ensuring protection against sexual harassment. In none of the laws addressing issues of violence against women the term "sexual harassment" appears. Also, the existing criminal provisions that narrowly address sexual harassment lack the key element of the act being 'unwelcome' or 'offensive' and rather focuses on the 'modesty' of a woman, without clarifying how perhaps 'modesty' can be determined. Relying heavily on a vague criterion like 'modesty', the provisions are clearly endorsing the stereotypical approach influenced by the patriarchal notions of focusing on the character of a woman when she complains of any sexual offence rather than focusing on the crime itself. Also, the provisions require proving intention to outrage the modesty, which in practice becomes almost impossible to prove for the prosecution. Further, due to the long delay in disposal of cases under the regular criminal courts, coupled with a low rate of conviction, offences such as these are hardly reported since they are generally considered to be 'minor' offences, often termed as mere 'eve-teasing'.

---

[38] International Labour Organization, *Violence and Harassment Convention*, 2019 (Convention No. 190) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190> accessed 07 January 2022; Hereinafter referred as C190.

[39] ibid.

[40] UN General Assembly, *Convention on the Rights of the Child* (UNTS vol. 1577, p. 3, 20 November 1989) < https://www.refworld.org/docid/3ae6b38f0.html> accessed 16 January 2022; UN General Assembly, *International Covenant on Civil and Political Rights* (UNTS vol. 999, p. 171, 16 December 1966) < https://www.refworld.org/docid/3ae6b3aa0.html> accessed 16 January 2022; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (UNTS vol. 993, p. 3, 16 December 1966) <https://www.refworld.org/docid/3ae6b36c0.html> accessed 16 January 2022.

Other than the criminal laws, sexual harassment is also not comprehensively addressed in any other laws. Whereas in order to effectively prevent and protect women from sexual harassment it is also crucial that sexual harassment is addressed comprehensively covering other areas of laws such as employment, anti-discrimination and right to compensation, to mention a few.

4.1 Penal Code 1860

In section 354, dealing with the offence of 'sexual assault', the Penal Code provides that "whoever assaults or uses criminal force to any woman, with the knowledge or intention to outrage her modesty, shall be punished with a maximum of two years imprisonment and fine". Section 509 of the Penal Code proscribes acts like "uttering any word, making any sound or gesture, or exhibiting any object, with the intention to insult the modesty of a woman", with a punishment of up to one-year imprisonment.

However, as discussed before, a problematic feature of these provisions is that they are both built on the concept of "outraging or insulting the modesty of a woman" and further, such acts had to be 'intentional'. The concept of "outraging modesty" is vague and leaves an opportunity for victim-blaming on the basis of the stereotypical notions surrounding the 'modesty' of a woman. Thus, "a woman who feels harassed or abused will find no redress under these provisions if the man did not "intend" to make her feel that way."[41] This "intent" requirement creates particular problems in sexual harassment complaints, as such discriminatory behavior often occurs as a result of that behaviour becoming normalized and institutionalized. As a result, it is not always "intentional" in the strict legal sense.[42] Importantly, such a requirement is ignoring the key element of the definition of sexual harassment, *i.e.* 'unwelcomed' – as accepted globally, and as such the provision of sexual harassment in the existing laws are also clearly in contradiction to the international standards.

4.2 "Women and Children Repression Prevention Act of 2000"

Similar to the Penal Code's section 354, the "*Nari O Shishu Nirjaton Daman Ain, 2000"* ("Women and Children Repression Prevention Act of 2000") (WCRPA)[43] makes a provision for sexual assault with a higher degree of punishment.[44] The

[41] Yasmin (n 11).
[42] ibid 153.
[43] WCRPA is a Special Statute to define and punish offences particularly relating to violence against women and children. Special Tribunals have been established under this Act to try the offences.
[44] "Rigorous imprisonment which may extend up to ten years but shall not be less than three years and shall also be liable to additional fine."

WCRPA in section 10 (titled as 'sexual oppression' etc.') provides that "if any person, in furtherance of his sexual desire, touches the sexual organ or other organs of a woman or a child with any of the organs of his body or with any substance, or he outrages the modesty of a woman, he will be said to have committed sexual assault"[45]. However, "despite of a harsher punishment, the provision does not cure the ambiguity of the existing provision on sexual assault, as the offence is still made contingent upon the vague concept of 'outraging modesty' of a woman".[46]

Although apart from sexual assault, other forms of sexual harassment are not addressed in WCRPA; the Act originally contained another sub-section to section 10, *i.e.* section 10(2), penalizing acts of 'sexual harassment' similar to section 509 of the Penal Code.[47] By an amendment in 2003[48], this subsection was omitted - apparently due to lack of clarification regarding the definition of certain terms used in the provision and the consequent risk of 'abuse of law'.[49] However, although this was deleted in 2003, in 2010 in response to an interim order issued by the HCD in *BNWLA vs. Bangladesh ("Writ Petition No. 8769 of 2010")*, the concerned Ministry sent a report to the Court describing the steps taken to include a proposed amendment to the WCRPA, by incorporating a new section '10 Ka' (10a). This proposed section suggested a clause defining "sexual harassment" as a separate offence with a maximum penalty of 7 years' imprisonment and fine.[50] However, till date no such amendment has been made to the WCRPA to include sexual harassment. Moreover, the Court was also critical about such provision of sexual harassment as not being comprehensive enough "to tamp down the prevailing amorphous social-epidemic"[51].

---

[45] The English translation (unofficial) of the section is used in a 2015 Report of the "National Human Rights Commission Bangladesh"; see Lyal S. Sunga and Kawser Ahmed, *A Critical Appraisal of Laws Relating to Sexual Offences in Bangladesh: A Study Commissioned by the National Human Rights Commission Bangladesh* <http://www.idlo.int/publications/critical-appraisal-laws-relating-sexual-offences-bangladesh>accessed 07 January, 2022.

[46] Yasmin (n 11).

[47] Section 10(2) states "If any male, trying to illegally satisfy his sexual urges, abuses the modesty of any woman or makes indecent gesture, his act shall be deemed to be sexual harassment and for such act he shall be punishable with rigorous imprisonment which may extend up to seven years but shall not be less than two years and shall also be liable to additional fine."

[48] Nari O Shishu Nirjaton Daman (Songshodhon) Ain, 2003 (Women and Children Repression Prevention [Amendment] Act, 2003)

[49] "It was proposed that the 'indecent gesture' term should be omitted from the list of acts constituting sexual harassment, as it is used to exploit and harass rivals" - The Daily Star, 16 June 2003; in n4.

[50] Reference to such amendment proposal is found in the judgment of *BNWLA vs. Bangladesh* (2011).

[51] ibid 13.

Another relevant section is section 9A of the WCRPA, which makes it an offence to cause a woman to commit suicide by "outraging her modesty". This section does see the creation of a new offence, however, it is again constrained by the concepts of violating or 'outraging modesty'.

4.3 The Bangladesh Labour Act, 2006

Section 332 of the "Bangladesh Labour Act, 2006" titled as "Conduct towards women" provides that- "Where any woman is employed in any work of any establishment, whatever her rank or status may be, no person of that establishment shall behave with her which may seem to be indecent or unmannerly or which is repugnant to the modesty or honour of that woman." Although no penalty is mentioned in this section for contravening the provision, section 307 of the Act provides that if no other penalty is provided for violating any provision of the Act, for such contravention or failure, the person liable "shall be punished with imprisonment for a term which may extend to 3 months, or with fine which may extend to 25,000 taka, or with both".

This provision again fails to adequately define or address sexual harassment at workplaces. Also there has been hardly any recorded instance of a case being lodged under this section in the Labour Courts.

4.4 Metropolitan Police Ordinances

The Metropolitan Police Ordinances for each of the six units of the Metropolitan Police[52] also include a specific provision similar to section 509 of the Penal Code. All the sexual harassment related sections in all of these six Ordinances are identical in language, other than the area of their operations. For instance, The "*Dhaka Metropolitan Police Ordinance 1976"* in section 76 lays down, "Whoever willfully and indecently exposes his person in any street or public place within sight of, and in such manner, as may be seen by, any woman, whether from within any house or building or not, or willfully presses or obstructs any woman in a street or public place or insults or annoys any woman by using indecent language or making indecent sounds, gestures, or remarks in any street or public place, shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to two thousand takas, or with both."

However, there is hardly any recoded evidence on the application of this provision; neither is there any available empirical study as to how many cases have been dealt with under this provision by the Metropolitan Police.

---

[52] <https://www.police.gov.bd/bn/metropolitan_police > accessed 07 January, 2022.

5. Directives of the High Court Division

In the 2009 and 2011 Guidelines on protection against sexual harassment in educational and workplaces and in public places, the Court categorically referred that "these directives are to be followed till adequate and effective legislation is made in this field." Drawing on the validity of such directives as having the force of 'law', the Court further stated that "These directives are aimed at filling up the legislative vacuum in the nature of law declared by the High Court Division under the mandate and within the meaning of Article 111 of the Constitution"[53].

5.1 The 2009 Guideline

This Guideline was meant for all work and educational sectors, whether public or private, within Bangladesh. The objectives of the Guideline included- **"**(a) to create awareness about sexual harassments; (b) to create awareness about the consequences of sexual offences and (c) to create awareness that sexual harassment is a punishable offence." The Guidelines enforced obligations on the employers and responsible authorities in workplaces and in educational institutions a) "to maintain an effective mechanism to prevent or deter the commission of offences of sexual abuse and harassments, and b) to provide effective measures for the prosecution of the offences of sexual harassments resorting to all available legal and possible institutional steps".

The Guideline then importantly gives a relatively comprehensive definition of what should be constituted as sexual harassment. The definition comprises sexual harassment of both categories- "quid pro quo" and "hostile working environment". The definition thus provides the following:

"Sexual harassment includes-

(a) Unwelcome sexually determined behavior (whether directly or by implication) as physical contact and advances;
(b) Attempts or efforts to establish physical relation having sexual implication by abuse of administrative, authoritative or professional powers;
(c) Sexually coloured verbal representation;
(d) Demand or request for sexual favours;
(e) Showing pornography;
(f) Sexually coloured remark or gesture;
(g) Indecent gesture, teasing through abusive language, stalking, joking having sexual implication.

[53] Yasmin (n 42) 19.

(h) Insult through letters, telephone calls, cell phone calls, SMS, pottering, notice, cartoon, writing on bench, chair, table, notice boards, walls of office, factory, classroom, washroom having sexual implication.

(i) Taking still or video photographs for the purpose of blackmailing and character assassination;

(j) Preventing participation in sports, cultural, organizational and academic activities on the ground of sex and/or for the purpose of sexual harassments;

(k) Making love proposal and exerting pressure or posing threats in case of refusal to love proposal;

(l) Attempt to establish sexual relation by intimidation, deception or false assurance."

The definition further provides, "such conduct mentioned in clauses (a) to (1) can be humiliating and may constitute a health and safety problem at workplaces or educational institutions; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her education or employment in various ways or when it creates a hostile environment at workplaces or educational institutions".

The Guideline lays down provisions "for creating awareness among all persons in the institution about sexual harassment in order to ensure a safe work environment for all". It also specifies several preventive measures against workplace sexual harassment, *e.g.* arranging regular training on gender-equality, publishing booklets, etc.

Importantly, the Guidelines made it obligatory upon all institutions to form Complaint Committees for receiving and investigating complaints of sexual harassment. The Guidelines also gave detail provisions on the formation and other procedures to be followed by the Committee which includes having at least two external members, preferably from "organizations working on gender issues and sexual abuse".

5.2 The 2011 Guideline

The 2011 Guidelines had an added clause of 'stalking' in the definition of 'sexual harassment'. It illustrates that "A male individual stalks a female if the male engages in a course of conduct with the intention of causing sexual harassment or of arousing apprehension of sexual harassment in the female." The definition also gives specific instances of 'stalking'.

The 2011 Guidelines included directives for public authorities to prevent sexual harassment at public places. For instance, it mandated that "every Police Station will have separate cell or team, designated only for the purpose of dealing with

complaints/instances of sexual harassments and such cells/teams under every Police Station will report to the existing District Law and Order Committee[54] of each district through their respective superior Police authorities". The District Law and Order Committee, in turn, is directed, "to organize regular 'Meet the People' sessions to be attended by the press and women and children rights activists and to update them about the incidences of sexual harassment in the concerned district and about the steps taken to punish the perpetrators and to prevent recurrence."

Importantly, the Guidelines required the Government, "to immediately complete its initiative to insert a new section in the WCRPA defining the offence of 'Sexual Harassment' in light of the definition given by the HCD Guidelines". The HCD had also asked the Government to "take immediate steps to enact laws for effective protection of victims and witnesses of sexual harassment cases". Also, the Guideline had required the Government "to take immediate steps to formulate law or amend the existing law for incorporating specific provisions giving evidential value to the audio/video recorded statements of victims or witnesses of sexual harassment".

Although "the 2009 Guideline made it binding for all public and private institutions to implement its directives as law, in practice, most institutions have not complied with the guideline".[55] "Some 54.9 per cent of workers surveyed by Karmojibi Nari (in total 1,002 workers in 113 ready-made garment factories) were not aware of the existence of an anti-harassment committee in their workplace".[56] Moreover, "33 per cent reported their factories did not have any such committee."[57] A report by Fair Wear Foundation (FWF) also reveals "a general lack of understanding of the guideline, among both workers and factory management, or how the guideline affects their rights and responsibilities".[58] According to FWF's "2015 Bangladesh Country Study", "only 50 per cent of audited factories had an anti-harassment committee".[59] Moreover, very few workers were aware of these committees' existence and activities or even knew the committee members. In some cases, committee members themselves were unaware of their committee's activities.[60]

---

[54] The monthly law and order committee meeting of the district administration.

[55] Yasmin (n 11).

[56] Karmojibi Nari, *Monitoring work and working condition of women employed in ready-made garment industries of Bangladesh* (2019) <https://www.karmojibinari.org/wp-content/uploads/2019/02/RMG-FactSheet2019.pdf> accessed 3 December 2021.

[57] ibid.

[58] Fair Wear Foundation, *Bangladesh Country Study 2018* (2018.) <https://api.fairwear.org/wp-content/uploads/2019/03/Fair-Wear-country-study-Bangladesh-2018-new.pdf> accessed 07 January, 2022.

[59] ibid.

[60] Action Aid Bangladesh, *Women's Rights & Gender Equity* (2020).

A 2018 report by Action Aid Bangladesh had shown a serious lack of knowledge about the 2009 Guideline "among senior management and workplace owners in various sectors".[61] A 2017 report by Human Rights Watch also found out "that workers interviewed were not aware of the Guideline, or of any cases of harassers being held accountable".[62]

Not having any mechanism to monitor or enforce the implementation status of the Guidelines is another crucial reason for its weak implementation. "Although relevant ministries were made respondents to the writ petition, after the judgment, they were not proactive in formulating policies or strategies for the guideline's enforcement and monitoring."[63] "The Guidelines did not propose how ministries or government agencies should coordinate to formulate a strategy on its implementation, or which entities should monitor implementation in different sectors or institutions."[64] Also, there is an absence of information on the actual number of organizations or institutions that have constituted complaint committees in compliance with the Guideline.

In May 2019, a number of civil society organizations – including the BNWLA– had again filed a writ petition in the Supreme Court. They sought a directive "instructing the Government to submit a report on whether committees for preventing sexual harassment had been formed in all educational institutions and workplaces nationwide, in line with the 2009 guideline".[65] During the hearing, the Court responded that *"Bangladesh is much ahead than many other countries in empowering women but its negligence in forming the committee to prevent sexual harassment at educational institutions and workplaces is disappointing"*.[66] In their petition, "the rights organizations implored the High Court Division to order the submission of a list of committees formed to prevent harassment through the Registrar General of the Supreme Court".[67] The case is currently pending for further hearings.[68]

---

[61] Taslima Yasmin, *Sexual Harassment at Educational Institutions and Workplaces: A study on the Implementation Status of the 2009 Supreme Court Guideline* (ActionAid Bangladesh, 2018).

[62] Aruna Kashyap, Human Rights Watch, 'Tackling Sexual Harassment in the Garment Industry' (Human Rights Watch, 11 December 2017) < https://www.hrw.org/news/2017/12/11/tackling-sexual-harassment-garment-industry> accessed 07 January, 2022.

[63] Yasmin (n11).

[64] ibid.

[65] Star Online Report, 'Not forming body to prevent sexual harassment disappointing: HC' *The Daily Star* (6 May 2019) < https://www.thedailystar.net/country/news/not-forming-body-prevent-sexual-harassment-disappointing-hc-1739572> accessed 07 January, 2022.

[66] ibid.

[67] ibid.

[68] Yasmin (n 11).

Another challenge in the successful enforcement of the Guideline is the fact that there are still a number of issues in the Guidelines that remain unanswered. For example, it does not provide any indication as to the provision for a quorum, termination of membership or the process for collecting evidence or hearing witnesses. Moreover, the Guideline lacks a comprehensive definition of the act of 'sexual harassment' itself and instead it only sets out a non-exhaustive list of acts that may fall within the ambit of 'sexual harassment'. In fact, it appeared that when organizations tried to apply the Guideline, they rather "found it confusing and, at times, conflicting with exiting human resource policies".[69]

There is a significant knowledge gap about the existing laws on sexual offences, including sexual harassment. In particular, there is less awareness about the Guideline also among the key stakeholders who are to be implementing it[70], *e.g.* employers, principals and members of governing bodies of schools/colleges, senior administrative personnel of universities, law enforcement agencies. At the advocacy level, there have been some efforts to create awareness about the implementation of the Guidelines. However, the overall advocacy for creating awareness to implement the Guideline has been relatively inadequate as they were mostly done on an individual level without coordination with other organizations and were mostly short-term project-based campaigns.

There had been also an ongoing advocacy on behalf of the civil society groups to enact a separate law for sexual harassment, and very recently, the "National Human Rights Commission of Bangladesh" had also proposed a draft anti-sexual harassment law.[71] However, until now, there has not been any official initiation, by the Government, of a process to legislate a law on the subject.

6 Conclusion

It is essential that a concerted effort be taken by all pertinent stakeholders to raise awareness about the Guidelines and the existing laws that address sexual harassment. Very few organizations, both public and private, have actually adopted a specific sexual harassment prevention policy[72]. Nevertheless, in order that the issue of sexual harassment gets due attention, adopting a specific policy in line with the 2009 HCD

---

[69] ibid; See also, Taslima Yasmin, *Study on the ILO Convention No. 190 and the Legal Framework of Bangladesh on Gender Based Violence and Harassment at the World of Work* (Unpublished research paper based on a study commissioned by CARE Bangladesh) (2020).

[70] Taslima Yasmin, ActionAid Bangladesh, *Sexual Harassment at Educational Institutions and Workplaces: A Study on the Implementation Status of the 2009 Supreme Court Guideline* (2019).

[71] Tribune Report, 'Human rights: Bangladesh still has a long way to go, says Law Minister' *Dhaka Tribune* (December 21, 2021) <https://www.dhakatribune.com/dhaka/2021/12/21/human-rights-bangladesh-still-has-a-long-way-to-go-says-law-minister> accessed 07 January, 2022.

[72] ibid.

guideline (for workplace and education) is crucial. As the 2009 Guideline kept a number of technical issues unanswered, organizations' own internal policies can set out the detailed provisions needed for effectively complying with the Guidelines.

At the same time, it is crucial that pertinent Government authorities take up initiatives to ensure sector-wise monitoring mechanisms to oversee the implementation status of the Guideline. Similarly in educational institutions, there is an absence of effective monitoring, especially in case of schools and colleges, as to the implementation of the HCD Guidelines. The relevant Ministry and other responsible authorities should prioritize designing a thorough action plan to monitor the implementation of the guidelines in educational institutions at all levels.

Most importantly, in the present context of the sexual harassment scenario in Bangladesh, it is essential that the existing sexual offence related laws also incorporate sexual harassment as a distinct offence with a clear outline of what the term comprises. However, only making it punishable is not adequate in preventing sexual harassment. "Law addressing sexual harassment must also include adequate preventive measures, a transparent and effective investigation procedure for complaints and effective provisions of legal redress."[73] In addition to penalizing the offender, the need of compensating the victim for the physical, mental, and financial losses is also essential and has been found in sexual offence related laws in other jurisdictions. "A comprehensive and separate anti-sexual harassment law as such needs to be promulgated to effectively address all these separate components of prevention and protection against sexual harassment."[74] In the absence of such specific legislation, effective enforcement of the HCD directives would remain a challenge.

[73] Yasmin (n 11).
[74] ibid.

© *Dhaka University Law Journal, 2021, 32(2), 119-134*
doi: https://doi.org/10.3329/dulj.v32i2.57961

The Law of Language and the Language of the Law: A Socio-legal Appraisal of Colonial Legal Language in Bangladesh

Arpeeta Shams Mizan*

1. Introduction

Generally, the language of the law, i.e. how the law is written, results from historical events and the nature of the legal system of any country.[1]This article deals with the legal language, and critically probes into the colonial linguistic style of legal language in Bangladesh which has considerable impact on not only the legislations, but also their application, their social implications, and the overall public knowledge of the law. As a result, we the people of Bangladesh get laws that we do not understand easily upon reading. This pushes us away from knowing or even talking about laws except superficially. In this context, I will explore what specific factors led to this poor condition of the legal language so that Bangladesh can move towards making laws 'for the people'. The term 'legal language' connotes the language used for legal writing. There are different kinds (genres) of legal writing: for example, (a) academic legal writing as in law journals, (b) juridical legal writing as in court judgments, and (c) legislative legal writing as in, laws, regulations, contracts, and treaties. [2] In this paper, I use the word legal language very consciously: for purposes of this article, legal language (আইনি ভাষা) is the language used for lawmaking and other legal procedures. It does not mean lawful or permissible language (বৈধ ভাষা) and it is not equivalent to language of the law (আইনের ভাষা) which more often refers to a particular piece of law or legislation.

1.1 Legal Language: What Is It?

The use of language is crucial to any legal system because if the law is written in a language that is incomprehensible or obscure and inaccessible to the people for whom it is made, the law becomes detached from the people. People tend to not know the law, and this ignorance of law breeds an unconscious, indifferent body of citizens.

---

* Assistant Professor, Department of Law, University of Dhaka, and doctoral researcher, University of Bristol Law School (UK).

[1] Maja Stanojević, 'Legal English – Changing Perspective' (2017) 9 (1) *Facta Universitatis* 67.

[2] See, Vijay K.Bhatia, *Analyzing Genre: Language in Professional Settings* (Routledge 1993) 101.

Therefore, lawmakers should use such language which can preserve the characteristic seriousness and formality of a statute and other legal instruments and at the same time ensure that the language used is easy for citizens, as well as members of the bar and the bench to use and apply.

However, as it happens, the legal language in Bangladesh, and in a good number of other countries, is far from easy to understand. Legal language is a language form of its own, and very often difficult for people from non-legal backgrounds to comprehend not because it is too smart for others but simply because specific training is required to understand the sentence structure and complexity of such language. For example, in case of English language, laws written in English follow a very typical emphasis on style, syntax and terminology; it is often heavy with redundant, lengthy, complex, and unusual sentence structure.[3] The plain English movement was initiated by Mellinkoff, who in his 1963 book 'The Language of the Law'[4] argued for promoting plain English writing style for laws. He analysed that, legal English, i.e. English that is used for legal/law-related writing, was characterized by 'pomposity and wordiness'.[5] From there, the necessity of plain English was further propounded by other scholars and researchers. In the late 1970s, psycholinguists Robert and Charrow proved through several experiments how the typical language structure used in laws, documents and many court procedures were difficult for the common people to comprehend.[6] Following their experiments, some laws in the USA were revised to make it more accessible to the public. For example, the old court instruction in California regarding testimony and evidence stated the definition of evidence as:

> Evidence consists of testimony, writings, material objects or other things presented to the senses and offered to prove whether a fact exists or does not exist.

This was not understandable to many. The later revised instruction, the New Instruction no. 202, started differently:

> Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion.[7]

The difference is easily noticeable: whereas the older instruction followed the legal grammar, a rigid structure and complex syntax, the newer instruction took a more conversational narrative and instructive approach. This trend gradually expanded, and

---

[3] Sanford Schane, *Language and the Law* (Continuum 2015) 6.

[4] See generally, David Mellinkoff, *The Language of the Law* (Little, Brown & Co. Boston 1963).

[5] Supra note 1 at 68

[6] Robert Charrow and Veda Charrow, 'Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions' (1979) 79(7) *Columbia Law Review* 1306.

[7] Old California Instruction: BAJI 2.00. BAJI refers to the old Civil instructions of California judiciary, which were later replaced in 2003 by new instruction of Californian Judicial Council <http://www.languageandlaw.org/JURYINST/COMPARE2.HTM accessed 21 October 2020.

by the early 2000s, many English speaking countries revised their drafting policies to make the language of the law simpler.[8] Australia is generally considered to be leading in this regard.[9]

1.2 Legal Language in Bangladesh

Bangladesh, following a ministerial decision, started to simplify the legal language, but this simplification seems to exist more in the mind of the drafters than on paper itself. The problem of legal language in Bangladesh, i.e. the legal Bangla, is twofold: firstly, the continuation of colonial laws, which results in adopting the pattern of colonial terminology, syntax and style in making present day laws, thereby making the language archaic; and secondly, there is noticeable lack of Bangla equivalents of important legal concepts and phrases, so whatever technical terms exist in Bangla, those are very instrumental and difficult for people from non-legal backgrounds as those words are not used in common spoken and written Bangla. The paper will now discuss these two issues.

2. Continuing the Colonial Legal Language

2.1 The Colonial Context

To understand the colonial influence on the Bangladeshi legal system, one must understand its roots and characteristics. Today's laws and legal system are a product of the ancient classical Hindu legal system, the Sultanate and Mughal legal system, the British legal system, and last but not the least, the Pakistani legal system all mixed together.

The colonial agenda of the British East India Company rulers was to transform a private corporate body into a colonial ruling power, with support from the British parliament.[10] The Pre-colonial legal systems of the Indian subcontinent were diverse. The legal system back then was characterized by legal pluralism: the Hindu legal period applied Vedic laws based on the notion of *Dharma*, while the Mughal and the Sultanate period ushered in the Sharia for Muslims and Hindu law for Hindus. Even

---

[8] Emma Wagner and Martin Cutts, 'A Movement to Simplify Legal Language Clarity, (2002) 47 *Clarity Journal* 1 <http://www.clarity-international.net/journals/47.pdf> accessed 28 June 2020.

[9] Hilary Penfold, 'When words aren't enough: Graphics and other innovations in legislative drafting', paper presented at Language and the Law Conference, University of Texas at Austin, 2001 <http://svc026.wic020v.server-web.com/plain/docs/words_arent_enough.pdf> accessed 4 February 2019. Also see generally, Peter M. Tiersma, *Legal language* (University of Chicago 2000).

[10] See generally, Willliam Dalrymple, *The Anarchy: How a Corporation Replaced the Mughal Empire, 1756-1803* (Bloomsbury 2016), also see William Dalrymple, 'The East India Company: The original corporate raiders' *The Guardian* (4 March 2015) <https://www.theguardian.com/world/2015/mar/04/east-india-company-original-corporate-raiders> accessed 28 June 2020.

then, the Hindu law varied greatly from region to region. This diversity was unfamiliar to the British colonisers, who were only accustomed to homogenous Common Law. As such, Sir James Stephens concluded that Indian laws were full of caprice, and that a wholesale transplant of English law was necessary to establish rule of law.[11]Lord Macaulay in his address to the Privy Council had admitted that Indian people had no need for a British legal system, but since allowing the Indians their own government would defeat the colonial purpose, the British would give what the British needed: a legal system to keep Indians under control.[12] For the British, the legislation was used as a rule for 'managing social relations'.[13] The colonial rule not only influenced but also significantly *changed* the nature of laws and legal system of Bangladesh,[14]by introducing the codification system through the Law Commissions (emphasis added). The First law Commission in its reports created a new form of writing, where the language was positivistic, because, the colonial law makers could not easily understand the plurality of laws that existed in India.[15] However, upon the wholesale codification, this style of writing persisted, and while legal English has moved on, the legal drafting style in Bangladesh stayed more or less the same. After the independence of Bangladesh, the most significant change in terms of legal language appears to be the shift from English to Bangla in legislative drafting.

Since 1971, the laws of Bangladesh with the aid of the judiciary have gradually developed its own style, but when it comes to the making and application of law, the influence of the diverse past is still very much intact.

2.2 The Codification Project

Being a former British colony, Bangladesh follows the Common Law System. Common law is a legal system which started in England with the Norman Conquest of 1066. In common law, judicial precedents, i.e., judicial decisions made by individual judges play a significant role. The higher court's decisions become obligatory upon other courts to follow for similar disputes in all future cases.

---

[11] David Skuy, 'The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century' (1998) 32(3) *Modern Asian Studies* 515.

[12] Thomas Babbington Macaulay, 'Speech Delivered in the House of Commons, 10th of July 1833' in *The Project Gutenberg EBook of The Miscellaneous Writings and Speeches of Lord Macaulay*, Vol. 4, 2008 https://www.gutenberg.org/files/2170/2170-h/2170-h.htm#link2H_4_0014 accessed 3 February 2020.

[13] Jon E. Wilson, 'Anxieties of Distance: Codification in early colonial Bengal' in Shruti Kapila (ed.), *An Intellectual History of India* (Cambridge University Press 2010) 15.

[14] The laws of Indian subcontinent were largely custom based before the British introduced the codification of laws. See ibid12-14.

[15] Maurice Eugen Lang, *Codification in the British Empire and America* (Reprint, originally published in 1924, Lawbook Exchange 2005) 78–92.

