Section 302: Matter of Death and Life on the Sentences Preference

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Abstract

My idea in this paper is that Article 111 of the Constitution is a strong reflection of the doctrine of binding precedent and it obliges the judicial organ to maintain a legal certainty. My submission is that a wide discretionary power entrusted to the judges under section 302 of the Penal Code leaves room for inconsistent and individual centric judgements which consequently is hindering the judicial organ to maintain a legal certainty. The focus then largely revolves surrounding the exercise of the discretionary power by the judges in the present sentencing system. First, whether there is any inconsistency in the decision of the HC benches while using their discretion under section 302 of PC. Second, whether bench system encourages inconsistency in the decision of the HCD and prevents the HCD to work as a whole. If so, can one HC bench can *per incuriam* the decision of another HC bench? Third, whether HCD has provided any specific direction for sentencing that has developed into a precedent. Keeping these questions in mind, this article makes an attempt to examine the application of Article 111 and 107 of the Constitution to maintain a legal certainty while sentencing.

Keywords: The Doctrine of Precedent, Death Reference (DR) Cases, *Per Incuriam*, Legal Certainty.

Introduction

Approximately hundred and sixty-eight years old criminal justice system of Bangladesh does not have any statutory provision for separate 'sentence hearing'. Hence, it does not allow any 'sentencing hearing' nor invites pre-sentencing report on the background of the accused before the trial court pronounces its judgments. Although, there used to be a statutory provision for separate 'sentencing hearing' introduced in 1978[2] with the Law Reforms Ordinance, 1978, it was repealed in 1983.[3] As a consequence, it was upon the

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[2] The Code of Criminal Procedure 1898 (BD), Chapter XXIII.

[3] The Code of Criminal Procedure (Second Amendment) Ordinance 1983 (Bangladesh), s 3.

discretionary of defence lawyers to present the mitigation pleas during the trial. Absorbingly, after repealing the statutory provision for 'sentencing hearing', the legislatures neither enacted statutory sentencing guidelines nor any separate sentencing statute to ensure that the sentence to be awarded are proportionate to the gravity of the offence.[4] Hence, in absence of sentencing guidelines or sentencing statute the judges award the sentences in the exercise of their individual sentiment and unbridled discretion provided under the statute.

At this backdrop, the paper delineates Article 111 of the Constitution, as a strong reflection of the doctrine of binding precedent, can be a venture towards a sentencing guideline as it obliges the judicial organ to maintain a legal certainty. Our justice system which purports to be based on the doctrine of precedent, in Latin term *stare decisis* ('stand by the decision'), reflects the principle 'treat like cases alike'.[5] The idea behind the doctrine is that when judges are deciding cases, they must pay proper respect to past judicial decisions.[6] In our justice system under 'Article 111 of the Constitution',[7] judges are bound to apply the reasoning of judges in past cases—in other words, 'follow' past decisions—when deciding cases with similar facts and issues.[8]

Complementing Article 111 of the Constitution, Section 367(5) of the CrPC states, "if the accused is convicted of an offence punishable with death or, in the alternative, with transportation for life or imprisonment for a term of years, the Court shall in its judgment state the reasons for the sentence awarded".[9] This implies, in principle, the judicial bodies ought to justify their option by providing the rationales for their judgement.

At this backdrop, the paper starts giving a synopsis about the sentencing Practice in High Court and Trial Court. Then the author has tried to inquire in to the question - whether bench system encourages inconsistency in the decision of the High Court Division (HCD) and prevents the HCD to works as a whole. If so, can one HC bench *per incuriam* the decision of another HC

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4 *Md. Yahia & others v State*, 1 MLR (1996) HCD 59.

5 David A. Strauss, 'Must Like Cases be Treated Alike?' (2002) University of Chicago Public Law & Legal Theory Working Paper No. 24 <https://chicagounbound.uchicago.edu/public_law_and_legal_theory> accessed 8 September 2018.

6 Matthew Harding, 'The High Court and the Doctrine of Precedent' (*Opinions on High*, 18 July 2013) <http://blogs.unimelb.edu.au/opinionsonhigh/2013/07/18/harding-precedent/> accessed 8 September 2018.

7 Article 111 says that the law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it.

8 John Delaney, *Learning Legal Reasoning: Briefing, Analysis, and Theory* (John Delaney Publications 1987) 5.

9 The Code of Criminal Procedure, s 367(5) <http://bdlaws.minlaw.gov.bd/sections_detail.php?id=75&sections_id=21500> accessed 8 September 2018.

bench? Furthermore the author examines whether there is any inconsistency in the decision of the HC benches while using their discretion to make the choice between death and imprisonment for life under section 302 of PC that reflects its effect on the practice of subordinate courts. Additionally, explores, whether HCD has provided any specific direction for sentencing that has developed into a normative character. Finally, the paper argues, HCD has impliedly given specific direction/guideline for sentencing. However, as the legal representatives show reluctancy to submit sentencing factors before the subordinate courts the judges show reluctancy to use their judicial mind. Consequently, such directions as a binding precedent is not followed which led to the violation of Article 111 of the Constitution.

In doing this qualitative research, the paper considered primary data, such as acts, and secondary data, collected by reviewing literatures from books, articles and law reports and reports of organizations. The paper has some limitations and one of the limitations of the paper is that the trial court judgments were not analysed. Due to some systematic difficulties access to trial court judgements was not received. Though analysing the trial courts judgments would have enhanced the paper, but, as the paper focuses on the Death reference Cases which is decided by the HCD, hence, analysing the HCD judgements gave an overall view of the trial court's practice.

Synopsis of the Sentencing Practice in High Court and Trial Court

Section 302 of the PC has provided the Judges with an immense discretionary power by stating, 'whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine'. This implies, there are two kinds of punishment prescribed under the Section- firstly, death sentence with fine, and secondly, imprisonment for life with fine. However, the Section does not enumerate the circumstances under which either of these sentences can be imposed. This indicates that, the either punishment shall be decided upon the Judges discretionary. However, under section 374 of the CrPC "when the Court of Session [trial court] passes sentences of death, the proceedings shall be submitted to the HCD and the sentence shall not be executed unless it is confirmed by the HCD". Hence, whenever, a death sentence is passed by the trial court it is sent to the HCD for confirmation and is called Death Reference Case.

As per the records of the Death Reference Branch of the HCD, there were 580 DR cases before the court in 2016. Of which 419 were pervious pending cases and 161 were newly submitted before the court for confirmation. Of these 580 DR cases, HCD could hear only 45 cases. Out of these 45 cases, 35 cases were studied from which it is ascertained that 32 DR cases were rejected. That means the rejection rate was approximately 91.4 per cent. Similarly, in 2017, HCD could hear only 66 cases, of these, 46 cases were studied, and the

rejection rate was approximately 65 per cent.[10] Here, the question arises why these DR cases were rejected?

It is noteworthy to mention, rejection in DR case does not always mean the suspect was wrongly convicted. Studying the 46 cases of 2017, it is been observed that in many cases the trial court has rightly convicted, but the punishment was not decided considering the mitigating and aggravating circumstances.[11] As held by the Appellate Division (AD) in *Nalu v The State*[12] in the cases where mitigating factors are present, the court may commute 'a sentence of death to one of imprisonment for life on consideration of mitigating circumstances'. So, what are these mitigating circumstances?

HCD at different times has considered tender age, old age, no previous crime record (PCPR), family circumstance, mental and physical health, along with long stay in condemn cell as mitigating factors and stated as the rationales for their judgement. According to the 1978 amendment of Section 367(5) of the Code of Criminal Procedure, 1898 (CrPC), "if the accused is convicted of an offence punishable with death or, in the alternative, with transportation for life or imprisonment for a term of years, the Court shall in its judgment state the reasons for the sentence awarded".[13] This implies, in principle, the judicial bodies ought to justify their option by providing the rationales for their judgement. In other words, these rationales are the soul of the decision-making process. Hence, these mitigating factors not only influence the decision of a judge but also justifies the judge's choice between life-or-death. So, can these rationales be called as 'declared law' under Article 111 of the Constitution? If yes, then these rationales are binding on the subordinate courts.

In fact, it is apparent that the reasons mentioned by the different HCD under Section 367(5) of the CrPC in deciding DR cases, i.e. mitigating and aggravating circumstances, purport to be a direction for the trials courts. However, the grounds for which approximately 65 per cent cases were rejected suggest that the mitigating circumstances are not considered by the sentencing trial judges. Hence, inconsonance is apparent between the practice of the trial court and HCD while sentencing.

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10 Sadiya S. Silvee, 'High Court decision on death reference' *The New Age* (Dhaka, 18 September 2018) <http://www.newagebd.net/article/50834/high-court-decision-on-death-reference> accessed 8 September 2018.