Interestingly, the British colonial rulers applied the common law to Indians through a civil law manner, i.e. via codification. Codification of laws is alien to the Common Law systems, yet the British believed that uncivilized Indians can only be ruled by clearly laid down written rules.[16] The colonial codification was more of an administrative intervention than a legal intervention. Upon conquering Bengal in 1757, the British faced tremendous difficulties in ruling and dispute settlement due to the diversity of the laws practiced in various regions of the land. Before the British rule, India was subject to long centuries of Hindu and Muslim rule. The Hindu period was deeply influenced by the Vedic religious norms, while the Muslim invasion had introduced the Islamic sharia and values. In more than two centuries this created a syncretic legal system where two streams of law flowed side by side. Both Sanskrit and Farsi were used for laws and treatises. Indeed, in the Sultanate and Mughal courts, there were pundits and legal experts well versed in Sanskrit to commentate and analyze Hindu legal issues along with *Muftis* and *Faqihs* to comment on Sharia interpretations.[17]

In this context, the British after their conquest of Bengal, tried to continue the laws but soon found out it to be challenging for various reasons. The British law makers and executive prior to the *Sepoy Mutiny* in 1857, were basically merchants and employees of the British East India Company who were not trained in law. Therefore, when faced with the diverse legal system that India had, they were confused with the nuances. Thus, they gave the excuse of Benthamian utilitarianism and wanted to unify homogenous laws through codification for making administration of justice and executive activities easier.[18]

Secondly, the British, albeit familiar with Islamic law due to their prior experience in Egypt and Middle East, were total strangers to the Hindu laws. So they audaciously analogized Hindu law with Islamic law.[19] They brought in Sanskrit linguist experts, such as William Jones, and they commented on the Vedas, Smritis and other legal texts. The only problem here was the fact that the Sanskrit they had learnt at Oxford and the Sanskrit in the classical texts, such as the code of Manu, was not the same. Therefore, they translated the legal texts in a decontextualized manner which disregarded the traditional style and then re-translated into English which

---

[16] Elizabeth Kolsky, 'Codification and the Rule of Colonial Difference: Criminal Procedure in British India', (2005) 23 (3) Law and History Review 671.

[17] Sheikh Mohammad Ikram, 'Chapter 16' in Ainslie Embree (ed), *Muslim civilization in India* (Columbia University Press 1964); see also, George Claus Rankin, *Background to Indian Law* (Cambridge University Press 1946) 16.

[18] Wilson (n13) 15-16.

[19] John D. Mayne, *A Treatise on Hindu Law and Usage* (Madras 1888) 14-15.

decreased the value and often changed meaning of the original text.[20] The same thing happened with Islamic law. The South Asian Islam had a deep Persian influence and many social customs were different.[21] But the British failed to appreciate the nuance.

The resulting chaos led the British for administrative and judicial advantage to undertake a codification project: a scheme under which they were to unify all laws under one body. Therefore, in 1860, after a lengthy work process, the first Law Commission came up with the Penal Code which compiled all offences and crimes under one statute. Soon other laws: land, property, evidence, etc. ensued. This is when the language of the law became important.

Since these laws were intended to aid the executive more than the 'savage' citizens,[22] they had some common features: these legislative pieces contained many vague words which were open to a wide variety of interpretations, almost all the laws gave the executive bodies and law enforcement officials overstretched discretion in carrying out their duties (and thereby bending the law), good faith clauses that would protect the executive from accountability, and complicated language are some amongst them.

These common features influenced the legal language quite deeply and over time these became intrinsic part of legislative drafting. The features, with their ensuing effects, are discussed below:

(i) Use of Vague Words and outdated/ underdeveloped legal concepts

Vague language of the law is particularly problematic both in colonial law and modern laws. While the law is promulgated by the legislature, it is applied by the executive. Vagueness in legal provisions leads to discretionary interpretation which overstretches the jurisdiction and original intent of the law. A befitting example is Section 54 of the Code of Criminal Procedure 1898which gives the power to the police to arrest any person on the basis of '**mere suspicion**.' The executive abused this provision for too long until in 2003 the Supreme Court of Bangladesh ruled in *BLAST& Others v. Bangladesh & Others*[23] that certain guidelines must be maintained before arrest is carried out.

Another example of executive dominance is the provisions regarding '**false, frivolous and vexatious' suits**.[24] While apparently it seems to be a safeguard against revengeful or inimical allegations (because the police during the colonial rule were

[20] Bernard S. Cohn, *Colonialism and its Forms of Knowledge* (Princeton University Press 2006) 66.
[21] Kolsky (n 16).
[22] Mayne (n 19) 6.
[23] *BLAST & Others v. Bangladesh & Others*, [2003] 55 DLR (HCD).
[24] Code of Criminal Procedure 1898 (Bangladesh), s 250.

famous for collecting false witness and for harassment)[25], it was more of a safeguard for the British subjects in Indian mofussil towns who considered themselves potential victims to false charges by their Indian counterparts.[26]

Another pertinent example in more recent laws is the now repealed Section 57 of the Information Communication and Technology Act 2006 and replaced by Section 28 of the Digital Security Act 2018, where the word '**religious sentiment'** is a vague word (and it is being given a broad interpretation by the executive). The 2018 Act lays down that the term 'religious sentiment' will be interpreted as defined in the Penal Code 1860, whereas the 1860 Act itself contains no definition or explanation of the word.

This drafting pattern of using vague words is a legacy of our colonial past. Because most of the colonial laws were drafted during the Victorian era, these laws commensurate to the erstwhile Victorian values which were alien to Indian society. While the world has moved on, our laws have not, and applying Victorian values through legal provisions create legal complexities as well as miscarriage of justice. A pertinent example is the use of the term rape. The Bangla equivalent for rape is ধর্ষণ, which is also the আইনের ভাষা. However, because the Victorian morale believed that only women could be raped, till today the Bengali equivalent used for sexual violence to males is বলাৎকার which is not the আইনের ভাষা but frequently used by the legal professionals as আইনি/ বৈধ ভাষা. Such conflicting use of terms for similar offences not only denies effective justice to the non-female victims of rape, but also confuses the general people by giving vague and mixed messages about the nature of offences, creating double standards concerning the gravity of violating personal and bodily integrity etc.

Another similar example is the offence of '**bestiality and unnatural activities**'.[27] Homosexuality was never a recognized crime in the Pre-British Indian territory. But the vagueness of these words (unnatural activities) and subsequent application has had considerable social implications: prosecuting rapes happening to men is a legal challenge[28], created homophobia and transphobia, and has been so deeply entrenched that often the legal system fails to recognize the rights of these groups of people clearly.

---

[25] N. Krishnaswamy Reddy, *Fourth Report of the National Police Commission* (Government of India Press 1980) 7.

[26] Kolsky (n 16) 667.

[27] Penal Code 1860 (Bangladesh), s 377.

[28] Recently, on 14 January 2021, a writ petition has been filed before the Supreme Court seeking to include the word Persons in the Penal Code definition of Rape so that male, transgender and other gender diverse people may seek relief under sec 375 of the Penal Code 1860.

The vagueness has become a legal culture. This may be evidenced by incidents such as when the Executive declared in 2020 that Transgender people shall be entitled to receive share of property under inheritance rights, the declaration remains vague and never clarifies whether that share would be the son's equivalent or daughter's, thereby perpetuating the legal confusions.[29]

Again, in order to accommodate cultural values of the Indians, the legislators inserted various provisions regarding women, which used words which did not have synonymous words or meaning in local language. One such example is '**outraging the modesty of a woman'** and '***pardanashin woman*'**. It is to be noted that there are no definitions of modesty and *pardanashin*, and it was through various court decisions that relevant literature were later developed. As such, these legal writings introduced a new legal language which, in turn, influenced the legal culture and moulded values in this geographical region for years to come. This is a vital factor, because according to a report[30] by World Health Organization (WHO), laws and policies that make violent behaviour an offence send a message to society that it is not acceptable.[31] Thus when laws or official documents contain gender gender discriminatory words as the আইনের ভাষা, it reduces the seriousness of a sexually violent behavior and sustains the patriarchal notions of misogynistic treatment of women as acceptable. In Bangladesh, we can see how cumulative serious offences like sexual harassment are expressed as eve teasing, 'শ্লীলতাহানি' (*shlilotahni*- violating modesty) etc. The problem with such downplaying terminology becoming আইনের ভাষা is that, while on one hand degrades the seriousness of the offence, and normalizes serious offences like rape in a consequent butterfly effect[32], on the other it stereotypes

---

[29] AFP, 'Transgenders to gain inheritance rights in Bangladesh' *Dhaka tribune* (Dhaka, 16 November 2020). This declaration by the honourable Prime Minister in a Cabinet Meeting has been welcomes by all quarters, but also garnered attention because it does not clarify how much share the Trans people would be receiving. There is a long-standing debate in trans-rights movement in Bangladesh where the Transwomen sometimes argue they should get the son's share in property.

[30] World Health Organization. *Violence Prevention the Evidence: Changing Cultural and Social Norms that Support Violence* (WHO 2009) 9 <https://www.who.int/violence_injury_prevention/violence/norms.pdf> accessed 25 January 2019.

[31] Taqbir Huda, '*Sexual harassment and the law: Where's the problem?*' *The Daily Star* 27 June 2019. The problematic wording of this colonial law invites sexist biases and unwarranted discussions about a woman's "modesty" which can end up victimising her rather than offering protection. Deepti Misra, *Eve Teasing*, (2017) 40(2) Journal of South Asia Studies. Also, the Justice Verma Commission report acknowledged how colonial use of terminologies sustained patriarchal notions and recommended repealing the sections of IPC containing the term 'modesty'. See, Justice Verma Report, Report of the Committee on Amendments to Criminal Law (2013) p111.

[32] A term coined by Edward Lorenz, butterfly effect denotes the sensitive dependence on initial conditions in which a small change in one state of a deterministic nonlinear system can result in large differences in a later state. See Geoff Boeing, 'Visual Analysis of Nonlinear Dynamical Systems: Chaos, Fractals, Self-Similarity and the Limits of Prediction' (2016) 4(4) *Systems* 37.

women by cementing sexist notions such as awoman's greatest asset is her 'honor/dignity/modesty' (নারীর সম্মানই তাঁর সবচাইতে বড় সম্পদ). This can be considered to be a crucial factor in creating or sustaining social and cultural norms promoting misogyny and patriarchy.

(ii) The Good Faith Clause

The good faith clause is a concept originally found in contract law.[33] However, most penal laws in Bangladesh have the good faith clause which states that if any officer of the State does something in 'good faith' then it will not be an offence even if it violates the law. Point to be noted is that there is no definition anywhere what good faith means, and over the decades it has come to mean 'absence of intention to break the law, acting in honest belief' etc. This has resulted in the executive and the law enforcement agencies enjoying wide indemnity, non-accountability and encouraged practices like police encounter, extra judicial killings and so on. [34] The good faith defence is now widely used by the state officers to make themselves beyond the authority of law.[35] Therefore, this articles submits that although the constitution guarantees that everyone is equal before the law; the good faith rule in practice translates into government officials relying upon and indeed receiving impunity (not least due to the laxity of legislative language). Indeed, even in 2017, the Fire Department of Bangladesh had claimed the benefit of the good faith clause to avoid a claim of negligence,[36] brought against them through a writ petition, the first of its kind in Bangladeshi legal history that claimed exemplary damages for the tort of negligence.[37]

---

[33] Harold Dubroff, 'The Implied Covenant of Good Faith in Contract Interpretation and Gap-filling: Reviling a Revered Relic' (2006) 80(2) *St. John's Law Review* 559; Paul MacMahon, 'Good faith and fair dealing as an underenforced legal norm' (2015) 99 (6) Minnesota Law Review 2051.

[34] See Human Rights Watch. '*Ignoring Executions and Torture: Impunity for Bangladesh's Security Forces*' (Human Rights Watch 2009) <https://www.hrw.org/report/2009/05/18/ignoring-executions-and-torture/impunity-bangladeshs-security-forces accessed 17 October 2021. The term good faith appears in the draft land law bill, with regard to which Christine Richardson says: as per section 231 of the draft law, action taken by the DC is not challengeable in the civil court and also any action taken in "good faith" by a public servant cannot be challenged in civil or criminal court under section 232. The term "good faith" is a matter of interpretation and has to be decided on a case to case basis. Therefore, any objection as to an action based on good faith needs to be open to interpretation by the courts. See, 'Proposed *Bangladesh Land Act 2020: what legal experts say*" *Daily Star* (Dhaka, 15 September 2020). The impunity arising from good faith clauses has been duly noted by scholars in other (common law) jurisdictions too. See for example Carolyn A. Yagla, 'The Good Faith Exception to the Exclusionary Rule: The Latest Example of "New Federalism" in the States' (1987) 71 (1) *Marquette Law Review* 166.

[35] ACC chief: Mistake done in good faith is not a crime *Dhaka Tribune* (Dhaka, 18 July 2019).

[36] *CCB Foundation V Government of Bangladesh*, (2017) 5 CLR (HCD) para 32.

[37] ibid.

(iii) Overstretching Sentences and over Reliance on the Executive

In the common law system, statutes i.e. written legislations mostly reconfirm the 'common' i.e. unwritten rules,[38] and are mostly found for special subjects whereas most laws are 'common' i.e. not written. That is why, in common law traditions, written statutes tend to focus on precision and particularity, since they do not need law for everything and are not legislation based. These laws have been nicknamed as "fussy law".[39] On the contrary, non-common law countries i.e. civil law countries are legislation based, and therefore their laws are open and general, known as "fuzzy law".[40]

The laws in Bangladesh suffer from the over stretching generalized provisions, which is different from common law tradition. The reason for this discrepancy again is the colonial legacy, since such overstretching openness gave leeway to the executive for discretionary action. This is seen in 19th century laws as much as very recent laws. For example, in the Tobacco Control Act 2005, smoking is prohibited in public places in Bangladesh. The law describes public place as follows:

> "পাবলিক প্লেস" অর্থ শিক্ষা প্রতিষ্ঠান, সরকারি অফিস, আধা-সরকারি অফিস, স্বায়ত্তশাসিত অফিস ও বেসরকারি অফিস, গ্রন্থাগার, লিফট, আচ্ছাদিত কর্মক্ষেত্র (indoor work place), হাসপাতাল ও ক্লিনিক ভবন, আদালত বভন, বিমানবন্দর ভবন, সমুদ্রবন্দর ভবন, নৌ-বন্দর ভবন, রেলওয়ে স্টেশন ভবন, বাস টার্নিমাল ভবন, প্রেক্ষাগৃহ, প্রদর্শনী কেন্দ্র, থিয়েটার হল, বিপণী ভবন, চতুর্দিকে দেয়াল দ্বারা আবদ্ধ রেস্টুরেন্ট, পাবলিক টয়লেট, শিশুপার্ক, মেলা বা পাবলিক পরিবহনে আরোহণের জন্য যাত্রীদের অপেক্ষার জন্য নির্দিষ্ট সারি, জনসাধারণ কর্তৃক সম্মিলিতভাবে ব্যবহার্য অন্য কোন স্থান অথবা সরকার বা স্থানীয় সরকার প্রতিষ্ঠান কর্তৃক, সাধারণ বা বিশেষ আদেশ দ্বারা, সময় সময় ঘোষিত অন্য যেকোন বা সকল স্থান;][41]

---

[38] For example, in *Meister v. Moore*, (1877) 96 U.S. 76, the Michigan apex court ruled that even if a statute may take away a common law right, but there is always a presumption that the legislature has no such intention unless it be plainly expressed.

[39] Lisbeth Campbell, 'Legal Drafting Styles: Fuzzy or Fussy?' (2017) 3(2) *Murdoch University Electronic Journal of Law* <http://classic.austlii.edu.au/au/journals/MurUEJL/1996/17.html> accessed 4 February 2019; see also, David Lidimani, 'Custom in Legislative Drafting: Adopting the FUSSY or FUZZY style?' (2009) 13(1) *Journal of South Pacific Law* <http://www.paclii.org/journals/fJSPL/vol04/13.shtml.

[40] ibid.

[41] The Smoking and Tobacco Products Usage Act 2005, s 2(f). The unofficial English translation is as follows: (Public Place" means educational institution, Government, semi Government and autonomous office, library, lift, hospital and clinic building, Court building, airport building, seaport building, river-port building, railway station building, bus terminal building, ferry, cinema hall, covered exhibition centre, theatre hall, shopping centre, public toilet, Government administered or private children park and any or all other places as may be declared by the Government, by notification in the Official Gazette).

A comparison with the British Health Act 2006 will make it clear:

Smoke-free premises: (1) Premises are smoke-free if they are open to the public. (2) Premises are smoke-free if they are used as a place of work— (a) by more than one person (even if the persons who work there do so at different times, or only intermittently), or (b) where members of the public might attend for the purpose of seeking or receiving goods or services from the person or persons working there (even if members of the public are not always present). They are smoke-free all the time.[42]

The British law gives a precise definition for any ordinary citizen to understand what a smoke free place can be. Of course, as per the common law tradition, when the meaning of the law is contested by different parties, the matter is decided by the courts. But it is to avoid such contests, and to make the law readily comprehensible to non-lawyers that the laws, especially criminal laws, have been simplified in England.[43]

The Bangladeshi statute provides no clear definition for public place, and it opts a style widely found in Bangladeshi laws of referring any future questions and interpretations to government gazette notifications. The text style relies upon the executive to decide and interpret for themselves should the police find people smoking in a place not mentioned in the law as public or not.[44]

Thus, I argue that the language of law, i.e. আইনের ভাষা, takes away the control from the people and put them at the mercy of state mechanism.

3. The Use and Non-use of Bangla in the Laws of Bangladesh

The Bangla Language Implementation Act was promulgated in 1987. This Act was a response is a time ripened demand as well as a historical recognition to the sacrifice by the language martyrs who, in 1952, laid down their lives to achieve the recognition of Bangla as the State language of the then Pakistan.

The reason behind promulgating Bangla as the official language for court procedure was simple and rational: use of English in court activities and legal documents made it difficult for the mass people of Bangladesh to understand the procedure / documents that concerned their rights and interests. However, the Bangla

---

[42] The Health Act 2006 (Bangladesh), s 2.

[43] David Ormerod, 'Simplification of the Criminal Law: Kidnapping and Related Offences' (Law Com No 355).

[44] Arpeeta Shams Mizan, 'Continuing the Colonial Legacy in the Legislative Drafting in Bangladesh: Impact on the Legal Consciousness and the Rule of Law and Human Rights (2017) 5(1) International Journal of Legislative Drafting and Law Reform 20.

that is used as আইনি ভাষা in the documents and law texts are also difficult, because most of the time they are in 'Sadhu' form, again using complex sentence structure. For example, the Copyright Act 2000 defines copyright as:

> "অনুলিপি" অর্থ বর্ণ, চিত্র, শব্দ বা অন্য কোন মাধ্যম ব্যবহার করিয়া লিখিত, শব্দরেকর্ডিং, চলিত, গ্রাফিক চিত্র বা অন্যকোন বস্তুগত প্রকৃতি বা ডিজিটাল সংকেত আকারে পুনরুতপাদন (স্থিরবাচলমান), দ্বিমাত্রিক, ত্রিমাত্রিক বা পরাবাস্তব নির্বিশেষ।[45]

This section uses many technical and rarely used (Bengali) words, which general readers will not understand by plain reading. This feeds into the popular notion that আইনের ভাষা is too complex for people to understand.

It is the right of every citizen to understand what is happening in the court. Article 33 of the Constitution of Bangladesh guarantees the right to be represented in the court of law, which stems from the right to fair trial under Article 10 of Universal Declaration of Human Rights (UDHR) 1948 and Article 14 of the International Covenant on Civil and Political Rights (ICCPR) 1966. Right to fair trial ensues having the free assistance of an interpreter if he cannot understand or speak the language used in court, and being informed…in a language which he understands of the nature and cause of the charge against him. Moreover, ICCPR promises to *protect all individuals from discrimination on the grounds of language*, (with specific reference to court of law) in Article 26.[46] The European Convention on Human Rights 1950 also protects this linguistic right: as per Article 5.2, reasons for arrest and charges have to be communicated in a language understood by the person; and as per art. 6.3, an interpreter for free must be available in a court, if the person cannot speak or comprehend the court language.

The crux of the matter is that the person concerned can effectively participate in the court proceedings,[47] and that they should not be mere spectators of the performance run by the judges and lawyers in front of them. This means that the concerned party can determine for themselves whether or not they are being correctly represented, whether or not the lawyers and judges are correctly appreciating the issues involved, and so on.

---

[45] Copyright Act 2000 (Bangladesh), s 2(1). The unofficial English translation is as follows: (Copy means a reproduction in the form of words, picture, sounds, letters, written form or in the form of sound recordings, cinematograph film, graphic picture or in the material or nonmaterial form, digital code (fixed or moving) or whether in two or three or surrealistic dimensions).

[46] James Brannan (tr), 'ECHR case-law on the right to language assistance in criminal proceedings and the EU response' (2016) (European Legal Interpreters and Translators Association) <https://eulita.eu/wp/wp-content/uploads/files/ECHR%20Language_assistance_case-law_summaries.pdf> accessed January 25, 2019.

[47] ibid; See also, *Özkan v. Turkey*, (2006) ECtHR 12822/02).

The subordinate judiciary in Bangladesh has been for long holding proceedings in Bangla, since 1838, when the Deputy-Governor General of Bengal ordered the substitution of Farsi by Bangla by Act XXIX as the court language in Bengal, Bihar and Odissa. The residents in erstwhile Dacca petitioned against it in favor of Farsi, and later the Sadar Court ruled in favour of using Bangla, Farsi or English as per the convenience of the parties.[48] However, due to the influence of the Mughal legacy on the legal system of Bangladesh, there are in fact many technical words (stemming from Farsi) that are used which are unintelligible to the layman. However, these words have become part of the Bangla court jargons, i.e. আইনি ভাষা, since there are no Bangla equivalents, or the Bangla equivalents are more illegible. To give a few examples:

Gong:	And others
Musabida:	Drafting
Ekuney:	Sum total
Katé :	Division/out of
Shikosti/poyosti:	Alluvion land (land that surfaces from river)/ diluvion (land that is submerged)

On the other hand, there are some other words which have good Bangla synonyms and substitutes, and in the lower judiciary such Bangla words are now being used, albeit seldom:

Sakin:	Address of residence (গ্রাম)
Solenama:	Compromise decree (আপোসনামা)
Mokam:	To/ before the court of (বরাবর/ঘর)
Kaymokami:	Substitution suit (প্রতিস্থাপন মামলা)
Taydad:	Suit valuation (মামলা মূল্য)
Chani mamla:	Miscellaneous case (বিবিধ মামলা)

[48] Christopher R. King, *One Language, Two Scripts: The Hindi Movement in Nineteenth Century North India* (Oxford University Press 1994) 57-58.

Thus, it can be argued that there is ample scope to increase the use of legible Bangla in the subordinate judiciary, which would help the masses to be engaged in court issues in an informed manner.

However, the most noticeable language problem seems to occur at the apex judiciary of Bangladesh, the Supreme Court. The Constitution provides that the State language of the Republic shall be Bangla, which is supplemented by the Bangla Language Promulgation Act 1987 provides that:

> ৩। (১) এই আইন প্রবর্তনের পর বাংলাদেশের সর্বত্র তথা সরকারী অফিস, আদালত, আধা-সরকারী, স্বায়ত্তশাসিত প্রতিষ্ঠান কর্তৃক বিদেশের সাথে যোগাযোগ ব্যতীত অন্যান্য সকল ক্ষেত্রে নথি ও চিঠিপত্র, আইন আদালতের সওয়াল জবাব এবং অন্যান্য আইনানুগত কার্যাবলী অবশ্যই বাংলায় লিখিতে হইবে।[49]

However, the fact remains otherwise. To evaluate the situation, the Law Commission of Bangladesh produced a report in 2011 where it observed how because of legislative lacuna, the 1987 Act cannot be properly implemented: the Legislative organ of the State follows the law and all parliamentary proceedings and legislation are done in Bangla. The lower judiciary also started following it. However, in the case of *Hasmat Ullah vs Azmeri Bibi and others*,[50] the High Court Division ruled that the government did not make any declaration regarding Bangla under Section 137(2) of the Code of Civil Procedure[51] 1908 (CPC), which provides: "The language which, on the commencement of this Code, is the language of any Court subordinate to the High Court Division shall continue to be the language of such subordinate Court until the Government otherwise directs". Since the 1987 Act did not have any non-obstante clause (i.e. a clause which provides that despite whatever is written in any other law, the provisions of the current law shall prevail), sec. 137 of CPC has not been changed by the 1987 Act. Thus, the CPC and the Criminal Procedure Code 1898 (CrPC)[52] are the reasons why Bangla is not widely used in the higher judiciary.

In order to address the situation, a writ petition was filed in 2014 by Eunus Ali Akond, an Advocate of the Supreme Court, seeking directives to implement the 1987 Act. The bench of Justice Quazi Reza-Ul Hoque and Justice ABM Altaf Hossain

---

[49] Unofficial English translation is as follows: (after the promulgation of this Act, except for correspondence with foreign countries, everywhere in Bangladesh, e.g. all government offices, courts, semi-government, autonomous institutions shall for all purposes use Bangla in documents, correspondence, letters, legislation, examination and court proceedings.)

[50] *Hasmat Ullah vs Azmeri Bibi and Others*, (1992) 44 DLR (HCD) para 20.

[51] Code of Civil Procedure 1908 (Bangladesh), s 137(1).

[52] Section 558 of the Code of Criminal Procedure 1898 (Bangladesh) states: The Government may determine what, for the purposes of this Code, shall be deemed to be the language of each Court within the territories administered by it.

ordered the authorities concerned to inform the court without delay on the compliance of the order, and issued a Rule to take measures for implementing and ensuring the use of Bangla language everywhere, including signboards, banners, electronic media advertisements, nameplates, and vehicle number plates, within 15 May 2014.[53]

Despite this encouraging judicial intervention, it is doubtful how much progress can be made. A major obstacle in this regard would be the serious lack of Bangla legal terminology. Due to heavy influence of English and Farsi as the court language in the past, Bangla was rarely used as a medium of legal scholarship. Even in present days not many authentic and authoritative law books are written in Bangla. The result is technical terms, legal maxims, basic concepts etc. do not have any Bangla translation or in some cases, Bangla original words.

It is pertinent to mention here that some scholars have cautioned against forced intervention which may hamper the smooth operation of court proceedings. [54] That would be to greater detriment of the people in comparison to continued use of English for the time being. Eminent scholars and linguists Anisuzzaman and Bhattacharya in different occasions opined that for an effective transitioning, there needs to be more research and publication to develop a rich reservoir of legal resources so that Bangla can be effectively used for legal practice.[55]

This has farfetched impact, covering not only the court going people but others. The law students of Bangladesh are one of the worst victims. The students have to read foreign text books, read the judgments in English, and hone their legal skills in English. This, firstly, fails to prepare them for practice; secondly, this keeps them detached from the ground realities of Bangladeshi courts. Thirdly, this creates a vicious cycle of using English and not developing Bangla legal language, preventing potential scholars from writing and publishing in Bangla for the fear of not being read and of being considered a second-rate scholar. Last but not the least, this sustains the

---

[53] Nahid Ferdousi,'How far the use of 'Bangla' in the Court of Bangladesh? *The Daily Star* (Dhaka, 25 February 2017; see also, 'HC rules on use of Bangla everywhere' *Dhaka Tribune* (Dhaka, 17 February 2014).

[54] Shishir Bhattacharya, বাংলা ভাষার প্রকৃত সমস্যা ও পেশাদারী সমাধান (আদর্শ প্রকাশনী ২০১৬); শিশির ভট্টাচার্য্য, ভাষা কমিশন ও বাংলা প্রচলন আইন কেন অপরিহার্য? (*Bdnews24.com*, 1 march 2018); মিজানুর রহমান খান, 'উচ্চ আদালতে বাংলা ভাষা: প্রয়োজনীয়তা ও সীমাবদ্ধতা' প্রথম আলো (ঢাকা, ১৬ এপ্রিল ২০১৭).

[55] শিশির ভট্টাচার্য্য, 'বাংলা ভাষাকেন্দ্রিক রাজনীতি ও কূটনীতি' প্রথম আলো (ঢাকা, ৮ মার্চ ২০২০); মহিউদ্দিন ফারুক, 'আইন আছে, প্রয়োগ নেই' প্রথম আলো (ঢাকা, ২১ ফেব্রুয়ারি ২০১৪).

colonial mentality of being English oriented,[56] as we can see how people tend to hold foreign trained 'Barristers' in higher esteem than the Bangladesh trained 'Advocates.'[57]

4. Conclusion

Language is expression, language is power. Therefore, the language of the legal instruments which make us free citizens of a country need to be so that we can use them to the best of our abilities, and to the best of their potentials. When language obscures law or when the law is inaccessible to citizens because of language, the citizens become disempowered. The colonial legacy is still shadowing the public life of Bangladesh, as is the universal after effect of colonialism. What nonetheless stands out in Bangladesh is that the linguistic effect of colonialism is not so starkly noticed in many other areas of the world. The linguistic issues affect our rights, access to justice, cultural and legal values, and overall attitude towards public life. The State must appreciate the value of linguistic rights for the citizens, and only then can the law become the power for the people.

---

[56] Mitra Sharafi talks about how barristers as a profession had the colonial attitude of aiding the despotic rulers and were in the initial stage restricted to privileged elite classes in most of the Bristish colonies, not just India. Mitra Sharafi, *A New History of Colonial Lawyering: Likhovski and Legal Identities in the British Empire*, (2007) 32(4) *Law & Social Inquiry*1059-1094.

[57] There are instances where law students and lawyers themselves acknowledge the prejudicial perception prevalent in favor of barristers. See Nabil Ahsan, '*Barrister: To be or not to be!*' *The Daily Star* (Dhaka, 1 March 2016); Chowdhury Tanbir Ahamed Siddique, '*Discriminatory Perception: Advocate Vs Barrister*' *The Daily Observer* (Dhaka, 21 April 2016); Saquib Rahman, '*Barristers' in Bangladesh: Why do they stand out?*' *The Daly Sun* (Dhaka, 26 October 2017).

© *Dhaka University Law Journal, 2021, 32(2), 135-160*
doi: https://doi.org/10.3329/dulj.v32i2.57962

Causes and Redresses of Delays in Disposal of Civil Suits in Dhaka District Judge Court: An Empirical Study

A B M Asrafuzzaman* and Md. Golam Mostofa Hasan**

1. Introduction

The problem of increasing backlogs of civil suits in Bangladesh is a long-identified concern that cripples the civil justice system. With a view toreducing the inordinate delay of disposal of civil litigations, the Code of Civil Procedure 1908 has been amended nine times from 1973 to 2021. However, the situation of case backlogs remains the unchanged-the number of pending cases rather showed an increasing trend in the last decade. There is an age-old proverb, 'justice delayed is justice denied'. There is also a maxim in equity that 'delay defeats equity'. Mr. Warren E Burger, a former Chief justice of the United States, in an address in 1970 nicely noted that '. . . a sense of confidence of the court could be destroyed if people come to believe that inefficiency and delay will drain even a just judgment of its value'.[1]

Delay in the justice delivery system is considered to be a hindrance in ensuring access to justice to common people and also a violation of human rights, thus being a major concern across the globe.[2] Countries thus pledge to ensure equal access to justice for all by 2030 as their national commitment to the Sustainable Development Goals (SDGs).[3] Equal access to justice for all itself is a crucial goal and also critical for attaining other SDGs, i.e., promoting gender equality (SDG 5), reducing inequality (SDG 10), access to safe and clean water (SDG 6), etc.[4] Lack of access to

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

** Assistant Professor, Department of Law, Jagannath University

1. Mobis Philipose, 'Serving justice, Sebi style' <https://www.livemint.com/Opinion/ifnBgiDzAX9sKlJMMO5r1H/Serving-justice-Sebi-style.html> accessed on 5 March 2021.
2. Shah Alam, 'Problems of Delay and Backlog Cases' *The Daily Star* (Dhaka, 25 February 2010) <http://www.thedailystar.net/suppliments/2010/02/ds19/segment3/delay.html> accessed on 29 August 2021.
3. See, Sustainable Development Goals, Goal 16; Target 16.3 <https://sdgs.un.org/goals/goal16> accessed on 29 August 2021.
4. Marcus Manuel and Clare Manuel, 'Achieving Equal Access to Justice for All by 2030' *Lessons from global funds*, Working Paper no 537 (Overseas Development Institute July 2018) 8. <https://cdn.odi.org/media/documents/12307.pdf> accessed 30 August 2021.

justice has also a greater negative impact on the condition of poverty.[5] Timely disposal of legal proceedings is an integral part of providing access to justice.[6]

Despite the fact that practically all developing and developed countries struggle to keep lengthy and delayed judicial processes at bay, the problem elsewhere is not as serious as in south-east Asian countries, notably in Bangladesh.[7] The major concern of all the Law Reform Commissions that have been established until today has been the excessive delay in the delivery of justice, which is a legacy of the British and Pakistan regimes and has continued through the Bangladesh period. They were established primarily to suggest reforms to eliminate such delays in civil and criminal proceedings.[8]

Further, The Law Commission, Bangladesh in its 2010 '*Report on Recommendations for Expediting Civil Proceedings'* commented that 'the problem of delay and backlog in the disposal of civil suits and cases has become alarmingly perennial, resulting in unbearable cost and time, and posing serious threat to access of the people to justice.'[9] The then Chief Justice of Bangladesh, while addressing the national judicial conference in 2016, cautioned that such a huge burden of unsettled cases might bring the judiciary to a standstill, can enhance the cost of justice, may discourage people from coming to court, and they may seek extra-judicial means such as money and muscle for securing suitable solution or remedy of their problems.[10] On 28 April 2019, the then Chief Justice expressed his concerns by stating that the case backlog in Bangladesh has reached a critical state.[11]

Therefore, unusual delay in disposal of civil litigations is the most serious concern at present in the administration of the justice system in all the courts in

---

[5] ibid.

[6] Sekander Zulker Nayeen, 'Access to Justice is a Right for All' *The Daily Star* (Dhaka, 19 March 2019) <https://www.thedailystar.net/law-our-rights/rights-advocacy/news/three-dimensions-access-justice-achieving-sdgs-1716856> accessed 20 September 2019.

[7] ibid, see also, Department of Justice. *A Study on Court Management Techniques for Improving the Efficiency of Subordinate Courts* (Ministry of Law and Justice India 2016) 8.

[8] After the British period, in order to examine the causes of delay of civil cases, the first Law Reform Commission was established in 1958, which was followed by the 1967 Committee headed by a highly reputed Judge Justice Hamoodur Rahman. After liberation of Bangladesh, at first, Law Reforms Committee was established in 1976 and later another Criminal Law Reforms Committee (for criminal laws only) was established in 1982. See, M. Zahir, *Delay in Courts and Court Management* (Bangladesh Institute of Law and International Affairs 1988) 1-6.

[9] 'List of Reports/Bills Forwarded by The Law Commission To The Government' (*Law Commission-Bangladesh*) <http://www.lawcommissionbangladesh.org/reports.htm> accessed 17 August 2020.

[10] Mizanur Rahman Khan, '5m pending cases by 2020' *The Daily Prothom Alo* (English version, Dhaka, 17 Jan 2017) <http://en.prothom-alo.com/bangladesh/news/136201/5m-pending-cases-by-2020> accessed 17 August 2020.

[11] Mizanur Rahman, '3.7 million cases in backlog in Bangladesh courts' *The Dhaka Tribune* (Dhaka 16 July 2020) <https://www.dhakatribune.com/bangladesh/court/2020/07/16/bangladesh-s-courts-collectively-have-36-84-728-case-backlogs> accessed 08 March 2021.

Bangladesh. Dhaka District Judge Court is noexception.Moreover, Dhaka District Judge Court is more crowded and covers more population than anywhere else.

The present research fundamentally aims to conduct an in-depth empirical study in order to identify the causes and barriers of case backlogs and undue delay which are distinct to the Dhaka District Judge Court. The article also attempts to suggest effective and practicable redress mechanisms so that such inordinate delay can be curbed. Furthermore, this research evaluates the practice and efficacy of recent amendments in the Code of Civil Procedure 1908 (hereinafter 'the Code'). The Code, the principal legislation governing the procedure for civil litigation in Bangladesh, has been amended nine times in the years 1973, 1974, 1978, 1983, 1989, 2003, 2006, 2012, and 2016.[12]

However, this study only addresses changes made since 2003 to the procedure for serving summons, adjournments, restoration of suits for non-appearance of parties, determination of a definite period for providing a written statement, beginning of the final hearing, and completion of the trial. The goal of these revisions was to limit the scope of dilatory techniques and to hold judges more accountable by requiring them to implement measures designed to speed up civil proceedings.[13] However, there is no recent study or research evaluating the application of these abovementioned amended provisions in the courts and the extent of their efficacy in reducing the delay of civil suits. The present research attempts to examine the current implications of these amended provisions in the tertiary level of the civil court system, particularly in the Dhaka District Judge Court. This research will be useful in formulating national strategy adopting suitable measures and/or enactment or amendment of laws in order to expedite disposal of civil suits.

1.1 Objectives of the Research

The objectives of the present article are-

(i) To assess the current situation of case backlogs and delays of civil suits in Bangladesh, in general, and in Dhaka District Judge Court, in particular;

(ii) To find out the causes of delay at the various stages of civil litigations that are distinct to the Dhaka District Judge Court;

(iii) To learn how the recently amended provisions of the Code since 2003 has been practiced so far in the Dhaka District Judge Court and to understand their implications on the current practices of the Courts;

(iv) To suggest pragmatic and practicable measures to be taken in order to reduce undue delays and expedite civil proceedings at each stage of a suit in the Dhaka District Judge Court.

---

[12] Mahmudul Islam and Probir Neogi, *The Law of Civil Procedure* (Vol. 1, 2nd edn, Mullick Bothers, Dhaka 2015) 2.

[13] Shah Alam (n 2).

1.2 Methodology and Limitation

This study is primarily doctrinal in nature. The majority of the data was gathered from secondary sources, such as prior study papers, Law Commission reports, journals, books, newspaper stories, and so on. It does, however, integrate with non-doctrinal or empirical approaches to examine and validate evidence obtained from secondary sources. Interviews based on a semi-structured questionnaire using both in-person and via email communication have been conducted in order to gain in-depth familiarity with real court practices and problems. The researchers' observations from time to time court visits, as well as their previous experiences as advocates, have been quite useful in writing this paper. The interviewees were the learned advocates, judges from Dhaka District Judge Court, and academics from both public and private universities based on Dhaka.

There are a few limitations of this research. It's worth noting that the judiciary is a delicate target for investigation. The so-called "mindset of confidentiality" in court processes obstructs the availability of research resources and the discovery of genuine malpractice scenarios, causing significant delays. Getting the experienced lawyers to take time out of their hectic schedules for interviews was likewise a difficult undertaking.

2. Situations of Case Backlogs in Civil Courts in Bangladesh, generally, and in Dhaka District Judge Court, particularly

Delay in the court proceedings is a global problem and the world suffers great economic diminution every year.[14] However, Bangladesh being a developing country faces its effect much more severely, and here even access to justice cannot be ensured for all classes of people due to delay in the court proceedings. Access to formal justice and legal entitlements in the courts for poor and disadvantaged people in Bangladesh is limited by a huge case backlog, delays in the disposal of cases, and high litigation costs.[15]

The number of total pending cases in all courts in Bangladesh as of 31 December 2016 stood at 3,156,878.[16] According to the Case Statistic Report sent to the media by the Supreme Court of Bangladesh, as of December 2019, the case backlog reached a critical state having a total of 36,84,728 cases in all types of courts across Bangladesh.[17] The Statistic Report explains that the Supreme Court of Bangladesh is

---

[14] Syed Emran Hosain, 'Delay in justice : An abysmal crisis' *The Financial Express* (Dhaka, 6 September 2012).

[15] Jamila A. Chowdhury, *ADR Theories and Practices* (2nd edn, London College of Legal Studies (South) 2018); See also, Jamila A. Chowdhury, 'Women's Access to Fair Justice in Bangladesh: Is Family Mediation a Virtue or a Vice?' (PhD thesis, University of Sydney 2010).

[16] Mizanur Rahman Khan (n 10).

[17] Mizanur Rahman Khan (n 11).

holding 5,12,685 case backlogs in total- 4,89,068 under the High Court Division and 23,617 under the Appellate Division, whereas the remaining 31,72,043 case backlogs are under the subordinate courts.[18] If the backlog continues at the present rate, the case-log jam may reach 5 million by 2020.[19] Close to this forecast, as of December 31, 2020, the total case backlogs reach a total of 39,33,186 pending cases with the courts across the country; where 34,64,998 of them with subordinate courts, and 4,52,963 with the High Court Division, and 15,225 with the Appellate Division.[20]

Further, the total pending cases in the all subordinates courts in Bangladesh was 4,75,753 (civil- 4,02,488) and 9,75,760 (civil- 6,46,923) in 2000 and 2010 respectively. The data by ten years indicates the sharp rise of total case backlogs including civil cases in the country.[21] From 2000 to 2010, it increased by 5,00,07 pending cases, whereas in the next ten years from 2011 to 2020, it increased by 24,89,238 pending cases. As a result, the number of pending cases has climbed by a fifth in the last ten years compared to the preceding ten. The truth is indeed troubling, and it foreshadows a more grim future in Bangladesh's legal system.

Almost all of the people responsdents for this study agreed that there is an unusual and excessive delay of years in the final disposition of civil suits. Amongst the respondents about 95% have experienced inordinate delay in the disposal of civil litigations. When we add the 2% who are undecided about the delay in civil litigations to the majority's side, we have 97 percent in support of the delay in disposal. Even more alarming is the fact that 87 percent of respondents believe it takes five years or more for a civil matter to be resolved; roughly 28 percent believe it takes ten years, while the remaining 15% believe it takes 15 years or more..

In February 2014, under the Judicial Strengthening Project (JUST), conducted by the United Nations Development Programme (UNDP) in collaboration with the Supreme Court of Bangladesh (SC), '*A House of Survey Research'*(SURCH) collected raw, case-related statistical data preparative to an analysis of the case flow in Bangladesh's three pilot district or subordinate courts.[22] The SURCH scrutinized

---

[18] ibid.

[19] Mizanur Rahman Khan (n 10).

[20] M Moneruzzaman, 'Bangladesh Shelves 26 Law Commission Proposals on Case Backlog: Govt acts only on power to remove SC Judges' *The Daily New Age* (Dhaka, 13 August 2021) <https://www.newagebd.net/article/146283/bangladesh-shelves-26-law-commission-proposals-on-case-backlog> accessed 1 October 2021.

[21] Asif Nazrul, Tureen Afroz, and Heather Goldsmith, *A Research Report on Evidence Based Analysis of the Trial Courts in Bangladesh* (United Nations Development Program and UK Department for International Development 2011) 9-13; See also, Mubina Yusuf, 'Mediation under the Code of Civil Procedure, 1908: Legal and Institutional Reforms' (PhD thesis, University of Dhaka, 2021); See more, Aminul Islam, 'Effectiveness of Alternative Dispute Resolution on the Recovery of Non-Performing Loans under Artha Rin Adalat: A study on Nationalized Commercial Banks in Bangladesh' (PhD thesis, University of Dhaka, 2019).

[22] United Nations Development Programme (UNDP) and Supreme Court of Bangladesh. *Summary*

randomly selected, closed civil case files from the Dhaka,Kishoreganj, and Rangamati District Judge Courts, which were characteristic of their respective caseloads. The report found that the number of total pending civil cases in Dhaka Judge Court at the end of the year 2011, 2012, and 2013 is 58896, 64840, and 79338 respectively.[23]

Based on a survey in three pilot districts—Dhaka, Kishoreganj, and Rangamati—the Supreme Court of Bangladesh and the United Nations Development Program collaborated to produce a study report in 2015 titled "A Challenge for a Change; Timely Justice for All, Court Processes, Problems, and Solutions".[24] It was found in this report that in almost three-fourths of the fifteen cases analyzed in Dhaka, the time between the date of the filing of the plaint and the date of decision was greater than six years.[25] Even, in 33% of the investigated cases, the time between the date of the filing of the plaint and the date of decision was between eight and more than fifteen years.[26] However, it is estimated that in terms of serving justice timely, no District Court case should take more than two years from the date of the filing of the plaint to the date of entry of judgment.[27]

As data analyzed above indicates, time passes by; reforms are proposed; and, accordingly, laws are amended, but unfortunately enough, the matters in the delay of civil litigations and court practices do not change and litigants suffer as much as they had suffered in the past. The saying that the same litigations are handed down from one generation to the next and likewise has become proverbial.[28]

3. Causes of Inordinate Delay in Dhaka District Judge Court

The current study, in addition to the empirical study and the authors' observations, drew on a number of past influential studies in order to find the actual reasons as they exist in the Dhaka District Judge Court on the ground. To name in particular, 'the 2015 SC-UNDP initiated Justice Strengthening Project titled, 'A challenge for a Change: Timely Justice for All, Court Processes, Problems and Solutions'[29], 'the

---

Report on Court Services Situation Analysis' (Judicial Strengthening Project, Supreme Court of Bangladesh 2013) <http://www.undp.org/content/dam/bangladesh/docs/Projects/JUST/Summary_Report_on%20Court%20Services%20Situation%20Analysis.pdf> accessed 10 February 2021.

[23] ibid 27-30.

[24] Supreme Court of Bangladesh and United Nations Development Programme, *A challenge for a Change: Timely Justice for All: Court Processes, Problems and Solutions'* (Judicial Strengthening Project, Supreme Court of Bangladesh 2015) 75.

[25] ibid.

[26] ibid.

[27] ibid.

[28] M. Zahir, *Delay in Courts and Court Management* (Bangladesh Institute of Law and International Affairs 1988) Preface.

[29] Supreme Court of Bangladesh and United Nations Development Programme (n 24).

1988 research book published by BILIA'[30], 'the 2011 Report by United Nations Development Program and UK Department for International Developmentinitiated 2012 project titled, 'Evidence-Based Analysis of the Trial Courts in Bangladesh',[31] and 'the 2010 Bangladesh Law Commission Report titled, Report on Recommendations for Expediting Civil Proceedings'[32].

The findings of the study, which included both theoretical and empirical research as well as the authors' observations, were identical to those discovered in the aforementioned papers. As part of the empirical study, in order to test several age-old conceptions whether they really matter in causing delay, the respondents were asked to choose among fourteen pre-settled factors as reasons for the delay of civil litigations in the Dhaka District Judge Court. The principal factors that the interviewees identified as causes of delay are given below in a table. The number of interviewees that responded to a particular cause of delay is converted to percentage.

Table 1: The Principal Causes of Delays of Civil Suits in Dhaka District Judge Court

No	Reasons for Delay	Percentage and Counts
	There are less number of Judges and courts in proportion to the number of suits and parties involved	72.7% (40)
	Lawyers mostly are passive and reluctant to expedite the suit due to financial interest, and no significant sanctions are practiced to compel disobedient advocates and ensure their compliance with codes, rules, and procedures	67.3% (37)
	Court staff's malpractices for gaining financial advantage from parties are quite common	67.3% (37)
	There are unethical practices in the service of summons leading to inordinate delays to complete such service	63.6% (35)
	Too many adjournments are being indulgently granted in both pre-trial and trial stages, and too much time elapses between individual hearings, or between the filing and disposition of cases	63.6% (35)
	Complex and lengthy execution proceedings	61.8% (34)
	Lack of modern court records and case management facilities	56.4% (31)

[30] Zahir (n 28).
[31] Nazrul, Afroz and Goldsmith (n 21).
[32] The Law Commission, Bangladesh. *Report on Recommendations for Expediting Civil Proceedings* (Dhaka, 2010) <http://www.lawcommissionbangladesh.org/reports.htm> accessed 25 September 2021.

Complex Procedure for Service of Summons	54.5% (30)
Lack of digital technology	54.5% (30)
Lack of efficiency and integrity of judges	49.1% (27)
Old and un-updated Laws	47.3% (26)
Corruption and delay in copy department in providing certified copies of the judgment	32.7% (18)
Complex Procedure for Payment of Court Fees	21.8% (12)
Congested location and not spacious court premises	21.8% (12)

It is noted that most interviewees think that the less number of judges and courts is the first cause for delay. The authors also emphasize on the fact that the resopondents opine that advocates' passive and reluctant role to expedite proceedings and court staff's malpractices and corruption are the second most important factor in delaying civil proceedings. It is well known that the administration of justice is governed by the judges, lawyers, and court staffs together and they each have an important role to play in resolving civil litigations on time. Neither of them can alone do anything.

However, this fact is often ignored and measures are taken bypassing this reality; for example, laws are amended to expedite civil litigations but they did not work out well due to the negative role of lawyers (67.3%), court staffs (67.3%) and sometimes the judges themselves (49.1%).[33] Moreover, the court staffs directly handle a civil suit in the stages of filing a plaint, issuing and service of summons, filing of written statement, discovery and inspection, settling date for the peremptory hearing, and also in fixing dates for all stages under the supervision of the Judges. The authors' observation and study also learn that often the overburdened judges heavily rely on their court staffs in these stages which leave the court staffs with unfettered powers to deal with the suits according to their wishes for monetary gain that leads to delay of the proceedings. This fact clearly dictates that the judges even if they are adequate in number and sufficiently skilled, alone could not resolve the problem of delay unless supporting staffs and lawyers who normally manipulate the system does not collaborate sincerely and honestly and unless they are made equally responsible for the malpractices they do.[34]

In order to get clear comprehension about the foregoing identified causes of delays of civil suits in Dhaka District Judge Court, they are categorized under three distinct headings: firstly 'causes of delay in stages of civil suits'- delay in stages of

[33] It is further discussed herein in paras 5.1 and 5.2.
[34] Nazrul, Afroz and Goldsmith (n 21) 17.

civil suits are again discussed under three subheadings, namely, delay in the pre-trial stage, trial stage and post-trial stage. Secondly, other associated reasons are given under the heading of 'causes of delay by the persons involving administration of justice' and 'infrastructural problems'.

4. Delay in Various Stages of Civil Suits

Civil litigation goes through multiple stages, and the Code's provisions are rich enough to allow for lengthy processes. The Code's age-old adversarial legal system, which assures procedural fairness at each level, invariably produces some inadvertent delay, and the system's manipulation generates much more unexpected delay. The summons must be served on the defendant when the plaint is filed, but this is not done in a timely manner owing to an unpaid process fee for a lengthy period. The aforementioned issue is only an illustration; each stage in this manner creates possibility for delays in the disposal of lawsuits.

4.1 Delay in Pre-trial Stage

A civil suit is instituted by the presentation of the plaint.[35] Thenthe service of summons, filing of written statement as a reply to the plaint, alternative dispute resolutions, framing of issues, and discovery and inspection constitute the civil pre-trial stage.

(i) Jurisdictional Problems

The pecuniary jurisdiction of the different tier of civil courts is outdated.[36] The limit of the pecuniary jurisdiction results in the concentration of cases in the court of Joint District Judges. Moreover, under the Civil Courts Act, 1887, cases are distributed or assigned to Judges according to the territorial jurisdiction. In that case, many of these courts have a workload that cannot be managed effectively by the Judges and staffs assigned. It means that some jurisdictions may have too much work and others, not enough. The current hierarchy and process of distributing cases to the Judges of Dhaka District Judge Court imposes a significant constraint on their effective utilization

(ii) Delay due to Improper Presentation of Plaint

While the plaintiff relies on documenmts in his possession or power as evidence in support of his claims, Order 7 Rule 14 of the Code requires him to exhibit them in court when the plaint is submitted, as well as provide the documents to be filed with

[35] See, Code of Civil Procedure 1908, s 26 and o 7.

[36] The updated ceiling of pecuniary jurisdiction under the Civil Courts (Amendment) Act 2021 comes into effect at the completion of the present research. The authors decide to keep jurisdictional problem as a cause of delay because of its effect in the past cases.

the plaint. However, it is observed that when the summons is ordered to be served upon the defendant,onlya copy of plaint without copies of documents is served upon him.[37] For this improper presentation, when the defendant appears in response to the summons, he seeks adjournments for filing his written statement on the ground that he has to make the inspection of the documents and other issues relied upon by the plaintiff in his plaint[38] and thus the process makes a civil suit prolonged. This kind of delaymight be avoided if all copies of the relevantdocuments were annexed to the plaint properly and served upon the defendantswith the summons.[39]

(iii) Delay due to Payment Procedure of Court fee

Payment of court fees is a vital part of a civil suit. Insufficient payment of court fee maybe a ground of rejection ofa plaint underOrder 7 rule 11 of the Code. The calculation of court fees is complex and the advocate has to pay court fees to the Bangladesh Bank through purchasing stamps from vendors. It adds extra steps to the filing process and an extra burden on the litigant to turn to yet another desk that is located outside the court premises. Hence, the problem is that there is no central or one-stop payment of court fee and requisites[40] rather payments are made at different places[41] which create complexity in the litigation process. The court fee takes at least 2-3 days to process before it can be used.[42]

(iv) Delay in Service of Summons

An incorrectly presented plaint causes an unintended delay in summons service, but there are also several additional circumstances that purposely create a delay in summons delivery. Delay in issuing summons is one of the crucial problems in the civil litigation system.[43]The present system of service of process or summons is defective. After filing the plaint, it takes at least three to four months to issue summons or process to the defendant or witness after filing a plaint.[44] However, the Code of Civil Procedure (Amendment) Act 2012 has amended the provisions of Order 5 rule 1(1) which prescribes five workings days to issue summons.

An investigation to the Nezarat section by the authors, revels that the amendment has failed to bring desired change to the situation on the ground. Under the present procedural system, the process-server is the most powerful person. Even he can escape his responsibility for his failure to serve summons in time. More often

---

[37] Muhammad Sazzad Hossain, and Mohammad Imam Hossain, Causes of Delay in the Administration of Civil Justice: A Look for Way Out in Bangladesh Perspective' (2012) 6(2) *ASA University Review*.
[38] ibid.
[39] Nazrul, Afroz and Goldsmith (n 21) 15.
[40] Supreme Court of Bangladesh and United Nations Development Programme (n 24) 31-32.
[41] ibid.
[42] ibid.
[43] Supreme Court of Bangladesh and United Nations Development Programme (n 24) 33-34.
[44] Hossain and Hossain (n 37).

summons are returned with an endorsement of 'party not found', 'address not known', and most of such endorsements are fake and not genuine.[45] Moreover, if the defendant is clever enough and is determined to evade service of summons, he can easily do so by greasing the palms of the process server.[46] There is also neither systematic distribution of process between process servers nor any monitoring mechanism of process servers by the Court or *Nezarat* section.[47]

Service by courier was adopted in 2012 with the goal of expediting summons service, however it has been discovered that the method has not yet been implemented in the Dhaka District Judge Court. The post office, which is in charge of delivering the summons to the defendant, was not upgraded. Therefore, delay in service of summons remains the same despite the change of laws.

(v) Delay in Submitting Written Statement

After the amendment of Order 8 rule 1 of the Code, it stands that the defendant must submit his written statement within 30 working days and the court is given the power to provide another 30 working days in case of failure to file it within the first 30 working day period. A written statement on the other hand must be filed within 60 working days; otherwise, the court is empowered to dispose of the suit *ex parte*. Despite of the strict prescription of law, submission of written statement still takes six months to one year.[48] In practice, often the defendant intentionally does not comply with the time-limit provision for filing a written statement. Rather numbers of frivolous applications and time petitions are filed at this stage before filing a written statement, which causes unnecessary delay in the disposal of proceedings.[49] The defendant who has no defence is naturally interested in prolonging the trial with a view to putting off the evil day as long as possible. Advocates help the defendant in such cases to prolong litigation by using dilatory tactics.[50]

4.2 Delay in Trial Stages of Civil Suits

The trial stage begins with the opening of the case by the plaintiff and the defendant and consists of the examination of witnesses, production, and exhibition of pieces of evidence, argument, and judgment.

(i) Delay in Peremptory Hearing/Final Hearing (PH/FH)

This stage faces several time petitions and again these petitions face too many adjournments. One of the reasons for the delay in disposal of suits is that the court

[45] ibid.
[46] ibid,Nazrul, Afroz and Goldsmith (n 21) 14.
[47] Supreme Court of Bangladesh and United Nations Development Programme (n 43).
[48] Supreme Court of Bangladesh and United Nations Development Programme (n 24) 83.
[49] Hossain and Hossain (n 37).
[50] Nazrul, Afroz and Goldsmith (n 21) 38.

usually puts no bar to grant adjournments and often readily grants it either for the courts' advantage or for the convenience of the parties or under the pressure of advocates. The liberal attitude of the court in respect of adjournment is one of the main causes for the inordinate delay as every such adjournment takes months together. For example, at the stage of hearing and recording of deposition of the witnesses, if adjournments are frequent on the pretext of one after another, the litigant who has come to the court with several witnesses on a particular date would fail to get his witnesses recorded of deposition due to unexpected adjournments.[51] This causes unnecessary delay to civil suit along with an unusual financial loss to the litigants.[52]

Moreover, witnesses are neither effectively managed nor efficiently coordinated which kills precious times of courts.[53] As there is a huge case backlog in civil courts too many cases are fixed for a trial in a day. Due to this case burden over the court, no trial can be concluded in a single day or any legitimate period. Examination- in-chief is the most important part of witness examination but, in Bangladesh from a civil practice perspective, it merely repeats the contents of the plaint that wastes the court's time.[54] Although the Code prescribes continuous hearing at the trial stage and bars granting any adjournment in the trial stage[55], it is not followed at all due to witnesses not appearing, overburdening of the court, and so on. Consequently, witness examination consumes 1-2 years of a civil trial.[56]

(ii) Delay in Delivery of Judgement and Drawing of Decree

Order 20 rule 1of the Code prescribes that the court shall, after the case has been heard, pronounce judgment in open court, either at once or on some future day not beyond seven days. And Order 20 rule 5A provides that a decree shall be drawn within seven days from the date of the pronouncement of judgment. However, a study finds that in Dhaka District Judge Court, it takes one month to six months for the court to deliver judgment and draw a decree accordingly.[57] 'The dual layer of the process of judgment and decree is an artificial distinction adding complexity and delay to the process with little or no benefit'.[58] The transfer of judges pending

[51] Muhammad Sazzad Hossain (n 37).
[52] ibid.
[53] Nazrul, Afroz and Goldsmith (n 21) 16.
[54] Supreme Court of Bangladesh and United Nations Development Programme (n 24) 51-53.
[55] o17 r 1(4), the restriction on the number of adjournments the court may grant at different stages is provided by the Code of Civil Procedure (Amendment) Act 2003, s 7. According to this provision, the court may grant six adjournments without cost and three adjournments with cost at the pre-trial stage. At the trial stage, the court may grant three adjournment with cost for ends of justice.
[56] Supreme Court of Bangladesh and United Nations Development Programme (n 24) 83-84.
[57] ibid 84.
[58] ibid 55.

judgement is also one of the grounds for delay.Thefrequent and sudden transfer of judges makes the situation more complex. 'Since the judge who is bound to pronounce the judgment is not the same judge who heard the case in full, it causes further delay in rehearing and preparation time for the judge'.[59]

Moreover, rotation and transfer of judges, meaning that the same judge who heard testimony may not decide the dispute when he/she moves a new jurisdiction, thus seriously impeding the process of continuous trial; the new judge may have to repeat some of the procedural requirements already fulfilled.[60]

(iii) Delay in Execution of Judgement

A judgment is not executed at the instance of pronouncing judgment rather separate execution suit is to be filed under Order 21 rule 10 of the Code. This separate execution suit again consumes time and prolongs the litigation. Sometimes, in the execution stage, to delay the execution intentionally, judgment-debtors take advantage of technicalities and adopt several tactics and tricks.[61] Thus it discredits the judgment and also the decree-holder. Moreover, the state enforcement mechanisms are also inefficient for which a judgment takes even 2/3 years to be executed.[62]

(iv) Delay in Appeal and Revision

According to an unstructured conversation with the interviewees it is found that in most cases the appellate court did not examine the merit of the appeal or revision at its first place during the admission hearing. Consequently, frivolous appeals and revisions are often filed as a dilatory tactic. It causes a huge delay in completing the trial by the trial court when a suit is remanded to it by any appellate court. Most orders of the court are appealable under Order 43 of the Code. Under section 115 of the Code, revision can be filed to the Court of District Judge against an order of the Court of Assistant Judge, Senior Assistant Judge, and Joint District Judge. Revision may be filed to High Court Division against an order of District Judge Court and Additional District Judge Court, and a decree from all subordinate courts. There is also a scope to file a second revision application against the decision of the District Judge that he passes exercising revisional jurisdiction on the ground of error of important question of law under section 115(2).