11 *State v Bidhan Chandra Roy*, 66 DLR (2014) HCD 500; 33 BLD (2013) HCD 359.

12 *Nalu v The State*, 32 BLD (2012) AD 247.

13 The Code of Criminal Procedure, s 367(5), <http://bdlaws.minlaw.gov.bd/sections_detail.php?id=75& sections_id=21500> accessed 8 September 2018.

Mitigating Factors: Consistent or *per incuriam* approach of the HCD

In order to examine the reasons behind the inconsonance between the practice of the trial court and HCD while sentencing I have considered Death Reference case decided from 1971 to 2017. And observed that in most of the case HCD has considered tender age, old age, no previous crime record (PCPR), family circumstance, mental and physical health as mitigating factors, however, vis-a-vis practice exists.

A. Tender age a Mitigating Factor or Not?

One of the prominent inconsonance exists in considering 'tender age' as a mitigating factor. In answering the question whether tender age itself is mitigating factor, the HCD bench presiding Justice Chowdhury A.T.M. Masud and Justice Mohammad Habibur Rahman in the *State v Punardhar Joydhar & Kudu & Shepali*[14] stated, "youth by itself is no extenuating circumstance to mitigate the sentence of death. It may, however, be taken into consideration along with other factors". However, opposing its own view in the *Salauddin v State*[15] the same bench stated, "the condemned-prisoner is, therefore, not so young that his youth by itself would be an extenuating circumstance for not awarding the sentence of death". This implies, the bench has shifted its position from 'youth by itself is no extenuating circumstance' to 'youth by itself is extenuating circumstance'. Later in many cases youth by itself was considered as extenuating circumstance.[16] In *State v Masudur Rahman,*[17] the bench presiding Justice Latifur Rahman and Justice Md. Moksudur Rahman have explicitly stated: "young age of the condemned prisoner and delay in disposal of the reference are extenuating circumstances for commuting the sentence of death to transportation for life".

Now whether the judgement of these two cases can be considered as "declared law" or in other words *ratio decidendi*. If yes, then, isn't it binding on the subordinate courts? Then, why the subordinate courts are not adhering to it?

It is noteworthy to mention here before considering tender age or 'young age' as mitigation factor one question needs to get answered that is - What constitutes 'tender age' that can be considered along with other factors? In *State v Punardhar Joydhar & Kudu & Shepali*[18] the age recorded by the learned Magistrate was 25 years but the learned Sessions Judge recorded it as 20 years during examination under section 342 Cr. P.C. And the same bench stated "youth by itself is no extenuating circumstance to mitigate the sentence

14 31 DLR (1979) HCD 312.

15 32 DLR (1980) HCD 227.

16 *Abdul Majid v The State*, 3 (1983) BLD (HCD) 304; *State v Masudur Rahman*, 4 (1984) BLD (HCD) 228.

17 4 (1984) BLD (HCD) 228.

18 31(1979) DLR (HCD) 312.

of death". Whereas, in *Salauddin v State*[19] analysing the fact of the case the same bench stated, "while recording the confessional statement the learned Magistrate recorded his age as 19 years and in his examination under section 342 CrPC, the Trial Court recorded his age as 24 years. The condemned-prisoner is, therefore, not so young that his youth by itself would be an extenuating circumstance for not awarding the sentence of death". This implies that, according to this bench of the HCD 'tender age' means below 20. But, does this formulation is constantly followed by the other bench?

In *per incuriam* to the decision given by the bench in *State v Punardhar Joydhar & Kudu & Shepali*,[20] the another bench presiding Justice Syed Muhammad Husain and Justice Amin-Ur-Rahman Khan considered the age of 22 years as 'young age' to commute death sentence with other factors in *Abdul Majid v The State*[21]. Considering this decision in *Amjad and Nawab Ali @ Naba v State*[22] another bench stated:

> The age of 25 years (of appellant Amjad) does not deserve any consideration in the matter, as it cannot be called a tender age. But the age of 20 years (of appellant Nawab) may be treated practically an age within teens and tender age. From the decision reported in 1983 BLD 304[23] ... it appears that the young age of 22 years has been taken to be a mitigating circumstance in favour of commutation.

Unlike other benches, this bench has created a parameter for considering 'tender age', according to which below and above 20 years but not exceeding 25 years can be considered as 'tender age'. [24] Adhering to this formulation in *Shahjahan Manik and Farida Aktar Rina v State*,[25] the age of 24 years was also considered as 'young age'.