It is found that, even before the completion of the trial, appeal and revision applications are filed in every suit several times and at least once go to High Court Division and it takes years that the suit comes back to the trial court.[63] Judges are

---

[59] ibid.

[60] Ashutosh Sarkar, 'Backlog of Cases' *The Daily Star*, (Dhaka, 18 March 2013) < https://www.thedailystar.net/news/backlog-of-cases> accessed 10 September 2021.

[61] Hossain and Hossain (n 37).

[62] Supreme Court of Bangladesh and United Nations Development Programme (n 24) 55-57.

[63] Nazrul, Afroz and Goldsmith (n 21) 39.

helpless to do anything about it even they know such appeals and revisions are filed as dilatory tactics.[64]

Another difficulty is getting certified copies of concerned judgments or orders. The copy department of the District Judge Court is responsible for giving certified copies and the authors observed that it is well known in the court premises that it is not possible to get such copies within due time without giving speed money to the concerned court staffs.The requirement of certified copies is a cause for a delay of seven days on average.[65]Furthermore, complex procedures and malpractices of court staffs in sending LowerCourt Record (LCR)substantially hinder the quick flow of the process of appeals, thus, causing inordinate delay in the appeal and revision stage.[66]

(v) Delay in Interim Matters

One of the popular attitudes of people to file a suit is to harass the opponent instead of getting justice in Bangladesh. Therefore, when any plaintiff obtains an interim or *ad interim* relief, he often becomes disinterested in getting the original suit decided on merit and goes on enjoying the fruits of such an order at the cost of another party. Moreover, often parties are naturally interested in delaying the proceeding so that stay or injunction is continued as far as possible because this stay is sufficient enough for him to teach a lesson to the opposite party. Some advocates also consider interim orders as their victory on the case. Thus, in most cases, the long-drawn battle of realizing interim orders from courts is nothing but a waste of money, time, and energy.

5. Delay Made by the Persons involving Administration of Justice

Delays caused by the persons who are instrumental in the administration of justice and more specifically the advocates and parties to the suit can be termed as intentional delays. Bar and the Bench are the two arms of the same machinery and unless they work harmoniously, justice cannot be properly administered. Advocates in many cases play their role in this delay because greater delay ensures more earnings to them.

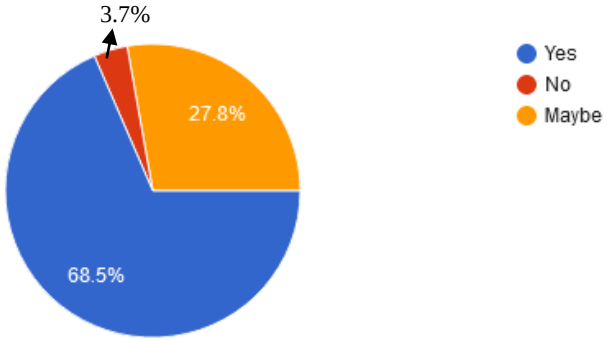
5.1 Advocates' Passive Attitude and Reluctance to Expedite Civil Proceedings for Financial Interest

In response to the question on the role of advocates in delaying civil litigation, 54 interviewees responded. Most interviewees were advocates from the Dhaka District Judge Court. Despite their professional bias, about 68% of the interviewees respond

[64] ibid.
[65] Supreme Court of Bangladesh and United Nations Development Programme (n 24) 56.
[66] ibid.

positively to the question and opine that the advocates do not play an active role in expediting procedures, rather often they are seen to employ dilatory practices. And they do so primarily for financial gain as they charge the clients whether or not the hearing is held. Only about 4% disagree and think that the lawyers do not engage themselves in such roles.

Figure 1: Advocates' Engagement in the Delay of Civil Suits



The financial interest of the advocates is one of the crucial factors to facilitate delay in disposal of suits. Since advocates generally settle their fees proportional to the number of hearings; naturally they tend to stretch a case to as many hearings as are possible by seeking adjournments on a pretext to have fees for per hearing. Moreover, advocates may take advantage of too many procedural applications more often just to delay the suit. For example, in any suit, an application may be filed by the party for (i) calling for particulars and interrogatories; (ii) application for issuing commission for local inspection or recording the deposition of witness; (iii) application for temporary injunction; (iv) application for appointment of a receiver, etc. These applications are of nature to keep a suit pending for a long time and during that time the party in possession of suit property can enjoy the property without any interruption.

5.2 Non-Conducive Relationship between the Bench and the Bar

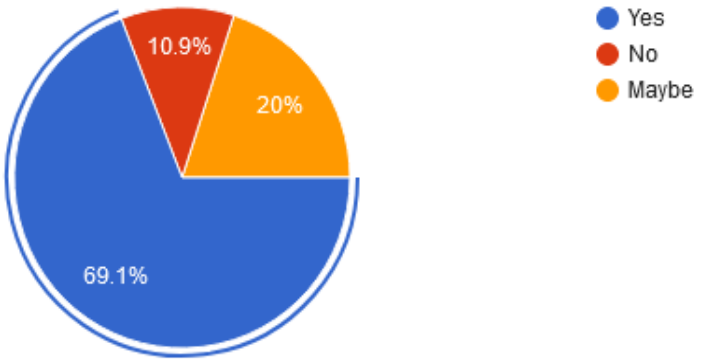
As the authors' observations progress and the interview unfolds, it becomes clear that there are underlying tensions between the Bench and the Bar in the courtroom, which exist or periodically surface. A report observed that

> Some Judges voiced concern over their inability to sanction a section of advocates for their behavior that delays the court process. The problem lies with the advocates and not the litigants. If a judge takes action against an unethical advocate, he finds himself fighting the entire bar. The bar does not care what the advocates do; they just tend to stick together.[67]

[67] Nazrul, Afroz and Goldsmith (n 21) 40-41.

The majority (about 51%) of interviewees admit that such an uneasy relationship of the bench with the bar brings negative impacts on the smoothly functioning of courts. About 35% are unsure whether it directly causes a delay in the proceedings. Only 15% observe that the bar-bench relationship has no bearing upon the court proceedings. In the next question, interviews were asked to comment on whether the positive and comfortable relationship between the bar and the bench expedites the disposal of civil suits. The fact that about 60% of interviewees observe in favour of 'yes' whereas only about 11% observes in favour of 'no' unequivocally exposes 'a circumstantial criteria' for resolving the procrastinated delay in civil proceedings.

Figure 2: Positive relations between bench and bar expedite disposal of suits



The authors put greater emphasis on the issue of building a collaborative relationship between the bar and the bench because it is a precondition- 'a circumstantial criterion', as the authors term it, for resolving the problems of inordinate delay in civil justice. Most time, in any effort of curbing delay in the administration of justice, this crucial circumstantial criterion has been ignored or less emphasized than the reformation of laws and technicalities. The authors argue that without developing a conducive legal culture promoting the collaborative relationship between the bench and the bar, timely justice delivery will be mere paperwork, even the appropriate reformations of laws are in place.

To give an instance from history, the Law Reforms Commission in 1958 suggested quite aseveralamendments in the procedural laws with a view to eliminating delay in the disposal of cases. To give effect to some of the recommendations, the then Government of Pakistan promulgated the Code of Civil Procedure (Amendment) Ordinance 1962 (Ordinance no. XLIV of 1962). Soon after the promulgation, it was found that the amendments in the Code of Civil Procedure were not received with approval by the members of the bar, the members of the bench, and also the litigant public. Resultantly, all the amendments, save a few, were

later withdrawn by the Code of Civil Procedure (Amendment) Act, 1962.[68] And, perhaps, due to ignoring the ground circumstances exited in the bar and the bench who can move the justice delivery, either way, the various law reforms since 1947 have miserably failed to have any marked effect on the rate of disposal of cases, even with the increasing number of judges.[69]

Coming to the ground reality in the court premises of Dhaka District Judge Court and all courts in Bangladesh, the SC-UNDP report 2015 exposes the situation which is not promising at all. It stated that complaints are found that the authority of the judge has been apparently usurped by the bar, evidenced by the numerous granting of requests for adjournments from the parties' advocates in individual cases. However, there are also similar complaints that the adjournments are often due to court congestion because a court could not possibly hear the huge number of cases on its cause-list in one day. In addition, a politically divided Bar also leads to tension inside the courtroom where an advocate'spolitical identity can often dominate as a factor of influence.[70] The authors are of strong opinion that this kind of ill-at-ease relationship among judges and advocatesacts as a major catalyst for the unfortunate failure of the recently-made amendments of the Code to bring real changes in the expedited disposal of civil litigations.

Responses of the present research astonishingly reveal that the crucial amendment of the Code that was made a decade ago, relating to service of summons, a prescribed time limit in filing written statement, application for amendments of pleadings, limiting the number of adjournments, in particular, are not yet strictly followed or often not followed at all. Therefore, unless the Bar and Bench build a collaboration towards each other and avoid dilatory tactics with a vibe of positive mentality to accept any change in the justice system that brings timely justice to litigants, no reformations of laws may help the court deliver timely justice at the door of the suffering litigants. In one word, changes must come from within-in the mind of people who are primarily responsible to do the task.

5.3 Filing of False Cases

It is commonly agreed that filing false and vexatious cases is one of the vital reasons for the delay in dispensing justice in Bangladesh. Both advocates and parties tend to file false cases for the financial interest or to harass the other parties respectively. However, it is impossible to assess the actual number of false cases that are filed but estimates from judges and advocates range from 10%-80%.[71] It has been observed

---

[68] Zahir (n 28) 4-5.
[69] Zahir (n 28) 8; See also,Nazrul, Afroz and Goldsmith (n 21).
[70] Supreme Court of Bangladesh and United Nations Development Programme (n 24) 25.
[71] Nazrul, Afroz and Goldsmith (n 21) 43-44.

that one can file a false case in Bangladesh with "virtual impunity."[72] The Code of Civil Procedure (Amendment) Act 2003 inserts section 35A that prescribes that the court may award compensation up to 20,000 taka to the aggrieved party for false and vexatious cases filed by the other party. However, it is hardly practiced in court. The research reveals that people who bring false cases are not prosecuted either because the process is too complicated, or the aggrieved party is already fed up and no longer wants to go for another cumbersome court proceedings, or it goes against the prevailing culture.[73]

6. Delay due to Infrastructural Impediments

6.1 Inadequate Number of Judges

Most members in the interview (about 73%)speak of an inadequate number of courts and judges in proportion to backlogs of cases as the cause of delay. It makes the lack of courts and judges the most important factor in delaying the disposal of lawsuits. The finding of previous research is that 65% of the lawyers formally interviewed stated that the shortage of the number of judgeswas a major reason for the backlog in cases. It was also commonly complainedby the judges as a problem in the quick disposal of suits.[74] Of course, the number of judges and courts must be increased to a reasonable proportion to the number of suits filed so that the judges do not become overburdened. However, often it is argued in a way that increasing the post of judges is the panacea for all ills that cripple our justice system.

However, the past experiences may suggest otherwise. For example- in the face of the increasing backlog of cases, in 1989, at the initiatives of the Ministry of Law and Justice of the Government of Bangladesh, the Chief Justice of Bangladesh constituted a Committee of Supreme Court Judges to study the reasons for the delay in disposal of cases. The report[75] of the Committee noticed with surprise that the backlog of cases continued to rise despite appointing of a good number of judges in 1984. Another study reveals that the problem of backlog continues to rise even after the appointment of a good number of new judges in 2007, largely because of the failure to address the main causes of delay in disposal of cases.[76]

These contradictions suggest that unless the fully equipped *Ejlash* (court room) is ensured for each judge, the number and quality of support staffs are enhanced, the cooperation and efficiency of lawyers are enhanced, litigants are made aware of their

---

[72] Hossain, Moran and Stapleton, *Joint Assessment of Prospects for Harmonization within the Justice Sector in Bangladesh*, (CIDA, DFID-WB Trust Fund, DANIDA, GTZ, 2007) paras 82-88.

[73] Nazrul, Afroz and Goldsmith (n 21) 43-44.

[74] ibid 59.

[75] The Committee of Supreme Court of Bangladesh, *Report on the Causes of Delay in Disposal of Cases and Recommendations for their Elimination and Better Management of Courts* (Supreme Court of Bangladesh 1989).

[76] Nazrul, Afroz and Goldsmith (n 21) Executive Summary.

rights and duties and above all procedural loopholes are thoroughly addressed, recruitment of more junior judges alone could not ensure disposal of the significantly larger number of cases.[77] This argument is also substantiated by the fact that the judges directly control only a few of various stages of the civil and criminal trial, while the support staff and lawyers could manipulate other processes more easily to delay a case.[78]

6.2 No Centralized Registry Function and other Modern Facilities

There is no central Office of the Registrar in the Dhaka District Judge Court. Advocates and litigants must deal directly with the respective *sherestadar* for each judge, depending upon the territorial or pecuniary jurisdiction of that judge.[79]For this, the number of cases cannot be distributed evenly among judges. Some are overburdened with cases and some have less number of cases. It decreases the institutional maximum capacity of the Dhaka District Judge Court. Besides, the District Judge Court is composed of many individual judges' chambers or offices, each with its *sherestadar, peshkar*, stenographer, pending cases storage, and courtroom. Each judge functions independently. Tasks that should be common to each office run the risk of being performed in a variety of different ways, at the inclination or whim of the respective judge, *sherestadar or peshkar*. It also results in the complexity of filing and dealing with cases.

Many judges have to share court rooms with another judge. Judges,*sherestadars and peshkars* work in a single room which are cramped, crowded, and ill-equipped with broken, damaged, mismatched or deficient furniture, furnishings, and equipment.[80] Without an effective organization, suitable office accommodation, and modern facilities, it becomes nearly impossible to prepare for and effectively conduct a hearing on the merits or to timely dispense quality justice. The Dhaka District Judge Court is chaotic, overwhelmed by too much paper, endless numbers of registers, antiquated procedures, and a dearth of managerial control.[81]According to a 1982 report, more than 80% of the judicial officers interviewed felt that they could dispose of cases sooner if provided with modern facilities and if they had more supporting staff.[82]

The empirical study undertaken for this research also found similar findings. The majority of the interviewees (about 55%) think that lack of modern facilities and digital technology prolongs the disposal of suits. Most of the time, we forget that

---

[77] ibid.
[78] ibid.
[79] Supreme Court of Bangladesh and United Nations Development Programme (n 24) 5, 26-27.
[80] ibid.
[81] Supreme Court of Bangladesh and United Nations Development Programme (n 24) 26.
[82] Zahir (n 28) 43.

judicial officers are human too. Whereas the offices of the government officers, even the bank managers' offices, and chambers of many lawyers are air-conditioned, courts are not. It is believed that good ventilation and air conditioners will certainly raise the standard and efficiency of judges.[83]

6.3 Complex Court Records Management System

The District Court records are manual hard copies, and the archives that are maintained need significant modernization and updating. The Dhaka District Court's archives appear disorganized, overcrowded, and in considerable disarray and they are in dire need of a complete renovation and should be equipped with adequate lighting, air conditioning, electrical outlets, etc.[84] Part III, Chapters 16-20 of the Civil Rules and Order (CRO) Volume I governs the organization of case files, as well as the retention and destruction of official court records.[85] The CRO is in dire need of modernization and simplification and needs to be translated into the Bangla language. As written, it is much too complex for the average *sherestadar* or registry office employee to understand, much less implement.[86] For example, the Dhaka District Judge Court's archives are overwhelmed with old, closed records that should be destroyed or consolidated off-premises.[87] The present study finds that about 56% of the interviewees believe that if modern court records and case management facilities could be introduced, it would have substantially decreased the delay of disposal of suits.

6.4 Crowded Location and Conjested Space for Courts

Based on the observations made during the court visits, it has been determined that the location of the court and the amount of space available are the most pressing issues for everyone. The court premise is located in the busiest old city in a narrow area. The court house remains always congested and crowded. Movement in the court premises and from one court to another is a challenging task. About 22% of interviewees observe that congested location and non-spacious court premises and buildings might cause the delay in the civil litigation. Thus is clear that it has influence on overall court administration, and such an environment in the courthouse undoubtedly causes a great deal of misery to litigants, lawyers, and judges.

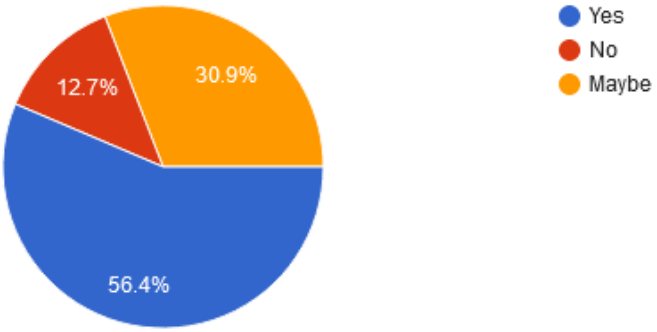
---

[83] ibid.
[84] Supreme Court of Bangladesh and United Nations Development Programme (n 24) 6, 27.
[85] ibid.
[86] ibid.
[87] ibid.

7. Appraisal of the Recent Amendments of the Code in Expediting the Civil Proceedings in Dhaka District Judge Court

Interviewees were asked whether they think that recent amendments of the Code are effective in expediting the litigation procedure of civil suits. The majority (56.4%) responds positively. Only about 13% think that these amendments are not effective to address the issue of delay of suits.

Figure 3: Appraisal of the Amendment of the Code to Expedite Civil Proceedings



In response to unstructured questions put to them, most of the interviewees agree on the sad fact that the amendments made since 2003 which were made to update the proceedings are not regularly practiced or could not be practiced due to circumstantial realities in the Court. On paras 5.2 and 5.3, the authors argue why these amendments could be made regularly practiced. The paper categorically states that given the findings from empirical data and secondary reports, no amendment will bring fruitful outcome in the administration of justice, if the practicing lawyers, incumbent court staff, and judges do not play a proactive role with skills, honesty, and integrity and acts collaboratively agreeing on the provisions of amendments. No imposition from up- Parliament or Executive, has not been effective and nor will be in the future. Amendment of procedural laws must come from the ground- the bar and bench must agree to them and swear to practice them.

8. Recommendations

The authors of the present research admit that the recommendations given herein are not wholly new because the inherent problems in the justice delivery system remain more or less the same till to date. Our findings substantially match those already given in the previous Law Reforms Commission's reports, research project reports, and elsewhere. In particular, most recommendations given below substantially correspond to those made in the reports of the Law Reforms Commissions of 1958,

1967, 1976, 1983; the 1989 Report of the Committee constituted by the Supreme Court of Bangladesh;the 2010 Bangladesh Law Commission Report and other research projects reports as mentioned in para 3. They are as follows-

(a) The post of the judicial officer must be increased and so be the number of supporting court staff. The vacant judicial post must be immediately filled up. The Judges must be promoted timely and their leave must be planned and coordinated so that no court goes unheard for a single day.

(b) Judicial culture must be developed that the lawyers do not seek unnecessary time petitions and adjournments except on urgent circumstances and the Judges feel free to take actions under the law against those who do so.

(c) The ethical code of conduct of lawyers must be strictly followed and the bar must provide support to trial judges who attempt to sanction lawyers for unethical behavior.

(d) The court must interfere in the initial stages of the suit by examining the plaint at or before signing on it to correct the valuation and to put an end to the practice of filing plaints with deficit court fees. It will save the huge time of the court at a later stage by preventing the opposite party to seek adjournments. The court must also frame issues by using the judicial mind and not mechanically on the issues supplied by *peshkars* or lawyers but on basis of the materials mentioned in the Order 14 rule 4 and Order 10. It will make the disputes of the suits precise and concrete and consequently save the court time at the trial stage as the court then can take evidence on the settled issues only. It will also provide minimum scope for the lawyers who wish to use dilatory tactics by applying for amendment of issues and seeking adjournments for this purpose.

(e) The 2012 amendment of the Code regarding amendment of pleadings must be strictly followed that prohibits the pleadings from being amended after the commencement of trial and empowers the court to impose compensation on the objector if the application for amendment is made after the commencement of trial and to delay the proceedings.

(f) Judicial culture must be developed that trial hearing must be taken place day to day without adjournments except onreasonableground and the judges and lawyers will act collaboratively for doing so.

(g) The assignment of cases according to territorial criteria or any other means that do not ensure randomness should be eliminated. Effective use of a random case assignment application would help to ensure that the judges' workloads are equitably distributed and that each judge has approximately the same number and the same type of cases assigned to him or her. Many Judiciaries such as the Philippines use a random lottery system to allocate cases to respective judges.[88] In the interim, the District Judge should also take active steps to redistribute the caseload of any judge who reports to him or her unmanageable load of pending cases. The District Judge, under section 24 of the Code, has the power to transfer a reasonable number of cases to other similar courts that have a minimum number of cases.[89] In this regard, the system of case flow management may be gradually institutionalized with the aid of foreign expertise in order to evenly distribute the cases among sitting judges and to monitor the progress of cases.[90]

(h) The Judiciary should establish a consolidated, centralized Office of the Registrar in the Dhaka District Judge Court.

(i) Judges must monitor and ensure accountability of their *sherastader* and *peshkars*. These court officers are often involved in malpractices and employ different techniques to delay the process so that they can take undue advantage from the litigants. If the judges carefully monitor their actions, many problems will be solved automatically.

(j) The summoning system must be updated introducing modern technology. The *Nezarat* section must be improved with modern facilities. The process servers must be given a proper uniform, travel facilities, and adequate travel allowances. The Judges must be strictly directed to proceed to act on either way of service by a process server or post whichever returns first to the court and not to wait for both services to be completed. Modern means e.g. email, SMS, fax, etc should be encouraged to use to send summons as the amendment of the Code, 2012 permits their use too.

(k) The payment of the court system must be made while filing the case in a one-stop desk where the case and the payment are received at the same time. Digital or online or mobile banking payment systems may be introduced for payment of the court fees which is also in line with the Bangladesh Government's Information Communication Technology (ICT) initiatives.

---

[88] Supreme Court of Bangladesh and United Nations Development Programme (n 24) 26-27.
[89] ibid 6.
[90] Zahir (n 28) 54.

(l) Alternative Dispute Resolutions(ADR)mechanisms should be encouraged more and both pleaders and judges must act together with *bonafide* intention to make such ADR a success in all appropriate cases.

(m) The requirement that the Judges have to take the deposition of witnesses and the testimony at hand which is very tedious and time-consuming. They must be well equipped with instruments like Dictaphones, digital recording devices, computers, etc, and well-staffed with a skilled stenographer.

(n) The practice of the court of taking evidence at the beginning of the trial that the plaintiff with the help of hisadvocatestates the whole plaint word by word which is totally time consuming and unnecessary. Similarly, the defendant has to restate his written statement. This oral repetition of what was already stated and submitted in written form must be dispensed with.[91] This could be avoided by adopting the amendment made in India in 2002. It provides that the examination- in- chief shall be taken place by affidavit and only cross-examination is heard by the court.[92]

(o) The dual-layer of judgment and decree should be removed and judgment and decree should be made in the same document simultaneously. It will reduce unnecessary time.

(p) Measures should be taken to abolish separate copy departments for giving certified copies of judgments and decrees. The task should be assigned to the office of *sherastader*. For this purpose, photocopy machine should be installed in each *sherasta* from which certified copies shall be provided by mere photocopying and sign and seal of the court. For the long term, digital and record-keeping management should be introduced as per the recommendation given by the Supreme Court of Bangladesh and the United Nations Development Programme in their report of 2015.

(q) The Appellate Court and Revisional Court must scrutinize the application of appeals and revisionsat the admission stage and should not grant leave to frivolous appeals and revisions. Advocates and litigants who file frivolous applications for revisions and appeals should be sanctioned.

---

[91] The Law Commission, Bangladesh (n 32).
[92] See, the Code of Civil Procedure 1908 (India), o 18, r 4.

(r) Bench and Bar dialogue should be initiated to solidify judicial independence and create a reform-conducive environment. In this regard, the Bangladesh Bar Council, as well as the Supreme Court of Bangladesh and the Ministry of Law, Justice and Parliamentary Affairs, should play a pivotal role in initiating a professional and politically neutral (and if necessary bi-partisan) dialogue, separating the day-to-day operations of conducting one's profession from their larger political aspirations. It is also necessary that the Bar should be consulted at both the planning and implementation stage of any new changes to laws and rules involving the court's work processor administration of justice.

(s) The members of the Bar should recognize and accept their professional responsibility to do their collective fair share to promote a more effective administration of justice in the courts. They should be fully prepared when their cases are called; should actively pursue settlements at every opportunity; should forego requests for unnecessary adjournments, and should avoid anything else that results in needless delay in disposing of their cases.

(t) The list of witnesses whom the party wants to examine must be submitted before the court within a prescribed time before the trial begins.[93]A suitable digitalized system of witness record management for each court for managing the hearing date and compelling the absent witnesses should be developed taking examples of best practices from developed countries.

(u) The amount of daily and traveling allowances for witnesses should be revised and made realistic for which adequate budget must be allocated by the Government.

(v) Waiting rooms and seating facilities with an adequate number of restrooms should be provided in the court premises to the litigants and witnesses. A staffed help-desk maybe set up in a conspicuous corner of the court premise which will be the official one-stop information providing point for all court-related information to the public.

9. Conclusion

The findings of previous studies and investigations under the present research as discussed above manifest that the problems in the delivery of civil justice remain and naturally continue to be almost the same as they were in the past. Inevitably, the

[93] The provision of the Code of Civil Procedure 1908 (o 17 r 1) in India may be followed.

solutions to resolve the problems as suggested under different influential studies happen to be more or less of a similar kind. The paper, therefore, concludes with greater emphasis that a conducive judicial or legal culture where the bar, the bench, and court staff will collaborate with a positive attitude in support of progress and with keenness to change the way they work must be promoted. Otherwise, any reformative measures taken to resolve the problem of case backlogs in the Civil Courts be it the Dhaka District Judge Court or any District Court will be fruitless. It was seen in the past and so is being seen at present.

The research explored that the amendment made since 2003 which were believed if introduced would reduce the delay substantially in the disposal of civil suits are quite rarely practiced or are not practiced at all in the Dhaka District Judge Court. It was due to the fact that the judges, advocates, and court staff could not change the traditional mindset and prevalent practices or they were mostly unwilling to bring any change in the existing system. That is why the promotion of a constructive legal culture, willing enough to take reformations seriously in their practices is of great significance as stressed upon by the recent 2015 SC-UNDP study report.[94]The paper, therefore, concludes in the following words as put by the above named report-

> Only after the professionals of the judiciary embrace the concept and take the actions recommended above with determination, discipline and consistency will timely justice for all becomes a reality. [95]

[94] Supreme Court of Bangladesh and United Nations Development Programme (n 24) 69.
[95] ibid.

© *Dhaka University Law Journal, 2021, 32(2), 161-174*
doi: https://doi.org/10.3329/dulj.v32i2.57963

Complementarity Principle in Prosecution of International Crimes: Assessing its Necessity and Efficacy

Mohammad Golam Sarwar*

1. Introduction

The effectiveness of international criminal law relies upon its implementation mechanisms functioning both in national and international forums to vindicate international criminal law violations.[1] Since there are two tiers prosecution systems it becomes necessary to regulate the relationship between the systems. In this regard, the principle of complementarity, considered one of the Rome Statute's cornerstone principles, appeared to govern the jurisdictional relationship between international criminal court (ICC) and national criminal justice actors.[2] While regulating the functioning of crimes adjudication systems, this principle has received both praise and criticism over the years. Some argue that this principle signifies an ingenious solution to a deadlock between sovereignty anxious states and the role of ICC while others claim that it is an excessive concession to sovereignty that may endanger the successful functioning of ICC.[3] Taking these criticisms in mind, this paper examines the principle of complementarity by scrutinizing its strength and limitations. It looks at the positive aspects and challenges of complementarity principle from its historical context and addresses its implication for the effectiveness of international criminal law. The paper, in essence, argues that the complementarity principle holds its relevance for the growth of international criminal law despite having certain limitations.

---

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

[1] Mohamed M. El Zeidy, 'The Principle of Complementarity: A new Machinery to Implement International Criminal Law' (2001-2002), 23(4) *Michigan. Journal of International Law* 869.

[2] Nirej Sekhon, 'Complementarity and Post Coloniality' (2013) 27 *Emory International Law Review* 799.

[3] Markus Benzing, 'The complimentary regime of International Criminal Court: International criminal justice between state sovereignty and fight against impunity' in Armin Von Bogdandy, Rüdiger Wolfrum and Christiane E. Philipp (eds.), *Max Planck Yearbook of United Nations Law* (Vol 7, Koninkijke Brill 2003) 591.

2. Historical Evolution of the Principle of Complementarity

The emergence of complementarity principle is not new. It coincides with the history of adjudication of crimes under international law. Historically states are used to prosecute crimes within the national jurisdiction even if crimes are of international character.[4] By virtue of state sovereignty and territoriality principle states regard it as an inherent right to exercise its jurisdiction over crimes committed in its territory.[5] The historical development suggested that the suspect criminals of World War I were tried under domestic jurisdiction.[6] It was also found that in rare cases states gave up from exercising the inherent right of sovereignty and they preferred not to entertain any international intervention unless required by special circumstances.[7]

However, with the change of time it became evident to prosecute grave crimes of international nature at the international forums going beyond state sponsored national jurisdiction. So the tension on the one hand based on utmost reliance of state sovereignty in terms of prosecuting crimes at the domestic level and adjudication of grave international crimes at the international forum on the other hand was rising.[8] In this regard, the complementarity principle emerged exploring the complementary role of both national and international criminal adjudication systems for the prosecution of international crimes and to fight against impunity.

The recognition of the complementarity principle can be traced back from the history of war crimes trial in Allied Tribunals after World War I where the allies allowed Germany to prosecute the accused in German courts with a reservation of setting aside the German verdicts under Article 228 of the Versailles Treaty.[9] Article 228 obliged the German government surrender the accused of war crimes to the

---

[4] ibid 870.
[5] ibid.
[6] ibid.
[7] ibid.
[8] Claire Brighton, 'Avoiding Unwillingness: Addressing the Political Pitfalls Inherent in the Complementarity Regime of the International Criminal Court' (2012) 12(4) *International Criminal Law Review* 629.
[9] Treaty of Peace with Germany, June 28, 1919, arts. 228-30, S. TREATY Doc. No. 66 49, at 90 (1919). Article 228 stipulates: 'The German Government recognizes the right of the Allied and Associated Powers to bring before military Tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a Tribunal in Germany or in the territory of her allies. The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by rank, office or employment which they held under the German authorities'. Referred in Zeidy (n 1) 871.

Allies so that they could be tried by a special military tribunal at the international level.[10] The spirit of this Article implied the principle of complementarity in terms of punishing the criminals when Germany failed to try them at national level and opened the door of prosecution at the international forum.[11] Regarding the trial of war criminals after the World War II there were again two tiers systems of adjudication where major criminals were tried under International Military Tribunal (IMT) and rest of them were tried by internal criminal jurisdiction.[12] Though IMT and national courts had different jurisdictions and tried different categories of crimes, the complementarity principle came up at a balancing point of effective cooperation between international and national criminal jurisdictions.[13]

The principle of complementarity was also reflected in the drafting history of Genocide Convention[14] where it was found that even in respect to the establishment of International tribunals most states claimed to exercise their own national criminal jurisdictions first and international court would only have jurisdiction if the states had failed to act.[15]

Finally, the principle of complementarity receives explicit recognition in the Statute of International Criminal Court. In this regard, the draft history of incorporation of this principle in the statute deserves attention. One of the important problems that the drafters of the statute faced was the question of determining the relationship between national and the newly emerged International Criminal Court.[16] It was found that some of the delegations, though supported the establishment of international criminal court, were unwilling to create an institution that could impinge on national sovereignty.[17] While stressing on the principle of complementarity, a number of delegates argued that this principle should focus on the primacy of domestic jurisdiction.[18] It was suggested that the issue of complementarity and the relationship between ICC and national courts should be scrutinised considering the

---

[10] ibid 872.
[11] ibid.
[12] ibid 874.
[13] ibid 876.
[14] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter referred as Genocide Convention].
[15] Zeidy (n 1) 878.
[16] William A. Schabas, 'Complementarity in Practice: Creative solutions or a Trap for the Court?' in Mauro Politi and Federica Gioia (eds.), *The International Criminal Court and National Jurisdictions* (Ashgate Publishing Limited 2008) 25-48.
[17] Zeidy (n 1) 890. Also in Jennifer J. Llewellyn, 'A Comment on the Complementarity Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transitional Contexts?' (2001) 24(2) *The Dalhousie Law Journal* 192.
[18] Zeidy (n 1) 890. Also in Jennifer (n 17) 195.

issue of international judicial cooperation.[19] After a long debate on this issue, the principle of complementarity secured its incorporation most significantly in the preamble and Article 1. The Principle also spelled out in Articles 15, 17, 18, and 19 of the Rome Statute of the International Criminal Court.

3. The Principle of Complementarity: What It Entails?

The preamble of the Rome Statute states: "… the most serious crimes of concern to the international community as a whole must not go unpunished and their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."[20] It also adds: "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions."[21]

Furthermore, Article 1 of the Statute states that "An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute".[22]

The preamble along with Article 1 entails the core aspect of the principle of complementarity in international criminal law. It starts with the aim of fighting against impunity of most serious crimes through effective prosecution at the national level and with the help of international cooperation. These two tiers adjudication of crimes reflect the complementary relationship between international criminal court and national jurisdiction. The principle deals with how the court will function emphasizing that crimes will be adjudicated primarily at the national jurisdiction and if national jurisdiction is unwilling or unable to prosecute only then the ICC will come into operation as a last resort of adjudication.[23] In this regard, it can be deduced that the purpose of ICC is to supplement the domestic adjudication of international crimes rather than supplant the domestic enforcement of international norms.[24]

The reason behind the emphasis on domestic adjudication is obvious from the fact that complementarity principle is more attuned with the sovereignty of the states.[25] It also signifies the obligation of states to use their domestic forum with a

---

[19] Zeidy (n 1) 890.
[20] Rome Statute of the International Criminal Court 1998, which entered into force on July 1, 2002, para 4.
[21] ibid, para 10.
[22] ibid, art 1.
[23] ibid, art 17.
[24] Zeidy (n.1) 896.
[25] A. Casssese, *International Criminal Law* (3rd edn, Oxford University Press, 2013) 298.

view to punishing the violators of international law. In addition, the duplicative reference of complementarity principle both in preamble and Article 1 also indicated that such duplication reflected the desire of the states to uphold state sovereignty from external influences.[26] Being part of complementarity, on the other hand, the ICC retains its power over irresponsible states that refuse the adjudication of heinous international crimes.[27] By taking two approaches simultaneously, complementarity principle comes into a balancing point between sovereign right of national states and international forum in terms of adjudication of crimes with the aim that no crime should go unpunished.[28]

4. Rationale behind Complementarity Principle

The Rome Statute does not offer any definition of complementarity. As such, in order to understand its nature and scope, the rational philosophy of the principle should be properly appreciated. The following discussion shall reflect the rationality behind the complementarity principle along with its contribution in the sphere of international criminal law.

4.1 Sovereignty of States and Complementarity Principle

One of the most significant rationale of complementarity principle is the protection of sovereignty of both State parties and third states.[29] Traditionally criminal jurisdiction has been left to the national sphere and it was the unfettered prerogatives of sovereign states to exercise criminal jurisdiction within the limits of public international law.[30] This exercise of criminal jurisdiction also considered as the central aspect of sovereignty itself.[31] International criminal law, while allowing individuals to avail international forum of adjudication, has been trying for a major shift in this regard.[32] However, the interest of the states is still prevalent and in most of the cases they remain in uncompromising position to give up their sovereignty in favour of an international tribunal.[33]

---

[26] Zeidy (n 1) 897.
[27] ibid 896.
[28] Brighton (n 8) 632.
[29] Benzing (n 3) 59.
[30] Olympia Bekou, 'In the hands of the State: Implementing Legislation and Complementarity' in Carsten Stahn and Mohamed M. EI Zeidy (eds), *The International Criminal Court and Complementarity: From theory to Practice* (Vol II, First Published (2011), Cambridge University Press 2011) 830-852.
[31] cf. Ian Brownlie, *Principles of Public International Law* (5th edn, Oxford University Press 1998) 298 referred in Bekou (n 30).
[32] Bekou (n 30) 834.
[33] ibid.

It is apparent from the jurisdictional relationship of States with ICC that consideration of sovereignty still has an influence over the functioning of ICC. The permanent nature of newly established ICC also stipulates that states while maintaining the sovereign prerogatives want to conduct the trail of criminals in accordance with their legal basis and in the exceptional cases refer them to the jurisdiction of ICC.[34] States, in this regard, were also concerned on the fact that their own nationals might be brought before the international tribunal without their consent and to address this anxiety complementary principle emerged to assuage their concerns.[35]

Another important factor that led to the adoption of complementarity principle is that ICC does not have any retrospective jurisdiction rather it has only prospective jurisdiction that extends only to future crimes. It is mentionable here that both Nuremburg and Tokyo International Military tribunals as well as International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) dealt with crimes which were committed earlier to the establishment of these tribunals.[36] For this reason, while establishing the ICC, states were more concerned on the ground that they might lose their control in the hands of external forum.[37] In this regard, with a view to preserving their interest, states agreed to set up the international criminal court on the ground of securing primacy of jurisdiction in the hands of sovereign states and on their failure only international forums can come forward.[38] So it can be argued that sovereign states still enjoy a substantial degree of control over the jurisdictional issues.

4.2 Duty to Prosecute and Shared Responsibility

The Rome Statute does not confine itself only to the assertion of the 'right' of the states to exercise criminal jurisdiction at the national level rather it also refers to the 'duty' of every state (not limited to state parties) to exercise its criminal jurisdiction over those responsible for international crimes.[39] So exercising sovereign rights carries a responsibility also. In this regard, the concept of 'responsibility to protect' refers that sovereign states are responsible for the protection of their people from mass atrocities and this responsibility extends not only to their own people but also to

[34] ibid 835.
[35] ibid.
[36] ibid 836.
[37] ibid.
[38] ibid.
[39] Benzing (n 3) 596. Referred the Paragraph 6 of the Rome statue of International Criminal Court.

the international community.[40] With the change of time it is increasingly felt that principle of non-interference in the domestic jurisdiction of the states cannot be considered as a safeguarding obstacle behind which massive human rights violation could occur with impunity. It has been argued that sovereignty is not merely a right or power but a responsibility also.[41] The right to inviolability amounts to nothingness, if the provision of rights safeguards is not ensured. [42]

The concept of sovereignty as responsibility is connected with the essence of complementarity principle. The essence of complementarity principle lies on the fact that it entails two tiers obligations on the states; firstly, by requiring the states on part of their obligations to prosecute alleged perpetrators at the domestic level and secondly, referring to an international prosecution in case when they failed to carry out their duty to prosecute.[43] Thus, complementarity principle allowed the prosecution at international level where national systems failed to take measures to avoid impunity and prevent future crimes.[44]

Based on the discussion above it can be said that, complementarity principle introduced a broader system of justice where the ICC and domestic courts complement each other with their mutual efforts to institutionalize accountability for mass crimes.[45] This wider system of justice implied that domestic jurisdictions and ICC carry a shared responsibility in combating crimes and promoting international criminal justice. The principle also serves another subtle role. The international criminal law gets the incentives of the state mechanism through the domestic enforcement.[46] In this way, it serves the interest of the international community at a broader perspective by prosecuting international crimes effectively. It discourages the culture of impunity and contributes to crimes deterrence.[47]

---

[40] Luke Glanvile, 'The Rise of the Responsibility to Protect in Sovereignty and the Responsibility to protect: A New History' (The University of Chicago Press 2014) 171.

[41] ibid 174.

[42] ibid.

[43] Benzing (n 3) 596.

[44] ibid.

[45] Carsten Stahn, 'Taking Complementarity Seriously: On the Sense and Sensibility of 'Classical' 'Positive' and 'Negative' Complementarity' in Carsten Stahn and Mohamed M. EI Zeidy (eds), *The International Criminal Court and Complementarity: From theory to Practice* (Cambridge University Press 2011) 233-282.

[46] Benzing (n 3) 596. The Bangladesh war trial in this regard can be noted. Though, Bangladesh has been prosecuting international crimes committed during the country's liberation war in 1971, an area where the ICC Statute does not have its operation, the Bangladesh experience can offer an explanatory study for the future study of complementarity principle by way of analogy. See, S M Masum Billah, 'Pakistani war criminals should not go unpunished' (December 16, 2015, Dhaka), http://www.thedailystar.net/supplements/pakistani-war-criminals-should-not-go-unpunished-187996. Accessed 10 March, 2021.

[47] Rome statue of the International Criminal Court, para 5 of the Preamble.

4.3 Protecting Rights of the Accused

The essence of complementarity principle also lies on the fact that international criminal court relied on domestic adjudication of international crimes with the expectation that human rights of the accused will be protected with due consideration at the domestic court and this mandate got recognition in Articles 17-19 that defined complementarity principle.[48] According to Article 17[49] principles of due process recognized by international law will be the determining factors in judging the willingness of the state to prosecute.[50] The principle of due process while aiming to protect the fair trial rights of the accused marked the unwillingness of the state where a state overzealously prosecute the criminals without independent and impartial proceedings along with unjustified delay that disregard the rights of the accused.[51] In this regard, principle of complementarity comes into scenario on the ground that when rights of the accused are denied at the domestic prosecution, international criminal court has the right to reconsider the case that clearly demonstrates the complementary relationship between domestic and international adjudication of crimes.

4.4 Resource Constrain of the International Criminal Court

Coming to the practical underpinnings of the principle of complementarity, it is submitted that since international criminal court has financial and infrastructural limitations it would not be able to settle the wide number of cases committed in various jurisdictions of the world.[52] It is alleged that due to resource constrain, the Court is unable to widen its scope in terms of undertaking any effective action in every case.[53] In recent years, States parties have slightly increased their contribution to the resources of ICC, however, the overall budget approach still continues to negatively influence the ability of the ICC in prosecuting crimes.[54]

The resource constrain hampers the investigations of current as well as previous cases while creating unnecessary delay and backlog in settling cases. Such capacity crisis of ICC driven by resource constrain raises questions about the effectiveness as well as legitimacy of the ICC in dealing with crimes where the intervention of ICC is

---

[48] Benzing (n 3) 597.
[49] Rome Statue of the International Criminal Court, art 17(2).
[50] Benzing (n 3) 597.
[51] ibid.
[52] Casssese (n 25) 298.
[53] Benzing (n 3) 599.
[54] Elizabeth Evenson & Jonathan O'Donohue, 'The International Criminal Court at risk' (May 6, 2015), <https://www.openglobalrights.org/international-criminal-court-at-risk/> accessed 21 May 2021.

warranted.[55] While addressing this practical impediment of lack of adequate resources, Rome Statue establishes a network of courts both at national and international levels that reflect complementarity scheme of prosecution of crimes.

4.5 Effective Prosecution at the Domestic Level

Another feature of complementarity principle addresses the effectiveness of domestic prosecution. It is argued that collection of evidence and witnesses are key factors to ensure effective prosecution and domestic courts are in a better position to facilitate the functioning of the courts proceedings.[56] It is also obvious that trials conducted closer to the place of occurrence have inherent practical and expressive value.[57] In addition, the educational value of a trial is lost when it is conducted far from the country of accused.[58] In case of domestic prosecution, it is more probable that the people at large will get the opportunity to identify the accused and denounce his criminal behaviour that also serves the purpose of criminal justice.

5. Challenges and Weaknesses of Complementarity Principle

As discussed above, we have seen the rationale of the principle of complementarity which actually reflects the strength of the principle upon which the principle is premised. However, this principle also has some limitations which deserve to be discussed in order to assess its competency in the context of international criminal law discourse.

Though it has been found that one of the rationale of complementarity principle implies about a right of the accused to be prosecuted by domestic authorities and tried before a domestic court, however, this is not an established right.[59] It was held in the decision of the Appeals of the ICTY in the *Tadic* Interlocutory Appeal on Jurisdiction[60] where the Chamber rejected the right of appellant to be tried by national courts under national laws.[61] It also added that under the ICTY's statutory framework the transfer of jurisdiction to an international tribunal did not violate any right of the accused.[62]

---

[55] ibid.
[56] Casssese (n 25) 298.
[57] Benzing (n 3) 600.
[58] Tzvetan Todorov, 'The limitations of justice' (2004) 2(3) *Journal of International Criminal Justice* 711.
[59] Benzing (n 3) 599.
[60] *Prosecutor* v. *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction 2 October 1995. Cited in Benzing (n 3) 599.
[61] Benzing (n 3) 599.
[62] ibid.

5.1 Domestic Prosecution of International Crimes: Is It Really Effective?

As it has been observed earlier that complementarity principle refers the primacy of domestic court in terms of prosecuting international crimes, but the question still remains how far the domestic court is effective to adjudicate crimes of international nature? It has been argued that in relation to international crimes particularly of war crimes and crimes against humanity state is often heavily involved as a perpetrator and in most of the cases these crimes are left unprosecuted.[63] Domestic courts while facing with societal and political tensions along with a fear of antagonizing patriotic sentiments or vested political interests often face challenges to ensure fair and efficient system of adjudication of crimes.[64]

In this regard, the failures of the Leipzig Trials in the aftermath of First World War are worth mentionable.[65] The resulting consequence of this type of domestic trial is that courts of the opponent state or the party may come down heavily on war criminals depriving their procedural rights.[66] Another significant point is that restrictive definition of ICC crimes in implementing (national) law may weaken the mandate the ICC Statute. There may be some states who could not make their implementing laws similar to the content of the crimes of ICC statute.[67] This lack of criminalization in national criminal laws might affect the admissibility of a case before the court and it can also lighten the credibility of investigation proceedings compromising the procedural fairness of international criminal justice system.[68]

Another challenging issue grounded on the fact that with a view to ensuring effective prosecution at the domestic level, the state concerned must establish its criminal justice system with tangible capacity that would be able to deal with ICC crimes rendering international justice.[69] In addition, since there is no established monitoring mechanism for assessing the effectiveness of the domestic prosecution, there remains a challenge whether there are genuine attempts at conviction or domestic prosecution is held only to avert justice.[70]

---

[63] Herman van der Wilt, 'War Crimes and the Requirement of a Nexus with an Armed Conflict' (2012) 10(5) *Journal of International Criminal Justice*, 1113-1128.
[64] ibid 1115.
[65] ibid.
[66] ibid 1116.
[67] Julio Bacio Terracino, National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC, (2007) 5(2) *Journal of International Criminal Justice* 421, 426.
[68] ibid 422.
[69] M Rafiqul Islam, *'International Law: Current Concepts and Future Directions'* (2014) (LexisNexis Butterworths 543).
[70] ibid 546.

5.2 Limited Scope of Intervention by International Forum

With a view to addressing the legal stalemates arising out of domestic courts, the intervention of the ICC or other tribunals is inevitable. But if we look back to the principle of complementarity, it is found that the ICC has limited scope of intervention since the principle emphasized mostly on domestic courts and referred international forum as a last resort. It is true that state has a duty to exercise its criminal jurisdiction over those responsible for international crimes but the very establishment of ICC indicates that there is deplorable gap between duty and practice.[71] In addition, the nature of international crimes suggests that these crimes violate the rules of customary international law that reflect the values of international community as a whole and to repress those crimes there exists a universal interest which can arguably be better served by the international court.[72] Complementarity principle, in this regard, while preserving and protecting domestic jurisdiction against ICC intervention failed to respond the aforesaid universal interest.

The limited scope of intervention also lies on the fact that the jurisdiction and functioning of ICC is contingent on the shortcomings or failures of domestic jurisdictions that means ICC comes into scenario only where the domestic system does not function properly. This contingency makes the ICC a mere watchdog body with the task of overseeing the genuinity of domestic adjudications[73] and the role of ICC as a separate distinct forum of prosecution is compromised. The complementary relationship between the ICC and states also suggests that in cases where the ICC does have jurisdiction it has to rely on national authorities in terms of collecting evidences and taking enforcement measures.[74] In fact, the drafting history of ICC Statute also revealed that while establishing an international court the emphasis was mostly to complement the existing national jurisdictions in criminal matters.[75]

5.3 Crisis of Implementing Law and Complementarity Principle

In order to be part of ICC's cooperation regime as reflected by complementarity principle, states parties to the Rome Statute are under an obligation to enact implementing law at the national level. The rationality is that implementing law will

---

[71] Wilt (n 63) 1116.
[72] ibid 1114.
[73] ibid 253.
[74] Claus Kress and Flavia Lattanzi (eds), *The Rome statute and Domestic legal orders: General aspect and Constitutional issues* (Nomos Verlagsgesellschaft 2000) 29 <https://books.google.co.uk/books?id=TTLvWqcWpn0C&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false> accessed 08 March 2021.
[75] William A Schabas, 'The rise and fall of complementarity' in Carsten Stahn and Mohamed M. EIZeidy (eds), *The International Criminal Court and Complementarity: From theory to Practice* (Cambridge University Press 2011) 150-164.

demonstrate the state's awareness in relation to its primary responsibility under international law and to ensure accountability by prosecuting international crimes at the national courts.[76] While maintaining this responsibility as well as giving effect to complementarity principle, implementing law needs to incorporate provisions comprising international crimes, the general principles of liability and the defences found in the Rome statute.[77] In addition, states desiring to avoid the jurisdiction of ICC are required to undertake action by making implementing law as a result of the operation of the complementarity principle.[78]

However, in reality it has been observed that more than fifty percent of the state parties to the Rome Statute do not have implementing legislation and States, those have implementing laws, adopt variant approaches based on their own legal systems and on their individual needs.[79] It is more than probable that states while emphasizing on domestic legal systems would fail to confirm the international fair trial standards including due process required by complementarity test of international criminal law.[80] This variant approach of state practices in relation to implementing law also widens the gap between ICC and national courts which goes against the spirit of complementarity principle. In addition, there remains a danger that absence of implementing laws or diverse approaches of implementing laws at national level might not be able to confirm the international community's standards of the best form of criminal justice.[81]

In addition to the limitations as discussed above, there remains also a possible danger that failure to exclude the provisions of amnesties and pardons for international crimes in the implementing legislation might undermine the essence of complementarity principle.[82]

6. Effectiveness of International Criminal Law and Justification for Complementarity

It is undeniable that effectiveness of international criminal law depends upon its implementation by prosecuting international crimes.[83] Although the roots of criminal prosecutions are found in the 17th and 18th Century but international criminal law

[76] Frederic Megret, 'Too much of a good thing? Implementation and use of Complementarity' in Carsten Stahn and Mohamed M. ElZeidy (eds), *The International Criminal Court and Complementarity: From theory to Practice* (Cambridge University Press 2011) 361-390.
[77] Bekou (n 30) 839.
[78] ibid.
[79] ibid.
[80] Megret (n 76) 373.
[81] ibid 363.
[82] Simon M. Meisenberg, 'Complying with Complementarity? The Cambodian implementation of the Rome Statue of the International Criminal Court' (2015), 5(1) *Asian Journal of International Law* 123, 139.
[83] Zeidy (n 1) 973.

started to expand its scope after the adoption of Rome Statute.[84] The Rome Statue while establishing ICC, a governing body of international criminal law, describes the ultimate goal of international criminal law that is to end impunity for perpetrators of international crimes.[85] As it has been observed that though criminal prosecutions were conducted at the state level from long times ago, however, those prosecutions were subjected to serious criticisms from different corners that prompted to the establishment of ICC.[86] In this regard, determination of suitable forum of prosecution of crimes became necessary because there were two forums one was in the national level and other in the newly established international forum. Here lies the delicate problem and the principle of complementarity came forward to respond in this regard. In order to address this delicate relationship, the position of complementarity principle is found to be paradoxical[87] and it is also apparent from the strength and weaknesses of the principle as discussed above.

The paradox is marked on the ground that complementarity principle has been traditionally used to defend specific interest both in international and national levels.[88] In the national level states applied this principle defensively in order to limit the engagement of ICC and to protect domestic jurisdiction while emphasizing more on the strict primacy of domestic adjudication of crimes.[89] On the other hand, with a view to overcoming its own deficiencies such as lack of enforcement power and limited capacity, ICC treated complementarity principle as a protective tool.[90]

It is also noticeable that in the initial stage of ICC, effectiveness of prosecution, by virtue of complementarity principle, was understood in the sense of strict prioritization of domestic jurisdiction and at the same time the absence of cases before the ICC was regarded as a major success.[91] Here, the position of complementarity principle is criticized on the ground that a systematic deference to domestic proceedings may undermine the shared responsibility of states and ICC in terms of ensuring effective and expeditious justice.[92] However, it can fairly be assumed that the justification of complementarity principle based on effectiveness, though faces criticism, is still considered as an important tool of balancing strategy between national sovereignty interests and International community interests.[93]

---

[84] Saqib Jawad, 'Objectiveness of International Criminal Law and Jurisdiction of ICC' (2015), 3(3) *Sociology and Anthropology* (2015) 3(3) 163-170 <http://www.hrpub.org/download/20150301/SA3-19602854.pdf> accessed 10 March 2021.
[85] Preamble to the Rome Statute of the International Criminal Court.
[86] Jawad (n 84) 163.
[87] Stahn (n 45) 234.
[88] ibid.
[89] ibid.
[90] ibid 235.
[91] ibid 276.
[92] ibid 277.
[93] Zeidy (n 1) 889.

7. Conclusion

The essentiality of complementary principle in relation to the effectiveness of international criminal law, though not well established, cannot be ignored since it portrays the practical difficulties of international crimes adjudication process. It cannot be denied that this principle could be traced even long before the newly expanded version of international criminal law but it is also true that the complementarity regime still remains far from perfect.[94]

It is worthy to add that international criminal law, though, urged to create global regime like ICC in order to guard against the abuse of sovereign powers[95], the above mentioned discussion suggested that it would have been impossible to establish an effective ICC without the commitment of sovereign states. It is practical that the tension between national and international forums of prosecution would be increased if states are found to be reluctant to compromise their sovereign powers. Considering this practicality, complementarity principle tried to ease the tension by categorizing responsibilities at both national and international levels with a view to achieving a common goal of ending impunity. The compromise by way of complementarity also underscores the humanitarian interest along with maintaining of international peace and security that receives prominence over any sovereign interests or interests of international community.

In this regard, the suggestion of the Report of the Bureau on Complementarity (2010) is worth mentioning that stresses on the enhancement of the capacity of national jurisdictions to investigate and prosecute serious crimes of international concern through the combined efforts of state parties, the ICC and other stakeholders including international organizations and civil societies.[96] Finally, it can be submitted that amidst of the limitations of the ICC in the one hand and the fear of abusive sovereign powers at the domestic level, on the other hand, the complementarity principle might not be the panacea but it is also not the 'pandora's box'. The role of this principle towards the effectiveness of international criminal law can hardly be underestimated.

---

[94] ibid 969.

[95] Payam Akhavan, 'International Criminal Justice in the era of failed states: The ICC and the Self-referral debate' in Carsten Stahn and Mohamed M. EI Zeidy (eds), *The International Criminal Court and Complementarity: From theory to Practice* (Cambridge University Press 2011) 283.

[96] 'Report of the Bureau on complementarity' (Note by the Secretariat), Assembly of State Parties, International Criminal Court, (New York, 6-10 December 2010) <https://www.icc-cpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-26-ENG.pdf> accessed 12 March 2021.

© *Dhaka University Law Journal, 2021, 32(2), 175-198*
doi: https://doi.org/10.3329/dulj.v32i2.57964

Working and Impact of Parliamentary Committees in the UK and Bangladesh: A Theoretical Analysis

M. Jashim Ali Chowdhury*

1. Introduction

Described as its "eyes and ears"[1], committees do three important jobs for the Parliament.[2] They continuously oversee executive accountability. They facilitate public participation in the parliamentary process. They offer expertise and alternative career prospects to the backbench MPs. All of these three tasks, however, risk putting the committees at odd with parliamentary political parties. Assertive parliamentary committees may invite the wrath of the governing party by seeking information on and revision of governmental policies.[3] They may question the government's sole representative claim by creating an independent public relations route for the Parliament.[4] They may trouble the parliamentary parties by fending off crude partisanship in parliamentary business and encouraging expertise-based work by the MPs.[5] The majority parties may see them as a reservoir of backbench revolts. The opposition parties may see them as harmful to their oppose-everything-and-propose-nothing approach. Therefore, the committee system's relationship with the party system is not straight.

The nature of legislature largely conditions the party-parliament relation and its impact on the committee system. The US styled congressional and the Westminster styled parliamentary systems offer significantly different political and institutional contexts that shape the work and impact of the committee system. Party cohesion is relatively loose in the congressional model. Therefore, committee assertiveness and

---

* PhD Researcher, King's College London, UK.

1 Michael Jogerst, *Reform in the House of Commons: The Select Committee System* (The University Press of Kentucky 1993) 215-216.

2 Martin Indyk, 'Making government responsible: The role of parliamentary committees' (1980) 15(1) *Australian Journal of Political Science* 93.

3 Gareth Griffith, 'Parliament and Accountability: The Role of Parliamentary Oversight Committees' *Breifing Paper* (No. 12, NSW Parliamentary Library Research Service 2005) 11.

4 Jogerrst (n 1) 215-216.

5 Bert A Rockman,'Legislative-Executive Relations and Legislative Oversight'(1984) 9(3) *Legislative Studies Quarterly* 387, 394.

individual member activities draw visible public attention there.[6] On the other hand, a Westminster parliament is party and cabinet dominated and, hence, the committee activism is relatively harder to achieve.[7]

There are four leading committee theories[8] that explain how the parliamentary committees are organised across the congressional and parliamentary systems, why they behave in particular ways and how the political parties influence their formation and work. These theories are known as the "distributive or gains from trade theory"; "information, scrutiny and expertise supply"; "coalition"; and "partisan cartel" theories. Exponents of the *distributive or gains from trade theory* argue that parliament members take their committee assignments seriously because it provides them with a scope to distribute development and other material benefits to their constituents and thereby enhances their chance for re-election. They can also use their committee positions as leverage to gain from trade or bargain with fellow parliament members working in other committees.[9] The *information, expertise and scrutiny theory* explains the institutional issues that support a strong committee system. Proponents of this theory argue that a strong committee system helps the Parliament by supplying information and expertise about public policies and ensuring detailed scrutiny of the governmental proposals.[10] The *coalition theory* considers the impact of collation governments on the committee system.[11] The *partisan cartel theory* deals with the partisan influence in the committee formation process.[12]

This paper aims to test each of the four committee theories on the UK House of Commons and Bangladesh's "Westminster Parliament"[13]. It argues that while the UK parliamentary committees have been able to overcome most of the partisan barriers and amass great institutional strength to make sense of the system in terms of all of the four theoretical strains, the operation and impact of the Bangladeshi committee

---

[6] Malcolm Shaw, 'Parliamentary Committees: A global perspective' (1998) 4(1) *Journal of Legislative Studies* 225, 227.

[7] Lawrence D. Longley and Roger H. Davidson, 'Parliamentary committees: Changing perspectives on changing institutions', (1998) 4(1) *Journal of Legislative Studies* 1, 2.

[8] Thomas Zittel and Eric M., 'Uslaner, Comparative Legislative Behavior' in Robert E. Goodin (ed.) *The Oxford Handbook of Political Science* (Oxford University Press 2009) 392–408.