However in Abdur *Rauf v State*[26] *per incuriam* to all above discussed decisions by the other benches the age of 29 years was considered as 'young age' to commute death sentence with other factors. A similar approach was taken by another bench in *Mojibur Rahman Gazi v State*[27] and the age of 35 years was also considered as 'young age'. Moreover, there are several cases where different ages ranging between below 20 year to 40 years were taken

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19 32 (1980) DLR (HCD) 227.

20 ibid

21 3 (1983) BLD (HCD) 304; A similar approach was taken by another bench in the *State v Md Masud Rana and Anr*, 35 (2015) BLD (HCD) 531.

22 D.R. No. 10 of 1986, with Criminal Appeal No. 337 of 1986 and Jail Appeal No. 354 of 1986; See also, Shahdeen Malik, 'Death Reference Cases: Waiting to be Executed — Delay as a Matter of Life or Death' (2000) 4(1&2) Bangladesh Journal of Law 63.

23 *Abdul Majid v The State*, 3 (1983) BLD (HCD) 304.

24 Malik (n 22) 64.

25 42 (1990) DLR (HCD) 465.

26 6 (1986) BLD (HCD) 402.

27 46 (1994) DLR (HCD) 423.

into consideration with other factors.[28] This demonstrates disagreement exists among the HC benches on what constitutes 'tender age'.

Additionally it is also apparent that regarding considering 'tender age' as mitigating factor 'two notions' exists among the HCD benches i.e., 'tender age' or 'young age' by itself[29] and with other factors constitutes the ground for commuting death sentence.

Now the question arises, whether HCD bench constantly follow this notion. In *the State v Mehadi Hasan alias Modern and others*[30] a bench presiding Justice A.K. Badrul Huq and Justice Md. Abu Tariq *per incuriam* the previous decision of other benches stated, "mere young age of convict-appellants cannot be a ground for desisting from imposing death penalty and cannot be termed as a mitigating circumstance in imposing punishment and no mercy can be shown to the culprits who pollute the society". A similar approach was taken by the court in *State v Naimul Islam @Mainul and another*.[31] However, there are other benches of HCD who adopted the view taken by the bench in the *State v Punardhar Joydhar & Kudu & Shepali*,[32] and considered tender age along with other factors.[33]

The present study asserts that two completely opposite notions exists among the HCD benches in considering the 'tender age' to commute death sentence i.e., 'young age' by itself and with other factors constitutes the ground for

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28 Muhammad Mahbubur Rahman, *Criminal Sentencing in Bangladesh: From Colonial Legacies to Modernity* (Brill Nijhoff 2017) 210.

29 *The State v Bidhan Chandra Roy*, 33 (2013) BLD (HCD) 359; *State v Md. Nasiruddin*, 23 (2018) BLC (HCD) 6; *The State v Tahazzel Hossain Nuta and Ors*., 35 (2015) BLD (HCD) 457.

30 24 (2004) BLD (HCD) 497; 13 (2005) BLT (HCD) 151.

31 60 (2008) DLR (HCD) 481.

32 31(1979) DLR (HCD) 312.

33 *Salauddin's case* 32 (1980) DLR (HCD) 227; *State v Masudur Rahman*, 4 (1984) BLD (HCD) 228; *Abdur Rouf and others v The State*, 6 (1986) BLD (HCD) 402; *Mojibur Rahman Gazi v State*, 46 (1994) DLR (HCD) 423; *State v Ranjit Kumar Mallik*, 4 (1996) BLT (HCD) 46; 2 (1997) BLC (HCD) 211; *Shahjahan (Md) v State*, 51(1999) DLR (HCD) 373; *State v Md Total Mia*, 51(1999) DLR (HCD) 244; *The State v Bellal Hossain*, 20 (2000) BLD (HCD) 45; *State v Md Shamim alias Shamim Sikder and ors*., 53 (2001) DLR (HCD) 439; *State v Md. Shahjahan alias Babu*, 7 (2002) BLC (HCD) 602; *State v Abdus Samad @Samad Ali*, 54 (2002) DLR (HCD) 590; *State v Mainul Haque @ Mainul*, 23 (2003) BLD (HCD) 220; *The State v Rafiqul Islam alias Gadan*, 23 (2003) BLD (HCD) 318; 55 (2003) DLR (HCD) 61; *Md. Khokan Mridha and another v State*, 8 (2003) MLR (HCD) 70; 7 (2002) BLC (HCD) 561; *State v Adam Khan*, 9 (2004) MLR (HCD) 405; *State v Kamruzzaman alias Mantu*, 13 (2005) BLT (HCD) 403; *State v Jamir Ali and another*, 13 (2008) BLC (HCD) 636; *State v Md. Zahurul*, 16 (2008) BLT (HCD) 235; *State v Nazma Sarker @ Beauty and 3 Others and Rokeya Begum and Another v The State*, 31 (2011) BLD (HCD) 515; *State v Nurul Islam*, 31 (2011) BLD(HCD) 285; *The State v Nurul Kabir*, 32 (2012) BLD (HCD) 353; *The State v Bidhan Chandra Roy*, 33 (2013) BLD (HCD) 359; *State v Dr Md Nurul Islam*, 22 (2014) BLT (HCD) 101; *The State v Tahazzel Hossain Nuta and Ors*., 35 (2015) BLD (HCD) 457; *State v Md Masud Rana and Anr*, 35 (2015) BLD (HCD) 531; *The State and Ors. v Julhash and Ors*., 35 (2015)BLD (HCD) 687; *State v Md. Nasiruddin*, 23 2018) BLC(HCD) 6; *The State and Ors. v Oyshee Rahman and Ors*., 25 (2017) BLT (HCD) 503.