[9] Kenneth A. Shepsle and B. R. Weingast 'Political Preferences for the Pork Barrel:A Generalization' (1981) 25 *American Journal of Political Science* 96.

[10] Keith Krebhiel, *Information and Legislative Organization* (University of Michigan Press 1991).

[11] Lanny W. Martin and Georg Vanberg, *Parliaments and Coalitions: The Role of Legislative Institutions in Multiparty Governance* (Oxford University Press 2011).

[12] Gary W. Cox and Mathew D. McCubbins, *Legislative Leviathan: Party Government in the House* (Cambridge University Press 2007).

[13] M Jashim Ali Chowdhury, 'Eastminster' Adaptations in the Westminster Model: The Confusing Case of Bangladesh (*Dhaka Law Review*, 11 February 2020) <https://www.dhakalawreview.org/blog/2020/02/eastminster-adaptations-in-the-westminster-model-the-confusing-case-of-bangladesh-4488> accessed 01August 2021.

system has remained hostage to a pervasive "partisan cartelisation". The next part (Part 2) of the paper will explain each of the four committee theories in greater detail. Part 3 will briefly introduce the committee system of Bangladesh *Jatya Sangsad.* Parts 4-7 of the paper would attempt a comparative evaluation of the UK and Bangladesh's parliamentary committee system *vis-a-vis* each of the four committee theories. Part 8 would conclude the paper.

2. The Four Committee Theories

There are four major theoretical propositions about how committee systems are organised and how they behave across the systems. The first theory – the distributive and gains from trade theory – focuses on individual committee members. The works of Shepsle and Weingast[14] influence this perspective highly. They argue that committee members seek committee assignments most relevant to their constituency interests and congenial to their re-election prospects.[15] They also engage in policy trade or pork-barrel politics with colleagues from the same or other committees to make sure that decisions most favourable to their constituents are supported and adopted there in return for their concession to measures that might be less relevant for their own but important for the others' constituents.[16] This type of behaviour allows the members to distribute particularistic benefits to their constituents and increase their re-election prospects.[17]

However, the distributive theory assumes that the legislature is highly decentralised[18] and has policymaking capability comparable to the US Congress. It also assumes that MPs can self-select into their preferred committees[19] without much dictation from their parties.[20] As the discussion in Part 4 would show, recent development in the UK House of Commons has paved the way for such non-partisan, if not fully autonomous, selection to the committees. Bangladesh's strictly partisan selection process, however, renders this theory a near redundancy here.

The second theory - the expertise or information supply theory - is attributable to the work of Keith Krehbiel.[21] Krehbiel has questioned the idea of distributive benefits

---

[14] Shepsle and Weingast (n 9).

[15] David W. Rohde and Kenneth A. Shepsle, 'Democratic Committee Assignments in the House of Representatives: Strategic Aspects of a Social Choice Process,' (1973) 67(3) *American Political Science Review* 889.

[16] Kenneth A. Shepsle, *The Giant Jigsaw Puzzle: Democratic Committee Assignments in the Modern House* (The University of Chicago Press 1978).

[17] Ingvar Mattson and Kaare Strom, 'Parliamentary Committees' in Herbert Dohring (ed), *Parliament and Majority Rule in West Europe* (University of Mannheim 1995) 249.

[18] Shane Martin and Tim A. Mickler, 'Committee Assignments: Theories, Causes and Consequences' (2019) 72(1) *Parliamentary Affairs* 77.

[19] Shepsle (n 16).

[20] Martin and Mickler (n 18) 79.

[21] Krebhiel (n 10).

or pork-barrel politics of trade grains. He rather perceives the committees as suppliers of information, scrutiny, and policy expertise to the main chamber. Applicable to both congressional and parliamentary models, Krebiel's theory argues that committees improve the quality of the policy process by capitalising on the varied expertise of the large pool of legislators. This theory invokes an economy of operation logic[22] and rational choice institutionalism[23] where specialisation and expertise are encouraged on a cost-benefit basis. If a member incurs the cost of applying his knowledge to a specific public domain, s/he should gain authority and deference in that policy area. Under this process, the chamber will need to "generate an incentive structure that induces members to take the trouble of acquiring expertise."[24] Parliament will benefit from the expertise and diversification of the workload. It will increase the overall legislative output.[25] As Mickler's study[26] shows, the workload of a legislature is a really good indicator of variation in committees and their mandates. The higher workload a parliament faces, the more autonomous its committees become. As the discussion in Part 5 would show, the UK Parliament has acquired a laudable level of specialisation, information generation and scrutiny capability over the years. Bangladesh, however, is simply refusing to move in that direction, though the underpinnings of this theory remain extremely relevant for her.

The third theory - Martin and Vanberg's coalition theory[27] - argues that the organisation of a legislature follows governments' formation and is, in particular, influenced by the frequency of the emergence of coalition governments. The theory builds on the tension between coalition partners who govern jointly but remain accountable to the people separately. To minimise the risk of being overly accommodating, parties try to keep a tab on their coalition partners. This factor has important ramifications for the organisation and the assertiveness of parliamentary committees. A Series of empirical studies show that multiparty governments significantly imbue committee autonomy.[28] Martin and Vanberg[29] tested the logic in

---

[22] Mattson and Strom (n 17).

[23] Thomas W Gilligan and Keith Krehbiel, 'Organization of Informative Committees by a Rational Legislature' (1990) 34(2) *American Journal of Political Science* 531, 544-47.

[24] Thomas W Gilligan and Keith Krehbiel, 'Collective Decision-Making and Standing Committees: An Informational Rationale for Restrictive Amendment Procedures' (1987) 3(2) *Journal of Law, Economics and Organization* 287; Thomas Gilligan and Keith Krehbiel, 'Asymmetric Information and Legislative Rules with a Heterogeneous Committee' (1989) 33(2) *American Journal of Political Science* 459.

[25] Martin and Mickler (n 18) 81-82.

[26] Tim A. Mickler, 'Committee autonomy in parliamentary systems –coalition logic or congressional rationales?' (2017) 23(3) *The Journal of Legislative Studies* 367.

[27] Martin and Vanberg (n 11).

[28] Mickler (n 26).

[29] Lanny W Martin and Georg Vanberg, 'Coalition Policymaking and Legislative Review' (2005) 99(1) *American Political Science Review* 93, 97-131.

strong (Denmark, Germany, and the Netherlands) and weak (Ireland and France) parliamentary setups. It appears that a strong committee system better allows the coalition partners to police their coalition bargain. Government bills on divisive issues get very rigorous scrutiny by coalition partners sitting in committees.[30] Another study by Martin and Depauw on Ireland shows that strong committees are the most powerful institutional tool for tabbing the collation partners.[31]

Zubek has tried the coalition logic from yet another angle. He shows that the coalition governments trying to temper committee autonomy is less likely to succeed than a majority government.[32] The strength of committees shapes the relative policy influence of coalition partners. Weak committee systems prioritise the dominant party's policy. A strong committee system enforces compromise on the positions of all coalition members and helps build an added layer of intra-coalition scrutiny over the one already working through the official opposition. An appraisal of the UK's Conservative-Liberal coalition government of 2010 bears testimony to this. However, discussion in Part 6 of this paper would show that Bangladesh's several "tactical electoral coalitions" have miserably failed to generate a minimum relation of intra-coalition accountability between the partners. The reasons behind those are relatable to the way the parties do their politics.

The fourth theory - the partisan cartel theory - is expounded by Cox and McCubbins, who argue that distributive and expertise theories unduly ignore the phenomenon of party politics within legislatures.[33] Political parties "cartelise" the legislative power by shaping the committees. Parties naturally need unity around any coherent policy programme. If individual members start seeking popularity at their constituencies by deviating from the party line, the leadership must worry. There, therefore, is a need to enforce at least a minimum coherence in their members' behaviour.[34] Hence, Cox and McCubbins reject the self-selection thesis.

They argue that though the member preferences for committee assignment are important in the US Congress, and determine much of actual assignments, party involvement in the process is no less significant. Cox and Cubbin's argue, if non-partisanship is so strong, there is a risk that committees become equally unpopular among the government and the opposition.[35] Governments might see a committee-

---

[30] ibid 132-155; Lanany W Martin and Georg Vanberg, 'Policing the Bargain: Coalition Government and Parliamentary Scrutiny' (2004) 48(1) *American Journal of Political Science* 13.

[31] Shane Martin and Sam Depauw, 'Coalition Government and the Internal Organization of Legislatures'(Annual Meeting of the American Political Science Association, Toronto, September 2009).

[32] Radoslaw Zubek, 'Coalition Government and Committee Power' (2015) 38(5) *West European Politics* 1020, 1032.

[33] Cox and McCubbins (n 12).

[34] Martin and Mickler (n 18) 82-83.

[35] Bert A. Rockman, 'Legislative-Executive Relations and Legislative Oversight' (1984) 9(3) *Legislative*

oriented parliament as a threat to party discipline and a potential reservoir of backbench revolts. The opposition also might feel forced by a consensual committee system to co-operate with the government rather than oppose it. It, therefore, makes sense that parties would like to leave the committee system within a structure that would allow them to influence the committee members' behaviour and agenda.[36] Given the paradox, it is perplexing that the UK House of Commons has recently opted for a less partisan committee assignment process and injected a very strong policy influencing and scrutiny capability in the system. Discussions in Part 7 will show how Bangladesh's political party system is resisting any progress in that direction.

While the later parts (Parts 4-7) of this paper would elaborately consider Bangladesh's position *vis-à-vis* each of the four committee theories, a general introduction of the Committee System of Bangladesh is presented in the next part (Part 3).

3. Parliamentary Committee System in Bangladesh

The Committee System is constitutionally entrenched in Bangladesh. Article 76 of the Constitution of Bangladesh specifically mentions two standing committees – public accounts and parliamentary privileges - and leaves the others to be detailed in parliamentary Rules of Procedure (from now on RoP).[37] Accordingly, Chapter XXVII of the RoP details other standing, select, and special *ad hoc* committees.[38]

Including the two mentioned in the Constitution, the RoP has mentioned eleven standing committees. While standing committees are constituted permanently for the whole duration of a parliament, select and special committees are constituted on an *ad hoc* basis to deal with specific issues arising from time to time. Permanent standing committees relating to a general area of concern, *e.g.*, parliamentary privileges, are known as General or Non-Ministerial Standing Committees (NMSC). Standing Committees relating to a designated ministry, *e.g.*, standing committee on the Ministry of Foreign Affairs, are known as Ministerial Standing Committees (MSC). General standing committees include committees on parliamentary business, private member legislation, public petitions, parliamentary privileges, government assurances, Parliament's internal administrative affairs, parliament library, parliamentary rules of procedure, public accounts, government estimates and public undertakings. Ministerial standing committees are entrusted with oversight of the related ministries. Until changes in the RoP in February 1992, the main functions of

---

Studies Quarterly 387, 394.

[36] John H. Aldrich and David W. Rohde, 'Measuring conditional party government' (Annual Meeting of the Midwest Political Science Association, Chicago, April 1998).

[37] The Constitution of the Peoples Republic of Bangladesh 1972, art 76(1) <http://bdlaws.minlaw.gov.bd/act-367.html> accessed 13 July 2021.

[38] The Rules of Procedure (RoP) of Bangladesh Jatya Sangsad, r 189(1) <http://www.parliament.gov.bd/index.php/en/parliamentary-business/procedure/rules-of-procedure-english> accessed 15 July 2021.

the ministerial standing committees were to scrutinise the bills concerning a ministry's mandate. After the 1992 amendment, ministerial committees now "review the enforcement of relevant laws and propose measures for such enforcement, any matter referred to it by Parliament as a matter of public importance, investigate or inquire into the activities or administration of a Ministry."[39]

Standing committees shadow the actual number of ministries and departments of the government. Hence the numbers of ministerial standing committees vary from Parliament to Parliament. As a study of Prof Nizam Ahmed[40] shows, the Fifth (1991-1996) and Seventh (1996-2001) parliaments had thirty-five Ministerial Standing Committees, whereas the Eighth (2001-2006) and Ninth (2009-2013) parliaments had thirty-seven and forty respectively. The Tenth (2014-2018) and Eleventh (2019-present) parliaments, on the other hand, constituted thirty-nine ministerial Standing Committees each.

Select committees are designated as Select Committees on Bills, which means that they are constituted at the discretion of Parliament as bills come to the chamber, and a motion is carried in the floor for referring it to a select committee.[41] Bills may also be referred to a standing committee by a motion in the House.[42] In such cases, government bills are likely to be referred to the standing committee on relevant Ministry and private member bills to the Standing Committee on Private Members' Bill. Special committees are constituted by a motion to deal with special issues or matter coming to the Parliament's attention at any given time.[43]

Existing literature on the Bangladeshi committee system has broadly identified some structural, procedural, behavioural, and political issues contributing to its low impact performance.[44] Structural issues are related to the organisation of the committees and their relation with other parliamentary and extra-parliamentary actors. Procedural issues arise from within the RoP. Behavioural problems are likely to arise from the MPs' lack of interest and expertise in committee works. Political problems of the committees arise mostly from the approach the political parties take towards the committees' work and contribution. Successive governments in Bangladesh have shown a horrible non-appreciation of the committee system and the committee related rules of the RoP were "mostly honoured in the breach"[45].

---

[39] Constitution (n 37), art 76(2)(c); RoP (n 38), r 246-48.

[40] Nizam Ahmed, 'Parliamentary Committees and Parliamentary Government in Bangladesh' (2001) 10(1) *Contemporary South Asia* 11; Taiabur Rahman, *Parliamentary Control and Government Accountability in South Asia: A comparative analysis of Bangladesh, India and Sri Lanka* (Routledge 2008).

[41] RoP (n 38), r 225.

[42] Constitution (n 37), art 76(2)(a); RoP (n 38), r 77.

[43] RoP (n 38), r 266.

[44] Nizam Ahmed (n 40) 31-33.

[45] Nizam Ahmed, *Parliament of Bangladesh* (Ashgate 2003) 131.

In one case, parliamentary committees were not formed until half the tenure of a Parliament.[46] Due to the opposition party's refusal to put their list of nominees, the Seventh Parliament (1996-2001) took two years to form all the parliamentary committees.[47] However, the same Parliament amended the RoP to make sure that committees are constituted within the first session of each Parliament. Still, the next Parliament (2001-2006) took more than 20 months to set up all the committees.[48] It took the UNDP to threaten withdrawal of funds from its "Strengthening Parliamentary Democracy" project to convince the ruling party to form committees and allow them to operate.[49] However, the Ninth (2009-2013), Tenth (2014-2018) and Eleventh (2019-present) parliaments have constituted their committees within the first session of their tenure. The current Eleventh Parliament has created a record of the fastest formation of committees within the first ten sitting days of its first session. It appears that this record-breaking speed was facilitated by the absence of any meaningful opposition in those parliaments.[50]

4. Committee Work for Constituency Benefits, Re-election and Career Prospects

As mentioned in Part 2, the first of the four theories – the distributive and gains from trade theory – argues that MPs try to play activist roles in the committees to enhance their re-election prospect by helping their constituency causes. The distributive and gains from trade theory primarily applies to the US congressional committees where congressmen try to enhance their visibility through legislative, budgetary and policy advocacies that appeal to their core constituents. Based on their priorities and constituency interests, the US congressmen are usually offered a choice of self-selection in their preferred committees. However, in parliamentary systems, the scope of pressing constituency issues through committee work is limited. MPs' constituency works here are primarily linked with government departments rather than parliamentary committees.[51] Also, parliamentary elections have a strong partisan tendency. People tend to elect the Prime Minister and the governing party rather than their constituency MPs.[52] Therefore, the parliamentary system does not offer

---

[46] Jalal Firoj, 'Forty years of Bangladesh Parliament: Trends, Achievements and Challenges' (2013) 58(1) *Journal of the Asiatic Society of Bangladesh* (*Humanities*) 83.

[47] Nizam Ahmed, 'From Monopoly to Competition: Party Politics in the Bangladesh Parliament (1973-2001)' (2003) 76(1) *Pacific Affairs* 55, 68-69.

[48] Quamrul Alam and Julian Teicher, 'The State of Governance in Bangladesh: The Capture of State Institutions' (2012) 35(4) *Journal of South Asian Studies* 858.

[49] Fahreen Alamgir, Tanvir Mahmud and Iftekharuzzaman, 'Corruption and Parliamentary Oversight: Primacy of The Political Will' (Transparency International Bangladesh 2006) <https://www.ti-bangladesh.org/research/Corruption&ParliamentaryOversight.pdf> accessed 30 July 2021.

[50] M Jashim Ali Chowdhury, '11th Parliament: Rays of hope for the Committee System' *The Daily Star* (Law and Our Rights, Dhaka, 05 March 2019) <https://www.thedailystar.net/law-our-rights/news/11th-parliament-rays-hope-the-committee-system-1710775> accessed 27 July 2021.

[51] Philip Norton, 'The Growth of the Constituency Role of the MP' (1994) 4(1) *Parliamentary Affairs* 705.

[52] A Eggers and A Fischer, 'Electoral Accountability and the UK Parliamentary Expenses Scandal: Did

substantial constituency benefit or re-election prospects for the committee members. Also, unlike the US congressional system, the scope of private member legislation is very limited in parliamentary systems.[53] The government admittedly controls legislative business in the Westminster parliamentary system.[54] MPs can rarely press constituency issues by sponsoring legislative proposals in Parliament. All these make the MPs' self-selection to their preferred committees difficult.

Despite the constraints, the distributive or gains from trade theory is growing in relevance in the party-centred parliamentary model. While the committee works may not guarantee direct constituency benefits and re-election prospects for the MPs, the committee works help them enhance their career prospect in particular areas of public policy. Growth of expertise begets reputation and profile for the MPs and makes their involuntary or party-directed removal from a committee harder. The post-1979 development of the select committee system in the UK has created avenues for non-partisan, if not fully autonomous, committee assignment.[55] Some of the recent studies by Lord Norton[56] show that party dominance has eroded significantly after the 1979 and post-2000 reforms.[57] Most of the senior British MPs' now acquire expertise and reputation in their respective policy areas that offer them a choice - call it a choice to self-appoint – on the type of committee they want.

The "*Shifting the Balance Report*"[58] of the Liaison Committee in 2000 called for greater transparency in the committee assignment process. *The Wright Committee* Report of 2010[59] was more specific about the allocation of committee chairs. In 2010, the House instructed the parties to follow an internal but transparent and democratic process for committee assignments. It was decided that chairs of most select committees should be elected by a secret ballot of all MPs rather than be chosen by

---

Voters Punish Corrupt MPs?' *Political Science and Political Economy Working Paper* 8/2011 <http://www2.lse.ac.uk/government/research/resgroups/PSPE/pdf/PSPE_WP8_11.pdf> accessed 28 July 2021.

[53] Megg Russel and D Gover, *Legislation at Westminster* (Oxford University Press 2017) 272.

[54] Robert Balckburn,'The Politics of Parliamentary Procedure at Westminster' (2017) 4(2) *Journal of International and Comparative Law* 279.

[55] Lucy Atkinson, *Select Committee and the UK Constitution* (The Constitution Society 2017) 40.

[56] Philip Norton, 'Power behind the Scenes: The Importance of Informal Space in Legislatures' (2019) 72(2) *Parliamentary Affairs* 245; Philip Cowley and Philip Norton, 'Rebels and Rebellions: Conservative MPs in the 1992 Parliament' (2002) 1(1) *British Journal of Politics and International Relations* 84.

[57] Michael A Jogerst, 'Backbenchers and select committees in the British House of Commons: Can Parliament offer useful roles for the frustrated?' (1991) 20(1) *European Journal of Political Research* 21, 35; Michael A Jogerst, *Reform in the House of Commons: The Select Committee System* (University Press of Kentucky 1993) 7-8, 31-35.

[58] Matthew Flinders, 'Shifting the Balance? Parliament, the Executive and the British Constitution' (2002) 50(1) *Political Studies* 23.

[59] The Reform of the House of Commons Committee was a Select Committee established by the UK Parliament. It is unofficially known after the name of its Chairman Tony Wright.

the committee members themselves.[60] The committee chairs are agreed and allocated to the political parties in proportion to their parliamentary seats through the "usual channel".[61] Once the number and names of committees whose chairs would be allocated to different parties are agreed upon, MPs from the concerned party would be elected as chair. The election takes place on the House floor, meaning that all the members of the House from all the parties would vote for the candidates. In the Backbench Business Committee, all the members are elected by secret ballot of all MPs.

The UK Select Committees' shift towards the whole House voting and secret ballot methods has earned greater institutional prestige and legitimacy for the select committee chairs. Experience suggests that the expertise and relevancy of members to a committee, rather than the preference of the party high-ups, play a decisive role in the voting.[62] Select Committee chairs and members thereby garnish an autonomous identity outside the traditional framework of partisanship.[63] Hence, while the British MPs may not pursue their committee assignments for their re-election prospects or constituency interest, they still choose their select committees for reasons beyond their party leaders' control.

On the other hand, committee assignments in Bangladesh do not offer direct constituency benefits for the MPs. MPs would rather utilise parliamentary question time and do personal lobbying with the Ministers for constituency benefits.[64] Similarly, the nomination of the MP candidates is an exclusive privilege of the party high-ups rather than the grass-root party units. Hence, the committee work is rarely related to the MPs' re-election prospects.[65] Committee work is also considered an

---

[60] Atkinson (n 55) 38.

[61] The "usual channel" is an informal but integral part of British parliamentary life. It is a way of Whip level communication between the government and opposition party that pre-negotiates almost all aspect of parliamentary calendar between the parties. See Nizam Ahmed, 'The Development of the Select Committee System in the British House of Commons' (1997) 20(4) *Canadian Parliamentary Review* 28, 29-30.

[62] In 2001, around 100 Labour MPs revolted against the Tony Blair government's attempt to de-select Gwyneth Dunwoody and Donald Anderson as the chairs of transport and foreign affairs committees of the House of Commons. See Dr Hannah White, Select Committees under Scrutiny The impact of parliamentary committee inquiries on government (Institute for Government 2015) 7 <https://www.instituteforgovernment.org.uk/sites/default/files/publications/Under%20scrutiny%20final.pdf > accessed 24 July 2021.

[63] Alexandra Kelso, 'Political Leadership in Parliament: The Role of Select Committee Chairs in the UK House of Commons' (2016) 4(2) *Politics and Governance* 115, 123-24; Rogers and Walters, *How Parliament Works* (Routledge 2015) 333.

[64] Zahir Ahmed, 'From Shape Shifting to Collusion in Violence: An Ethnography of Informal Relationships Between Bangladeshi Members of Parliament and Their Constituents' (2019) 42(1) *Legal and Political Anthropology Review* 5, 11-13.

[65] Mohammad Mozahidul Islam, 'The Toxic Politics of Bangladesh: A Bipolar Competitive Neo-

unattractive career or expertise development route for them. Instead of the MPs pursuing an extra-governmental route of a political career, committee chairs in Bangladesh are distributed by the party high-ups as compensation for those party men who could not be offered ministerial positions in the first place.[66] As a result, there are allegedly more than necessary parliamentary committees in Bangladesh. Those work as sources of patronage for the government rather than as sources of government accountability.[67] The unwillingness of Bangladeshi political parties to appreciate the recent development in parliamentary models like that of the UK has reduced the relevance of the distributive theory's premise in Bangladesh.

5. Committees as Suppliers of Information, Expertise and Scrutiny

As explained in Part 2 earlier, Keith Krehbiel, proponent of the second committee theory – the expertise and information supply theory - argue that MPs have an incentive to acquire expertise in any particular area of public policy and governance. For them, expertise is necessary for getting deference and recognition in related areas. It also enhances their possibility of getting a ministerial position when their party comes to power. Parliament's interest in patronising committee level expertise development also is understandable. The plenary of the House draws apolitical, objective, and technical information from the committees. The support enhances the Parliament's capability to make up at least some of its expertise, information and knowledge gaps *vis-à-vis* the bureaucrats and technocrats in the government.

5.1 Supply of Expertise and Information

In the UK, a decisive moment came in 1979 when the detailed and permanent system of select committees was established. The new select committee system of 1979 is aligned in the departmental line.[68] Departmental select committees examine three areas of their related departments - expenditure, administration and policies and associated public bodies. When the Prime Ministers shuffle their departments, the House responds by changing the select committees accordingly.[69] Some select committees, *e.g.*, Public Accounts, Environmental Audit and Public Administration, have a cross-departmental mandate. All the select committees are coordinated by a

---

patrimonial State?' (2013) 21(2) *Aisan Journal of Politcial Sceince* 148, 149-51.

[66] A.T.M. Obaidullah, 'Standing Committees on Ministries in the Bangladesh Parliament: The Need for Reorganisation' (2011) 18(2) *South Asian Survey* 317, 338.

[67] Philip Norton and Nizam Ahmed, 'Legislatures in Asia: Exploring Diversity' in Philip Norton and Nizam Ahmed (eds), *Parliaments in Asia* (Frank Cass 1999) 51-52.

[68] Atkinson (n 55) 27.

[69] Meg Russell, Bob Morris and Phil Larkin, 'Fitting the Bill: Bringing Commons legislation committees into line with best practice' (2013) The Constitution Unit, UCL, 10, 14-15 < https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/Fitting_the_Bill_complete_pdf.pdf > accessed 16 October 2021,

Liaison Committee comprising all the committee chairs. The most prominent Liaison Committee work is questioning the Prime Minister periodically. It also works as a vanguard of select committee powers and deals with government responsiveness to them. The UK committees are empowered to determine their agenda, gather written and oral evidence, sometimes by travelling through the country or beyond, and employ specialist advisers outside the Parliament.[70] Committee reports are printed and published on the parliament website. The government is expected to respond to committee reports, particularly recommendations, within sixty days of submission. Recent evaluations of select committees have been largely positive.[71] Committees also maintained a very high media profile, perhaps comparable to the US congressional committees.[72]

Compared to the expertise-driven work of the UK select committees, the ministerial standing committees in Bangladesh have not been able to build expertise and legal or public support base. They have paper powers to inquire into irregularities and serious complaints against the administration and recommend corrective measures. They also have the authority to review and recommend necessary measures for due enforcement of laws passed by Parliament.[73] They have plenary power of subpoena,[74] examination on oath, production of documents, papers and records.[75] The government, however, may refuse to supply documents on the grounds of the safety or interest of the state.[76] Understandably, the governments almost routinely label any attempt to call administrative records "prejudicial to the safety and interest of the State".[77]

Governments exercise their refusal power in manners devoid of objectivity and without clarity about what is prejudicial and on what basis. It determines which documents would be made available to the committees and which would not be at its convenience and caprice. Committees also lack the power to follow up with their reports and recommendations. Even in rare cases of the government responding to committee reports, the responses are generally evasive. The minority members in the committees are usually not allowed to prepare and submit their report except to record a very brief "note of dissent", which is appended to the committee report.

---

[70] The House of Commons Standing Order No. 152 (4a) <https://publications.parliament.uk/pa/cm200102/cmstords/27519.htm> accessed 25 July 2021.

[71] Meg Russell and Meghan Benton, 'Selective Influence: The Policy Impact of House of Commons Select Committees' (2011) The Constitution Unit, UCL, 9-29 <https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/153.pdf > accessed 16 October 2021.

[72] Marek Kubala, 'Select Committees in the House of Commons and the Media' (2011) 64(4) *Parliamentary Affairs* 694.

[73] Constitution (n 37) art 76(2)(b).

[74] ibid art 76(2)(c).

[75] ibid art 76(3); RoP (n 38) r 202-204.

[76] Ahmed (n 40) 28, 30.

[77] RoP (n 38) r 203.

When a report is tabled on the floor of the House, the Chairman, or in his absence any other member, confines himself to a brief statement of fact, but there are no debates held on that statement at that stage.[78] Though there is scope for the House to debate a committee report,[79] such incident is rather rare.[80]

Once the committees are formed, the MPs show extreme inertia in discharging their duties and mandates. The lacklustre approach shown by the committee members to their committee assignments is reflected in statistics. The first Parliament (1973-1975) received only one report from a committee.[81] The second Parliament (1979-1981) witnessed committee chairs as condolence gifts to people who could not be included in the cabinet otherwise.[82] The third Parliament (1986-1988) constituted some general standing committees but did not form ministerial or departmental standing committees. Public Accounts Committee of that Parliament produced three reports only. The fourth Parliament (1988-1990), for the first time in the history of Bangladesh, established a detailed range of committees.

However, all the committees produced only five reports – two by the Public Accounts, one each by the Estimate, Public Undertaking and Governmental Assurance committees.[83] In the Fifth, Seventh and Eighth parliaments, thirty, twenty-nine, and ten committees respectively did not produce any report at all. There is a rule that every standing committee would meet at least once a month.[12,] It is very rarely acted upon.[84] A very recent study on the works of the committees on the Ministry of finance and Agriculture confirms the dismal state of affairs in terms of meeting frequency, attendance and quality of the reports produced by the committees.[85]

5.2 Supply of Legislative Scrutiny

When it comes to scrutiny of legislative proposals, the UK Public Bill Committees (from now on PBCs) have been circumscribed by partisan committee appointments and strict pre-programming of the committee work by the House.[86] Membership in

---

[78] ibid, r 211.
[79] ibid, r 81.
[80] Ahmed (n 47).
[81] Dilara Choudhury, *Constitutional Development in Bangladesh: Stresses and Strains* (Oxford University Press 1994) 122.
[82] Ahmed (n 45) 133.
[83] S Aminuzzaman,'Institutional Processes and Practices of Administrative Accountability: Role of *Jatiya Sangsad* (National Parliament) in Bangladesh' (1993) 10(2) *South Asian Studies* 44.
[84] Ahmed (n 40) 15.
[85] Navid Saifullah, 'Effectiveness of the Parliamentary Standing Committees in Bangladesh' (Masters dissertation, BRAC University 2006) 41.
[86] Jessica Levy, 'Public Bill Committees: An Assessment Scrutiny Sought; Scrutiny Gained' (2010) 63(2) *Parliamentary Affairs* 534, 542; S A Walkland, 'Government Legislation in the House of Commons' in S A Walkland (ed), *The House of Commons in the Twentieth Century: Essays by*

public bill committees reflects the strength of political parties in the House. As Robert Blackburn and Andrew Kennon note, the Committee of Selection routinely accepts a partisan list of nominees from either side.[87] Partisan selection to the bill committees allegedly turns the members into "cannon fodder" attendees who almost always tend to vote in party lines.[88] When it comes to expertise,[89] the one valued in legislative committees is primarily procedural.[90] There are, however, changes in recent times. The Modernisation Committee of 2006 proposed, through its "*The Legislative Process Report",* significant changes in the PBCs. The House approved changes to parliamentary Standing Orders (the UK Parliament's rules of procedure), allowing the PBCs the power to "send for persons, papers and records" in the manner of a select committee. It permitted the PBCs to call for experts, citizen groups and outsiders to contribute to the legislative process. Evidence shows that the growth of expert participation in the PBCs has helped the consensual approach in their work.[91] This device has helped the PBC members to gain more expertise and interest in committee work.[92] Though there is still much powerlessness in witness selection and timetabling of scrutiny works, the British PBCs devote substantial time to questioning the Minister-in-charge of any bill. They are rolling out increasing number of government and non-government amendments to the bills.[93] Ministers in charge of bills are often persuaded and sometimes forced to undertake and assure the committee about bringing amendments at the report stage.[94] The impact of Bill Committees has also been demonstrated during the passage of bills through the House of Lords.[95]

Members of the Study of Parliament Group (Clarendon Press 1979) 247, 251; Alexandra Kelso, *Parliamentary Reform at Westminster* (Manchester University Press 2009) 36; Louise Thompson, 'More of the Same or a Period of Change? The Impact of Bill Committees in the Twenty-First Century House of Commons' (2013) 66 *Parliamentary Affairs* 459, 472.

[87] Robert Blackburn, Andrew Kennon, M A J Wheeler-Booth MAJ and J A G Griffith, *Griffith and Ryle on Parliament: Functions, Practice and Procedures* (Sweet & Maxwell 2003) 387.

[88] Patrick Dunleavy, *How effective are the Commons' two committee systems at scrutinising government policy-making?* (Democratic Audit UK 2018).

[89] Camilla Hagelund and Johnathan Goddard, *How to run a Country: A Parliament of Lawmakers* (Reform 2015) 17-18.

[90] Russell, Morris and Larkin (n 69) 43.

[91] Levy (n 86) 539.

[92] Louise Thompson, 'Debunking the Myths of Bill Committees in the British House of Commons' (2016) 36(1) *Politics* 36, 45.

[93] Louise Thompson, 'More of the Same or a Period of Change? The Impact of Bill Committees in the Twenty-First Century House of Commons' (2013) 66 *Parliamentary Affairs* 459,470.

[94] ibid 459-479.

[95] M Russell and J Johns, 'Bicameral Parliamentary Scrutiny of Government Bills: A Case Study of the

The British Departmental Select Committees also play an important pre-legislative scrutiny role. A tradition and a parliamentary law support the pre-emptive legislative scrutiny by the select committees. By tradition, the government has to publish its annual legislative agenda in a White Paper and the Queen's Speech. It gives the select committees very clear signals to start their pre-legislative studies. By parliamentary law, the government must respond to all select committee reports, which force the government to anticipate "how the committees will react" to a particular legislative proposal.[96] Select committee engagement with legislative proposals can go as far as forcing the government to consider their pre-legislative reports. On many occasions, select committees have criticised the government position and secured substantial modification of the government's legislative agenda.[97] However, an exceptionally defiant government is likely to face stiff opposition during the passage of a bill. Select committee reports also generate a huge amount of opinion force behind its position. Select committees do this by gathering public testimonies and reflecting on those on a cross-party basis.

Unlike the UK's Public Bills Committees, the contribution of the bill committees in the legislative scrutiny process of Bangladesh is modest. The RoP stipulates sending bills to a select committee created for the specific bill or a related ministerial standing committee.[98] The use of select committees for specific bills started in the Seventh Parliament (1996-2001). Before 1996, bills were rarely sent to committees after the second reading. Since the seventh Parliament, however, most bills are being sent to the bill committees or ministerial standing committees. Absent any pre-legislative scrutiny by any ministerial standing committee; the bill committees are left on their own in dealing with the law. Unlike the UK, where the journey of a bill is programmed in the House,[99] Bangladeshi rules of procedure provide that committees should report back within a month if the House prescribes no time limit. If the committee requests further time, the House may extend it.[100] While this might appear a good opportunity for bill committees to do some detailed works, they usually waste the chance by dilly-dallying their works. Lapse of bills in the committee stage and never returning to the House is not rare in Bangladesh. Although the committee members may propose amendments to a bill, its acceptance or rejection depends on the attitude of the government party. Traditionally, no major changes are proposed, tolerated, or accepted by the House. Also, the finance committees do not have any

---

Identity Cards Bill' (Political Studies Association Conference, University of Bath, April 2007); S Kalitowski, 'Rubber Stamp or Cockpit? The Impact of Parliament on Government Legislation' (2008) 61 *Parliamentary Affairs* 694.

[96] Meg Russell and Daniel Gover, *Legislation at Westminster* (Oxford University Press 2017) 228-30.

[97] ibid 212.

[98] RoP (n 38) r 77, 80.

[99] Russell, Morris and Larkin (n 69).

[100] RoP (n 38) r 209(1).

scope of discussion or deliberation on budget, financial or appropriation bills. It means that the committees have no say, let alone control, over the government's budgetary and fiscal policies.[101] It is in clear contrast with the practice of the House of Commons, where the Commons Treasury Select Committee and Lords' Economic Affairs sub-committee do significant scrutiny over the budget.

To sum up, the discussion above shows that while the UK Parliament has acquired a laudable level of specialisation, information generation capability, and scrutiny mandate over the years, Bangladesh is refusing to recognise the parliamentary committees as a reservoir of expertise, information, and scrutiny. Without this prospect, committeemen would show a very poor commitment to the committee works[102] and remain loyal "lobby fodders" of their parties who would select or de-select them at their sweet will.[103]

6. Coalition Logic for Committee Assertiveness

The third of the four committee theories - Martin and Vanberg's Coalition theory - tries to fathom the scale of committee assertiveness during multiparty coalition governments. As mentioned in Part 2 earlier, the strength of the committee system should ideally enhance during the coalition governments. Committees then are bolstered by an added layer of intra-partner political accountability. In institutionalised parliamentary systems, coalition governments are usually formed under a negotiated Coalition Pact between the partners. Coalition partners use the pact as a powerful political tool of mutual restraint. Parties in the coalition usually appoint Junior Ministers to shadow the Ministers appointed from another coalition partner. Partners also negotiate an agreement on the day-to-day government businesses and the role the collation Ministers would play within the government.

Within the Parliament, coalition party members use parliamentary questions and committee works to scrutinise their partners.[104] Committees serve the best sort of accountability when the Minister and committee chairs belong to different coalition parties.[105] Kim and Loewenberg's study on several German coalition governments indicates that majority and minority partners distribute committee chairs in a way that

---

[101] ibid, r 111(3).

[102] Tabibur Rahman (n 40) 110-129.

[103] Nizam Ahmed, 'Reforming the parliament in Bangladesh: Structural constraints and political dilemmas' (1998) 36(1) *Commonwealth and Comparative Politics* 68, 88.

[104] Kaare Strøm, Wolfgang C. Muller and Daniel Markham Smith, 'Parliamentary Control of Coalition Governments' (2010) 13 *Annual Review of Political Science* 517, 527-528; see also, Lanny W. Martin and Georg Vanberg, 'Coalition Government, Legislative Institutions, and Public Policy in Parliamentary Democracies' (2020) 64(2) *American Journal of Political Science* 325.

[105] Mark Hallerberg, 'The Role of Parliamentary Committees in the Budgetary Process within Europe' in R R Strauch, J Von Hagen (eds.), *Institutions, Politics and Fiscal Policy* (Kluwer 2000) 87–106; M Hallerberg, 'Electoral Laws, Government, and Parliament' in H Doring and M Hallerberg (eds.) *Patterns of Parliamentary Behavior* (Aldershot Ashgate 2004) 11–33.

allows one partner to shadow the ministries controlled by another partner(s).[106] This factor has important ramifications for the organisation and the assertiveness of committees. A series of empirical studies show that multiparty governments significantly imbue committee autonomy.[107] It appears that a strong committee system better allows the coalition partners to police their coalition bargain. Government bills on divisive issues get very rigorous scrutiny by coalition partners sitting in committees.[108]

A study on the dataset of parliamentary questions during the David Cameron and Nick Clegg's coalition government (2010–2015) has shown that the coalition party backbenchers have extensively used the parliamentary question times in the UK.[109] The Cameron-Clegg Cabinet was based on a Coalition Agreement that placed a "coalition committee" at the "top of the government's collective decision-making machinery".[110] Governmental policies were outlined in the "Coalition Programme for Government". Working within the agreed structure, Prime Minister David Cameron had to work under an added "intra-party" layer of accountability.[111]

In its parliamentary history, Bangladesh has seen at least four - two official and two unofficial - coalition governments so far.[112] In 1991, the majority party BNP fell eleven seats short of a majority (140 out of 300).[113] They formed a government with the tacit support of Jamaat Islami (from now on JI), who had eighteen seats. Though they did not do any political pact or express coalition making, it is understood that the coalition was based on some tactical voting arrangement during the election.[114] After the government's formation, however, BNP took 28 of the 30 reserved seats for women. JI got the rest of the seats. Once the reserved seat election was over, BNP no more needed JI's support to sustain its majority. Hence the electoral coalition ended

---

[106] D H Kim and G Loewenberg, 'The role of Parliamentary Committees in Coalition Governments: Keeping tabs on Coalition partners in the German Bundestag' (2005) 38 *Comparative Political Studies* 1104.

[107] Tim A. Mickler, 'Committee autonomy in parliamentary systems – coalition logic or congressional rationales?' (2017) 23(3) *The Journal of Legislative Studies* 367.

[108] Lanny W Martin and Georg Vanberg, 'Coalition Policymaking and Legislative Review' (2005) 99(1) *American Political Science Review* 93.

[109] Martin and Richard Whitaker, 'Beyond Committees: Parliamentary Oversight of Coalition Government in Britain' (2019) 42(7) *West European Politics* 1464.

[110] A. Paun, *United We Stand: Coalition Government in the UK* (Institute for Government 2010) https://www.instituteforgovernment.org.uk/publications/united-we-stand> accessed 31 July 2021.

[111] Mark Bennister and Richard Heffernan, 'Cameron as Prime Minister: The Intra-Executive Politics of Britain's Coalition Government' (2012) 65 *Parliamentary Affairs* 778.

[112] M. Moniruzzaman, 'Parliamentary Democracy in Bangladesh: An Evaluation of the Parliament during 1991–2006' (2009) 47(1) *Commonwealth and Comparative Politics* 100.

[113] Craig Baxter, 'Bangladesh in 1991: A Parliamentary System', (1992) 32(2) *Asian Survey* 162.

[114] Taj Hashmi, 'Islamic Resurgence in Bangladesh: Genesis, Dynamics and Implications', in Satu P. Limaye, Mohan Malik and Robert G. Wirsing (eds), *Religious Radicalism and Security in South Asia* (Honolulu, Hawaii: Asia pacific Center for Security Studies 2004) 35-75, 54.

there. JI later joined the combined opposition parties pressing for the introduction of the caretaker government. The combined opposition ultimately resigned from Parliament in 1994 to press their demand home.[115] A similar thing happened in the seventh Parliament when AL got 146 seats and formed a government with the support of the Jatya Party (from now on JP).[116] Unlike BNP, AL offered a Ministry to the JP in its "Government of National Consensus".[117] Absent any declared political pact between the AL-JP; the intra-partner accountability relations remained unclear. Like, the BNP government of 1991, the AL government secured its absolute majority through the reserved women seats. The JP Minister acted like a loyal associate of the AL Prime Minister.[118] The JP leader, H. M. Ershad, later joined the opposition parties and went against the government. The JP Minister, however, refused to resign from the cabinet.[119]

Bangladesh's first-ever official coalition government took power in 2001. This time BNP-JI formed an electoral alliance and won the election as a coalition.[120] The JI was given two ministries. But the election result itself was not conducive to any intra-coalition bargain. In the 2001 election, BNP got 193 seats, and JI got 17. Left without any need for JI's continued support to sustain a parliamentary majority, BNP would not have to bother much about its coalition partner. The JI Ministers largely offered a blank check to the majority partner and co-operated it throughout the tenure.[121] A similar thing happened in the ninth parliamentary election of 2008. AL got 230, and its Grand Alliance partner JP got 33 seats. Some Ministries were given to different coalition partners, but no intra-coalition pact of accountability was declared. Coalition Ministers behaved as though they all were from the majority partner AL.[122] It, therefore, is not unsurprising that the parliamentary literature of Bangladesh has so

---

115 Golam Hossain, 'Bangladesh in 1994: Democracy at Risk' (1995) 35(2) *Asian Survey* 171.

116 Mohammad Mohabbat Khan and Syed Anwar Husain, 'Process of democratization in Bangladesh', (1996) 5(3) *Contemporary South Asia* 319.

117 Stanley A. Kochanek, 'Bangladesh in 1996: The 25th Year of Independence', (1997) 37(2) *Asian Survey* 136; M. Rashiduzzaman, 'Political Unrest and Democracy in Bangladesh', (1997) 37(3) *Asian Survey* 254.

118 Immigration and Refugee Board of Canada, 'Bangladesh: The estrangement between Jatiya Party (JP) cabinet minister Anwar Hussain Manju and the leadership of the JP (since June 1996)' (Canada: September 1998) <https://www.refworld.org/docid/3ae6ab265e.html> accessed 31 July 2021.

119 Elora Shehabuddin, 'Bangladesh in 1999: Desperately Seeking a Responsible Opposition', (2000) 40 (1) *Asian Survey* 181.

120 Moazzem Hossain, 'Home-Grown' Democracy', (2006) 40(9) *Economic and Political Weekly* 791.

121 Ishtiaq Hossain and Noore Alam Siddiquee, 'Islam in Bangladesh politics: the role of Ghulam Azam of Jamaat-I-Islami', (2004) 5(3) *Inter-Asia Cultural Studies* 384; Rounaq Jahan, 'Bangladesh in 2002: Imperilled Democracy', (2003) 43(1) *Asian Survey* 222.

122 Sandeep Bhardwaj, *Bangladesh in 2009: Challenges After Elections* (Institute of Peace and Conflict Studies IPCS: Issue Brief No 90 January 2009) <http://www.jstor.com/stable/resrep09011> accessed on 28 July 2021.

far overlooked this "intra-coalition" aspect of parliamentary accountability. The coalition logics of Martin and Vanberg, therefore, seem to be of little relevance for Bangladeshi Parliamentary Committee System.

7. Partisan Cartelisation of Parliamentary Committees

As briefly discussed in Part 2 earlier, the fourth committee theory - Cox and McCubbins' partisan cartel theory – argues that proponents of self-selection and expertise-driven committee formation unjustifiably ignore the political parties' role in the committee formation process. Political parties – government or opposition - have a strong interest in cartelising the committees. They do so because they feel that too assertive committee activists are harmful to internal party discipline. According to this theory, party control in committee assignment is unavoidable even in the US styled congressional system. Party's control over the committee formation process is more obvious in the parliamentary system where the Heads of the governments and their Cabinet are drawn from the Parliament. Still, the modern UK Parliaments seem to defy Cox and McCubbins' cartelisation logic. Despite the system's inherent proneness to partisan cartelisation, the UK House of Commons has recently opted for a less partisan committee assignment process and injected a very strong policy influencing and scrutiny capability in the committees. As mentioned earlier, the 1979 select committees in the UK and their subsequent reforms in 2006 and 2010 have facilitated a shift from crude partisanship[123] to a consensual approach of non-party or cross-party dealings.[124]

On the other hand, the political parties in Bangladesh are not culturally receptive to non-partisan and reconciliatory approaches. The absence of command decentralisation and decisional autonomy for the party members affects the committee system directly. The selection of members and committee chairs in Bangladesh is an absolute privilege of the party leadership. As per the RoP, the number of members in different committees is either fixed or subject to a ceiling.[125] The RoP does not deal with the methods of appointment as such. The Speaker chooses the members of committees concerning the administration of Parliament, *e.g.*, House, Petition and Library Committees.[126] In other cases, it is the party high-ups who decide who is to be placed where. Membership is distributed among parties

---

[123] Michael Rush, 'Parliamentary Scrutiny' in Robert Pyper and Lynton Robins (eds), *Governing the UK in the 1990s* (St Martin's Press 1995) 108-30; Gavin Drewry (ed), *The New Select Committees: a study of the 1979 reforms* (Clarendon Press 1985).

[124] Atkinson (n 55).

[125] RoP (n 38) r. 219, 225, 231, 239, 240, 245, 246, 264, 266.

[126] ibid, r. 231, 249, 257.

in proportion to their seats in the House. Though the political parties usually gather their members' interests and preferences before they are pencilled for a committee, committee members are ultimately chosen from the partisan lists. The House moves a formal resolution confirming the appointment. In some cases, opposition parties allege that the Speaker, instructed by the government party, had ignored their list of members. For example, an opposition MP who appeared assertive in the seventh Parliament's defence committee was dropped from the same Committee in the Eighth Parliament by the new party in power. He was offered a relatively less significant committee instead.[127]

Regarding the appointment of Committee chairs, RoP allocates the chair of some committees on an *ex officio* basis.[128] Other chairs may be appointed through the resolution of Parliament or elected, formally at least, by the committees concerned.[129] Ruling parties have traditionally claimed chairmanship of most committees, and the appointment of opposition members to the chair is rare.[130] Once in the fifth Parliament (1991-1995), the chair of a sub-committee established by a committee was assigned to an opposition party member as a good gesture - the first of its kind in Bangladesh's history. Since the Ninth Parliament, chairs have been distributed among the parties on a *pro-rata* basis. As mentioned earlier, allocation of the chairs, however, remains an absolute privilege of the party leaders, *i.e.*, the Prime Minister and the opposition leader.[131]

7.1 Partisan Cartelisation as a Barrier to Committee Performance

The absolute grip of the leadership over the "allocation" process has impaired the performance of the committees in general. Mustafizur Rahman's study[132] of the Committee on Ministry of Communication, Energy, Power, and Mineral Resources in the Eighth Parliament (2001-2006) show that energy, power, and mineral resource committee was successful in publicising corruption within the Ministry. It ultimately

---

127 Rahman (n 40).
128 RoP (n 38) r. 219, 257, 264.
129 ibid, r. 191(1).
130 K.M. Mahiuddin, 'The Parliamentary Committee System in Bangladesh An Analysis of its Functioning' (Ph.D. Thesis, Ruprecht-Karls-Universität Heidelberg 2009) 104-106.
131 Nizam Ahmed, 'Parliament- executive relations in Bangladesh, (1997) 3(4) *The Journal of Legislative Studies* 70, 85-88.
132 Muhammad Mustafizur Rahaman, 'Parliament and Good Governance: A Bangladeshi Perspective' (2008) 9(1) *Japanese Journal of Political Science* 39, 54-56.

caused the resignation of the State Minister for energy and mineral resources for his irregularities with a foreign mineral resource company. Similarly, Nizam Ahmed's study on the Domestic Violence Prevention Act 2010[133] shows that the Standing Committee on the Ministry of Women and Children Affairs in the Ninth Parliament (2009-2014) was decisive and swift in scrutinising and passing the law. However, both Rahman and Ahmed show that such assertiveness was possible only because the government high-ups were either supportive or not opposed to the committee agenda in hand.[134]

On the other side of the story, the committee agenda, unsupported by the party high-ups, are unlikely to create any impact. The Chairman of the Committee on Ministry of Defense in the Seventh Parliament had to drop a discussion on defence purchase at the insistence of the government Chief Whip and the top rank military officials.[135] Similarly, the Committee on Ministry of Communication of the Eighth Parliament failed to dig deeper into a scandalous import deal of Concentrated Natural Gas (CNG) driven three-wheelers in Bangladesh. Rather the Chairman of the committee was reportedly schooled by the Prime Minister for "tarnishing the image of her government".[136] For the same reason, an All-Party Parliamentary Committee of the Ninth Parliament entrusted with discussing and finalising the Constitution Fifteenth Amendment 2011 failed to express its view on the reform of caretaker government. Despite a reported consensus among the committee members for the continuance of the caretaker government system, [137] its final report remained silent on the issue. It is largely assumed that the Committee took a clue from the Prime Minister's unilateral decision to abolish the caretaker government. Prime Minister's personal view was conveyed to the public at a time when the Committee was finalising its report.[138] Later, the Fifteenth Amendment to the Constitution controversially abolished the caretaker government.[139]

---

133 Nizam Ahmed, 'Parliament, Public Engagement and Legislation in Bangladesh: A case study of Domestic Violence Act of 2010' (2018) 24(4) *The Journal of Legislative Studies* 431.

134 ibid 445; Rahman (n 132) 55.

135 Ahmed (n 45) 155. Also see, Syed Imtiaz Ahmed, 'Civilian supremacy in democracies with 'fault lines': The role of the parliamentary standing committee on defence in Bangladesh' (2006) 13(2) *Democratization* 283.

136 Rahaman (n 132) 55.

137 Adeeba Aziz Khan, 'The politics of Constitutional Amendments in Bangladesh: The case of the non-political Caretaker Government' (2015) 3 *International Review of Law* 11-13.

138 Nizam Ahmed, 'Abolition or Reform? Non-party Caretaker System and Government Succession in Bangladesh' (2011) 100 (414) *Round Table: The Commonwealth Journal of International Affairs* 303.

139 Afsan Chowdhury, 'The 15th amendment: Restoration in, caretaker system out, and political jhogra imminent', *BDnews24.com* (Dhaka, 4 July 2011) <https://opinion.bdnews24.com/2011/07/04/the-15th-amendment-restoration-in-caretaker-system-out-and-political-jhogra-imminent/> accessed 28

7.2 Partisan Cartelisation as a Barrier to Meaningful Reform

The partisan cartelisation of the committee assignment process has also limited the benefits of some of the progressive developments in Bangladesh so far. The Chairmanship of the Public Accounts Committee (from now on PAC) is an example of this. Though there were repeated calls for appointing chairs of Public Accounts, Public Undertaking and Estimate Committees from the opposition parties,[140] it was not heeded until the current Parliament. In the current Parliament, a lawmaker from the main opposition party JP, Rustam Ali Farazi, has been appointed the Chair of the PAC. Since there is no declared commitment on the part of the ruling party to establish the appointment as a matter of convention, the appointment remains a matter of grace rather than a conviction for the ruling party. This good thing might have happened because the main opposition party of the present (2019-present) and previous (2014-2018) parliament is a ruling party ally pretending to be its official opposition.[141]

The second example could be the recent trend of appointing senior party members and ex-ministers as the chairs of different standing committees. Until the Seventh Parliament (1996-2001), there was a ludicrous rule of appointing the Ministers as Chair of the parliamentary committee on their Ministries.[142] That rule was changed in 1997. Still, the Minister concerned is given an *ex officio* membership in the Committee. Ministers and cabinet members being the senior leaders of the parties, a committee chair chosen from the backbench would feel the hegemony of the Ministers sitting in their committees.[143] There has been a proposal to scrap the Minister's *ex officio* membership. Not heeding to that demand, parliaments since 2009 have instead appointed some ex-Ministers as standing committee chairs. While this practice could potentially help expertise development and reduce the ministerial influence in committee works,[144] the appointment depends on the Prime Minister's good grace - the ultimate party leader - who would select or deselect whatever ex-Ministers s/he likes. The above cases of the partisan suppression of parliamentary committees show that parliamentary committees can work in Bangladesh only if they are allowed to by the party leadership and it makes Cox and McCubbins' "partisan cartel theory" the most sensible explanation of Bangladeshi parliamentary committees.

July2021.

[140] A.T.M. Obiadullah, *Institutionalization of Parliament in Bangladesh: A study of the donor intervention for reorganisation and development* (Palgrave Macmillan 2019) 107-138.

[141] M Jashim Ali Chowdhury, 'In Search of Parliamentary Opposition in Bangladesh' (IACL-AIDC Blog, 21 January 2021) <https://blog-iacl-aidc.org/2021-posts/2021/1/21/in-search-of-parliamentary-opposition-in-bangladesh> accessed 01August 2021.

[142] RoP (n 38) r. 247(2).

[143] Ahmed (n 45) 156.

[144] Chowdhury (n 50).

8. Conclusion

The US Congressional committees are regarded as the most powerful and institutionalised version of all.[145] One of the reasons behind this is the decentralised structure of American political parties and the congressmen's relative autonomy from their party leaders.[146] Secondly, unlike the parliamentary system, the US version of separation of power segregates the executive government from the legislature. Absent strong partisan whipping and the Head of the Government and Cabinet from the legislature, Congressmen work as relatively independent constituency agents. The US separation of power also arms the Congress with necessary resources and tools to meet the executive bureaucracy with a counter legislative bureaucracy of congressional committees, subcommittees, and staff. The Separation of Power system brings an unspoken rule of comity whereby neither the executive nor the legislature interferes with each other's institutional autonomy in arranging staff and finances.[147] Its autonomy from parties, the government high-ups and the separation of its administration from the executive branch puts the US Congress in stark contrast with legislatures in parliamentary systems.[148]

In contrast, a Westminster parliament institutionally lacks the competitive zeal against the executive and normally works to enable, rather than obstruct, the government.[149] Also, a strong party cohesion being a signature of this model, a strong committee system appears "antithetical"[150] to the system. A Westminster parliament is admittedly a "policy influencing"[151] - rather than policymaking - legislature. Sometimes described as an "arena type parliament"[152] where the theatrics of debate take priority over meaningful scrutiny, it usually reacts to a government policy rather than transforming it proactively.[153]

Despite these institutional barriers, committee systems are rapidly consolidating across the parliamentary world. There seems to be a "consensus"[154] in the parliamentary world that a strong committee system is necessary for a policy

---

145 Malcolm Shaw, 'Parliamentary Committees: A global perspective' (1998) 4(1), *Journal of Legislative Studies* 225, 227.

146 ibid 228.

147 John Hart, *The Presidential Branch* (New York: Pergamon 1987).

148 Shaw (n 145) 228-229.

149 K.C. Wheare, *Legislatures* (Oxford University Press 1967); G.P. Thomas, 'United Kingdom: The Prime Minister and Parliament' (2004) 10(2-3) *Journal of Legislative Studies* 4 - 37; Nicholas D. J. Baldwin, 'Concluding Observations: Legislative Weakness, Scrutinising Strength?' (2004) 10 (2–3) *Journal of Legislative Studies* 295–302.

150 Lawrence D. Longley and Roger H. Davidson, 'Parliamentary committees: Changing perspectives on changing institutions' (1998) 4(1) *Journal of Legislative Studies* 1, 2.

151 Philip Norton, 'Parliaments: A framework for analysis', (1990) 13(3) *West European Politics* 1, 4-5.

152 Nelson W. Polsby, 'Legislatures' in Greenstein, Fred I. and Nelson W. Polsby, (eds.), *Handbook of Political Science, Vol. 5, Governmental Institutions and Processes* (Reading, Mass.: Addison-Wesley, 1975).

153 Michael L Mezey, *Comparative Legislatures* (Durham: Duke University Press 1979)

154 S Whitmore, 'Challenges and Constraints for Post-Soviet Committees: Exploring the Impact of Parties on Committees in the Ukraine' (2006) 12(1) *Journal of Legislative Studies* 32, 36.

influencing Parliament, and the purpose of the parliamentary opposition is best served within a strong committee framework.[155] As the discussion throughout this paper has shown, even a traditional parliamentary system like the UK is tackling the challenges of partisanship by developing an elaborate and powerful committee system. The UK House of Commons committees' traditional *ad hoc*-ism has given way to a permanent structure that mirrors the executive departments. Members also see huge expertise and alternative career potentials in committees and regard them as their "actual place of work".[156] Lord Philip Norton has labelled this as the transformation of "a nascent legislative institutionalisation to a developed institutionalisation."[157] The UK's success in excelling its committee system is seen as the example of a "vigilant parliament, willing and able to use [whatever] powers [it has] at its disposal"[158] to achieve its greater goal of democratic accountability.

However, the trend is not limited to the UK only. It is visible across the Commonwealth traditions in the West and the East.[159] While the third world legislatures have faced authoritarian assaults, *e.g.*, abolishment or suspension, they have sustained at least as symbols of regime legitimacy.[160] The Parliament of Bangladesh also sustained military and partisan authoritarian attacks more than once. Still, the parliamentary system has remained operative for more or less forty years of Bangladesh's fifty years' life span.[161] It, therefore, may have survived the test of time and is "far from being obsolete".[162] However, despite the Parliament's existential perseverance, the global trend of parliamentary resurgence is not visible in Bangladesh. Parliamentary committees are still undernourished, mostly nominal in the policy process and play a marginal role in the democratic accountability process.[163] This comparative analysis of the UK and Bangladesh's parliamentary committee system vis-à-vis the leading committee theories has suggested that Bangladesh's dynastic, patriarchal, and clientelist party system is standing on the way to all possible avenues of consolidation of the committee system as a meaningful accountability institution.

---

155 S Martin and S Depauw, 'The Impact of Multiparty Government on the Internal Organization of Legislatures' (69th Annual National Conference of the Midwest Political Science Association, Chicago, April 2011) 1.

156 K Strøm, 'Parliamentary Committees in European Democracies' (1998) 4(1) Journal of Legislative Studies 21.

157 Philip Norton, 'Nascent Institutionalisation: Committees in the British Parliament' (1998) 4(1) *Journal of Legislative Studies* 143.

158 Hansard Society. *The Challenge for Parliament: Making Government Accountable* (Report of the Hansard Society Commission on Parliamentary Scrutiny, VacherDod Publishing 2001) 2.