commuting death sentence and young age cannot be termed as a mitigating circumstance. Nonetheless, in the maximum judgement young age by itself and with other factors is considered as a ground for commuting death sentence. Although no parameter of 'tender age' is constantly followed by the HCD benches, it have consensually considered 'tender age' or 'young age' as a ground to commute death sentence, except in few cases. However, may be, absence of parameter of 'tender age' had led the trial court into a *dubious possie*. Or else, the legal representatives have not brought the factor before the trial court. Here the question arise, how important it is for the legal representatives to bring the 'age' factor before the court when so many judgements have been given by the court.

B. Family and Economic Condition a Mitigating Factor or Not?

Like the 'tender age', similar inconsonance exists regarding considering family and economic condition as a mitigating factor. Here, it is important to examine whether family condition of a convict can be considered as a mitigating factor to commute sentence.[34] In the *State v Punardhar Joydhar & Kudu & Shepali*,[35] the bench presiding Justice Chowdhury A.T.M. Masud and Justice Mohammad Habibur Rahman, upon submission by the convict's Advocate, considered convict's minor child of aged 3 years as mitigating factor and awarded the convict with life imprisonment. However, in this case the child was allowed to remain with his mother in custody. However, in *Shafiullah @ Kala Mia v The State*[36] the bench presiding Justice A.T.M. Afzal and Justice Nurul Hoque Bhuiyan considered the same fact that the convict had a minor child and stated, "We have noticed that the appellant has a minor child by his deceased wife who has got to be looked after. The mother is already dead and it will be pretty inhuman for keeping the father of the child in confinement for long. Considering all aspects of the matter and the ends of justice, we propose to pass a rather lenient sentence upon the appellant." A similar approach was taken by the bench presiding Justice Bimalendu Bikash Roy Chowdhury and Justice Md. Mozammel Hoque in *State v Kalu Bepari*[37] where the accused had two minor children.[38] Similarly, in *the State v Bellal Hossain*[39] the bench stated, 'He (the accused) has an old mother, one wife (1st wife) and two children to support and look after. [..]Accordingly the sentence of death is reduced to life imprisonment'.

Securitizing these cases, it is observed that, HCD has considered 'family and economic conditions' as a mitigating factor along with other factors in several

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34 Rahman (n 28) 212-215.

35 31 (1979) DLR (HCD) 312.

36 5 (1985) BLD (HCD) 129.

37 10 (1990) BLD (HCD) 373; 43 (1991) DLR (HCD) 249.

38 The similar view was also taken in *Shahjahan Manik and Farida Aktar Rina v State*, 42 (1990) DLR (HCD) 465.

39 20 (2000) BLD (HCD) 45.

cases.[40] However, there are several other cases where 'family and economic conditions' where not argued by the convict's advocate.

C. Other Relevant Factors as Mitigating Factor or Not?

Apart from age, family and economic condition, mental health and no previous crime record is also considered as mitigating factors. In *State v Abdul Kader*[41] along with other factors the bench had considered- 'grave and sudden provocation, act of commission of murder is not pre-mediated, cold blooded and brutal, confession has been made to express his repentance and appeal for mercy' as mitigating factors. In the *State v Mosammat Mallika Khatun*[42] the bench considered the submission of the convict's advocate that the convict 'was an epileptic patient'. However, the Advocate failed to establish the fact. However, in *the State and Ors. v Oyshee Rahman and Ors*[43] accepting the convict's advocate's submission on convict's mental and physical health[44] with other factors the bench has commuted the convict's sentences. In this case, 'no previous criminal record' was also considered as a mitigating factor with other relevant factors. 'No previous criminal record' was also considered by the bench in *State v Bidhan Chandra Roy*[45] with other factors. Nonetheless, by emphasizing on 'careful analysis of all the attending circumstances of the case' the *State v Tahazzel Hossain Nuta and Ors*[46] the court has implied that 'Judges are [..] sitting not for passing sentence of death,'[47] rather to do justice by carefully analysing all the relevant factors so that the 'sentence to be awarded should be proportionate to the gravity of the offense'.[48]

Furthermore, after analysing all these cases regarding extenuating circumstance or mitigating, the study observed that, due to the enormous number and range of mitigating circumstances that have been held to be relevant to sentencing, judges in Bangladesh enjoy wide discretion in

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40 *State v Mannan Gazi*, 6 (2001) BLC (HCD) 187; *Md. Khokan Mridha and another v State*, 8 (2003) MLR (HCD) 70; *State v Anjuara Khatun*, 57 (2005) DLR (HCD) 277; *State v Yeasin Khan Palash alias Kala Palash alias Kaila Palash and others*, 27 (2007) BLD (HCD) 469; *State v Abdul Kader alias Kada and others*, 28 (2008) BLD (HCD) 420; *State v Jamir Ali and another*, 13 (2008) BLC (HCD) 636; *State v Arman Ali and other*, 17 (2009) BLT (HCD) 485; *State v Md. Zahurul*, 16 (2008) BLT (HCD) 235; *State v Silbestar Roy alias Noorzzaman*, 13 (2008) BLC (HCD) 287; *State v Nazmul Islam Babu and others*, 14 (2009) BLT (HCD) 569; *State v Md. Monir Mridha and others*, 14 (2009) BLC (HCD) 532; *State v Jahangir Mallik*, 15 (2010) BLC (HCD) 67; *State v Imran Ali*, 69 (2017) DLR (HCD) 135.

41 60 (2008) DLR (HCD) 420.

42 6 (1986) BLD (HCD) 352.

43 25 (2017) BLT (HCD) 503.

44 The convict 'was suffering from mental derailment or some sort of mental disorder and also suffering from ovarian cyst and bronchial asthma; her paternal grandmother and maternal uncle had a history of psychiatric disorders according to exibit-15'.

45 66 (2014) DLR (HCD) 500; 33 (2013) BLD (HCD) 359.

46 35 (2015) BLD (HCD) 457.

47 *State v Anjali Debi alias Monju Debi*, 61 (2009) DLR (HCD) 738.

48 *Md Yahia and others v State*, 1 MLR (HCD) 59.

imposing punishment. This has resulted in a large amount of disparity in sentencing. Furthermore, it is also been observed, upon the submission of the legal representatives the bench has considered such factors. Now, the question that arises here is, why the legal representatives, bestowed with the duty to assist the bench, have not submitted the factor before the court in other cases. These also raises the question, if the legal representatives are found to be reluctant to submit the mitigating factors before the trial court, whether trial court judges can also be reluctant to apply their 'judicial mind' while applying their discretionary power to decide whether the convict shall be hanged or imprisoned.

In the *State v Anjali Debi alias Monju Debi* rejecting the reference the HCD impliedly recommended the judges to apply their judicial mind and stated:

> Judges are sitting for doing justice, not for passing sentence of death. Death sentence is a sentence which should be passed. When the offence committed has not been compatable with any other sentence. Sentence is the judicial determination of a punishment to be inflicted on the facts of the given case. A judge is sitting for doing justice, a judge is not a butcher sit only to hang the accused.

Here it is important to mention Michael Tonry, an eminent commentator on sentencing, who noted, 'sentences sometimes reveal more about judges than about offenders'.[49] And scrutinizing these DR cases, it is observed that firstly, disagreement regarding the mitigating factors exists among the HC benches. Secondly, a tendency to *per incuriam* the previous decision of other benches is also observed among judges; which led the subordinate court judges to pick and choose the factors with preference. Subsequently, the underlying philosophy of Article 111 of the Constitution cannot be effectuated.