159 Shaw (n 145) 238-245.

160 Hasan-Askari Rizvi, 'The Civilianization of Military Rule in Pakistan' (1986) 26(10) *Asian Survey* 1067.

161 Firoj (n 46).

162 M Jashim Ali Chowdhury, 'Is the 1972 scheme of parliamentary system dead?' *The Daily Star* (Law and Our Rights, Dhaka, 19 March 2019) <https://www.thedailystar.net/law-our-rights/news/the-1972-scheme-parliamentary-system-dead-1716871> accessed 28 July 2021.

163 Alam and Teicher (n 48) 876-880.

© *Dhaka University Law Journal, 2021, 32(2), 199-210*
doi: https://doi.org/10.3329/dulj.v32i2.57965

Truth Commission: A Principled and Highly Effective Alternative to Trial?

Aminul Islam*

1. Introduction

In the aftermath of conflicts, the new government of a transitional State often finds it difficult to deal with those who are responsible for human rights abuses.[1] Because the outgoing regime seeks to avoid punishment, civil society seeks truth and justice, and the new administration aims to remain in power.[2] In such a situation, the government either prosecutes those guilty for human rights breaches to meet public expectations or allows impunity due to the outgoing regime's pressure. If the government does not take the first step, it risks losing public support and, as a result, legitimacy, which could make it more challenging to restore the rule of law and democratic institutions. And if the administration refuses to follow the latter, it risks inciting a violent military response, jeopardising its democratic progress.[3] Amid this challenging choice between amnesty and punishment, Pascoe proposes a third option: the truth and reconciliation commission (TRC), commonly known as the truth commission (TC), which allows both victims and perpetrators to speak out.[4] TC is a restorative justice process that avoids the punitive aspects of traditional trials. Thus, it is widely believed that TC is more useful in a post-conflict society than other forms of trials, such as international tribunals, special courts, or domestic trials, because they primarily contribute to 'the reconciliation of societies after the war.'[5]

This article examines the suitability and effectiveness of TCs as a transitional justice option for States. TCs were initially regarded as the second-best option for

* PhD Researcher, University of Sussex, UK and Joint District and Sessions Judge, Bangladesh Judicial Service.

[1] Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (Routledge 2010) 4.

[2] Rachel Kerr and Erin Mobekk, *Peace and Justice: Seeking Accountability After War* (Polity Press 2007) 142.

[3] Elin Skaar, 'Truth Commissions, Trials – Or Nothing? Policy Options in Democratic Transitions' (1999) 20(6) *Third World Quarterly* 1109, 1110.

[4] Daniel Pascoe, 'Are truth and reconciliation commissions an effective means of dealing with State-organised criminality?' (2007) 3 *Cross-sections* 93, 93.

[5] Kerr and Mobekk (n 2) 136.

States where trials were deemed destabilising. However, it is currently claimed that TCs have proven to be a principled and highly effective alternative to trials, which can appear to be a superior form of justice at times. This article will assess the truth of this assertion using examples from some of the most powerful TCs in South Africa, El Salvador, Guatemala, Timor-Leste, Argentina, Chile, and Peru. To that end, Section 2 of this article examines the differences between trials and TCs, focusing on transitional justice politics. Section 3 investigates whether TCs are suitable in a State that has just transitioned from a totalitarian and brutal dictatorship to a democratic one. It also examines the idea's plausibility that 'TCs are principled and highly effective alternatives to trials'. Section 4 investigates the TCs' potential to render justice and promote peace as a transitional justice tool. Section 5 concludes that the TCs are one of the most important and powerful mechanisms to deal with transitional justice issues that have ever evolved. They are now even considered the best alternative to prosecutions.

2. Truth Commissions and/or Trials: The Politics of Transitional Justice

Transitional justice is a rapidly growing field at the crossroads of 'jurisprudence, comparative politics, and political theory' that deals with past human rights abuses in post-conflict societies.[6] The UN Secretary-General perhaps provided the best description of transitional justice, in his report on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*,[7] which comprises:

> the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.[8]

To address previous egregious human rights atrocities, a democratic transition government only has three options: truth commissions, trials, or nothing at all.[9] However, picking one is very difficult because it depends on the authoritarian regime factors, transition and democratic governance factors, and thus, the choice case to case varies.[10] Typically, where public demand for justice is high and the outgoing

---

[6] Eric A Posner and Adrian Vermeule, 'Transitional Justice as Ordinary Justice' (2004) 117 *Harvard Law Review* 762, 762.

[7] Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (2004) UN Doc S/2004/616, para. 8.

[8] ibid.

[9] Skaar (n 3) 1110.

[10] Tricia D Olsen, Leigh A Payne and Andrew G Reiter, *Transitional justice in balance: comparing processes, weighing efficacy* (<United States Institute of Peace <Press 2010) 43-59.

regime's pressure is weak, the government prefers trials to prosecute those liable for earlier human rights atrocities. Where, on the other hand, there is high pressure for the outgoing regime's impunity and little public pressure for justice, the government simply does nothing, fearing that the outgoing totalitarian regime will retaliate and destroy the country's embryonic democracy.[11] However, there may be a third, more intriguing scenario, in which both the public demand for justice and pressure for the exiting regime's impunity are strong. In such a critical scenario, the government presents TCs as a compromise solution to preserve democracy[12] – similar to what happened in Argentina in the 1980s.[13]

TCs are less politically sensitive than courts and tribunals because they do not have the power to punish. Therefore, Kerr and Mobekk claim that TCs are frequently chosen as 'the primary or only vehicle of justice' in a post-conflict society.[14] The TC option has proven particularly appealing in light of the numerous transitions that have occurred as a consequence of negotiated settlements rather than a decisive win by one side of the conflict.[15] In these situations, perpetrators of human rights abuses often retain some influence throughout the transition. And thus, they can disrupt fragile post-conflict societies if confronted with the prospect of punishment.[16] For example, after the negotiated settlement of the Guatemalan war in the lower 1990s, the world witnessed the establishment of a TC only.[17] Hence, many scholars argue that 'truth commissions exist because of political compromises';[18] thus, they see the TCs as the second-best option to trials.[19]

On the other hand, in the cases of authoritarian regime's collapse or defeat rather than negotiated exit, the former regime has less power and influence over the new democratic government's decisions.[20] A complete break with the past and the former authoritarian order's diminished legitimacy provide the new democratic administration more leeway to hold the old regime or its individuals accountable,[21] which is more likely to result in prosecutions.[22] The establishment of the International

---

[11] Skaar (n 3) 1113.
[12] ibid.
[13] Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2011) 43-44.
[14] Kerr and Mobekk (n 2) 142 (emphasis added).
[15] Wiebelhaus-Brahm (n 1) 4.
[16] ibid.
[17] Hayner (n 13) 32-35.
[18] Robert I Rotberg, 'Truth Commissions and the Provision of Truth, Justice, and Reconciliation' in Robert I Rotberg and Dennis Thompson (eds), *Truth v Justice: The Morality of Truth Commissions* (Princeton University Press 2000) 7.
[19] Wiebelhaus-Brahm (n 1) 5.
[20] Olsen, Payne and Reiter (n 10) 46.
[21] ibid.
[22] Skaar (n 3) 1110.

Criminal Tribunals for the former Yugoslavia (ICTY) and the International Criminal Tribunals for Rwanda (ICTR) in the mid-1990s are the best instances in this regard. The principal ritual method for publicly contextualising and sharing the experience of transgression has been trials.[23] In the case of trials, however, bureaucratic roadblocks, witness intimidation, and the absence of evidence are all too prevalent. As a result, rather than trials, TCs are increasingly being used to uncover the truth about large-scale previous human rights breaches.[24] TCs, on the other hand cannot determine an individual's guilt or penalise or sanction criminals for their acts. They can, however, advise compensation for the victims. They can even recommend State institutional reforms in their findings, which a Court cannot do, to prevent future attempts at human rights violations.[25]

3. Is Truth Commission an Effective Alternative to Trial?

'Trail' and 'truth commission' have different theoretical foundations in transitional justice mechanisms.[26] According to Hayner, a TC:

> (1) is focused on past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences; (4) is a temporary body, with the aim of concluding with a final report; and (5) is officially authorised or empowered by the State under review.[27]

The four decades have witnessed about 40 TCs doing justice and restoring community after a conflict.[28] Trials or criminal prosecutions, on the other hand, are intended to bring to justice individuals who have grossly violated human rights, particularly those accused of the most heinous crimes such as crimes against humanity, war crimes, and genocide.[29] Trials could be domestic, international, or hybrid in nature.[30] However, domestic trials in a post-conflict State are always difficult to institute due to weak judiciaries, unstable democracies, and amnesty

---

[23] Ruti G Teitel, *Transitional Justice* (Oxford University Press 2000) 75.

[24] Michael Humphrey, 'From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transition and Individual Healing' (2003) 14(2) *The Australian Journal of Anthropology* 171, 172.

[25] Kerr and Mobekk (n 2) 130.

[26] Alexander Dukalskis, 'Interactions in Transition: How Truth Commissions and Trials Complement or Constrain Each Other' (2011) 13 *International Studies Review* 432, 434.

[27] Hayner (n 13) 11-2; see also Gabriela Andaur Gómez, 'Finding facts and constructing memory: the creation and custody of human rights records in South America' (2012) 40(3) *Archives and Manuscripts* 158, 162.

[28] ibid xi-xii.

[29] International Center for Transitional Justice, 'What is Transitional Justice?' <https://www.ictj.org/about/transitional-justice> accessed 7 October 2020.

[30] ibid.

laws.[31] As a result, attempts have been made to bring individuals responsible for past crimes to justice through internationally recognised courts and tribunals.[32] The Nuremberg and Tokyo military tribunals were established after World War II. International criminal law remained dormant for nearly 40 years until the *ad hoc* international tribunals, the ICTY and ICTR, were founded. In the meantime, States devised TCs as an alternative method to deal with serious and mass crimes.[33] Despite this, the creation of the ICTY and the ICTR marked a significant milestone in international criminal justice.[34] Finally, the idea of international prosecution gained widespread recognition with the establishment of the International Criminal Court (ICC) in July 1998.[35]

In general, proponents of international criminal trials believe that trials aid in rebuilding communities. Because trials help to achieve one or more of the following objectives: (1) uncovering and publicising the truth about past atrocities; (2) punishing criminals; (3) addressing the victims' needs; (4) advancing the law and order in embryonic democracies; and (5) encouraging reconciliation.[36] However, it is argued that the above-mentioned international tribunals and courts have failed to achieve these goals at desired levels.[37] There is criticism that *ad hoc* tribunals are weak, using the ICTY and ICTR as examples, because they are not long-term institutions often not widely understood by the general public or outside of professional circles.[38] They are described by Zacklin as 'extremely costly bureaucratic machines'.[39] Sarkin and Daly have highlighted that international trials certainly have a minimal impact on reconciliation, and their usefulness to reconciliation is 'questionable'.[40]

---

[31] Laurel E Fletcher and Harvey M Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24(3) *Human Rights Quarterly* 573, 575.

[32] Cessare PR Romanno, in André Nollkaemper and Jann K Kleffner (eds) *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press 2004) ix.

[33] Declan Roche, 'Truth Commission Amnesties and the International Criminal Court' (2005) 45 *British Journal of Criminology* 565, 566.

[34] Jackson Nyamuya Maogoto, 'International Justice under the Shadow of Realpolitik: Revisiting the Establishment of the Ad Hoc International Criminal Tribunals' (2001) 5 *Flinders Journal of Law Reform* 161, 163.

[35] The ICC came into force on 1 July 2002. see Romanno, Nollkaemper and Kleffner (n 32) ix.

[36] Fletcher and Weinstein (n 31) 586.

[37] Ralph Zacklin, 'The Failings of Ad Hoc International Tribunals' (2004) 2(2) *Journal of International Criminal Justice* 541, 543.

[38] Sandra L Hodgkinson, 'Are Ad Hoc Tribunals an Effective Tool for Prosecuting International Terrorism Cases?' (2010) 24(2) *Emory International Law Review* 515, 518-19.

[39] Zacklin (n 37) 543.

[40] Jeremy Sarkin and Erin Daly, 'Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies' (2004) 35(3) *Columbia Human Rights Law Review* 661, 690-91 (emphasis added).

After establishing the ICC, it was hoped that all the perpetrators of human rights atrocities would be aware that they could be held accountable in this independent and permanent criminal Court outside their home country.[41] But the reality is quite different. It took almost a decade to deliver its first verdict in any case.[42] This Court's trials are currently marked by delays, and as a result, it has failed to have a practical deterrent effect on potential human rights violators' minds. The ICC prosecution team has already announced that the allegations of crimes against humanity against Kenyan President Uhuru Muigai Kenyatta have been withdrawn.[43] They also dropped charges against Sudanese President Omar Hassan Ahmad Al Bashir, accused of genocide, crimes against humanity, and war crimes in the Darfur uprising.[44] These incidents have highlighted the ICC's flaws and shattered the optimism of many who had hoped for justice. Due to the disadvantages of criminal prosecutions, transitional societies have sought an effective alternative to trials; and establishing a TC to ensure transitional justice has proven extremely popular in post-conflict societies.[45]

However, individual accountability for past crimes may only be ensured via trials. According to Fletcher and Weinstein, it allows a society to 'construct a new national narrative that will help forge civic unity in the aftermath of mass violence.'[46] In contrast, Nino argues, trials 'may provoke further violence and risk democratic rule'.[47] Furthermore, in a transitional society, the adversarial nature of trials could be a major impediment to the restoration of damaged relationships.[48] It is also said that most trials focus on the past regime's senior leaders rather than the soldiers and their accomplices who really carried out the atrocities.[49] As a result, the first-hand perpetrators remain untouched. Another critique is that trials ignore victims,[50] while a TC's primary focus is on the victim – which has been promoted as one of a TC's great strengths compared to trials.[51] That is why, Gentilucci writes, 'in transitional justice, the roles of truth-telling and accountability may not be best served by a trial.'[52]

---

[41] Declan O'Callaghan, 'Is the International Criminal Court the Way Ahead?' (2008) 8 *International Criminal Law Review* 533, 541-42.

[42] *Situation in the Democratic Republic of the Congo (The Prosecutor v Thomas Lubanga Dyilo)* (Judgement) ICC-01/04-01/06, T Ch I (14 March 2012).

[43] Amy Senier, 'The International Criminal Court: Situation in the Republic of Kenya'(2011) 50(4) *International Legal Materials* 494.

[44] Khalid Abdelaziz, 'Sudan's President Omar al-Bashir claims victory over ICC after it drops Darfur war crimes investigation' *The Independent* (London, 14 December 2014) < http://www.independent.co.uk/news/world/africa/sudans-president-omar-albashir-claims-victory-over-icc-after-it-drops-darfur-war-crimes-investigation-9924471.html> accessed 20 November 2020.

[45] Kerr and Mobekk (n 2) 128.

[46] Fletcher and Weinstein (n 31) 599.

[47] Carlos Santiago Nino, *Radical Evil on Trial* (Yale University Press 1996) 188.

[48] Eric Brahm, 'Uncovering the Truth: Examining Truth Commission Success and Impact' (2007) 8 *International Studies Perspectives* 16, 18.

[49] Fletcher and Weinstein (n 31) 579.

[50] Dukalskis (n 26) 436.

[51] Kerr and Mobekk (n 2) 134.

[52] Geoff Gentilucci, 'Truth-Telling and Accountability in Democratizing Nations: The Cases against

Moreover, those to be tried may still hold powers and have massive followers. It means that prosecuting them risks spreading violence, which might lead to the incipient State's total collapse.[53] The amnesty instituted by Pinochet in Chile constrained the new government options of trial for responding to Pinochet-era human rights abuses as he had the support of a significant Chileans and military was under his control – the government chose the alternative option of trails – established a TC to find the truth about past for societal reconciliation.[54] Thus, in a transition based on a military pact, trials might be viewed as an invitation to a coup and a repeat of bloodshed, potentially wiping out the gains made by the new democratic government.[55] The outgoing regime also keeps a close eye on the pact's terms, which deal with previous human rights atrocities. For example, during the UN-mediated negotiations that successfully ended the Guatemalan war in the 1990s, the armed forces' leadership was primarily concerned with avoiding prosecution for previous human rights atrocities during the transition to peace.[56] Any threat of prosecution could have derailed the peace negotiations. Thus, there was no option but to establish a TC to find the truth about past crimes – even though the outgoing regime imposed a restriction, the TC would have no power of naming perpetrators.[57] Again, while armed conflicts are ongoing, those facing prosecution may not be willing to come for negotiations. For example, peace negotiations were shelved after the ICC issued arrest warrants for Sudanese President Omar Al-Bashir and Uganda's Lord's Resistance Army leader Joseph Kony.[58]

The concept behind many of the TCs is that people will be more likely to talk about their activities if they aren't prosecuted for them – this can be crucial in situations when people have 'disappeared' and relatives of the victims are left in the dark about their loved ones' fates.[59] Recognition of the missing persons can help to vindicate and respect those who have suffered, as well as alleviate the suffering of the victims.[60] According to anti-apartheid activists, the South African TRC's most significant accomplishment was simply to eliminate the prospect of continuous denial.[61] Moreover, TCs are not wildly expensive undertakings, and this is one of their benefits, especially when set against the enormous costs of international Courts.[62] In light of these advantages, Stahn points out that TCs can be used for a

---

Chile's Agusto Pinochet and South Korea's Chun Doo-Hwan and Roh Tae-Woo' (2005) 5(1) *Connecticut Public Interest Law Journal* 79.

[53] Dukalskis (n 26) 436.

[54] Hayner (n 13) 47.

[55] Dukalskis (n 26) 436.

[56] Hayner (n 13) 32.

[57] ibid 32-35.

[58] Dukalskis (n 26) 436.

[59] Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) 571.

[60] Roche (n 33) 569.

[61] Hayner (n 13) 20-21.

[62] Kerr and Mobekk (n 2) 132.

variety of reasons that are typically outside the jurisdiction of Courts.[63] It contains an underlying moral argument that a TC is the most viable alternative to trials – that is, it aids citizens in forming a new society based on shared values.[64]

A TC may also be asked to help in the battle against impunity, and it is usual for it to make specific recommendations to improve criminal accountability.[65] The TRC in Timor-Leste, for example, delivers files to the prosecution authorities in cases of genocide, crimes against humanity, war crimes, torture, murder, and sexual offences.[66] TCs can complement trials in this fashion.[67] According to the Office of the High Commissioner for Human Rights(OHCHR):

> [T]he information collected by a truth commission may be useful to those investigating cases for prosecution, be it while the commission is still operating, immediately after its conclusion or many years later. Generally, a truth commission should be viewed as complementary to judicial action.[68]

As a result, while TCs have proven to be the best alternative to trials for administering transitional justice in a fragile State, the world has seen trials for individuals responsible for major crimes such as genocide, war crimes, and crimes against humanity. These crimes are so grave that perpetrators should not be allowed to escape the punishment they deserve. Otherwise, atrocities may recur, as impunity for such crimes may incite others to commit similar crimes. Furthermore, watching offenders go unpunished may have a long-term negative impact on the victims' mental health and the mental health of their family members and well-wishers, perhaps leading to a traumatised society. In such cases, trials are thought to be the best option to ensure justice in a transitional society.

4. Are Truth Commissions Providing A Superior Form of Justice?

The new government must offer an official accounting of the crimes committed and hold those involved accountable to compensate the public for the harm caused by human rights breaches.[69] To that end, trials are motivated by a 'retributive justice' sentiment that implies at least some form of punishment, which is required to restore

---

[63] Carsten Stahn, 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor' (2001) 95(4) <*American Journal of International Law* 952, 954.

[64] Amy Gutmann and Dennis Thompson, 'The Moral Foundations of Truth Commissions' in Robert I Rotberg and Dennis Thompson (eds), *Truth v Justice: The Morality of Truth Commissions* (Princeton University Press 2000) 28.

[65] Hayner (n 13) 22.

[66] Stahn (n 63) 958.

[67] Kerr and Mobekk (n 2) 138.

[68] Office of the High Commissioner for Human Rights (OHCHR), *Rule-of-Law Tools for Post-Conflict States: Truth Commissions* (United Nations 2006) 27.

[69] Gentilucci (n 52) 79.

balance to the moral order of a community.[70] TCs, on the other hand, have become associated with an alternative form of justice known as 'restorative justice'. This strategy transforms anger, hatred, and vengeance into community-building, which emphasises reconciliation.[71] Inevitably, judicial trials must focus on true and false accounts of something past and in concert with the rigorous slogan – 'Let justice be done though the heavens fall!'. The Courts are bound to make judgments of guilt or innocence without significant concern for the impact on society.[72] Restorative techniques like TCs, on the other hand, focus on the fundamental causes of conflict and human rights violations, such as laws and practices, rather than on individual abusers, facilitating required political and cultural change and paying more attention to the needs of victims.[73] Therefore, restorative justice is more likely to prioritise forward-looking than retributive justice.[74]

However, opponents of TCs argue that the wording of their charters compromises the pursuit of justice in the traditional sense in favour of promoting other social goals like historical truth and societal cohesion.[75] According to Gutmann and Thompson, the pursuit of justice does not imply a retributive perspective of punishment;[76] yet, Moghalu and many others define justice in a strictly retributive sense – justice is about punishing offenders through trials.[77] The South African TRC's Director of Research, Charles Villa-Vicencio, identifies six distinct types of justice, which are:

> 1) *Retributive justice* affirms the place of *lex talionis* ('an eye for an eye and a tooth for a tooth')…. 2) *Deterrent justice* has a place in seeking to limit atrocities in the future. 3) *Compensatory justice* that requires beneficiaries of the old order to share in programs of restitution needs to be explored. 4) *Rehabilitative justice* that addresses the needs of both victims and survivors….5) *Justice as the affirmation of human dignity* recognizes the equal dignity of all people. 6) *Justice as exoneration* affirms the need for the records of persons who have been falsely accused by the State and/or within their own communities to be put straight.[78]

---

[70] Jens David Ohlin, 'On the Very Idea of Transitional Justice' (2007) 8(1) *Whitehead Journal of Diplomacy and International Relations* 51, 52.

[71] Wiebelhaus-Brahm (n 1) 10.

[72] Donald W Shriver, 'Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?' (2001) 16 *Journal of Law and Religion* 1, 19.

[73] Brahm (n 48) 19.

[74] Cath Collins, *Post-Transitional Justice: Human Rights Trails in Chile and El Salvador* (Pennsylvania State University Press 2010) 12.

[75] Gutmann and Thompson (n 64) 22.

[76] ibid.

[77] Kingsley Chiedu Moghalu, 'Reconciling fractured societies: An African perspective on the role of judicial prosecutions' in Ramesh Chandra Thakur and Peter Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (United Nations University Press 2004) 199-200.

[78] Charles Villa-Vicencio, 'Why perpetrators should not always be prosecuted: Where the International

After evaluating these forms of justice, Clark believes that while international war crimes tribunals may be able to achieve some degree of deterrent justice, they are arguably not well-positioned to deliver the other forms of justice.[79] In this context, Asmal adds that if we take a serious analytical look at these many forms of justice, we may see that truth commissions, if effectively conducted, are a form of justice pursuit rather than sacrifice.[80]

Proponents of TCs claim that disclosing the truth about the former regime's human rights atrocities will aid in the psychological healing of victims and their families, as well as reconciliation.[81] Indeed, the South African TRC anticipated that speech would result in some form of catharsis, that speaking directly about previous experiences would be therapeutic.[82] The South African Truth and Reconciliation Commission chairperson, Archbishop Emeritus Desmond Tutu, has stated that '[t]he acceptance, the affirmation, the acknowledgement that they had indeed suffered was cathartic for them [victims].'[83] Furthermore, when the truth about past crimes is revealed, individuals rather than the entire community are singled out for blame, which helps to minimise the chance of returning of violence by preventing retaliation or revenge killings. However, it makes it easier for antagonistic parties to repair bonds.[84] Laakso claims that 'racial violence became almost non-existent in South Africa, and the fact that there were no revenge killings after the TRC started its work says a great deal about the kind of impact that the Commission had.'[85] Zalaquett, a member of Chile's TRC, writes from his own experience that:

> Hardly anyone, however, showed a desire for vengeance. Most of them stressed that in the end, what really mattered to them was that the truth be revealed, that the memory of their loved ones not be denigrated or forgotten, and that such things never happen again.[86]

Criminal Court and Truth Commissions meet' (2000) 49(1) *Emory Law Journal* 205, 215 (emphasis added).

[79] Janine Natalya Clark, 'The three Rs: retributive justice, restorative justice, and reconciliation' (2008) 11(4) *Contemporary Justice Review* 331, 333.

[80] Kader Asmal, 'Truth, Reconciliation and Justice: The South African Experience in Perspective' (2000) 63(1) *Modern Law Review* 1, 12-13.

[81] Pascoe (n 4) 97.

[82] Janine Natalya Clark, 'Reconciliation via Truth? A Study of South Africa's TRC' (2012) 11 *Journal of Human Rights* 189, 193.

[83] ibid.

[84] David Mendeloff, 'Truth-Seeking, Truth-Telling and Post-conflict Peacebuilding: Curb the Enthusiasm?' (2004) 6(3) *International Studies Review* 355, 359.

[85] Jen Laakso, 'In Pursuit of Truth, Justice and Reconciliation: The Truth Commissions of East Timor and South Africa' (2003) 22(2) *Social Alternatives* 48, 50.

[86] José Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations' (1992) 43 *Hastings Law Journal* 1425, 1437.

That is why, according to Hayner, a TC may be able to assist lessen the chance of future abuses merely by publishing a truthful record of the violence, in the hopes that a more informed population will recognise and fight any signs of the return to repressive rule.[87] Furthermore, TCs promote peace and ensure justice by advocating institutional reforms and strengthening democracy. Relevant examples include the judicial reforms in El Salvador as per TC's recommendation and the Argentinean Commission's discovery of the military's torture culture, which led to reforms.[88]

TCs may also suggest vetting, used in some countries to remove abusive military, police, judiciary, and civil service officials.[89] Based on TC's proposal, the peace accords in El Salvador established a committee to remove human rights abusers from prominent positions in the armed forces.[90] Furthermore, TCs make reparation programmes easier to implement. For example, the Timor-Leste TRC devised an immediate reparations system, granting $200 to some of the victims of human rights violations who had suffered severe injuries.[91] In Peru, 'A High-Level Multisectoral Commission' was created to design a reparation plan following the TC's recommendations – which was quite successful.[92] Chile's reparation programmes included monetary compensation, health care services, educational assistance, business loans, and pension reform, all of which were based on TC's recommendations.[93] These actually help the victims and the people at large to rebuild society.[94]

TCs also help victims of conflict and their families get justice. It is argued by Mendeloff that disclosing the truth, assigning blame to abusers, and forcing them to confess their misdeeds publicly contributes to the attainment of justice.[95] One of the main criticisms against TCs is that they often offer perpetrators amnesties from prosecution in exchange for their testimony. South Africa was the first TC to incorporate an amnesty clause in its mandate, where a perpetrator would not risk prosecution if they told the truth about past abuses.[96] Guatemala's, El Salvador's,

---

[87] Priscilla B Hayner, 'Fifteen Truth Commissions – 1974 to 1994: A Comparative Study' (1994) 16(4) *Human Rights Quarterly* 597, 609.
[88] Pascoe (n 4) 107-08.
[89] OHCHR (n 68) 28.
[90] Hayner (n 13) 51.
[91] ibid 41.
[92] ibid 38.
[93] Pablo de Greiff, 'Introduction' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006) 10.
[94] Merryl Lawry-White, 'The Reparative effect of truth seeking in Transitional Justice' (2015) 64 *International & Comparative Law Quarterly* 141, 143-44.
[95] Mendeloff (n 84) 360.
[96] Kerr and Mobekk (n 2) 139.

Argentina's, and Chile's TCs incorporated various conditional and unconditional amnesties in their work, although Rwanda's, Yugoslavia's, and Timor-Leste's did not (for serious crimes).[97] Supporters of the 'truth for amnesty' provision claim that the TC's goal is to achieve justice through reconciliation.

Thus, they claim that, rather than forsaking justice, the commission supports an 'enhanced form of justice.'[98] If war criminals are forced to declare their misdeeds in front of the public, even if it's for the sake of amnesty, they risk public humiliation and ostracism.[99] As a result, many black South Africans thought the TRC's amnesty provision, in which the accused exchanged criminal prosecution for public confessions of their misdeeds, was sufficient justice.[100] Many proponents of TCs even argue that public shame can be harsher than criminal sanctions in many cultures, and so can be an effective deterrent.[101] According to Scharf, exposing the truth about an individual's role in violations of human rights exposes the perpetrator to public humiliation and is thus a form of punishment.[102] In this way, restorative justice, ie, TC becomes immensely popular, eclipsing and overtaking other justice ideas.[103]

5. Conclusion

TC is likely to be one of the most prominent and powerful of the several methods of transitional justice that have ever been developed.[104] TCs are also widely accepted as complementary to trials, particularly to try those charged with the most serious crimes ie, war crimes, crimes against humanity and genocide.[105] For these heinous crimes, trials are thought to be the best option, if possible and practicable, to provide justice in a transitional society. However, trials appear to be less effective in dealing with systemic injustice and collective crimes. In such cases, TCs have proven to be the best alternative to trials because they provide many benefits to a transitional society, [106] including societal healing and reconciliation, the promotion of democratic values and human rights, the ability to initiate broad institutional reform and reparations, the creation of a common historical record by exposing the truth about the past, justice and deterrence, which can be summed up as the superior form of justice.

---

[97] Pascoe (n 4) 95-6.
[98] Gutmann and Thompson (n 64) 25.
[99] Mendeloff (n 84) 361.
[100] Ibid 367.
[101] Jeremy Sarkin, 'The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda' (1999) 21 *Human Rights Quarterly* 767, 801.
[102] Michael P Scharf, 'The Case for a Permanent International Truth Commission' (1997) 7 *Duke Journal of Comparative & International Law* 375, 394.
[103] Christian B Gade, 'Restorative Justice and the South African Truth and Reconciliation Process' (2013) 32(1) *South African Journal of Philosophy* 10, 16.
[104] OHCHR (n 68) 36.
[105] Wiebelhaus-Brahm (n 1) 5.
[106] Miriam J Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002) 15 *Harvard Human Rights Journal* 39, 43.