Nexus between Bench System in HCD and the Inconstancy in Sentencing

Article 111 of the Constitution of Bangladesh states that 'the law declared by the AD shall be binding on the HCD and the law declared by either division of the SC shall be binding on all courts subordinate to it'. This means the judicial discipline requires the HCD to follow the *ratio decidendi* declared by the AD and that it is necessary for the lower tiers of courts to accept the *ratio decidendi* declared by the higher tiers as a binding precedent.[50] But, does a decision of one HC Bench is a binding precedent upon another HC Bench? However, Article 111 of the Constitution is reticent in this regard.[51] This

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49 Michael Tonry, Sentencing Reform Across Boundaries, in Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press 1995) 267-268.

50 *Bangladesh Agricultural Development Corporation (BADC) v Abdul Barek Dewan being dead his heirs: Bali Begum and others*, 19 BLD (1999) AD 106.

51 Sadiya S. Silvee, 'Article 111 of the Constitution: whether a decision HC or AD can *per incuriam* its own decision' *The Daily Our Time* (Dhaka, 1 September 2018).

raises another question, whether several benches of the HC collectively functions as the HC or not? If yes, then, whether a bench of the HC can *per incuriam* a decision of the HC?

In order to explore the answer it is important to know how these HC benches are formed and what is the purpose behind it. Under Article 107, sub-article 3 of the Constitution, the Chief Justice is empowered to 'determine which judges are to constitute any bench of a division of the SC and which judges are to sit for any purpose'. This implies, the Chief Justice is empowered to direct any two or more Judges to sit together as a Bench, and may by order invest such Bench with any of the powers conferred or conferrable.[52] For instance, at present the Chief Justice constituted 58 HC Benches with 93 judges for hearing and disposing of the different case from DR Cases to Writ Petitions.[53] At present, there are two HC benches dealing with DR Cases.[54]

Here, I argue that as Article 111 of the Constitution is reticent on the binding effect of the decision of one HC bench upon another *per incuriam* attitude is apparent among the judges. And as section 302 of the PC provides the judges with an immense discretionary power there is also a tendency of discordant use of power. Subsequently, legal certainty in sentencing is challenged.

In order to entrench the argument, it is important to comprehend the 'bench trial' introduced in this sub-continent back in 1861.[55] This methodology is quite similar to the 'jury trial' practice in England and America.[56] The 'bench trial' practice developed in England and America in early seventeenth century[57] and was introduced in this sub-continent with the Indian Penal Code (1860) and the Indian Code of Criminal Procedure (1861, amended in 1872, 1882, 1898) beside the jury trial. With 1950 Constitution and the 4th Report of the Law Commission of India[58], India abolished the jury trial practice and transferred to the 'bench trial' practice solely. Studying the 4th Report of the Law Commission of India clears the purpose of the 'acclimation effect', i.e.,

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52 Supreme Court of Bangladesh (High Court Division) Rules, 1973, Chapter II, Rule 1 <http://www.supremecourt.gov.bd/resources/rules/High_Rules_1.pdf>> accessed 21October 2018.

53 Supreme Court of Bangladesh, Cause List : High Court Division <http://www.supremecourt.gov.bd/web/?page=bench_list.php&menu=00&div_id=2> accessed 21 October 2018.

54 ibid

55 Eastern Book Company, 'Jurisdiction and Seats of Indian High Courts' <http://ebc-india.com/lawyer/hcourts.htm> accessed 21 October 2018.

56 Susan C. Towne, 'The Historical Origins of Bench Trial for Serious Crime' (1982) 26(2) American Journal of Legal History 123–159 <https://doi.org/10.2307/844838> accessed 21 October 2018.

57 R. M. Jackson, *The Machinery of Justice in England* (Cambridge 1940) 80-90.

58 The Law Commission of India, The Proposal that High Courts should sit in Benches at different places in a State, Fourth Report (1956) <http://lawcommissionofindia.nic.in/1-50/Report4.pdf> accessed 21 October 2018.

moving from 'jury trial' to 'bench trial'. Despite identifying some complications with the 'bench trial' in the 4th Report of the Law Commission of India, the Commission encouraged 'bench trial' by proposing that the High Courts should sit in Benches for appeal. The Commission stated that "in the India of today justice should be taken to the door of the litigant and therefore the litigant should not be compelled to go long distances to the High Court. [..] In effect the High Court will be divided into several High Courts sitting at different places".

A similar view was taken by Pakistan.[59] One Pakistani judge referred the jury trial as 'amateur justice'.[60] And, Bangladesh, born in 1971, started its journey by acquiring the 'bench trial' system with all its complications. However, unlike India, Bangladesh did not divide the High Court into several High Courts sitting at different places, rather choose to divide the High Court into several High Court Benches for appeal sitting in the same place. Here, the question arises whether this division into several benches hinders the High Court of Bangladesh to function as a whole?

According to the Law Commission of India, 4th report one of the complication in the bench trial that it hinders the High Court to function as a whole because, 'if there are different Benches it is quite possible that one Bench may come to a decision contrary to the one given by another Bench a few days before'. And Bangladesh acquired the 'bench trial' system with these complications. In solution to this problem the Law Commission of India stated that 'it is essential that the High Court should function as a whole. [..] The High Court will have to frequently constitute Full Benches to re-solve these conflicts'.[61] This implies, two issues, firstly, several benches of the High Court must function collectively as a whole High Court. Secondly, though a decision of one High Court bench is not binding upon another High Court bench under Article 111 but, the High Court benches cannot, without any prior reason, *per incuriam* the decision of another High Court bench under the doctrine of precedent advocated by Article 111 while dealing with 'like cases' to maintain legal certainty.

Hence, it is contended that, the Supreme Court can re-solve these conflicts arising out of the contradictory decisions. Article 107 of the Constitution has conferred the rule-making power upon the Supreme Court of Bangladesh by stating "subject to any law made by Parliament the Supreme Court may, with the approval of the President, make rules for regulating the practice and procedure of each division of the Supreme Court and of any court subordinate to it". Delineating Article 107 in *Mr. Giasuddin Quader Chowdhury v A.B.M.*

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59 Pakistan got independence in August 1947. It originally consisted of two parts, West Pakistan (now Pakistan) and East Pakistan (now Bangladesh).

60 The Commonwealth, *Pakistan: History* <http://thecommonwealth.org/our-member-countries/pakistan/history> accessed 9 January 2019.

61 ibid

Fazle Karim Chowdhury and others[62] the AD stated, "the provision of Article 107 of the constitution is with regard to framing of Rules or regulating the practice and procedure of each division that is the High Court Division and the Appellate Division and for the Subordinate judiciary and it deals with constitution of the Bench and the power exercised by the learned Judges". This implies the "power is not merely to compile, revise or codify the rules of procedure [..] the power is to promulgate rules concerning pleading, practice, and procedure in all courts, which a power to adopt a general, complete and comprehensive system of procedure, adding new and different rules without regard to their source and discarding old ones."[63] It is noteworthy to mention, these judicial rules are not statutory law rather can be substantive as well as procedural laws. And when it comes to bringing consistency or legal certainty within different benches and in sentencing then a Sentencing Procedural Law can be a radical approach.

Conclusion

In death sentencing and for life sentencing imprisonment process two important factors come out-which shall shape appropriate sentence (i) aggravating factor and (ii) mitigating factor. These two factors control the sentencing process to a great extent.[64] These extenuating/mitigating and aggravating circumstances were also considered by the AD in *Dipok Kumar Sarker v The State.*[65] Thus, the present study, firstly, asserts that 'under section 302 of the Code, though a discretion has been conferred upon the Court to award two types of sentences, death or imprisonment for life',[66] the discretion is to be exercise by giving 'weight to the mitigating factors and aggravating factors'.[67]

Secondly, in many judgements the AD along with the HCD has given the direction to weight the mitigating factors and aggravating factors to shape appropriate sentence for the convict. The HCD has also identify many mitigating factors. However, although the decision of the HCD is binding on subordinate courts under Article 111 of the Constitution, but these directions are not followed by the subordinate courts while sentencing. Mostly, because of the unprincipled nature of the mitigating factors and the *per incuriam* attitude of the courts to adopted the primary rationale or coherent justifications for punishment. Another reason that complements the situation is the

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62 13 (2005) BLT (AD) 12.

63 *Bustan v Lucero*, 81 Phil. 640, 652; See also, Carlos A Barrios, 'The Rule-Making Power of the Supreme Court' (1959) 34 Phil. L.J. 315.

64 *The State v Bidhan Chandra Roy,* 33 (2013) BLD (HCD) 359.

65 40 (1988) DLR (AD) 139.

66 *The State v Bidhan Chandra Roy,* 33 (2013) BLD (HCD) 359.

67 *The State and Ors. v Oyshee Rahman and Ors,* 25 (2017) BLT (HCD) 503.

inconsistent practice among the HC benches. Subsequently, the legal system falls short to maintain the legal certainty.

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